

## Chapter Two • Drafting Conservation Easements

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### Practice 8G: Project Planning

All land and easement projects are individually planned so that the property's important conservation values are identified and protected, the project furthers the land trust's mission and goals, and the project reflects the capacity of the organization to meet future stewardship obligations.

This practice calls for each project to be tailored to the specifics of the property through some form of project planning. The process may take the form of an actual project plan, a completed project planning data sheet, or may be reflected in the correspondence, maps or other documents related to the project. The formal or informal project plan becomes the guide for the next steps in the protection process. The planning documentation becomes particularly important when there is more than one person working on the project. The project plan or data sheets prepared by the land trust representative evaluating the property, for instance, can be essential for the attorney drafting the conservation easement. Initial project planning should evaluate the conservation values and protection strategies against the land trust's mission and capacity. Project planning should also include the identification of the conservation values and the potential threats that could significantly impair those values (threats may vary by geographic region and land trust mission). In addition, project plans should evaluate the land trust's and landowner's goals for the project, and then devise protection strategies accordingly.

— From the *Background to the 2004 revisions of Land Trust Standards and Practices*

### Practice 9E: Easement Drafting

Every easement is tailored for the property according to project planning (see 8G) and: identifies the important conservation values protected and public benefit served; allows only permitted uses and/or reserved rights that will not significantly impair the important conservation values; contains only restrictions that the land trust is capable of monitoring; and is enforceable.

This practice is integrally linked with 8G, Project Planning, and reflects the integration between easement planning, drafting and enforceability. The actual drafting of an easement should implement the project plan. Restrictions should be drafted to ensure that important conservation values are not significantly impaired, and in a way that ensures public benefit and maintains

the credibility of the land trust. An easement's restrictions must be monitorable and enforceable, and a clear statement of the easement's purpose must support them. Future interpretation of an easement rests on how clearly the document explains the restrictions and their intent, as well as on how enforceable the restrictions are.

— From the *Background to the 2004 revisions of Land Trust Standards and Practices*

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## Learning Objectives

After completing this chapter, you should be able to:

- Understand why creating a project plan helps a land trust craft an easement that meets all legal requirements, satisfies the land trust's and the landowner's conservation goals, and is capable of being monitored and enforced in perpetuity
- Understand what preliminary steps must be taken prior to drafting a conservation easement
- Draft a conservation easement that:
  - Follows the project planning decisions made during the process described in Practice 8G
  - Documents the important conservation values to be protected
  - Creates a public benefit and documents the public benefit served by the easement
  - Uses clearly defined terms and measurable standards (or refers to accepted standards)
  - Describes the purposes, prohibited uses and reserved rights
  - Allows only permitted uses and/or reserved rights that will not significantly impair the important conservation values of the property
  - Contains restrictions that the land trust is capable of monitoring and enforcing
  - Specifies when grantee review or approval is required
  - Contains enforcement and grantee remedies
  - Has an adequate legal description and description of any special use areas
  - Clearly identifies the owner(s) of the property
- Understand the importance of including a specific provision on amending the easement
- Use a template easement, knowing what elements are boilerplate and why, and what elements must be tailored to the specific property and why

## Summary

Conservation easements have been used to protect more than 37 million acres of land in the United States (as of the end of 2005), which demonstrates the popularity of this tool in preserving important conservation values on private land for future generations. Many of these easements qualified for federal tax benefits and many were granted to charitable organizations (land trusts) as part of their mission to protect important lands in the communities they serve. These facts underscore the importance of conservation easements to present and future generations and the need to ensure these documents are prepared according to the highest professional standards, allowing appropriate tax benefits and providing a public benefit.

Because land trusts primarily determine how conservation easements are drafted, they can ensure their enforceability, guaranteeing that the promise of perpetual conservation is achieved. By understanding the best professional practices associated with the drafting of these documents, land trusts can create easements that will withstand scrutiny, provide the public with important benefits and assist landowners in achieving their personal and conservation goals.

As the use of conservation easements has grown, the conservation community has gained a greater understanding of how the drafting of these documents affects the landowner's ability to live with the easement and the land trust's ability to monitor and enforce the easement over time. We now understand that the land trust should draft easements for clarity, avoid ambiguities, limit restrictions on the use of the property to only those necessary to protect the land's conservation values, and ensure each restriction is within the organization's capacity to monitor and enforce. Drafting easements in such a way is critical to preserving this tool and the land itself for future generations.

## Evaluate Your Practices

Conduct a quick evaluation of your land trust's project planning and conservation easement drafting. Give your organization one point for every "yes" answer. Scores are shown at the end of the exercise.

1. Does your organization prepare a project plan for every conservation easement?

2. Does your organization use the project plan as a basis for negotiating and drafting the conservation easement?
3. Does your organization secure title work for every conservation easement and review it for liens, mineral interest ownership, easements and other matters of record that may impact the ability to protect the conservation values of the property in perpetuity?
4. Does your organization secure a subordination agreement for every lien or mortgage existing on a property as a condition of accepting a conservation easement?
5. Do the conservation easements accepted by your organization contain recitals clauses that detail the conservation values on the land, the public benefit to be achieved by the easement, and how the values meet the conservation purposes test of the IRC for tax-deductible easements; describe any governmental policies supporting the easement; and detail how the project advances your organization's mission and goals?
6. Do your organization's conservation easements contain a purposes clause that adequately describes the intent of the parties in conserving the land?
7. Do your organization's conservation easements permit only those activities that will not adversely impact the values protected by the easement?
8. Do your organization's conservation easements contain all provisions required by the IRC and Treasury Regulations for tax-deductible easements or easements for which the landowner intends to seek federal estate tax relief?
9. Do your organization's conservation easements contain an amendment clause?
10. Can you identify boilerplate provisions in a conservation easement and do you understand why these provisions should not be negotiable?

If your land trust scores:

9–10: Great! This course may help you refine your conservation easement drafting practices, but your land trust is already well-educated about the basics of enforceable conservation easement preparation. Share your knowledge with your colleagues by contributing your key documents to the Land Trust Alliance to post on The Learning Center.

7–8: Good! Your organization has acquired many of the basic skills of good easement preparation, but there is room to improve and increase those skills.

5–6: Your organization is on the right track, but it needs to improve its easement practices so that your land trust can serve your community by delivering on the promise of perpetual land conservation and so that your easements can withstand scrutiny.

0–4: Your organization should adopt procedures and increase its knowledge in order to improve its conservation easement drafting practices — to ensure that the easements it accepts satisfy state and federal legal requirements, preserve the identified conservation values and are enforceable in perpetuity.

## **The Role of Project Planning in Easement Drafting**

Very few, if any, land trusts have the capacity to accept every conservation easement that comes their way, so land trusts use a project selection process to identify those projects that have the most significant conservation values, whose completion will best address the organization’s mission and goals, and that the organization has the financial and organizational capacity to monitor and defend in perpetuity. A good conservation easement project selection process involves:

- Inspecting the site thoroughly
- Interviewing the landowner
- Researching the property and its conservation attributes
- Applying selection criteria (including analysis of the public benefits that would arise from the completion of a project)
- Preparing a project plan

The project plan, prepared in accordance with such a process, guides the development of a conservation easement that protects the identified conservation values while allowing landowner activities consistent with those values. For more information on project planning, see the Land Trust Alliance course “Evaluating and Selecting Conservation Projects.”

Project planning is the final step in the conservation project selection process. It consists of synthesizing all of the information gathered by the land trust about a particular potential conservation project into an evaluative *process*. The land trust partners with the landowner to identify and prioritize the conservation values in need of protection on the land. The purpose of project planning is to use the information gathered by the land trust through its project selection process to craft a conservation easement that will protect the identified conservation values while meeting the landowner's goals for the future of the property.

Most land trusts already intuitively create a "project plan" for each of their land conservation projects, but they either do not recognize it as such, or call the process and its result by a different name. Practice 8G is not intended to create a new step in the land conservation process. Rather, it is intended to emphasize the importance of evaluating all the information gathered about a potential project and using the synthesis of this information to guide the negotiation and drafting of the terms of the conservation easement in order to ensure that the expected conservation results are achieved.

A land trust's conservation projects reflect the needs of the organization's constituency, its mission and its strategic planning goals. They should be chosen based upon the land trust's written project selection criteria. For the most part, these selection criteria involve general questions (e.g., is the property visible from a public road?) to enable the land trust to screen for project appropriateness; they do not generally delve into a specific analysis of the landowner's and land trust's goals and how they may best be achieved (e.g., should structures be permitted in a certain location in the future? Why or why not?). It is this second, evaluative step that is represented in a project plan.



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**Create a project plan before final negotiations commence so your land trust understands the terms it must secure in order to achieve its conservation objectives.**

Project planning involves evaluating a property to identify the important resources for protection, understanding the landowner's conservation goals and desired future uses of the land, and creating a plan that best meets the needs of the land trust, the landowner and the land itself. Creating such a project plan is necessary before final negotiations can commence, so that the land trust understands the terms it must secure in order to achieve its conservation objectives.

A project plan can take many forms, and no one particular format is required in order for a land trust to meet Practice 8G. Furthermore,

different organizations have found different mechanisms for creating a project plan. The process may take one of the following forms:

- Narrative plan
- Completed project data sheet
- Memorandum prepared by land trust staff or volunteers
- Detailed minutes of project staff or project committee meetings
- Correspondence, maps or other documents related to the project

The universal thread in all these plans is the underlying evaluation and analysis that support the plan. Each land trust should develop a consistent format to compile and present the information it has gleaned about the property during the project planning process.

## **Types of Project Plans**

### **Property Map with Supplementary Information**

This map should depict the property's important characteristics and identify any "special use zones" as defined by the conservation easement. This map may later become, or inform the creation of, the baseline map. For more on creating baseline documentation and baseline maps, see chapter 3.

The challenge is to keep the property map simple enough so that people unfamiliar with the project will be able to understand the project plan and, therefore, the proposed conservation easement. Through the property map, the project plan illustrates the key aspects of the property that the landowner and land trust want to conserve.

Supplementary information can include supporting natural resource materials and/or other data (such as viewsheds, soil mapping, etc.) that clarify your decisions as to how the land will be protected. These materials can be attached to the property map as part of the project plan. Frequently, this is information that you have already compiled as part of the site inspection or project selection process. You should also append written documentation or notes describing your conversations with the landowner and consensus on the overall conservation goals and future consistent uses permitted for the property.

## Checklist

Some organizations document the project planning process by creating a checklist of issues to be addressed. This technique is particularly helpful if the person working on the project and negotiating with the landowner is not the one who drafts the conservation easement. In this case, the checklist constitutes the project plan and is a compilation of the natural resource analysis and conversations with the landowner. (For an example of a checklist, see Maine Coast Heritage Trust's Conservation Planning Data Sheet on page 156.) Another version of this type of project plan is to use the checklist initially, and then take one additional step and create a formal document that serves as a project plan, as in the Maine Coast Heritage Trust example.

Using a checklist as a project plan is also helpful if more than one person is working on the same project over the course of one or more years. Again, you should append supporting maps, letters, references and other documentation relating to the property's important natural resources. These materials should become part of the project file.

## Memoranda

Some land trusts find that a detailed memorandum to the board, committee or person who oversees the land trust's protection program — or a memorandum to the file — is an effective method for documenting the project planning process. The memorandum should:

- Clarify any issues that are out of the ordinary
- Outline the property's important conservation attributes
- Describe the landowner's conservation and development goals (if any)
- Confirm the land trust's capacity to undertake the project

It is important that memoranda are consistent from one project to the next. Supporting maps and other documentation should be appended, as outlined above.

## Minutes of Project Consideration

Some land trusts use detailed minutes of project staff meetings (for land trusts with staff) or project/conservation committee meetings to serve as their project plan. Once the project selection process has



progressed to the planning stage, the land trust uses these meetings to discuss the property's conservation attributes, the landowner's conservation and development goals, and the basic terms that would be necessary in a conservation easement in order to achieve both the land trust's conservation goals and the landowner's goals for the property. These minutes should include copies of maps or other materials discussed in the meeting in order to constitute a project plan that meets Practice 8G.

Land trusts may use one of these forms — map, checklist, memoranda or minutes — as their project plans at one stage in their organizational life and move to a more formal style as they grow and add capacity. No one format is correct. What is important is that the land trust recognizes the need for a project plan and adopts a process that works for its organization and produces a plan that reflects the synthesis of the information gathered about a particular conservation proposal. Completion of the project plan will inform the drafting of the conservation easement.

## Creating a Project Plan

Techniques for creating a project plan vary, but universally involve the *synthesis* of available information. Through this process, the appropriate land protection tools and goals become evident, and the project's goals are aligned with the landowner's desires and the organization's mission and capacity. Whether or not to include other conservation partners is also regularly considered during preparation of the plan.

## Assessing Organizational Capacity

The challenge is to recognize that your organization is unlikely to realize all its (or the landowner's) ideals in conserving a property. Therefore, the land trust must establish the best protection strategy possible, utilizing all the appropriate tools. As part of every project plan, you will need to assess the immediate, ongoing and long-term costs (staff time, volunteer time, consultant time, legal time, etc.) that it will take to monitor and defend a conservation easement in perpetuity.

Organizational capacity is difficult to gauge. However, understanding your organization's capacity and how it affects any given project proposal will greatly inform the project plan and your overall conservation efforts. For example, one element of the project plan for a

property might include establishing protected buffers along wetlands and streams. However, depending on the land trust's mission and capacity, the buffer restrictions could vary widely. Some organizations may decide that they will simply identify a buffer that prohibits barns in an area along a stream (thereby preventing nutrient loading in the stream due to manure from animals housed in and around the barn). For others, the project plan might include the prohibition of livestock in the buffer area and therefore require fencing and a greater level of monitoring than simply reviewing whether a barn was constructed in the buffer area or not. An organization with greater organizational capacity and a mission that includes preservation of water quality might require that buffers are maintained in a certain manner (e.g., mowing to remove phosphates, no mowing to maintain a shaded stream area, specified cutting restrictions, etc.).

For more information on gauging capacity, see Practice 7A, Capacity, and the Land Trust Alliance courses "Mission, Planning and Capacity" and "Evaluating and Selecting Conservation Projects."

## **Gathering Information**

Much information on a potential conservation easement will have already been collected by the time the project planning process begins. Gaps in that information will likely become apparent when land trust representatives apply their selection criteria to a particular parcel and/or take the project to the organization's board for preliminary approval of the transaction. Therefore, land trusts often find they need to acquire additional information about a conservation easement proposal before being able to complete the project plan.

Different locations of the country have access to a wide and varied amount of information regarding land. Site-specific information is increasingly available on the Internet, in public computer databases and through online service agencies (see Additional Resources at the end of this chapter). In addition, land trusts should remember that historical documentation and landowner narratives about the property can provide helpful information for the project plan. Some organizations undertake this substantive data collection during the project selection process, while others wait to obtain much of the data until after the board has given preliminary approval for the project.

### Maps/Data Layers

One of the best ways to begin assessing the conservation attributes of a specific property is to compile information and maps that are readily available to help gain an understanding of the property's geology, water, cultural features, proximity to other protected lands and plant and animal composition.

Many local municipalities throughout the country now have access to Geographic Information System (GIS) databases that provide data layers for geography (slope, topography, soil types, bedrock configurations), vegetation cover types, wetlands and waterbodies, wildlife habitat and roads and structures. Many counties and townships have compiled these data and will often readily share them with conservation organizations (although there may be a fee for the information). However, if you are in an area that does not yet have this technology, you can obtain much, if not all, of the same data by referencing published maps and reports (see Additional Resources).

Some local or state governments may also have information on rare and endangered species, wind patterns, fire occurrence patterns, culturally important viewsheds and related features, such as historic buildings, trails, battlefields, overlooks, gathering areas, burial grounds, etc., or this information may be available through other resources (see Additional Resources).

### Planning and Zoning Information

Land trusts can obtain useful information on what can happen on a particular property and surrounding properties by consulting local zoning laws (if zoning exists). This information can help the land trust assess whether or not potential development will adversely affect the land trust's ability to achieve its conservation goals for the project. Likewise, reviewing the pertinent local comprehensive or master plan (if one exists) can illuminate the community's overall goals related to conservation and the potential development of a particular property. For example, if land adjacent to a proposed conservation project is zoned for dense commercial development, a land trust should analyze the implications of this development on the property it is considering protecting.

Current zoning and any government plans can also help you avoid negotiating reserved rights that landowners may not be able to implement under existing land use laws. If the landowner wants to reserve the right to subdivide a portion of the land in the future, you should



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**Local comprehensive or master plan:** A land use plan adopted by a community in order to help guide growth and development to protect important physical, natural or human resources.

ensure that both parties understand how local (and other government) regulations will affect the project in both the short and long term. This information will likely influence conservation easement language and any map or subdivision plan that is prepared as part of the project. While some communities may not have this information, for those that do such information can help identify potential threats to a parcel and neighboring land, such as potential future development, and assist with the project planning process.

### **Gaining Information within the Broader Context**

Too often land trusts devise project plans by assessing only the property currently under consideration for protection. The result of this limited analysis is that important natural and cultural resources may be overlooked, and the overall project plan may fall short of its potential conservation benefits. For example, it may be possible to overlook an important wildlife migratory route on an isolated property that would otherwise be evident when looking at aerial photographs and resource maps of the surrounding area or after consulting with a wildlife expert. Or, when locating a reserved house site, it might be logical to place it in one corner of the property (if you are only considering that one property) but when viewed in a larger context, the proposed house site's location could severely impact the overall landscape.

Another issue to consider when examining the larger landscape is the impact of neighboring development and roads. If you are fortunate enough to work with the surrounding landowners, how will those properties affect your project plan? How would the existing roads and development, and possible construction of future roads and development, impact your immediate project and that of additional conservation work or areas of historical and cultural importance in the vicinity?

### **Talking with the Landowner**

As part of the project planning process, it is important that the easement holder and landowner discuss the conservation and development goals (if any) for the property. Many landowners are new to their property and often enjoy “seeing the land through your eyes” as a land trust representative. Other landowners, particularly those whose land may have been in the family for generations, will likely enjoy sharing their knowledge of the property with you and actively collaborating on its protection. These discussions should commence during the site inspection process, but may need to be expanded upon by further discussions with the landowner once the project planning process begins.

Sometimes, landowners have development goals in mind for their property that are incompatible with the conservation of its natural resources. You should understand these goals and work with the landowner to ensure that the project plan addresses both the landowner's needs (to the extent possible) and the land trust's conservation goals.

For example, imagine you are faced with a landowner who wishes to reserve a building envelope that would be located in prime habitat for a species eligible for listing as threatened or endangered by the US Fish and Wildlife Service. Your land trust's mission is to protect wildlife habitat, so the organization's conservation goals would be severely compromised if it accepted the landowner's proposed building envelope location. You explain your concerns to the landowner and offer to meet with him on his land (taking an aerial and topographic map of the land to illustrate your concerns), in order to explore different potential locations for his home site that offer views similar to those of his initial home-site location, but that will also preserve the native sagebrush community that is critical habitat for the species in question.

After these discussions, you suggest that it might be helpful to stake out on the property the approximate building envelope area proposed by the land trust so that the landowner can see what that envelope offers as a building location. You also note that the local land use code requires preserving habitat for this species and that the county has been diligent about enforcing this code. Using a Global Positioning System (GPS) unit, you stake out the proposed building envelope. (You can also pace out the area on foot or with a measuring tape.)

Once the landowner sees the size of the building envelope on the ground and recognizes that it offers many of the same attributes as his original request, he is likely to accept the new building envelope's location.

### **Aerial Photographs**

Aerial photographs are another great way to gain helpful information and facilitate communications with the landowner (and his or her advisors, as appropriate). Depending on the level of specificity of your project plan and your overall conservation goals for the property, aerial photographs may provide much of the background information you need. In addition, you can often obtain photographs that track the property over a series of years, which will be helpful if you are analyzing a resource for long-term trends.

## **Ground-proofing the Information**

It is often helpful to take a composite sketch map (or a copy of your various data sheets) and conduct a site visit to “ground-proof” or verify the relevant project information. For example, you may check waterways to verify their presence and configuration, walk or drive roadways, and establish the presence or absence of other man-made improvements (which you might have seen on the aerial photographs). Any differences regarding the features you have observed should be corrected and noted as part of the project plan.

This site visit can be conducted with or without the landowner, and serves to confirm or enhance your knowledge of the property. Generally speaking, this site visit occurs early in the process and helps the land trust gain the knowledge it needs to make educated decisions about both the landowner’s and its own conservation goals.

The total number of site visits to a potential easement property that will be necessary to complete a thorough project plan is determined on a project-by-project basis. The number of visits will vary depending on the property, the complexity of the land trust’s easement program and the clarity of the landowner’s goals.

You may also find site visits with the landowner a helpful way to negotiate the project plan should you discover significant differences of opinion or perspectives. In such a situation, scheduled visits, instead of letters or phone calls, allow for a more informed dialogue with the landowner.

The natural resource complexity of your target property will also determine how extensive your site visits need to be. For a property that is largely comprised of similar landscape types, or where the land trust and the landowner agree that large portions will remain much “as is,” you can usually reach consensus on a project plan relatively quickly, perhaps in as few as one or two site visits.

## **Determining the Most Appropriate Conservation Strategy for the Property**

Each project should be evaluated to discern the most appropriate conservation strategy for the property based on the organization’s goals and capacity, the landowner’s goals and community needs. Not

all land lends itself to protection with a conservation easement, just like not all land lends itself to public access. Smaller land trusts may not have the capacity to steward a conservation easement after learning details about the land's conservation values, and thus may partner with another conservation organization or may refer the project to another group. As part of the project planning process, you should consider what the appropriate protection strategy is for each property on a project-by-project basis. For more information, see Practice 8H, Evaluating the Best Conservation Tool.

### **Very High “Land Sensitivity”**

A land trust sometimes finds upon evaluating a parcel that the land's conservation resources (or attributes) are so significant that the property is more suited to outright ownership than a conservation easement. For example, if you find yourself devising complex protection strategies for a particular parcel requiring active restoration or detailed land management plans, it could be impractical to expect a private landowner to carry out these directives in perpetuity as part of a conservation easement. If a great many restrictions or affirmative rights are required to protect a property, fee ownership may be a better choice. As many land trusts have discovered, the original landowner may be willing to subject his or her property to this degree of control, but subsequent owners may not have the resources to comply with the restrictions or affirmative rights or may not be comfortable with the easement terms. For the land trust, such a situation can mean demanding long-term stewardship obligations (both financially and in terms of staff time) to enforce such provisions in perpetuity.

There is no one correct approach in these situations. However, the land trust should have realistic expectations as to what the land trust and the landowner will be obligated to uphold over time.

Thus, if a parcel of land contains highly sensitive resources or requires intensive management, outright ownership is generally the best option. Full ownership gives the land trust the most certain ability to protect and manage the conservation resources on the property. Some organizations use this opportunity to form ownership or management partnerships with other conservation organizations or agencies, or may serve as an “acquisition agent” and “pre-acquire” the land with the goal of transferring it to another entity that can undertake its appropriate management.



**You should set realistic expectations as to what your land trust and the landowner will be obligated to uphold forever.**



### **Public Access as Part of an Organization’s Strategic Goals**

If the land trust has identified an important trail corridor or network on the property, it must weigh the various approaches to achieve its public access goals, minimize long-term maintenance costs through careful planning and design, and create strategies to develop (or maintain) community (and landowner) confidence in the trail(s).

If a property is appropriate for intensive public use, land trust or public ownership is the best approach. Public access on privately owned land requires an additional level of sophistication in the project planning process. While not universally common because of many landowners’ concerns about privacy and liability, an increasing number of land trusts and communities are working to establish public access trails—many of which are partially on privately owned lands.

As part of the project planning process, the land trust must carefully determine whether a conservation easement or fee acquisition of the property is the appropriate protection mechanism.

### **Limited Development**

Increasingly, because of the price of land or the landowner’s goals, land trusts have to consider incorporating some development into conservation projects. The challenge is to ensure that such development minimizes, to the maximum extent possible, detrimental impacts on the property’s conservation values.

In this situation, the land trust should gather information as it would for any conservation project plan, but also focus on where development would be most appropriate from both a conservation and human perspective. In some instances, this level of planning may be beyond the expertise or capacity of the organization; therefore, the land trust should suggest that the landowner hire a professional land use planner to assist with this task. In other instances, land trusts rely upon landowners to propose building envelopes and limit their own project planning on the prospective development to gathering the information necessary to understand where such development can *not* be placed in order to protect the property’s conservation values, and leave it to landowners to do the rest of the research necessary to locate acceptable development areas.



## Using a Project Plan

Once the land trust completes a project plan for a conservation easement, the project plan becomes extremely valuable in informing the development of easement language that:

- Indicates how the project meets the organization's mission
- Documents the conservation values of the property
- Imposes the most appropriate restrictions to protect the conservation values
- Reflects the capacity of the organization to meet future stewardship obligations

## Principles Underlying Easement Drafting

Understanding some of the basic principles that apply to every conservation easement can give you a solid foundation from which to develop your organization's easement program and will help guide effective easement negotiations.

### Principle One: Shared Control Over the Land's Future

It is important to remember, as discussed in chapter 1, that conservation easements are different from every other type of restriction on real property. They generally represent prohibitions on otherwise legal uses of a piece of property, in order to protect certain identified conservation values. An easement reflects the partnership between the landowner and the land trust to preserve such values over time.

Because conservation easements are usually perpetual in nature, their terms must be flexible enough to respond to changes in land management techniques, market forces and landowner needs, while still protecting the conservation values identified on the land. While we cannot predict the future, critical analysis to ascertain an appropriate amount of flexibility in its terms is important to an enforceable easement. For example, some land conservation practitioners are trying to determine how global climate change may affect their conservation easements over time. Their goal is to plan their easements to be flexible enough to adapt to climate change while preserving the purposes of the easement in perpetuity.

Further, when considering how an easement should be flexible, it is important to try to predict points of friction that may arise under an easement, and to take steps to address those points whenever possible. For example, some land trusts that prioritize the conservation of productive agricultural lands wrestle with whether the easements they accept should require a landowner (or someone else) to use the land for agricultural production (locking in the agricultural use of the land), or merely to keep the land available for such use. Or they may struggle with a landowner's request that the land always be organically farmed, rather than permitting conventional agriculture practices that use chemical fertilizers or herbicides. Decisions on matters such as these that provide the greatest flexibility in the use of the land in the future, while conserving its important conservation values, will help dictate whether the easement remains enforceable in perpetuity, or if it will be subject to continual challenge by future landowners as too restrictive or out-of-date with current standards.

### **Principle Two: Protecting Conservation Values**

Another important principle in conservation easement drafting is to ensure that the easement provides the greatest possible protection to the identified conservation values. In order to do so, the conservation easement must clearly express the right of the land trust to protect those values. It must also clearly specify the values found on a particular piece of ground and the purpose of the easement must be clearly tied to protecting those values. For more information, see the discussion on drafting recitals and purposes clauses on pages 112–6.

### **Principle Three: Balance Land Trust and Landowner Goals**

A third principle to keep in mind when negotiating and drafting easements is to be sure to draft for a workable balance between the desired future condition of the land and its likely uses by a landowner. We cannot always achieve the perfect conservation results on a parcel of privately owned land, because current and future owners will use the land to some degree. Thus striking a balance between what a landowner is *willing or able* to do on his or her land, and what the land trust would *like* that landowner to do with that land, is an important part of easement planning. For example, a land trust that wishes to protect a wetland located on a piece of land might, in a perfect world, want the landowner to restore the wetland to a pristine condition and refrain

from degrading it in the future. When considering whether this result is truly achievable or not, however, a land trust must balance its desire for a fully restored wetland with the reality of what the landowner will do. Given the cost and time involved in fully restoring the wetland, the land trust may have to settle for a commitment from the landowner to confine his or her activities to those that do not negatively impact the existing wetland system. Remember, fee ownership of land is the best guarantee of protecting critical biological resources or achieving intensive land restoration goals. If fee ownership is not an option, when planning a conservation easement, the land trust must balance its goals with what is practical.

### **Principle Four: Clarity**

A final principle that is important to keep in mind when drafting a conservation easement is to strive for clarity in:

- What it prohibits and what it permits
- What approvals must be sought by the landowner before undertaking certain activities
- What notice must be provided to the easement holder by the landowner under certain situations

The structure of easements can assist landowners and land trust personnel in understanding the easement's terms more easily. Generally speaking, land trusts use three types of easement structures:

1. Listing restrictions under the categories of "permitted" and "prohibited" uses
2. Listing easement subjects by topic
3. Categorizing easement contents by spatial areas (identifying areas on the land to which the provisions apply)

In the first type of structure, the restrictions on the use of land are set forth in a section entitled "permitted (or consistent) uses" and in a section entitled "prohibited uses." In order for a landowner or a land trust representative to understand whether a particular practice is allowed on a property, one only needs to read the "permitted uses" section of the easement. In practice, however, many land trusts find it is difficult to confine their drafting to such simple categories, so descriptions of prohibited uses creep into the "permitted uses" section and vice versa. In order fully to answer the question of whether a use is permitted, therefore, it is

necessary to read both sections — a complication that some easement drafters fear leads to confusion about easement terms.

In an attempt to overcome the drawbacks associated with the permitted/prohibited uses structure, some land trusts have chosen to organize their easements topically, so that each type of potential use of the property is addressed under its own section. For example, such an easement would have topics such as “roads,” “fences,” “structures,” “surface alterations,” “vegetation management” or “waste disposal,” and under each topic the easement would describe the full range of permitted and prohibited activities associated with that topic. If a landowner or land trust representative wanted to know if a new road could be built to an existing structure, he or she would only have to read the section in the easement entitled “roads” or “surface alterations” to find the answer.

A further refinement of the topical easement structure is an easement that is organized spatially, so that uses are defined depending upon where on a particular property a use is proposed. In this structure, a minimum of two zones are created on a property, such as a building area and a habitat area, or a building area and an agricultural area, based upon the presumption that certain activities would be permissible in one, but restricted in another. Each zone is identified in the easement (and on its attached easement map) and then the uses are listed topically under each zone. Therefore, a landowner or land trust representative would identify the location on the land where a particular use is in question, and then turn to the part of the easement that relates directly to that part of the land. This type of easement structure is best suited to complicated projects that involve prioritizing areas of the land for particular conservation purposes and identifying areas suitable for limited development.

## **Essential Preliminary Steps to Easement Drafting**

Before you can even start negotiating an easement, and well before the actual drafting commences, you must take a number of steps. The first and most critical step is to identify the conservation values that exist on the property that warrant protection and determine what it will take to conserve those values over time. The key to drafting enforceable conservation easements is to be clear about the purpose of the easement, the conservation values to be protected, the desired future condition of the land and the public benefit to be derived from the land’s protection.

Once the organization has determined that the conservation values on the property are worthy of protection and will be consistent with the land trust's mission and goals, one of the first steps a land trust should take in preparing the conservation easement is to acquire title work for the property. The need for different types of title work may vary depending upon the type of transaction and a land trust's own policies. When an easement is purchased, for example, it is common for the land trust to acquire title insurance to protect its investment. When an easement is donated, unless the easement is intended to be transferred to another holder, a land trust may choose not to obtain title insurance. In either case, an early preliminary step in an easement transaction is to acquire some form of title work (such as a title commitment) that shows:

- All recorded owners of the property
- Status of the property's mineral rights
- Easements or other matters of record that may encumber the property
- Mortgages or other financial liens that are secured by an interest in the property

Once the land trust obtains the title work, the organization will know if it needs to work with the landowner to secure a subordination of any existing liens or mortgages to the conservation easement. For a discussion about mortgage subordination requirements, see pages 33–5. Land trusts typically choose one of two methods of recording the subordination agreement — either the agreement is made a part of the conservation easement itself and attached to the easement (either as an exhibit or contained within a section of the easement document), or the agreement is treated separately from the conservation easement. In the second method, the subordination agreement would be recorded in the applicable real property records immediately following the recording of the conservation easement. Land trusts that include the subordination agreement in their easements do so because they believe it ensures the subordination is simultaneous with the creation of the conservation easement interest. However, because the lender must therefore sign the conservation easement (as with respect to the mortgage subordination agreement section only) or sign an exhibit to the easement (the actual subordination agreement), some land trusts have found it difficult to manage the process, because lenders sometimes become understandably worried about being signatories to the actual easement. For this reason, a separate subordination agreement that is recorded immediately after the easement can work to confine

the lender's review to the agreement only and simplify the negotiations with respect to the agreement. Given the potential complications that including the agreement within the easement itself may create, it may be simpler, and therefore preferable, to handle the subordination agreement as a document separate and distinct from the actual easement.

Securing title work early in the development of a conservation easement project will also alert the land trust to whether the mineral rights associated with the property have been severed, or whether the current landowner owns all mineral rights associated with the property. As discussed in chapter 1, mineral rights are one of the "sticks" in the "bundle of sticks" representing an interest in real property. If any of the mineral rights have been severed from the property, a conservation easement placed on the property will not be eligible for federal tax benefits unless the landowner can demonstrate that "the possibility of surface mining is so remote as to be negligible" [Treas. Reg. §1.170A-14(g)(4)(i and ii)].

If some or all of the mineral rights have been severed, and a landowner wishes to qualify his or her easement for federal tax benefits, a land trust can assist a landowner (while being careful to not give legal advice on the issue) in either locating and acquiring the severed mineral rights, securing a subordination of those rights to the conservation easement, or securing a report (commonly referred to as a "remoteness letter") from a qualified geologist or other qualified professional. The remoteness letter should conclude that the probability of surface mining, based upon existence of minerals and/or the economic possibility of their development, is so remote as to be negligible.

If the title work shows that the landowner owns some or all of his or her mineral rights, the conservation easement must address the issue of whether such rights can be exercised. Generally, conservation easements prohibit any surface mining of a conserved property while restricting or prohibiting any subsurface mining. Whether to prohibit subsurface mining, or to craft easement terms that permit such mining under conditions intended to protect the identified conservation values and remediate the land after any mining, will depend upon a number of factors, including the wishes of the landowner, the community in which the land trust works, the conservation values at issue, the land trust's capacity to monitor mining provisions and the ability to access subsurface minerals from a site off the property or otherwise control

any subsurface mining so that its impacts do not adversely affect the conservation values and purpose of the easement.

A final preliminary step that the land trust must address is the possibility that a property might be contaminated with hazardous materials. Before accepting a conservation easement on a piece of property, it is critical that a land trust representative evaluate the land to determine if hazardous materials are present and whether further investigation by a qualified party is warranted. Such an evaluation always includes a physical inspection of the land in order to determine if there is visual evidence of possible hazardous materials (e.g., oil sheen on water, vent pipes in the ground, chemical odors) and an interview with the landowner to learn if he or she is aware of any buried tanks, chemical spills, buried wastes or the like on the property. Many conservation organizations take a further step and examine public records to determine if a piece of property is subject to federal or state clean-up orders or otherwise known to be contaminated, or if the easement property is located adjacent to or in the vicinity of a known site.

If contamination is suspected, a land trust should acquire a Phase I Environmental Assessment, performed by a qualified professional, in order to understand the extent of and potential harm associated with the existence of any hazardous materials. If the assessment identifies the presence of hazardous materials, a Phase II or Phase III Assessment may also be necessary in order for an easement holder to understand the risks associated with such materials and any remediation that should be completed.

For more information on this topic, see Additional Resources at the end of this chapter and Practice 9C, Environmental Due Diligence for Hazardous Materials.

## **Basic Elements of a Conservation Easement**

Although every conservation easement is unique, many of the terms found in an easement are consistent from one document to another. For example, every easement should contain such basic provisions as a purposes clause and lists of allowable and restricted uses of the land. A conservation easement that is intended to qualify for federal tax benefits must contain those provisions specified by the IRC and Treasury Regulations. Finally, all conservation easements contain boilerplate provisions (provisions that are essentially nonnegotiable, due to their importance to the



interpretation and enforcement of the easement), such as a statement about which state laws apply to the document, how signatures may be placed on the easement, notice provisions and so forth.

A sample easement with the different sections identified and explained can be found on page 178. For a list of all of the provisions that are likely to be found in a conservation easement, see “Checklist 1: The Complete Outline” on pages 169–74. The discussion that follows below highlights some of these provisions; for other items on the checklist, see *The Conservation Easement Handbook* for explanations and sample language.



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**Conveyance:** A term used to refer to any document that transfers title to real property.

**Exhibit:** A paper, document, chart, map or the like referred to and made part of the conservation easement.



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Conservation easements must conform to all state and federal law provisions to be enforceable.

## Form of Conveyance

The form of conveyance a conservation easement must take will be dependent upon the conservation easement enabling statute in your state. The technical form may be different from state to state (a restriction, a covenant, a deed, an indenture or a servitude, for example), but other aspects of the introductory material that is first found in a conservation easement should be standard from easement to easement. It is important that your conservation easement conform to all state and federal law provisions in order for the easements to be enforceable. For ease of stewardship and future interpretations, consistency of form among a land trust’s conservation easements will provide benefits.

The title and date of the document generally comes first in an easement, followed by identification of the parties and their respective mailing addresses, for ease of reference. Generally, the easement holder is identified as either a nonprofit organized under the laws of the identified state or as a governmental entity. The identification of the landowner who will convey the easement (known as the “grantor”) will tie directly to the title work you ordered, because the grantor of the easement must be the exact same name(s) as those shown to own record title in the property. If there is more than one owner of the property interest, all owners must be listed and all must sign the easement. If there are third parties with rights in the easement (such as co-holders or parties with rights of enforcement), they should be identified in this part of the document and should also sign the document. In some states, nonowner spouses must also sign the easement to release their marital rights in the property.

Following identification of the parties is an identification of the property to be conserved, which is generally, but not always, placed in the



first recitals clause of the easement (see “Recitals clauses,” page 114). A legal description of the property taken from the title work or survey is critical in order to ensure that the easement attaches to the property in perpetuity. If the legal description is long, it is generally placed in an exhibit to the easement. The property is defined by that legal description, and the exhibit containing the description is said to be “incorporated by reference” into the easement itself. Shorter legal descriptions can be placed in the body of the easement, but there is no harm in setting forth all legal descriptions of the property in an exhibit. In addition, if your land trust prepares an easement map for every project (and it should — see chapter 3), the map is generally referred to as representing the property that is legally described.

An example of the identification of the property to be conserved:

Grantor is the owner in fee of real property (the “Property”) consisting of approximately 100.3 acres in one (1) tax parcel in the Town of \_\_\_\_\_, located in \_\_\_\_\_ County, New York, as legally described in Exhibit A and shown on the Easement Map (attached hereto as Exhibit B), both of which exhibits are incorporated herein by this reference.

Other important aspects of the initial portions of an easement include:

- The required words of conveyance
- A statement of the duration of the easement (usually perpetual)
- A statement of what consideration was given in exchange for the conveyance of the easement
- Any title covenants that state laws may require

Real property laws in the United States generally provide that a transfer of an interest in real property (including a conservation easement) is effective so long as adequate consideration is “paid” for the interest and all statutory requirements are met. If an easement is purchased, the amount paid for the easement (or one dollar) is sometimes recited as the consideration for the grant of easement. If an easement is donated, easements generally refer to the mutual promises and covenants contained in the easement as the consideration received by the grantor as “payment” for the donation of the easement.

The following is an example of a simple recitation of consideration for donated easements that is found in the Columbia Land Conservancy’s model easement language, which follows the New York land trust’s detailed recitals clauses and precedes the actual grant language of the property interest:

Now, therefore, in consideration of the foregoing and the mutual covenants contained herein, the parties agree as follows:

Other examples may be found in *The Conservation Easement Handbook*.

## Purposes Clause

The purposes clause of a conservation easement is often referred to as the heart of an easement, and for good reason. This clause is likely the most important clause in the entire document, because it is this section that sets forth:

- Why the easement was granted
- What conservation values the landowner and land trust want to protect
- Why the landowner and the land trust want to protect these conservation values

The clause will be the standard against which current and future activities on the protected land will be evaluated. Therefore, it is *imperative* that you spend time crafting a clear, unambiguous and sufficiently detailed purposes clause that can withstand the test of time and avoid a generic purposes clause, such as “The purpose of the easement is to protect the open space, wildlife habitat and scenic resources of the property.” A well-written purposes clause should be a narrative statement that:

- Reflects the conservation values described in the recitals
- Describes the public benefit served by the easement
- Describes the statutory foundation for the transaction (including the state enabling statute and IRC provisions, if applicable)

In addition, the clause can establish priorities among conservation values or areas on the property where priorities of values differ or where there are potentially conflicting conservation interests (such as



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**You must craft a clear, unambiguous and sufficiently detailed purposes clause that can withstand the test of time. Avoid generic purposes clauses!**

the preservation of working agricultural lands with the preservation of relatively natural wildlife habitat).

If future landowners propose activities on the land that were not anticipated when the easement was originally granted, it is the purposes clause that will determine whether or not these uses are appropriate on the protected property. Most easements are drafted to address such future, unanticipated uses of the protected property by restricting landowners to “uses of the property that are not prohibited by the terms of this Conservation Easement and that are otherwise consistent with the Purpose of this Conservation Easement.” Proposed, unanticipated uses are thus measured against their consistency with the purpose of the easement. Finally, if a land trust believes a violation of a conservation easement has occurred and the dispute ends up in court, courts will generally look at the purposes clause to assist them in evaluating such claims.

Not only is the wording of the purposes clause critical, the placement of the clause is also critical. The purposes clause must be placed in the easement so that it will be considered a formal and operative part of the easement by a court that may be called upon to interpret the easement. Some states do not consider recitals clauses an operative part of the easement, and in these states the purposes clause should not be placed *only* in the recitals clauses. In such states, the purposes clause can be placed anywhere in the document, so long as it is then incorporated by reference into that part of the easement recognized by the courts as the operative part of the document. Generally speaking, this location follows the grant language of the easement, but your particular state’s laws must be examined and professional advice sought on this matter to ensure you place the purposes clause in the correct location in your easements.

Land trusts regularly place the purposes clause where it will be prominent, and thus it is frequently found either in the first few sections of the easement or as the first statement of the easement (before the recitals clauses) and then incorporated into the document later, if necessary.

The following is an example of a purposes clause from the Vermont Land Trust’s (VLT) Large Tract Forest Conservation Restrictions template easement:



**The purposes clause must be placed in the easement so that it will be considered a formal and operative part of the easement by a court that may be called upon to interpret the easement.**

1. Purposes of the Grant. Grantor and Grantee acknowledge that the Purposes of this Grant are as follows (hereinafter “Purposes of this Grant”):

To apply the following Principal and Secondary Objectives to the Protected Property, except for the land designated as Special Treatment Areas (as described in Section IV, below):

- a. The principal objectives of this Grant are to establish and maintain productive forestry resources on the Protected Property and, in consideration of the contribution timber and maple products make to the economy and communities of the region and the State, to encourage the long-term, professional management of those resources, and to facilitate the economically sustainable protection of forest resources in a manner that minimizes negative impact and the duration of impact on surface water quality, recreational benefits to the public, wildlife habitat, and other conservation values (the “Principal Objectives”); and
- b. The secondary objectives of this Grant are to encourage sustainable management of soil resources, to conserve scenic and natural resources associated with the Protected Property, to improve the quality of life for Vermonters, and to maintain for the benefit of future generations the essential characteristics of the Vermont countryside (the “Secondary Objectives”).

Note that the Vermont Land Trust places the purpose in the first section of its easement in order to emphasize the importance of the clause.



**Do not rely on boilerplate recitals clauses, but rather take the time to prepare these clauses with great attention to detail.**

## Recitals clauses

The recital (or “whereas”) clauses may or may not be considered an operative part of a conservation easement by your state’s laws, as described in the previous section, but they are still an important part of every conservation transaction. These clauses tell the story of the project in detail, providing a perpetual record of the project, a description of the land at the date the easement was completed and a description of why the land trust believed the project important enough to complete. Some easement drafters incorporate the recitals into the operative and formal part of the easement to ensure that they will be considered should the easement ever end up in court in a dispute over its terms. Attorney Stephen J. Small urges easement drafters not

to rely on boilerplate recitals clauses, but rather to prepare “three to four pages of unbelievably specific” recitals, in order to emphasize the importance of this part of every easement. Because of their importance to the perpetuity of easements, you should take the time to prepare these clauses with great attention to detail.

Well-written recitals clauses will include a detailed description of the conservation values identified in accordance with Practice 8F, Documenting Conservation Values, rather than a generic laundry list of such values. So, rather than stating that an easement is granted to “preserve wildlife habitat,” the recitals clause should state that the easement is granted to:

... preserve a large expanse of unaltered sagebrush that is not grazed by domestic livestock and that provides habitat for the Gunnison sage-grouse, a bird species of special concern as identified by the Colorado Division of Wildlife, and a species eligible for listing as threatened by the US Fish and Wildlife Service.

Recitals clauses should state why completion of the project will fit within the land trust’s mission and goals (Practice 1A, Mission). The clauses should also explain the conservation values in terms of meeting the IRC conservation purposes test and Treasury Regulation provisions (for easements intended to qualify for federal tax benefits) and in terms of meeting the provisions of a state’s conservation easement enabling statute. Government policies supporting the conservation of the property should be defined and quoted in the recitals, and the public benefit derived from the completion of the conservation easement should also be described in detail. When drafting recitals clauses, take care to describe only those values the easement is intended to protect. Doing so avoids confusion in the long-term administration of the easement. For example, if there are historic land areas or structures on the land but you are not seeking their protection through the conservation easement, the recitals should not list “historic resources” as one of the conservation values identified on the property.

Finally, recitals clauses can be used to describe the current uses of the property to be protected. Thus, for example, the recitals could describe the water and/or mineral rights associated with the property, a description of current land uses and a thorough description of all man-made structures and improvements on the property. Alternatively, these



**Well-written recitals clauses will include a detailed description of the conservation values identified in accordance with Practice 8F.**



**When drafting recitals clauses, take care to describe only those values the easement is intended to protect.**



Recitals must lay out the specific conservation values with sufficient detail to provide both a factual context and a public policy rationale for the land use restrictions to follow.



**Reserved rights:** All of the rights to use a protected property that the landowner retains after conveying a conservation easement on his or her land.

descriptions could be placed in the baseline documentation report, described as part of the property’s legal description or identified in the description of the landowner’s reserved rights. In summary, as noted in *The Conservation Easement Handbook*, the important thing, for drafting purposes, is that the recitals lay out the specific conservation values of the property to be conserved with sufficient detail to provide both a factual context and a public policy rationale for the land use restrictions to follow.

## Reserved Rights

The term “reserved rights” refers to all of the rights to use a protected property that the landowner retains after conveying a conservation easement on his or her land. As noted above, reserved rights are frequently described as all rights not specifically prohibited by the easement so long as the exercise of those rights is consistent with the purpose and terms of the easement. The definition of reserved rights can go further, however, by specifically permitting a landowner to exercise certain rights that may adversely impact the conservation values, and thus are permitted only so long as they conform to the provisions of the easement. Reserved rights to build additional homes or other buildings on a property, the right to harvest timber and the right to subdivide are all examples of the types of rights a landowner may wish expressly to reserve under an easement. A land trust must carefully consider these types of reserved rights, however, and ensure that the easement permits these rights to be exercised only in a manner that preserves the property’s conservation values.

Federal laws will not permit an easement to qualify for federal tax benefits if uses are reserved to a landowner that, when exercised, would permit the destruction of significant conservation interests [Treas. Reg. §1.170A-14(e)]. The Regulations state that if an easement permits such uses, the donation will not meet the requirement that it be “exclusively for conservation purposes.” The Regulations do provide, however, that a conservation easement may qualify for federal tax benefits even if it permits such things as “selective timber harvesting or selective farming” so long as such uses do not impair significant conservation interests. Although ensuring that a landowner’s reserved rights do not impair the property’s conservation values is enshrined in the federal tax laws, *every* conservation easement should adhere to this principle whether or not the easement is intended to qualify for such tax benefits.

Therefore, in determining which reserved rights would be consistent with a particular conservation project, a land trust must take particular care to understand all of the conservation values located upon the property that the land trust and landowner wish to conserve, and the types of activities that would impair those values. For example, if a land trust protects a parcel for its scenic attributes, the *location* of new buildings or structures will be very important and should be limited by the easement's terms. Or, if the land trust wants to protect a wetlands system on a property, buffer areas around the wetlands should be identified and uses within those buffer areas restricted.

If a landowner reserves the right to engage in certain activities, the exercise of which may have an adverse impact on the conservation interests associated with the property, the Regulations require that the landowner give notice to the land trust before exercising such right [Treas. Reg. §1.170A-14(g)(5)]. In situations where a landowner's reserved right could be harmful to the conservation values if not exercised correctly, many land trusts take the extra step and require the landowner to obtain permission before taking action. Each land trust must evaluate a landowner's reserved rights to determine for which the law requires prior notice, and which, if any, should also be subject to prior approval. If approvals are required, the land trust must establish clear evaluation parameters, such as approvals tied to height, mass and location rather than to subjective standards such as "undue impact." Easements typically create four categories of uses:

- Uses that are permitted without the need of the land trust's approval
- Uses for which the landowner must only give notice to the land trust
- Uses for which the landowner must secure land trust approval before they can commence
- Uses that are prohibited

Those rights that permit a landowner to develop new residential structures on a property (commercial and industrial structures are usually, but not always, prohibited or greatly restricted by conservation easements) should be an area of big concern for the land trust. For any new structures, it is advisable to work with the landowner to determine where such buildings can be constructed, or at least to determine where they cannot be constructed. An easement that permits construction of new structures anywhere on a conserved property is likely not going



**An easement that permits construction of new structures anywhere on a conserved property is likely not going to meet the conservation purposes test or anyone's concept of land conservation, and may subject the easement to scrutiny by the IRS.**



to meet the conservation purposes test or anyone's concept of land conservation, and may subject the easement to scrutiny by the IRS. If there is nowhere on the land that should be protected from development, what exactly is being conserved?

Easement holders use several methods to locate new buildings, including:

1. Building envelopes — identified, limited areas on a piece of land where new development is permitted. Generally, this method is considered the easiest for a landowner to understand and for a land trust to monitor and enforce. However, it requires a landowner to make some important decisions during the easement negotiations that not all are willing or able to make at that time. This method also requires the land trust to identify building envelopes, preferably through a surveyed legal description, and placement on the easement map, both of which may mean an additional cost to the landowner for completing the easement.
2. Exclusion zones — identified areas on a piece of land where new development is prohibited. This method is often viewed as the least preferable way of locating new development, because it leaves larger portions of a protected property open to disturbance than might occur using one of the other three methods discussed in this section. This method works best when there are readily identifiable conservation values on a piece of land that would be impaired by development, such as riparian areas, wildlife migration corridors or easily identifiable view corridors.
3. Development zones — areas identified as appropriate for development within which a building envelope or envelopes of a maximum specific size can be placed when a landowner is ready to specify the envelope location. This method is useful for landowners who are not sure what size building envelope they will need and are not prepared to identify the specific location of such envelopes at the time of easement drafting. The land trust should allot additional time to finalize the location of the envelopes when the landowner is prepared to initiate development.
4. Floating building envelopes — envelopes that are not fixed until so designated by a landowner, and that “float” within an area of land acceptable for development. This method is similar



to “development zones,” except that the number, size and shape of the building envelope(s) is generally established at the time of the easement closing, but it is agreed the final location will be specified at some point in the future, sometimes through an amendment to the easement.

Some land trusts will simply exclude development areas from an easement entirely, in order to avoid the need to monitor and enforce development restrictions.

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### Avoiding Amendments through Better Easement Planning

### Example

The Society for the Protection of New Hampshire Forests has found that among the most common amendment requests are those associated with its early easements with houses within conservation easement areas, as landowners today change their homes in ways that could not have been anticipated when the easement was drafted. Today, the Society usually excludes existing residential use areas from new easements. If the landowner wishes to retain the right to build a future home, the Society offers two options:

- Exclude a future house site from the easement area before conveying the easement; or
- Reserve a right in the easement to withdraw a site in the future

Given changing local land use regulations, the first approach could result in a legally substandard site in the future, which in turn could generate an amendment request. In the second option, easement terms provide that the site either be a specified number of acres, or the minimum needed for local regulatory approval, along with guidelines for location of the withdrawn site. This approach ensures that the future withdrawal does not compromise the conservation purposes and values. Under either option, the Forest Society must approve the selected site. Instead of amending the easement when the house site is withdrawn, a survey of the site and a “notice of withdrawal” are recorded at the registry of deeds.

The broader lesson is to identify future changes that are likely to affect the easement land — physical changes such as shifting river courses as well as changes in land use and other requirements — and draft the easement proactively.

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**The land trust should establish a process, with measurable standards, to approve unanticipated uses on its easement properties.**

Landowners who grant conservation easements generally choose whether or not to open their property to the public. Some landowners grant public access rights with their easements, such as to allow fishing or hiking in specified locations or to permit periodic guided tours. The land trust should also carefully consider whether a public access provision in the easement is appropriate for the property. Permitting the public to use a protected property can help the conservation easement meet the conservation purposes test of the IRC, but may harm the very values the easement is designed to protect. Furthermore, public use can also be difficult to control. For example, easements granted primarily to protect wildlife habitat may permit some public access on a designated trail, but use of the public trail would likely be confined to specific times of the year and may include a prohibition on dogs using the trail. If the land trust that holds the easement does not have a mechanism to enforce such restrictions, or the capacity to do so, public use may negatively impact the very reason the easement was granted in the first place and may cause the landowner concerns that his or her conservation goals were harmed by the public's use of the land. For these reasons, many landowners decide not to include public access provisions in their conservation easements.

Finally, because it is difficult to anticipate all possible uses a landowner may wish to make of a piece of land when drafting the easement (easements drafted in the 1980s, for example, by and large do not anticipate issues related to the placement of cell-phone towers, windmills and solar panels on protected properties), the land trust should establish a process, with measurable standards, to approve unanticipated uses. The Maine Coast Heritage Trust uses the concept of “discretionary consent” to deal handily with this issue. The Trust crafts its easements to include language that permits a land trust to consider new uses or activities and grant approval for such uses even if the easement is silent with respect to such uses, so long as a use is not inconsistent with or detrimental to the protection of the property's conservation values.

For example, Maine Coast Heritage Trust language provides for the land trust's discretionary consent (see italics):

As of the date of this grant, there are no surface alterations except an unpaved trail and an unpaved parking area near the roadway, which may be maintained, and, *with the prior written consent of Holder*, relocated. No additional filling, dumping, excavation or other alteration may be made to the surface

of the Protected Property *without the prior written consent of Holder.*

In this example, if a successor generation landowner wishes to construct a second parking area to accommodate increased public use of the trail on the property, the Trust could consider approving this activity, even though it was not specifically contemplated in the original easement, without the need to consider amending the easement.

When evaluating whether to use discretionary consent language in your organization's easements, you should consider the concern that some easement drafters have with respect to this language. They note that there is a perceived lack of oversight and/or accountability when a land trust retains the right to approve actions it had not originally contemplated on a property without either going through a formal conservation easement amendment process or seeking an appropriate external approval(s), such as from the attorney general, a court or other regulatory body. Others worry that this type of language may reward aggressive landowners who act without seeking approval or even consulting with the land trust about their plans for the property, and then receive consent after they take the action. Maine Coast Heritage Trust addresses these issues by setting expressed limits on an easement holder's discretionary approval powers, similar to those limiting amendment powers.

## Restrictions

Drafting the restrictions section of a conservation easement is likely the most challenging part of any project development and is probably where the easement drafter and the landowner will spend the most time in negotiations. The restrictions that should be placed in a conservation easement are entirely dependent upon the facts surrounding the conservation project, including:

- The conservation values identified for protection
- The land trust's goal for the future of the property (as it relates to the organization's mission)
- Uses the landowner wishes to make of the land in the future
- Provisions that must be made to satisfy any funders if the easement is being purchased
- Restrictions the land trust has the capacity to monitor and enforce over time



### **Successor generation landowner:**

An owner of protected land who acquires protected property and was not the original grantor of the conservation easement on the land.

Drafting the restrictions can become particularly challenging if there are competing interests that must be balanced. For example, the land trust must weigh the landowner's desire for a certain level of development against protecting the conservation values.

In addition to the normal challenges associated with negotiating and drafting restrictions, additional challenges may arise depending upon whether the easement was donated to or purchased by the land trust. When the land trust purchases an easement (either at fair market value or at a bargain sale price), the land trust generally requires a greater level of protection of the conservation attributes than with a donated easement. Therefore, the land trust may require stricter provisions and enforcement levels, affirmative rights to use or permit the public to use the land, and higher standards of protection for the identified conservation values. When an easement is donated, the land trust often finds that it is more important to balance the landowner's needs for use of the property with the restrictions required to protect the conservation values.

Particular care needs to be exercised when drafting restrictions for an easement intended to qualify for federal tax and/or estate tax benefits. The IRC and Treasury Regulations contain a number of provisions that must be present in such an easement, and both the land trust and the landowner's attorney must take care to ensure that such provisions are present and set forth without substantial changes from the form set forth in federal laws. In addition, for easements intended to qualify for the additional estate tax benefits established by IRC §2031(c), the law requires that all but de minimis commercial recreational uses be prohibited on the property. Although the government has not promulgated regulations to clarify what the de minimis limitation means, a land trust should consider prohibiting all commercial recreational uses or including a prohibition that tracks the precise language of the law if this issue is of concern to the landowner. For more information about specific federal tax law requirements for conservation easements, see Checklist 5 in *The Conservation Easement Handbook* and accompanying discussions.



**Only those restrictions necessary to protect the conservation values should be included in a conservation easement.**

The first step in creating the easement restrictions is to understand thoroughly the conservation values of the land (Practice 8F, Documenting Conservation Values) and what restrictions are necessary to protect those values. Only those restrictions necessary to protect the conservation values should be included in a conservation easement. If uses are permitted under a conservation easement that may lead to the destruction of significant conservation interests, the easement will not qualify

for federal tax benefits [Treas. Reg. §1.170A-14(e)]. If the easement restricts uses that have no bearing on the protection of the conservation values, a future landowner may be able to challenge such restrictions as unreasonable and unsupported by the purpose of the easement. Therefore, when drafting the restrictions clauses in a conservation easement, every restriction should be thoroughly examined to ensure that it serves the appropriate purposes. For example, imagine if a land trust accepted a conservation easement to protect a relatively natural habitat, and the easement permitted one reserved home site within a building envelope specifically located to protect such habitat. If the land trust adds an additional restriction limiting the height of a structure to a single story within the building envelope, such an additional restriction might be viewed by a court in the future as an “unreasonable restraint on alienation” and thus unenforceable. In other words, in this hypothetical situation, a court might find that a height limit on the house permitted by the easement had no bearing on protecting the conservation values associated with natural habitat, and thus posed such a burden on the landowner (potentially creating a situation where the landowner would have trouble selling the land with such a restriction) that the court would order the restriction removed from the easement. The danger of such a scenario is not only that one of the easement’s restrictions might be removed, but also the uncertainty of what else a court might order changed in an easement if a weakness in the document leads to its legal challenge.



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**If the easement restricts uses that have no bearing on the protection of the conservation values, a future landowner may be able to challenge such restrictions as unreasonable and unsupported by the purpose of the easement.**

Every conservation easement restricts, to some extent, division of land, construction of buildings and improvements, industrial and mining activities and alteration of, or degradation of, natural resources, because these activities are the most likely to affect adversely any identified conservation values. *Restrict* does not necessarily mean *prohibit*; therefore, you should also identify what activities need to be restricted and how. Also, you should understand when a land trust must hold firm in negotiating an easement’s terms with a landowner. If you are uncertain as to what activities should be restricted to protect the conservation values, you can seek input and advice from experienced resource managers, such as the Natural Resources Conservation Service, your state’s wildlife department or local cooperative agricultural or forestry extension services. In some cases, you may need to consult with professional foresters, range management experts, wildlife biologists or aquatic biologists to assist you in crafting restrictions that will protect the conservation values of the land. Ultimately, the degree of control of activities specified by the easement is directly



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Special use areas should be identified on an easement map and in the baseline documentation, and should be easily identifiable on the ground by both landowners and easement monitors.

Restrictions should be limited to factors that the land trust can monitor for compliance by site observation or by reasonably cost-effective scientific analysis, depending upon the organization's capacity.

related to the severity of the threat the activity poses to the conservation values and purposes of the easement.

When crafting restrictions, you should use special use area designations when applicable. Special use area designations identify places of particular conservation value, and thus there may be greater restrictions within those areas than on other areas of a protected property. These designations can be used to protect wetland and riparian areas, wildlife migration corridors, designated scenic corridors or particularly high quality soils on agricultural lands. If an easement is crafted to incorporate special use areas, these areas should be identified on an easement map and in the baseline documentation and should be easily identifiable on the ground by both landowners and easement monitors. Topographic maps and/or aerial photos can be helpful in identifying special use designations, as can survey descriptions or Global Positioning Systems.

There are two different methods for creating easement restrictions:

1. Prescriptive standards — prohibitions that are often quantifiable (e.g., no construction within 100 feet of the stream bank)
2. Performance standards — limitations on activities based on goals (e.g., the house shall not be visible from the public road)

The land trust's capacity to monitor the restrictions and the degree of control necessary to protect the resource will determine which method is used. Performance standards are sometimes considered to be easier to uphold, because they offer a flexible goal, rather than a rigid standard, which may be easier for land trusts and landowners to accept and maintain over time. Performance standards may also be attractive to land trusts because their flexibility helps avoid technical violations of an easement that may not actually adversely impact the conservation values to be protected. Easements often combine prescriptive and performance standards so that the goals of the easement are more likely to be met. This method also allows permitted activities to change as technology and new scientific understanding emerge. Both kinds of restrictions should be limited to factors that the land trust can monitor for compliance by site observation or by reasonably cost-effective scientific analysis, depending upon the organization's capacity. Thus, restrictions should use measurable standards. For example, rather than stating "no action is allowed that would impair scenic views from the pond," a land trust should draft a restriction that defines a linear setback from the pond for specific activities and define how it is measured. If measur-

able standards are impracticable, reference should be made to accepted standards, such as current scientifically based best management practices recommended by the Natural Resources Conservation Service or other government or private natural resource conservation agency.

When examining restrictions to determine if the land trust has the capacity to monitor and defend them in perpetuity, remember that certain types of restrictions will have greater stewardship needs than others. An empirical study of a sampling of conservation easements by the Property and Environment Research Center revealed that certain types of restrictions and reserved rights cost more over time to monitor and defend than others. For example, easements that permit limited development (subdivision and additional residential home sites) are more costly to manage over time, as are strict biological restrictions. This information does not mean that land trusts should not enter into easements with these types of restrictions or reserved rights; rather, it means that a land trust should accept these types of easements only after it has determined it has the capacity to monitor and enforce the provisions over time, given the increased capacity and funds they will likely require when compared to other types of easement restrictions and reserved rights. For more information, see “Stewardship Principles in Conservation Easement Drafting” in the Sample Documents at the end of this chapter, and the Land Trust Alliance course “Determining Stewardship Costs and Raising and Managing Dedicated Funds.”

You should review *each proposed restriction* to determine:

1. Does the land trust have the capacity (organizational and financial) to monitor and enforce the restriction over time? For complicated restrictions, such as compliance with forest harvest plans, a land trust may need the financial capacity to hire professionals to assist with monitoring.
2. Is the restriction capable of being effectively monitored through routine annual inspections? If a restriction (e.g., no vehicles, no hunting) requires constant policing, it may be a sign that a conservation easement is not the best tool to achieve the land trust’s conservation objectives on the land.
3. Does the land trust need the restriction in order to meet its mission and goals for the preservation of the property’s conservation attributes?
4. Would the land trust be willing to go to court to enforce the restriction?



Good easement drafting often means avoiding restrictions that are only superficially related to the conservation values, such as a prohibition against mobile homes or operating a home-based business on the land. Sometimes landowners will request restrictions on their land because of their personal beliefs about a certain topic (such as prohibitions on hunting), and land trusts must carefully evaluate such restrictions to ensure that they are necessary to protect the conservation values and are capable of being monitored and enforced forever.

The most common types of restrictions in an easement relate to:

- Alteration of land
- Alteration of existing buildings
- Construction of new buildings and/or improvements
- Commercial or industrial uses
- Mineral development
- Water resources
- Soils
- Subdivision
- Vegetation management, including livestock grazing and timber harvesting
- Waste dumps
- Wetlands/riparian areas
- Wildlife habitat

Sample clauses for all of these types of restrictions may be found in *The Conservation Easement Handbook*.

Some special purpose easements will require specific restrictions to meet their conservation goals. Such special purpose easements may be drafted to protect important agricultural or forest lands, to permit some limited development, for historic preservation and for natural area or “forever wild” easements.

Working lands easements must be carefully drafted to permit the continuation, adaptation and expansion of farming, ranching or forestry activities while managing those activities to protect the land’s conservation values. A careful balance must be struck between the landowner’s need to make intensive use of the land and remain economically viable and the protection of its conservation values. Working lands easements can help keep family farmers on the land and make it easier for lands to transfer to those who wish to farm or ranch the land. Such ease-



ments can also protect working forestlands and the continuation of forest harvest while protecting water quality and wildlife habitat and preventing soil erosion. Management plans are frequently required for these types of special use easements in order to guide the land management toward the joint goals of preserving conservation values while permitting economic use of the land. The most common advice for drafters of such easements is to require a management plan in the easement, specify the goals of the plan and the frequency of any updates or amendments to the plan, but do not include the plan as part of the easement document. Land management practices and the land itself will change over time; thus, management plans will need to be changed. If the plans are not a part of the actual easement, such updates will not require an amendment to the easement. For more information about drafting working lands easements, see the Additional Resources at the end of this chapter.

Conservation easements that permit some level of limited development have their own challenges. The location and number of permitted new dwellings and other buildings must be based upon the landowner's needs and the impacts such development will have on the conservation values. Using simple land planning techniques to work with a landowner to limit and locate future development activities is critical to these types of easements. The number of subdivisions permitted by an easement should be evaluated based upon several factors, including the impacts on the conservation attributes of land fragmentation and the stewardship implications of a land trust's need to monitor and enforce the easement against all new owners of any subdivided, protected lands. House size limitations and design criteria are difficult to draft, monitor and enforce, and thus should be carefully considered before they are included in a conservation easement — these types of restrictions should only be included if directly related to the conservation easement's purpose (such as preservation of a historic structure or scenic or historic landscape) and if required by the land trust's mission.

Easements that preserve buildings and other cultural features, sometimes referred to as “preservation” easements, have unique challenges. Such easements may protect an individual structure, or they may be used to protect all of the character-defining elements that collectively make up a historic place. Drafting language to protect these types of resources is different from drafting language to protect the natural environment or working lands. Because buildings must be maintained, and thus changed, over time, preservation easements must ensure that

the essential character of the building is preserved, while allowing necessary changes to maintain the structure. Additional information on drafting preservation easements may be found in *The Conservation Easement Handbook*.

## Easement Holder's Rights

In addition to restrictions on the use of land, some land trusts include affirmative rights and/or obligations in their easements. Affirmative rights and/or obligations take a few different forms. Typical affirmative rights found in most conservation easements include a land trust's right to enter the property to monitor the easement and the right to enforce the terms of the easement. However, some easements go further in imposing affirmative rights and/or obligations on a piece of property. Such affirmative obligations may require *the landowner* to do certain things, such as:

- Restore the land to a certain condition (e.g., reclaim land that was mined for gravel)
- Manage the land in a certain way (e.g., eradicate invasive species)
- Open all or part of the land to public recreational use (e.g., construct a trail)



**Before placing affirmative rights in your conservation easement, it is imperative that you seek legal advice as to whether they are permitted by your state's conservation easement enabling statute.**

Affirmative rights may also include the right of land trust personnel to enter a protected property to conduct restoration activities, lead tours or otherwise bring members of the public onto the land.

Before you decide to place such requirements in your conservation easement, it is imperative that you seek legal advice as to whether such affirmative rights or obligations are permitted by your state's conservation easement enabling statute. Affirmative rights required by federal laws (such as the right to enter the property and the right to enforce the easement) so that an easement can qualify for federal tax benefits are generally always permitted, but others may not be in particular states. Some state laws limit conservation easements to only negative covenants (restrictions on use) and do not permit affirmative obligations.

Further, you should carefully consider the pros and cons of placing such affirmative rights and/or obligations in your easement, even if permitted by your state's laws. For example, some land trusts believe these rights will be difficult to enforce, because although the grantor

of an easement may be willing to agree to take such actions (or permit such actions) on their land, successor generation landowners may not be so willing. Therefore, a land trust may find that such clauses may lead to more violations and enforcement actions. Further, a land trust that creates affirmative rights for itself to use a protected property will likely create a greater potential for hazardous materials liability and/or public liability issues for the organization. Finally, placing affirmative rights and/or obligations in a conservation easement will increase the land trust's monitoring commitment for the land, so these provisions will require a greater level of capacity from the land trust than an easement without such affirmative rights and/or obligations. If a land trust believes it needs strong affirmative rights and/or obligations on a piece of property in order to preserve its conservation values, it should consider acquiring the land in fee, rather than using a conservation easement to protect the land's conservation attributes.

Even if you decide that including affirmative rights are not in your best interest, you must include those that the federal government requires for easements to qualify for federal tax benefits. These rights are critical to a land trust's ability to monitor and enforce the easement, and thus deliver on its promise of land conservation to its community and supporters. Therefore, they should be in all easements whether or not the easement qualifies for a deduction.

Some of the rights a land trust should secure for itself in an easement include:

1. The right of entry and inspection. This right permits a land trust to monitor the easement and inspect the property for easement violations. Without this right, a land trust representative who enters private property may be considered a trespasser.
2. The right to enforce the conservation easement and to require restoration of the land following a violation. Land trusts should reserve to themselves the right to take immediate action (secure an injunction from a court) in the event they discover a violation that may irreparably damage the conservation values, in addition to other rights they may have to enforce the easement.
3. The right to proceeds in the event a conservation easement is terminated or all or a portion of the property subject to an easement is condemned by a governmental authority. This right, required by the Treasury Regulations, is intended to ensure that

the public's investment in an easement that received federal tax benefits is protected in the event the easement is terminated or condemned, in whole or in part. In this eventuality, the land trust that holds the easement will receive compensation equal to the value the easement represented to the property at the time the easement was created (generally established by an appraisal of the fair market value of the easement), which the land trust can then spend to conserve similar lands.

4. The right to receive notice when certain reserved rights are exercised by the landowner, and the right to approve certain activities that may be established by the terms of the easement.
5. The right to transfer the easement to a qualified easement holder that agrees to uphold the terms of the easement.

Landowners will sometimes request the right to designate a transferee or to disapprove a proposed transferee in this eventuality. Land trusts should carefully consider the consequences of agreeing to such limitations. It is difficult to predict the future of eligible easement holders. Also, a land trust may have little or no choice as to what entity it can transfer the easement to, due to a lack of land trusts in its service area, or the reluctance of an eligible organization to accept an easement. Therefore, it may not be wise to limit your land trust's options for transferees in perpetuity. Some land trusts address this issue by offering to "consult" with a landowner about a transferee, but stop short of giving the landowner veto power over what entity the easement is transferred to. (Some conservation easements may contain rights applicable to co-holders, backup holders or other third parties. See discussion related to third-party interests, page 134).

### **Costs, Taxes, Liability, Property Maintenance**

Because a conservation easement represents only the transfer of some, not all, of an interest in real property, there may be some confusion about what rights and obligations a landowner retains and what effects an easement has on general property ownership issues. For this reason, many conservation easements address such topics directly. For example, a section in an easement might serve to remind landowners that they retain the obligation to pay all property and other taxes on the property after the conveyance of the easement. In addition, easements often contain a section that states that all obligations for property maintenance and compliance with laws relating to real property

ownership continue to be the responsibility of the landowner. Another common provision is one that states that the fact an easement has been placed on a property will not affect the applicability of laws relating to the property (such as local land use laws).

Liability issues are also commonly addressed in conservation easements. Most land trusts require landowners to hold them harmless for liabilities that arise from property ownership, in particular personal injury and property damage and environmental liabilities. Some land trusts regularly request that property owners add their organization to the landowner's policy of liability insurance, to provide additional protection to the land trust against lawsuits arising from damages occurring on the property.

These types of provisions are generally regarded as part of the boilerplate provisions of a conservation easement. Because they are found in every easement and are generally consistent from easement to easement, these provisions are generally not subject to negotiation. A land trust should be cautious about deleting or substantially modifying such types of clauses, and should obtain legal advice on the subject before doing so.

## State and Federal Law Requirements

There are a number of state and federal law requirements that land trusts must (due to the laws' provisions) include in every conservation easement, including:

1. *Compliance with conservation purposes and state law requirements.* Both the recitals clauses and the purposes clause of the easement demonstrate how the easement meets the federal conservation purposes test (see pages 112–4) and the requirements of your state's conservation easement enabling statute.
2. *Demonstration of public benefit.* Every easement, whether it is intended to qualify for federal tax benefits or not, should clearly state what benefits will accrue to the public from completion of the project. This demonstration is often found in both the recitals clauses and the purposes clause.
3. *Qualification of the land trust* (and any assignee or transferee). Every easement should state, in an appropriate location, why the land trust is qualified under federal and state laws to accept and hold a conservation easement and should include the



**You should require landowners to hold your land trust harmless for liabilities such as personal injury and property damage. You can also request that landowners add your land trust to their liability insurance policy.**

**Land trusts should be cautious about deleting or substantially modifying boilerplate clauses and obtain legal advice before they do so.**

requirement that any assignee or transferee of the easement be so qualified.

4. *Baseline documentation.* It is common to reference the creation of baseline documentation in the easement and to note who holds the original of the documentation (generally the land trust). Some land trusts record the baseline as an exhibit to the easement so that it is always part of the public record, and thus not subject to being lost or destroyed. However, it is costly to record this document (recording charges are based on the number of pages placed in the public records) and often the types of standard items found in a baseline (photographs, maps, etc.) are not permitted to be recorded. In addition, because baselines often contain information that a landowner may regard as personal (the size of their home, the number of outbuildings, what uses they are making of their land, etc.), some landowners strongly object to having the baseline recorded.

Other land trusts choose not to record the baseline because updating the baseline to reflect changes in the document would require amending the easement, a practice that *Land Trust Standards and Practices* discourages except in rare circumstances:

**Practice 11I. Amendments.** The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

5. *Mortgage subordination.* Some conservation easements contain the mortgage subordination in the easement, either as an exhibit or in a section of the easement, while other conservation transactions handle the subordination through a separate document. If the subordination is handled outside the easement, drafters should make reference, within the easement

itself, to the fact that all liens and mortgages have been subordinated to the easement.

6. *Required notices.* Any notices required to be given by the Treasury Regulations, or negotiated as part of the easement, must be addressed in the easement. The easement should specify the type of notice to be provided, when it must be provided, what contents the notice must contain, and whether approvals will also be required for the activity to which the notice applies.
7. *Inspection rights.* Every easement must give the land trust the right to enter the property to inspect it for compliance with the terms of the easement. Landowners frequently want to limit these inspection rights, either by limiting the number of times the land trust can visit the property, or the date and hour of the day the inspections can occur, or the notice that must be given in advance of the inspection. Generally, land trusts find that there is a stewardship benefit to treating this provision as a boilerplate provision, so that different easements do not require different types of notice and times for monitoring. Any limitation on the number of monitoring visits agreed to by a land trust must not prevent the land trust from entering the property if it suspects a violation, particularly if the violation may cause lasting or irreparable damage to the conservation values (for example, a prohibited harvest of old-growth trees).
8. *Assignment limitations.* The federal Treasury Regulations require that an easement intended to qualify for tax benefits state that a holder of such an easement may only transfer the easement to other holders that will qualify under the Regulations, and who agree to carry out the original conservation purposes of the grant of easement.
9. *Termination and proceeds.* The Treasury Regulations require that, in order for an easement to qualify for federal tax benefits, the easement states that if it is terminated because an unexpected change in the conditions surrounding the protected property makes impossible or impractical the continued use of the property for conservation purposes, the land trust must be entitled to proceeds of a later sale in a particular proportion, and must use such proceeds from a later sale or exchange of the land in a manner consistent with the conservation purposes of the original easement [§1.170A-14(c)(2)].



## Third-Party Interests

For various reasons, some conservation easements contain what are commonly referred to as “third-party” interests. When drafting an easement that contains such third-party interests, a drafter must be sure to include information regarding the third party and its rights and/or obligations under the easement and to have the third party execute the easement when appropriate. Land trusts often enter into side agreements with these third-party interests to clarify the rights and responsibilities of the parties among themselves.

There may be situations where it is appropriate to co-hold a conservation easement with another organization. Sometimes, land trusts with small capacities to monitor and enforce easements choose to co-hold their easements with other land trusts in order to ensure that the easement will always be appropriately monitored and enforced. Other co-holding arrangements may arise when a landowner desires the participation of a second co-holder as a protection against the original holder’s perceived ability to overreach, or simply because the landowner is not comfortable with the primary holder. This situation sometimes arises when a government entity has the funds available to purchase an easement from a landowner, but the landowner is uncomfortable with the government entity holding a property interest in his or her land. The addition of a nonprofit land trust as a co-holder can often assuage a landowner’s discomfort in this situation. Another frequent co-holder situation arises when a new land trust seeks to accept its first easements, but cannot demonstrate the required commitment and resources to defend an easement to the satisfaction of the landowner (as required by federal law). In this instance, the young land trust may ask another established local land trust, or a state or national land trust, to co-hold the easement.

In such co-holding arrangements, the easement should specify the co-holder and should be clear about which easement holder is the holder to whom the landowner should turn for questions, notices, required approvals and so forth. If a co-holding agreement exists between the two easement holders, this fact is often referenced in the easement. Finally, both holders of the easement must execute the document.

Co-holding of conservation easements is a common practice for Maryland land trusts. The state-affiliated Maryland Environmental Trust co-holds easements with many of the local land trusts in the state and takes responsibility for monitoring (in cooperation with the local land trusts), stewardship and legal support of co-held easements. The Trust requires a cooperative agreement with any local land trust interested in co-holding easements. The agreement describes how the two organizations will work together on joint easements, spelling out the responsibilities of each party with respect to issues such as landowner outreach, processing, easement format, review and monitoring.

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Another form of third-party interest that may impact the contents of an easement is the identification of a backup grantee. Backup grantees are identified as the entity to which the easement will be first offered or transferred, under certain conditions. Backup grantees may also be identified by land trusts seeking to meet the terms of Practice 11G:

**Practice 11G. Contingency Plans/Backups.** The land trust has a contingency plan for all of its easements in the event the land trust ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the land trust secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement, the land trust has complete and accurate files and stewardship and enforcement funds available for transfer. (See 11H.)

A final type of third-party interest found in conservation easements is a “third-party right of enforcement.” Essentially this right gives another entity the power to enforce the terms of the easement or to give approval to certain requests made under the easement. Although not universally common, this type of interest is often found when the original holder of a conservation easement transfers the easement to another entity. To ensure that the new holder enforces the easement, to assuage its community that the easement will continue to be monitored and enforced when necessary, or to meet its own internal requirements, the original holder may require that it retain the right to enforce the easement. Such rights may arise if the new holder refuses to enforce the easement, or if the new holder does not have the capacity to enforce the easement. In these situations, the conservation easement should clearly identify the third-party right of enforcement, what entity holds such right and the conditions

surrounding the right. The entity with this third-party interest should also execute the conservation easement.

Another situation in which a third party may require the right to enforce or endorse approvals granted under the easement arises when a government agency provides funds for the acquisition of a conservation easement and, as a condition of the funding, reserves to itself the right to approve certain actions under the easement (such as amendments). In this situation, the easement should specify which actions require the approval of the third-party interest and how such approvals are processed.

### Amendment Clause

*Land Trust Standards and Practices* cautions that easement amendments should *not* be “routine” (Practice 11I, Amendments). An amendment clause in the conservation easement declares what powers the land trust has to modify the terms of the easement and what restrictions or requirements apply. Land trusts should include an amendment provision in conservation easements to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws. Doing so clarifies up front to all parties that there are circumstances under which the conservation easement may be modified.

Some experienced land conservation professionals do not include an amendment clause in their easements because they fear that the presence of such a clause will encourage landowners to request amendments. These professionals believe the absence of an amendment clause in their easements helps keep the number of amendment requests low. Others note that absence of an amendment provision could be interpreted to mean amendment is not permitted, leading to possible disputes if an easement is later amended contrary to the original donor or grantor’s understanding.

If a conservation easement may be treated as a charitable trust, an amendment clause grants the land trust defined powers to modify the easement by agreement with the landowner, powers that the land trust might otherwise lack for some amendments without court approval.\* In some states, an amendment clause may be necessary to make any

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\* For a further discussion of the theory of conservation easements as charitable trusts, see “Rethinking the Perpetual Nature of Conservation Easements,” by Nancy A. McLaughlin, *Harvard Environmental Law Review*, Vol. 29, No. 2, 2005.



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You should include an amendment clause in all conservation easements.



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**Charitable trust:** A trust established for charitable purposes.

changes to a conservation easement without seeking court approval. Because the law of the various states is uncertain today and may change even on points that appear certain, including an amendment clause in current easements may assist in the future even if not apparently essential today.

For more information on this issue, see *Amending Conservation Easements: Evolving Practices and Legal Principles*, published by the Land Trust Alliance and posted in the Digital Library on The Learning Center.

Amendment clauses often include the following details:

- A description of the amendment process
- The fact that fees may be charged or other conditions placed upon amendment requests based upon the land trust's amendment policy in effect at the time of the request
- The fact that the land trust will not agree to amend the easement under certain conditions (to increase the amount of development rights or subdivision rights, for example)
- The fact that any amendment must conform to federal and state laws, especially those prohibiting private inurement or impermissible private benefit
- The fact that the amendment must be approved and recorded as was the original easement

## General Boilerplate Provisions

All conservation easements contain general provisions relating to the interpretation of an easement and other legal matters. These are the provisions most commonly referred to as boilerplate provisions, because they are standard in every easement and are generally understood not to be negotiable because of their importance to the perpetuity of the instrument. A thorough discussion of these provisions is found in *The Conservation Easement Handbook* and a few of these important provisions are briefly discussed:

1. *Controlling law and interpretation.* This section identifies the state whose laws will control interpretation of the easement and may identify the court in which any enforcement action will be initiated.
2. *Owner's responsibility.* If the landowner's responsibility to pay



**Estoppel certificate:** A statement prepared by the land trust for a landowner who is selling easement property or securing a loan with the easement property as collateral. The certificate reviews the condition of the property as of the land trust's most recent inspection. Such a certificate may also be called a "statement of compliance" or "compliance certificate."

taxes and maintain the property is not set forth in another part of the easement, a catchall provision relating to such matters is often found in the General Provisions.

3. *Subsequent transfers.* This clause refers to the provision that states a landowner must make reference to the easement in future transfers of the land, and often requires the landowner to notify the easement holder of any transfer.
4. *Compliance/estoppel certificates.* Some land trusts include this provision as part of their boilerplate easement contents; many others do not, because they do not want to offer such certificates randomly or bind themselves to delivering the certificates except in the most important circumstances. A compliance or estoppel certificate is issued most frequently when either a lender is considering making a loan to a landowner secured by a pledge of the landowner's property (subject to a conservation easement), or when a protected property is being sold and a potential buyer or lender wants assurance that the easement has not been violated by the current landowner. A compliance or estoppel certificate is issued by the land trust and states that, subject to any exceptions set forth in the certificate, the easement is in full force and effect and has not been violated. Once such a certificate is issued by a land trust, the land trust is prevented ("estopped") from claiming the easement has in fact been violated. Thus it is clear that producing certificates takes a great deal of time and investigation by the land trust, because the organization must be absolutely certain of their contents. For this reason, many land trusts do not place a section in their easements promising to provide compliance or estoppel certificates, but rather choose to offer one when a particular landowner's situation requires it.
5. *Economic hardship.* This provision is not found in all easements, but the conservation easement drafters who use this provision believe it will help avoid terminations of the easement in the future for inappropriate reasons. Such provisions state that the landowner placed the easement upon his/her property knowing that without the easement, the land might be able to be put to more economical uses, and that "changed circumstances" increasing the value of the property without the easement should not be considered in terminating or modifying an easement. The provision is intended to protect the public benefits inherent in an easement by prohibiting courts from considering financial changes as a reason to modify or terminate the easement.

6. *Waiver of certain defenses.* This clause is intended to ensure that a land trust that delays enforcing a violation, or fails to enforce a violation, will not be presumed to have waived such right to enforce in the future. It is also intended to preclude a landowner from claiming that he or she has acquired the right to continue a prohibited use simply because the land trust has not prevented it, and to preclude a landowner from defending himself/herself against a violation simply because a land trust did not initiate a court action within its state's statute of limitations period (which in some states is as short as one year for easement violations). Statutes of limitations laws generally provide that if a party has the right to institute a lawsuit based upon what it knew, or should have known, within a certain period of time, but fails to institute the lawsuit within that time, it forever loses the right to bring the lawsuit. An example of this type of waiver provision follows:

Any failure by Grantee to discover a violation or forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver. Grantor hereby waives any defense available to Grantor pursuant to [applicable statute of limitation], or the defense of laches, prescription or estoppel.

Other important general provisions found in many easements include:

- A severability clause (providing that one unenforceable section of the easement will not render the entire easement unenforceable)
- Captions (stating that the title assigned to sections of the easement will not affect the meaning of the section)
- Standing to enforce (the primary purpose of this provision is to limit what parties may have the right to enforce the easement)

- Counterparts (allows the easement to be signed simultaneously by owners of the property who may be located in different places in order to avoid the need to circulate one easement document among many signatories, reducing the risk of loss of the document)
- Notices (setting forth the addresses and method of giving any required notices set forth in the easement)

This list is not an exhaustive recital of General Provisions, but is meant to highlight some of the most common or most important. Please see *The Conservation Easement Handbook* for a thorough discussion.

## Habendum and Signatures

The habendum clause (“To have and to hold . . .”) is the traditional language found at the end of an easement immediately preceding the signatures of the parties. Easement drafters should secure legal advice as to what the laws of their jurisdiction may require in this clause. Because a conservation easement is not only a transfer of a partial interest in real property, but is also often a contract, both parties (the grantor and grantee) should sign the document. Depending upon which other parties may have rights in the easement (backup grantees, co-holders, funders, etc.), other signatures may also be necessary. In addition, parties who have an interest in the property that precedes the conservation easement, such as tenants or lessees, should also be required to sign the easement in order to subordinate their interests to the provisions of the easement. Alternatively, such pre-existing interests in the property may also be addressed through a separate subordination agreement. The form of these signatures should match the title work you secured indicating the record owner of the land to be protected with a conservation easement and any parties of record with interests in the property. In some states, nonowner spouses must also sign to release their marital rights in the interest conveyed.




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**Habendum clause:** “To have and to hold . . .” (*habendum et tenendum*, in Latin) is traditional, though not universally required, language for concluding a grant of the easement, defining the extent of ownership the grantor is conveying.

Many states require an acknowledgment of the signatures on documents relating to interests in real property, commonly referred to as “notarization” of the signatures, and will specify the language that is necessary to meet state laws. Therefore, many conservation easements will require that the signatures on the easements are notarized. An attorney familiar with the real property laws of your state can advise if a notary is necessary for your easements and if any particular language is required for the notarization.



## Exhibits

Exhibits to a conservation easement often include the legal description of the conserved property, the easement map, water rights descriptions and, depending upon the land trust, the mortgage subordination and/or baseline documentation report. The first time an exhibit is mentioned in the text of the easement, it must be explicitly incorporated by reference into the document. For example, “Exhibit \_\_\_\_, attached hereto and incorporated herein [*or*, made a part hereof] by this reference.”

Legal descriptions of the conserved property, as well as any identified special use areas, such as building envelopes, are commonly set forth on the first exhibit (Exhibit A). Legal descriptions can often be very long, so they are not always suitable for inclusion in the recitals clauses, or are included in the exhibit simply for ease of reference. In addition, legal descriptions of water rights, when applicable to a conservation project, are often set forth in an exhibit, either as a separate part of Exhibit A, following the legal description of the land, or in their own exhibit.

More and more land trusts attach an easement map as an exhibit to their conservation easements. These maps can be very sophisticated, computer-drawn maps or surveys specifically created for a project, or they can be hand-drawn on topographic maps of the property or on a current aerial photograph. These maps may also be found in the baseline documentation report. When a land trust does not have a practice of recording the baseline, it becomes more important to have the easement map attached to the recorded copy of the easement, so that it is always a part of the real property public records. An easement map should show, at a minimum:

- Property and easement boundaries
- All man-made improvements
- Topographical or natural features of note
- Building envelopes and/or building exclusion zones
- Special use areas (natural zones or scenic viewplanes) that are important to the easement’s interpretation

Before you create and record an easement map, you should check to make sure your state permits you to record such a map. Some states do not allow anything other than an official survey prepared by a licensed surveyor to be recorded as a map of real property. See chapter 3 for further discussion of easement maps.



**The first time an exhibit is mentioned in the text of the easement, it must be explicitly incorporated by reference into the document.**

As discussed above, some land trusts record the mortgage subordination as an exhibit to the conservation easement in the belief that by attaching the subordination to the easement, the subordination of the lien or mortgage to the easement occurs simultaneously with the effectiveness of the easement. Other land trusts find this method too cumbersome and sometimes difficult to coordinate, and these organizations do not believe there is any legal difference between recording an easement with the subordination attached as an exhibit or recording the subordination agreement immediately following the conservation easement.

Finally, some land trusts record the baseline documentation as an exhibit to the conservation easement, but the more common practice is not to record the baseline. First, some real property records offices will not accept standard baseline contents for recording (such as photographs and maps). Second, land trusts worry that recording the baseline with the easement will necessitate amending the easement every time the baseline is updated in order to keep the report current. Finally, many landowners believe that the baseline contains information (title insurance, appraisals, etc.) that is too personal to place in the public record. As will be discussed in chapter 3, so long as the existence and significance of the baseline documentation report is set forth in the text of the conservation easement, and the baseline is kept in a safe and tamper-free location for the duration of the easement, it should not be necessary to record the baseline.

## Assessing the Stewardship Implications of Easement Restrictions

*This exercise may be completed either in classroom training or through self-study.*

*The following easement clauses have been taken from actual conservation easements. Using a scale of 1–5 (1 = **low** stewardship demands, 5 = **high** stewardship demands), rate the clauses regarding the difficulty of long-term stewardship. Note the reason for each decision. Guidance on answering these questions is on page 147.*

1. Any cutting of trees or vegetation, including pruning or trimming, is prohibited, except for the cutting or removal of trees or vegetation that pose a threat to human life or property.

Rating: \_\_\_\_\_

Why:

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2. The cultivation or disturbance of soil or vegetation within twenty-five (25) feet of the normal bank of any natural or artificial watercourse bordering or crossing the Property is prohibited, except that the Grantor may use such watercourses for the watering of livestock.

Rating: \_\_\_\_\_

Why:

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**PUTTING IT INTO PRACTICE**

3. No dogs shall be allowed upon the Property except within the designated Building Envelope. A maximum of three (3) dogs may be kept within the Building Envelope, as shown on the Baseline Documentation. Any dogs kept within the Building Envelope shall be confined and shall not be permitted to run loose on the Property.

Rating: \_\_\_\_\_

Why:

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4. Exhibit C is a map of the Property, showing the location of one “Building Envelope” within which are located all of the buildings on the Property. The Building Envelope contains [x] acres. Within the Building Envelope, the Grantor reserves the right to construct, in addition to the existing buildings, such other buildings and structures as are accessory to the single-family residential use of the Property, subject to the impervious surface limitation set forth below. Except for permitted drives, vehicle trails and fencing, all buildings and other structures shall be located within the Building Envelope.

Rating: \_\_\_\_\_

Why:

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5. No more than [x] new single-family residences may be built on the Property. No new single-family residence shall exceed 5,000 square feet in floor area (including any attached structure such as a garage) nor 35 feet in height.

Rating: \_\_\_\_\_

Why:

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6. All roofing and exterior surfaces shall be non-reflective and shall, to the extent practicable, be of a design that is visually unobtrusive and consistent with the other similar structures already on the Property. The color of said structures shall be compatible with the surrounding landscape and shall consist of natural tones.

Rating: \_\_\_\_\_

Why:

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7. The use of motorized vehicles, including snowmobiles and ATVs, off of existing roadways is prohibited if such use would in any way result in the degradation of the land or the wildlife habitat thereon.

Rating: \_\_\_\_\_

Why:

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8. The existing farm manager's house, as depicted on the Baseline Documentation, may be enlarged, repaired or otherwise enhanced, providing that it shall only be used for farm managers working and solely employed on the Property.

Rating: \_\_\_\_\_

Why:

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9. Harassment of elk or other wildlife, as defined by [state] law, by people, vehicles or domestic animals is prohibited. Lawful hunting is not wildlife harassment.

Rating: \_\_\_\_\_

Why:

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**PUTTING IT INTO PRACTICE**

10. There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall there be activities conducted on the Protected Property or on adjacent property if owned by Grantor, which would be detrimental to water purity, or which could alter natural water level and/or flow in or over the Protected Property.

Rating: \_\_\_\_\_

Why:

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11. Except for existing lighting not in conformity with this requirement, all external lighting (including the replacement of existing lighting fixtures) shall be located within the Building Envelope and shall be 90° horizontal cutoff downcast fixtures and shall only produce light that is incandescent in color. No light shall be more than eight feet above the ground unless attached to a building.

Rating: \_\_\_\_\_

Why:

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*Please note that some of these clauses have been included to demonstrate the difficulty of their stewardship over time; therefore, land trusts should evaluate these clauses carefully before including them in an actual easement.*

## Guidance

1. Rating 4–5, due to the difficulty, if not impossibility, of determining if any vegetation has ever been pruned or trimmed. The restriction was intended to preserve a natural area in a “forever wild” state.
2. Rating 3–4, due to the presence of some standards that are capable of measurement (25 feet from normal bank, no cultivation within protected zone), yet the possibility that the “normal bank” will be difficult to locate; also because of the potential difficulty of determining if any disturbance was caused solely by permitted livestock watering or other causes. The restriction was intended to preserve a riparian area while permitting ongoing agricultural operations.
3. Rating 5, due to the impossibility of knowing if dogs ever run loose on the property and the difficulty of knowing if just three dogs, no more, are ever on the property. This restriction was intended to protect wildlife habitat outside the building envelope.
4. Rating 1, due to the clearly defined terms of the building envelope (amount of acreage and location are noted on map), as well as the list of improvements that are the only ones allowed outside of the building envelope. The restriction was intended to preserve scenic open space by confining man-made improvements as much as possible to one development area.
5. Rating 3–4, due to clear limitations on building size and height, yet uncertainty of how such measurements are made. The restriction was intended to preserve a scenic working landscape.
6. Rating 4–5, due to the potential of vague terms (visually unobtrusive, natural tones) being defined in very different ways by the land trust and landowner. The restriction was intended to preserve a historically important land area.
7. Rating 4–5, due to the difficulty of determining “degradation” of land or wildlife habitat by off-road vehicles. The restriction was intended to permit some off-highway vehicle use while preventing erosion and disturbance of wildlife habitat.



## PUTTING IT INTO PRACTICE

8. Rating 3–4, due to the fact that the existing house appears to be well documented, but the difficulty of determining who lives in the home and if he or she is solely employed on the protected property. The restriction was intended to help preserve a working farm and allow only farm-related housing on the property.
9. Rating 5, due to the impossibility of defining “harassment” and whether at any time such harassment occurred on the property. The restriction was intended to preserve critical winter range for elk and other animals.
10. Rating 4, due to the high level of monitoring (water quality, water level and flow monitoring) that would be required to meet the standards of the restriction. The restriction was intended to protect a high-quality system of wetland and riparian areas.
11. Rating 1–2, due to the specificity of restriction’s terms, which makes it enforceable, but also due to the intensity of monitoring that will be required to ensure that the restriction is not violated. The restriction was intended to protect a scenic landscape in part through protecting the dark sky around the property.

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## Easement Restrictions Columbia Land Conservancy

The Columbia Land Conservancy (CLC) is a 20-year-old land trust operating in the Upper Hudson River Valley of New York State. The organization's mission is to protect wildlife habitat, farmland and rural open space, and to encourage balanced growth. It has a staff of 12. The organization holds conservation easements on approximately 17,500 acres and owns and/or manages six public preserves.

In 2003, the land trust researched its existing conservation easements to determine how many easement relationships it would have once all reserved rights to subdivide protected properties were exercised. When this process was completed, the land trust recognized that its future stewardship obligations were greater than it had previously assumed and grew concerned about its capacity to manage so many easements adequately. The executive director at the time, Judy Anderson, asked her staff to keep track of the time each of them spent on different stewardship issues related to these easements for the next two years.

The results of this effort were informative. The land trust learned that a majority of the stewardship time staff spent on existing easements was related to those easements' restrictions on house size, height and exterior lighting. The staff was concerned that spending so much time on these issues prevented it from completing more conservation projects. In addition, the amount of time spent monitoring the house size, height and lighting restrictions was not proportionate to the importance these issues had to the mission and goals of the land trust. Finally, the staff realized that as all the reserved rights in the land trust's existing easements were exercised, the time they spent on these three types of restrictions would potentially diminish the organization's capacity to adequately manage the other provisions of the easements. For these reasons, Judy requested that the land trust's board of directors consider removing these restrictions in future easements, replacing them with a requirement that a building envelope be identified on each conserved property within which all residential structures and accessory structures would be located. She proposed that landowners be permitted to build whatever size and height of structure any applicable local building and land use codes allowed and to install exterior lighting as permitted by local laws.

Some of CLC's board members were distressed by this proposal, because they felt strongly that the size and lighting of structures were important to regulate through

the land trust's conservation easements. A majority of the board, however, ultimately decided that such matters were not directly related to the land trust's mission and goals, and should therefore be regulated by the community as expressed in local land use and building codes, rather than by CLC's conservation easements. The board agreed to remove the lighting restrictions and require building envelopes for future easements, and removed the requirements for size and height limitations, except in exceptional circumstances when such design criteria related directly to the conservation values the organization identified on a particular property. Two board members resigned in protest over this decision, but the staff and the rest of the board believe that the stewardship savings the organization will achieve with this change in policy will help it complete more projects and more accurately reflects the anticipated future stewardship capacity of the organization.

### **Discussion Questions**

1. Why do you think restrictions on exterior lighting and house size and height required so much stewardship time from CLC's staff?
2. Are there ever times that these types of restrictions would be important to protect a property's conservation values?

### **Guidance**

1. The restrictions were time-consuming because:
  - Landowners asked questions about how to measure the size and height of homes
  - Staff had to educate landowners' architects about the restrictions
  - Staff spent time reviewing architectural drawings to ascertain the size and height of proposed buildings
  - Exterior lighting restrictions required frequent monitoring to ensure that landowners did not change the types of lights installed on their homes after the initial lights were approved
  - Monitoring of the exterior lighting had to be completed after regular working hours
  - Monitoring the size and height of homes required at least two land trust staff members to complete (to hold tape measures, etc.)
  - Remodels of existing homes had to be scrutinized to ensure that they did not exceed the restrictions

2. Yes! If a conservation organization's mission includes the preservation of historic structures, historic landscapes or scenic views then, in some cases, size and height limitations may be necessary to protect the cultural integrity of the property or scenic view corridors. Restrictions on exterior lighting may be important if a land trust's mission requires it to protect the dark skies of its community.

The purpose of this case study is not to discourage any land trust from adopting these types of restrictions, but to remind easement drafters that any restrictions in those easements should be directly related to the organization's mission. These restrictions should only be placed in an easement if the land trust has the capacity to monitor them.

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## Conclusion

Negotiating and drafting conservation easements are two of the most important tasks land trusts undertake, because these easements form the core of many of these organizations' land protection efforts. Land trusts achieve the promise of perpetuity by thoroughly analyzing and planning each conservation project. For every conservation easement, a project plan should be created that synthesizes the information gathered by the land trust during its project selection process, including site inspections and interviews with the landowner, researching the land's conservation values and applying the land trust's selection criteria to a project (including an analysis of the project's public benefit). The project plan helps guide the development of the final conservation easement by highlighting what restrictions on the use of the land will be necessary to conserve the identified conservation values while permitting those uses that will allow the landowner to meet his or her goals for the future of the property.

When beginning to draft a conservation easement, a land trust must first understand and address common principles underlying easements, including the fact that control of the land in the future will be shared by the land trust and landowner, that the land's conservation values must be protected by the easement's terms, that a balance must be struck between the desired future condition of the land and the uses a landowner intends to make of the property, and that an easement must be clear and easy to understand, both through the language used and in how the document is structured. Once a land trust understands how these principles are applied to a specific project, the organization turns to essential preliminary steps toward securing a conservation easement, including ordering and examining title work for the property to learn if there are liens that must be subordinated or if the land's mineral rights have been severed. A land trust also examines any potential hazardous materials issues that may exist, and secures a professional analysis if necessary.

After completing these preliminary steps and any other due diligence deemed necessary or appropriate, a land trust can commence the actual drafting of the document. Whether a land trust uses a template conservation easement or not, the organization should know which provisions must be in the final easement document and which provisions cannot be negotiated away. The land trust should pay particular attention to the drafting of the purposes clause of the easement,

understanding that the purposes clause will be essential to the interpretation and perpetuation of the easement over time. This clause must be placed in the correct location in the document to ensure that it is an operative part of the easement. The land trust should craft recitals clauses that provide an explanation of how and why the project was pursued by the organization. The easement should only contain those restrictions (with measurable standards) and rights reserved to the landowner that protect the identified conservation values existing on the land and are within the land trust's capacity to monitor and enforce over time. Particular care must be given to drafting easements intended to qualify for tax benefits and in creating any affirmative rights. Land trusts should include an easement amendment clause, and adequate enforcement remedies and easement holder rights sufficient to protect the conservation values.

## Sample Documents

### **Conservation Planning Data Sheet, Maine Coast Heritage Trust** *(page 156)*

You should tailor your organization's project planning data sheet to focus on the information you will need to implement your land conservation program. Sometimes organizations spend a great deal of time obtaining interesting information about a property that is not directly relevant to their conservation goals. Maine Coast Heritage Trust used this form to analyze its complex easement projects, which it is able to complete due to its significant capacity. Land trusts with less capacity may need less information or less detail or may not choose to impose the same restrictions on protected property. However, this comprehensive form can provide a starting point for creating a project planning checklist. Note: MCHT no longer uses this form.

### **Conservation Easement Information Form, Columbia Land Conservancy, New York** *(page 166)*

The Columbia Land Conservancy asks the landowner to complete this form, which is similar in function to that of Maine Coast Heritage Trust (which the easement holder completes). The Conservancy's form is less complex and detailed, and so conforms to its mission, goals and conservation projects.

### **Checklist 1: The Complete Outline** *(page 169)*

This checklist, reprinted from *The Conservation Easement Handbook* by Elizabeth Byers and Karin Marchetti Ponte (The Trust for Public Land and the Land Trust Alliance, 2005), is a comprehensive list of sections and paragraphs that could be included in a conservation easement. It corresponds to sample provisions contained in *The Conservation Easement Handbook*. By using this checklist, an easement drafter can create a document that addresses all relevant topics. The checklist may also serve as a basis for developing a model or template conservation easement for your organization.

### **Stewardship Principles in Conservation Easement Drafting, Vermont Land Trust** *(page 175)*

This set of easement-drafting principles was created by the Vermont Land Trust (VLT) to assist its project staff with understanding how to ensure that the easement restrictions they negotiate and draft are the types of restrictions the organization has the capacity to monitor and defend in perpetuity. Even though VLT has a large capac-

ity, it holds easements on thousands of acres of land throughout the State of Vermont, and thus must manage its easement obligations just as all other land conservation organizations must manage their responsibilities.

**Environmental Site Assessment Checklist**, Minnesota Land Trust  
(page 176)

This form is intended to be used by land trust personnel to investigate a potential project property for evidence of hazardous materials. If any such evidence is suspected, the next step would be to commission a formal environmental assessment of the land by an expert.

**Diagram of a Conservation Easement** (page 178)

This diagram illustrates and defines the important sections of the easement. The diagram also contains suggestions on how to fashion the language of your easement template. This example demonstrates how *one* land trust, following good practices, drafts its easements in response to the issues raised in this chapter. When drafting your own easement template, see the CD that accompanies *The Conservation Easement Handbook* for additional examples. Thanks to Columbia Land Conservancy for providing an easement for this diagram.



**MCHT Conservation Planning Data Sheet**

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**CONSERVATION PLANNING DATA SHEET: Maine Coast Heritage Trust**

**Project/Property Name** \_\_\_\_\_

**OWNER** \_\_\_\_\_

**COUNTY** \_\_\_\_\_ **TOWN** \_\_\_\_\_ **U.S.G.S. QUAD** \_\_\_\_\_

**TOWN TAX MAP and LOT** \_\_\_\_\_ **CHART NO.** \_\_\_\_\_

**ECOLOGICAL CHARACTER OF COASTAL MAINE:** Region \_\_\_\_\_ **Map** \_\_\_\_\_

**GEOGRAPHIC/INTEREST AREA** \_\_\_\_\_

**LAND TO BE PROTECTED:** acres \_\_\_\_\_ shorefront feet \_\_\_\_\_ road frontage \_\_\_\_\_

general character \_\_\_\_\_

other \_\_\_\_\_

[If a part of larger parcel, give details on larger parcel:

acres \_\_\_\_\_ shorefront feet \_\_\_\_\_ road frontage \_\_\_\_\_

general character \_\_\_\_\_

other \_\_\_\_\_

**WHAT IS SPECIAL ABOUT THIS LAND THAT MERITS PRESERVATION?** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Key Contact People** (owner, attorney, planner, staff, etc.)

\_\_\_\_\_  
name/relationship

\_\_\_\_\_  
address

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
e-mail

\_\_\_\_\_  
name/relationship

\_\_\_\_\_  
address

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
name/relationship

\_\_\_\_\_  
address

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
e-mail

\_\_\_\_\_  
name/relationship

\_\_\_\_\_  
address

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
e-mail

\_\_\_\_\_  
e-mail

**Legal Information:** (add sheets if more space is needed)

**RECORD OWNERS:** (year round and seasonal info/dates)

\_\_\_\_\_  
Name as on deed

\_\_\_\_\_  
name as on deed

\_\_\_\_\_  
address

\_\_\_\_\_  
address

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
city/state/zip

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
phone/fax

\_\_\_\_\_  
e-mail

\_\_\_\_\_  
e-mail

**TYPE OF OWNERSHIP** (tenants in common, joint tenant, corporate, trust, partnership, long term, family holding, developer, etc.) \_\_\_\_\_  
\_\_\_\_\_

**INTENDED FUTURE OWNERS** (buyers, family, associates - details) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**HOW PROPERTY WAS ACQUIRED** (probate dockets, deeds, declarations of trust -- including names, dates, book and page numbers, locale) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SOURCE FOR DESCRIPTION OF PROPERTY** (list deeds, line agreements, partition orders, surveys - if only a portion will be restricted, list source of description for entire property and tell plan for describing relevant portion, i.e.) lots, survey, landmarks) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CONTIGUOUS LAND OWNED BY FAMILY** (donor, spouse, brother, sister, ancestor, lineal descendent - inform appraiser for IRS "enhancement" computation) \_\_\_\_\_  
\_\_\_\_\_

**EXISTING ENCUMBRANCES** (mortgages, liens, public or private rights-of-way, power easements, deed restrictions, zoning, pending or threatened litigation, boundary issues) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**MCHT Conservation Planning Data Sheet**

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**PRIMARY LANDOWNER MOTIVATION** \_\_\_\_\_  
\_\_\_\_\_

**TAX INCENTIVES DESIRED:** income tax deduction? \_\_\_\_\_ estate/gift tax relief? \_\_\_\_\_ property tax relief? \_\_\_\_\_

**Baseline Information, Existing Character and Condition of Land to Be Protected By Easement:** (Specify where information relates to owner's entire parcel and to portion to be protected if they are not the same, add, and refer to more pages if space insufficient.)

**GENERAL BASELINE INFORMATION:**

**PRIMARY CURRENT USE OF LAND** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SECONDARY USES** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**INTENDED USES PENDING EASEMENT, SUBDIVISION APPROVALS, TRANSFERS** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**EXISTING PUBLIC USES** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**EXISTING LIMITATIONS ON USE** (intrinsic, zoning, covenants, current use classification) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SPECIAL CLASSIFICATIONS, RECOGNITION** (site specific and/or feature specific governmental/scholarly recognition of land/history/ecological features, [attach reports, statutes].) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**NEIGHBORING LAND/INFLUENCES** (any information on nearby land use, population density, aesthetic character, zoning, public or private land conservation, development trends, public use, proximate public vantage points, disputes, etc.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_

**FAMILY INFLUENCES** (involvement of non-owners with concern for land, cooperative or otherwise) \_\_\_\_\_

**OTHER IMPORTANT GENERAL INFORMATION** \_\_\_\_\_

**SPECIFIC BASELINE INFORMATION:**

**TERRAIN** (include description of elevations, views from land, water bodies large and small, wetlands, character of shoreline, geology, important features) \_\_\_\_\_

**EXISTING CHARACTER OF FLORA AND FAUNA** (include habitat information, animal/plant communities, rare species, vegetation cover, agricultural and forestry practices/plans/history, extent of clearing and vegetative screening, location, aesthetic character) \_\_\_\_\_

**EXISTING SURFACE ALTERATIONS** (include size, location, and uses)

roads/trails: \_\_\_\_\_

cultivation: \_\_\_\_\_

archeological sites: \_\_\_\_\_

ponds/wells/springs: \_\_\_\_\_

gravel pits/ mines: \_\_\_\_\_

subsurface utilities/septic: \_\_\_\_\_

soil test pits: \_\_\_\_\_

waste disposal: \_\_\_\_\_

other: \_\_\_\_\_

Sketch or Attach Map of Vegetation Types & Surface Alterations:

**EXISTING STRUCTURES** (INCLUDE size, visibility, setback, location).

## MCHT Conservation Planning Data Sheet

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residences: \_\_\_\_\_  
\_\_\_\_\_

accessory structures: \_\_\_\_\_  
\_\_\_\_\_

commercial buildings: \_\_\_\_\_  
\_\_\_\_\_

docks/floats/piers: \_\_\_\_\_  
\_\_\_\_\_

walls, fences: \_\_\_\_\_  
\_\_\_\_\_

seasonal storage: \_\_\_\_\_  
\_\_\_\_\_

bridges, stairs, boardwalks: \_\_\_\_\_  
\_\_\_\_\_

utility apparatus: \_\_\_\_\_  
\_\_\_\_\_

recreational facilities: \_\_\_\_\_  
\_\_\_\_\_

aquaculture facilities: \_\_\_\_\_  
\_\_\_\_\_

junk/refuse: \_\_\_\_\_  
\_\_\_\_\_

other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Sketch or attach drawings for clarity:

### **The Conservation Plan/Proposed Restrictions/Reserved Rights**

**CONSERVATION PURPOSE:** What is important to preserve? (Refer back to cover sheet and limit the actual plan to restrictions that actually further conservation purposes, deferring any private purposes or wishes to private legal or informal mechanisms.)

**PRIMARY CONSERVATION PURPOSE** (refer to IRS tests: habitat protection, public recreation, open space/scenic, and historic preservation, but specify important features) \_\_\_\_\_  
\_\_\_\_\_

**SECONDARY** \_\_\_\_\_  
\_\_\_\_\_

**COMPETING CONSERVATION VALUES? METHODS TO RECONCILE THESE?** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WHAT SORT OF USES WOULD THREATEN VALUES? [Given your organization's goals] \_\_\_\_\_  
\_\_\_\_\_

COMPETING USES OWNER DESIRES \_\_\_\_\_  
\_\_\_\_\_

CAN THESE BE LIMITED TO BE MADE COMPATIBLE? HOW? \_\_\_\_\_  
\_\_\_\_\_

IF SCENIC PRESERVATION, WHO SEES LAND? FROM WHERE? \_\_\_\_\_  
\_\_\_\_\_

### Land Use Areas/Specific Restrictions and Reserved Rights

**PROTECTED LAND** (Should entire parcel, or only a portion be included in easement? Should easement cover land intended for development? Describe areas, survey needed) \_\_\_\_\_  
\_\_\_\_\_

**LAND USE ZONES** (If included in easement, should development be limited to particular locations, specify why and where - natural areas, exclusionary zones, buffers, setbacks, development areas, building envelopes - strive for least complex arrangement) \_\_\_\_\_  
\_\_\_\_\_

**PUBLIC ACCESS AREAS** (All, part or none of land, means of access, specific limits on, specific allowances) \_\_\_\_\_  
\_\_\_\_\_

**SUBDIVISION** (permitted/prohibited/limited? prescribe extent) \_\_\_\_\_  
\_\_\_\_\_

(May land be used to permit increased density on abutting unrestricted land?) \_\_\_\_\_  
\_\_\_\_\_

**SPECIAL PROTECTION AREAS** (i.e.; rare species habitat, buffers, other) \_\_\_\_\_  
\_\_\_\_\_

### Specific Restrictions/Reservations

**VEGETATION MANAGEMENT**

## MCHT Conservation Planning Data Sheet

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general prohibition of cutting of standing timber/or alteration of vegetation? \_\_\_\_\_

exceptions and reserved rights: prevention of fire/disease/exotics, emergency, holder approvals? \_\_\_\_\_

vegetative screening of permitted structures? \_\_\_\_\_

personal firewood/building materials, methods and location limits? \_\_\_\_\_

commercial timber harvesting? \_\_\_\_\_

forestry plan, standards? \_\_\_\_\_

need for holder approval? \_\_\_\_\_

location limits? \_\_\_\_\_

clear-cutting/selective harvesting, definitions \_\_\_\_\_

commercial/personal agriculture, limits, methods \_\_\_\_\_

creation of views from permitted structures/from public vantage points/from neighboring lands,  
cleared or selective cuts \_\_\_\_\_

planting/landscaping/harvesting vegetation \_\_\_\_\_

maintenance of existing clearings \_\_\_\_\_

creation of additional clearings, size/location/screening limits \_\_\_\_\_

clearing for yards/lawns, size/location/screening limits \_\_\_\_\_

clearing for roads, trails, permitted structures, setback/ screening limits \_\_\_\_\_

boundary maintenance \_\_\_\_\_

other \_\_\_\_\_

### **SURFACE ALTERATIONS** (specify intended uses, limitations)

General prohibition on all surface alterations, excavation, filling, wetland alteration, surface mining

Exceptions to no surface alterations, and reserved rights, as necessary for:  
permitted structures/ vegetation management \_\_\_\_\_

roads, trails, size/location/setback/paving limits \_\_\_\_\_

cultivation of household gardens \_\_\_\_\_

agricultural cultivation, limits \_\_\_\_\_



archeological \_\_\_\_\_  
\_\_\_\_\_  
ponds/wells/springs, limits \_\_\_\_\_  
\_\_\_\_\_  
shellfish harvesting \_\_\_\_\_  
\_\_\_\_\_  
other \_\_\_\_\_  
\_\_\_\_\_  
gravel for road-building, restoration \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PERMITTED STRUCTURES** (specify intended structures/limitations)

General prohibition on all structures, temporary, permanent, meaning any man made object, not just buildings, with exceptions listed \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Is the land divided into development and natural areas? (Describe here and show on Sketch map and specify information below for each area) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Exceptions to prohibition on Structures, and Reserved rights:  
If the easement, or a portion of it will generally prohibit building altogether, can there be signs? fences? boundary markers? outdoor furniture? walkways? culverts? hunting blinds? interpretive signs? outhouses? stairs? boardwalks? wells? septic systems? utility structures? any items to serve owner's other land? other? Specify materials or visibility limitations? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If there are existing structures, may they be maintained, replaced, increased in size, moved to other locations, altered significantly? \_\_\_\_\_  
\_\_\_\_\_

Limitations on size, height, location, setback, screening, of existing structures? \_\_\_\_\_  
\_\_\_\_\_

Can new major structure be built ? \_\_\_\_\_

If so, any limitations on size, height, location, setback? \_\_\_\_\_  
\_\_\_\_\_

Are there any other special sorts of structures that should be mentioned as specifically permitted, prohibited, limited in some way, or as an exception to a general limitation, for instance, docks, tent platforms, tents? \_\_\_\_\_  
\_\_\_\_\_

## MCHT Conservation Planning Data Sheet

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**SPECIFIC PROHIBITIONS** (things that are worth mentioning in the conservation easement, even though the general restrictions would imply that they are prohibited)

- bridges or causeways? \_\_\_\_\_
- Towers (how about wind turbines?), antennae, satellite dishes? \_\_\_\_\_
- \_\_\_\_\_
- hotels, motels? \_\_\_\_\_
- inns, bed & breakfasts? \_\_\_\_\_
- waste disposal sites? \_\_\_\_\_
- junkyards? \_\_\_\_\_
- apartment buildings, multifamily units? \_\_\_\_\_
- campgrounds? \_\_\_\_\_
- condo, timeshares? \_\_\_\_\_
- trailer parks? \_\_\_\_\_
- others? \_\_\_\_\_

**Project History** Date Initiated \_\_\_\_\_ By whom/why? \_\_\_\_\_

Project Goals \_\_\_\_\_

Initial staff visit \_\_\_\_\_ Date \_\_\_\_\_ Details \_\_\_\_\_

**DATE**                      **ACTION**

Community sentiment? \_\_\_\_\_

Contribution to Stewardship? \_\_\_\_\_

Holder? \_\_\_\_\_

Survey needed/done? \_\_\_\_\_

Baseline Data compiled? \_\_\_\_\_

Baseline Data certified? \_\_\_\_\_

Subordination/consent? \_\_\_\_\_

Right-of-way needed to access protected portion of owner's land? \_\_\_\_\_

IRS Form 8283 discussed w/accountant? \_\_\_\_\_

Appraisal? \_\_\_\_\_

Other? \_\_\_\_\_

**Sketch Map** (This should ideally be two maps, one showing the geographic location in the larger context, and another showing the approximate boundaries of the owner's entire parcel, the area to be restricted, and important information which will vary depending on the purpose of the easement, (for instance: existing roads and trails, existing buildings, surface alterations, cultivated areas, cleared areas, vegetation notations, slope and elevation info, height of tree canopy in places, wetlands, special habitat features, public access areas, nearby public vantage points, etc.)

## CLC Conservation Easement Information Form

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### COLUMBIA LAND CONSERVANCY'S

#### *Conservation Easement Information Form*

(2006)

Please fill out the following information as completely as possible and return it to the Conservancy at your earliest convenience. If there are questions that are not applicable or are unknown, please make a note on the form. This information will enable Conservancy staff to complete your conservation easement and supporting charitable deduction tax forms. This form, as well as your \$850 deposit, must be received no later than two weeks prior to a board meeting to facilitate its inclusion for board review.

Date: \_\_\_\_\_

Your Name: \_\_\_\_\_

1. Legal names/owners of the Property as they appear on the property deed:

\_\_\_\_\_

Primary mailing address:

\_\_\_\_\_  
\_\_\_\_\_

Telephone Numbers: Daytime \_\_\_\_\_ Evening \_\_\_\_\_

Weekend \_\_\_\_\_

Fax(s) \_\_\_\_\_

Email address: \_\_\_\_\_

2. Property Owner(s) social security number(s). The Conservancy only needs this information if you wish to utilize a charitable gift as part of your conservation easement:

\_\_\_\_\_

3. Location of the Property that would be protected:

\_\_\_\_\_

4. Is there a mortgage, home equity loan or other lien or agreement without a filed satisfaction on the property? \_\_\_\_\_

If yes, please name the lender:

\_\_\_\_\_

Who is the contact person?

\_\_\_\_\_

Note: A mortgage does not prohibit the restricting of your land with a conservation easement. However, if you do have a mortgage or lien on your property, you will need

**CLC Conservation Easement Information Form**

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to get subordination approval from your lender as soon as possible. Conservancy staff will assist you as necessary.

5. Are there tenants on your property? \_\_\_\_ If yes, please list: \_\_\_\_\_

6. Is there a survey for your property? \_\_\_\_\_  
Please note: A boundary survey is required. CLC will need a copy of your survey prior to commencing work on your conservation easement map.

7. What is the total acreage of the property? \_\_\_\_\_

8. Are all property taxes and utility fee expenses up-to-date? \_\_\_\_ If no, please explain:  
\_\_\_\_\_

9. What is the principal use of your property (farming, forestry, wildlife habitat, recreation, etc.)?  
\_\_\_\_\_

Is your property enrolled in New York State's agricultural or forestry "current use" program?  
\_\_\_\_\_

10. To enable Conservancy staff to create the conservation easement and supporting land planning map as efficiently as possible, please list the number of existing:

Houses: \_\_\_\_\_

Guest houses, carriage houses, apartments, tenant houses: \_\_\_\_\_

Barns, garages, sheds: \_\_\_\_\_

Tennis courts, swimming pools, etc.: \_\_\_\_\_

Gravel pits: \_\_\_\_\_

Farm dump (state whether it is old or being used): \_\_\_\_\_

Other: \_\_\_\_\_

11. What is the name and address of the attorney who will be reviewing your conservation easement? If you wish, Conservancy staff can provide you with names of attorneys who are familiar with conservation easements.  
\_\_\_\_\_  
\_\_\_\_\_

Phone number: \_\_\_\_\_ Fax number: \_\_\_\_\_

12. Have you read, and are comfortable with, CLC's model conservation easement?  
\_\_\_\_\_

13. Do you wish to complete this conservation easement during this calendar year?  
\_\_\_\_\_

## CLC Conservation Easement Information Form

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Please note that your easement project, once completed, will be featured in CLC's publications.

14. CLC has several project periods (January-April, May-August, and September-December) in which to work on specific easement projects. Board approval is needed prior to the project period selected. Which period would work best for you, if there is a slot available?

\_\_\_\_\_

15. Are there individuals, other than yourself, who should be included in the conservation easement planning process? \_\_\_\_\_ If yes, please explain:

\_\_\_\_\_

16. Please explain any additional information or concerns the Conservancy staff should be aware of:

\_\_\_\_\_

\_\_\_\_\_

*The Conservation Easement Handbook*

**Checklist 1: The Complete Outline**

This checklist contains a comprehensive outline of the sections and paragraphs in chapter 19. Information in parentheses supplements the captions to provide a brief description of the contents. The commentary in chapter 20 uses the same section and paragraph numbers and captions.

**Section I. Caption (*Project Name*)**

**Section II. Deed Form**

- II.A. Identification of Parties
- II.B. Consideration—Words of Conveyance—Title Covenants
- II.C. Legal Description of the Property

**Section III. Purpose Statement**

**Section IV. Recitals: The “Whereas” Clauses**

**Section V. Incorporation of Purpose and Recitals**

**Section VI. Restrictions and Reserved Rights**

Paragraph 1. LAND USE

- 1.A. Generally
- 1.B. Specific Prohibitions
- 1.C. Land Use Areas

Paragraph 2. SUBDIVISION

- 2.A. Division Limitation
- 2.B. Exceptions
- 2.C. Extinguishment of Development Rights
- 2.D. Water and Mineral Rights

Paragraph 3. STRUCTURES (*Lists existing structures, prohibits new structures, subject to grantor’s reserved rights, which follow*)

- 3.A. Existing Structures
- 3.B. Minor Structures
- 3.C. Temporary Structures
  - 3.C.(1) Minor Agricultural Structures
  - 3.C.(2) Temporary Forestry Structures
- 3.D. Building Area—Existing Structures
- 3.E. Building Area—Additional Structures



## The Conservation Easement Handbook Checklist #1

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- 3.F. Notice to Holder (Option: approval)
- 3.G. Grantor's Historic Preservation Covenants
  - 3.G.(1) Covenant to Maintain
  - 3.G.(2) Prohibited Activities
  - 3.G.(3) Grantor's Conditional Rights Requiring Approval by Holder
  - 3.G.(4) Review of Grantor's Requests for Approval
- 3.H. Campsite Areas

Paragraph 4. SURFACE ALTERATIONS (*Lists existing surface alterations, prohibits additional surface alterations, subject to grantor's reserved rights, which follow*)

- 4.A. Generally
- 4.B. Trails and Footpaths
- 4.C. Roads
  - 4.C.(1) Driveways
  - 4.C.(2) Management Roads and Landings
- 4.D. Cultivation and Grazing
- 4.E. Water Resources
- 4.F. Archaeological and Scientific Study

Paragraph 5. VEGETATION MANAGEMENT (*Describes existing vegetation, prohibits future alterations to vegetation, subject to grantor's reserved rights, which follow*)

- 5.A. Generally
  - 5.A.(1) As Necessary for Other Reserved Rights
  - 5.A.(2) As Necessary with Additional Rights
- 5.B. Existing Fields and Open Areas
  - 5.B.(1) Right and Obligation to Maintain
  - 5.B.(2) Right to Maintain
- 5.C. New Open Areas
- 5.D. Forest Management
  - 5.D.(1) Noncommercial Purposes
  - 5.D.(2) On Historic Properties
- 5.E. Commercial Forestry Operations
- 5.F. Forest Management Plan
  - 5.F.(1) Forest Management Plan—Holder Approval
    - (a) Ten-Year Plan
    - (b) Content of Plan
    - (c) Management Activities
  - 5.F.(2) Forest Management Plan—Forester Certification—Holder Review
    - (a) Required Reports
    - (b) Ten-Year Management Plan

- (c) Forester Certification
  - (d) Contents of Plan
- 5.F.(3) Forest Management Plan—Third-Party Certification—Holder Review
  - (a) Ten-Year Management Plan
  - (b) Holder Review
  - (c) Third-Party Certification
- 5.G. Forest Management Plan Contents

Paragraph 6. WASTE DISPOSAL AND WATER PROTECTION

- 6.A. Waste Disposal
- 6.B. Use of Toxic Agents
  - 6.B.(1) Minimum Restrictions
  - 6.B.(2) Forever-Wild Easements
  - 6.B.(3) With Holder Approval Only
  - 6.B.(4) For Limited Development

Paragraph 7. PUBLIC RECREATION AND ACCESS

- 7.A. Access (Public use not granted)
- 7.B. Public Recreation (Granted)
  - 7.B.(1) Grant
  - 7.B.(2) Limitations
- 7.C. Public Recreation and Education
  - 7.C.(1) Grant to Holder—Holder Manages
  - 7.C.(2) Limitations—Grantor’s Uses Allowed
  - 7.C.(3) Liability
- 7.D. Trail Easement and Public Access
  - 7.D.(1) Grant of Trail Rights to Holder
  - 7.D.(2) Grant of Management Rights to Holder
  - 7.D.(3) Grantor’s Public Use Rights
  - 7.D.(4) Liability
- 7.E. Holder’s Public Recreation Rights
  - 7.E.(1) Grant to Holder
  - 7.E.(2) Holder’s Management Rights
    - (a) Rules and Fees
    - (b) Trails
    - (c) Campsites and Picnic Areas
    - (d) Boat Launching Facilities
    - (e) Access
    - (f) Signage
    - (g) Restoration
    - (h) Insurance

## ***The Conservation Easement Handbook Checklist #1***

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### Paragraph 8. DEFINITIONS

- 8.A. Agriculture
- 8.B. Recreation
  - 8.B.(1) Nonintensive Outdoor Recreation
  - 8.B.(2) Commercial Outdoor Recreation [IRC §2031(c) issues]
- 8.C. Normal High-Water Mark
- 8.D. Wetland
- 8.E. Forest Management
- 8.F. Selection Cutting
  - 8.F.(1) Selection Cutting—Textbook
  - 8.F.(2) Selective Cutting—Prescriptive
- 8.G. Clear-Cutting
  - 8.G.(1) Clear-Cutting—Appearance Based
  - 8.G.(2) Clear-Cutting—Quantifiable
  - 8.G.(3) Clear-Cutting—Measured Openings
- 8.H. Structure
- 8.I. Gross Covered Ground Area
- 8.J. Residences—Single or Extended Family
- 8.K. Not Prominently Visible

### Paragraph 9. HOLDER'S AFFIRMATIVE MANAGEMENT RIGHTS

- 9.A. Trails
- 9.B. Recreational Use and Improvements
- 9.C. Guided Public Access
- 9.D. Field Maintenance

## **Section VII. Administrative Provisions**

### Paragraph 10. HOLDER'S AFFIRMATIVE RIGHTS

- 10.A. Entry and Inspection
- 10.B. Enforcement
- 10.C. Protection of Conservation Values
- 10.D. Boundaries
- 10.E. Holder Acknowledgement Signs
- 10.F. Rights of First Refusal
  - 10.F.(1) Right of First Refusal—Fee Ownership
  - 10.F.(2) Continuing Right of First Refusal—Fee Ownership

### Paragraph 11. NOTICES TO HOLDER

- 11.A. Means of Notice
- 11.B. Content of Notice

- 11.C. Process of Notice and Approval
- 11.D. Failure to Respond
- 11.E. Transfers of Ownership

Paragraph 12. NOTICES TO GRANTOR

- 12.A. Means of Notice
- 12.B. Grantor's Designee

Paragraph 13. COSTS, TAXES, LIABILITY

- 13.A. Taxes and Liens
- 13.B. Hold Harmless
- 13.C. Permits and Applicability of Other Laws
- 13.D. Environmental Liability (Hazardous waste)

Paragraph 14. CONSERVATION EASEMENT REQUIREMENTS UNDER STATE AND FEDERAL LAW

- 14.A. Conservation Purposes—Applicable Law
- 14.B. Qualified Donee (Holder)
- 14.C. Assignment Limitation
- 14.D. Required Notices
- 14.E. Baseline Documentation
- 14.F. Liens Subordinated
- 14.G. Termination and Proceeds

Paragraph 15. GENERAL PROVISIONS

- 15.A. Controlling Law and Interpretation
- 15.B. Owner's Responsibility—Joint Obligation
- 15.C. Subsequent Deeds and Transfers
- 15.D. Compliance/Estoppel Certificates (Optional)
- 15.E. Amendments
  - 15.E.(1) Amendment and Discretionary Consents
  - 15.E.(2) Amendment (Historic preservation)
- 15.F. Economic Hardship
- 15.G. Waiver of Certain Defenses
- 15.H. Breach of Contract (Historic preservation)
- 15.I. Severability—Entire Agreement—No Forfeiture
- 15.J. Standing to Enforce
- 15.K. Captions
- 15.L. Additional Conservation Grants
- 15.M. Grantor's Attorney
- 15.N. Counterparts

## ***The Conservation Easement Handbook Checklist #1***

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Paragraph 16. THIRD-PARTY INTERESTS (*Backup holders*)

16.A. Executory Limitation

16.B. Third-Party Rights of Enforcement

16.C. Right of First Refusal—Assignment of Easement

### **Section VIII. Habendum and Signatures**

### **Section IX. Acknowledgement and Recording**

### **Section X. Holder Acceptance**

### **Section XI. Exhibits and Attachments**

Exhibit A—Legal Description of the Protected Property

Exhibit B—Sketch Map(s)

Exhibit C—Description or Map of Land Use Areas

Exhibit D—Critical Baseline Information

Exhibit E—Subordination of Mortgage



### Stewardship Principles in Conservation Easement Drafting

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#### Vermont Land Trust

Conservation easement transactions represent a balance between resource needs, landowner needs, and the feasibility of providing long-term stewardship. Conservation easements should in general be consistent in language, simple to administer, and require few individual landowner contacts, while reasonably meeting resource needs and landowner needs at a level that can be sustained perpetually. When addressing special issues and drafting special provisions the following apply:

1. Limit the use of new “non-approved” easement clauses and “creative” special provisions to those resources that are truly outstanding and those circumstances that are truly unique.
2. Minimize the number of potential stewardship contacts by limiting the number of separate ownerships, using pre-approvals, and excluding buildable sites or non-standard activities that the owner wishes to continue.
3. Provide guidelines (height, location, mass) for an allowed activity rather than subjective standards (“unreasonable” or “undue impact”). Use performance standards (state the goal, and allow flexibility to reach the goal) when possible.
4. Consider discretionary approval provisions (written approval at the holder’s sole discretion) to prevent easement obsolescence, limit amendments, meet unforeseen circumstances, and adapt to changing conservation practices.
5. Delineate clearly the boundaries of a designated protection or use zone both by map and on the ground using easily discernable features or, if necessary, permanent stakes and/or painted blazes.
6. Limit restrictions concerning activities which are (a) outside the holder’s “core competency” and require consulting with outside professionals (habitat biologists, architectural historians) or (b) require intensive review and oversight (mineral extraction, design review).
7. Avoid restrictions of activities that (a) cannot be monitored and enforced, (b) provide marginal resource benefit for significant stewardship commitment, or (c) dictate specific property management prescriptions rather than broader management requirements.
8. Position any special provision within the easement document as a separate numbered paragraph rather than as a modification to a standard numbered paragraph, but with a cross-reference to the special provision in the appropriate standard paragraph.

# Minnesota Land Trust Site Assessment Form



Date: \_\_\_\_\_

Prepared by: \_\_\_\_\_

## MINNESOTA LAND TRUST ENVIRONMENTAL SITE ASSESSMENT CHECKLIST

SITE: \_\_\_\_\_

TRACT: \_\_\_\_\_

COUNTY: \_\_\_\_\_

MINNESOTA LAND TRUST REGION: \_\_\_\_\_

**1. DESCRIPTION:** Provide a brief description of the property and surrounding area.

SETTING:       Rural                       Urban                       Suburban

Describe: \_\_\_\_\_

**2. LAND USE HISTORY, FEATURES & DEVELOPMENT:** Check and comment as appropriate.

CURRENT LAND USES AND FEATURES

Residential                       Commercial                       Industrial  
 Agricultural                       Dump/Landfill                       Wetland  
 Gravel/Mining                       Woods                       Other

Comments: \_\_\_\_\_

STRUCTURES AND IMPROVEMENTS

Wells                       Transformers                       Ponds  
 Septic                       Sumps                       Basins  
 Underground Tanks                       Drums                       Pipelines  
 Surface tanks                       Other:

Comments: \_\_\_\_\_

PREVIOUS LAND USES

Residential                       Commercial                       Industrial  
 Agricultural                       Dump/Landfill                       Other  
 Gravel/Mining                       Timbering

Comments: \_\_\_\_\_

ADJACENT LAND USES (ONE MILE RADIUS)

Residential                       Commercial                       Industrial  
 Agricultural                       Dump/Landfill                       Other  
 Gravel/Mining                       Timbering

Comments: \_\_\_\_\_



3. **SITE VISIT:** Describe visit to the property, identify others present, check and comment as appropriate.

OBSERVATIONS OR EVIDENCE OF CONTAMINATION

- Surface Staining
- Oil Sheen
- Odors
- Vegetation Damage
- Prior spills/leaks
- Other: \_\_\_\_\_

Comments: \_\_\_\_\_

4. **RECORDS AND INVESTIGATIONS:**

Prior environmental assessment or tests:  yes  no

Any governmental or regulatory investigation or inquiry:  yes  no

Comments: \_\_\_\_\_

REVIEW OF REGULATORY AGENCY RECORDS

Check MPCA records. See the MPCA web site, [www.pca.state.mn.us/backyard/neighborhood.html](http://www.pca.state.mn.us/backyard/neighborhood.html). Review additional agency records if there is an indication of any potential release of a contaminant at or near the project location. Identify any records checked and results. Attach materials if appropriate.

REVIEW OF OUTSIDE RECORDS WHICH MAY INDICATE PAST LAND USES

Review additional materials (title information, business licenses, insurance records, fire hazard maps, tank permits, etc.) if items checked above indicate a potential for contamination. Identify any records checked and results. Attach materials if appropriate.

**SUMMARY**

After conducting a field inspection and/or record search of the subject property:

There is no apparent contamination potential.

OR

Contamination potential exists and additional investigation is needed.

COMMENTS:  
\_\_\_\_\_

April 2007

# Conservation Easement Diagram

1. Recording information for the conservation easement will be shown somewhere in this area, and will consist of either a book and page number, reception number, filing number or some other method for locating the easement in the local public records.

Recording Requested by:  
Columbia Land Conservancy, Inc.  
P.O. Box 299  
Chatham, NY 12037

## 2 DEED OF CONSERVATION EASEMENT {Subject to minor changes pending final CLC attorney review}

2. This is the form of conveyance. In New York, conservation easements are deeds; in other states, they may be indentures, servitudes, restrictions or covenants. Easements are commonly entitled by their form of conveyance, as shown here.

THIS CONSERVATION EASEMENT AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2007, between XXXXXXXXXXXX, mailing address, XXXXXXXXXXXXXXXXXXXX hereinafter called "Grantor", and the **Columbia Land Conservancy, Inc.**, P.O. Box 299, 49 Main Street, Chatham, New York 12037, a New York not-for-profit corporation hereinafter called "Grantee."

3. The names and mailing addresses of the landowner (grantor) and the land trust (grantee) are shown in this introductory paragraph, together with the date on which the easement was conveyed.

### 4 WHEREAS:

A. Grantor is the owner in fee of real property (the "Property") consisting of approximately XXXX acres in one (1) tax parcel in the Town of XXXXXXXXX, Columbia County, New York, more particularly described in Exhibit A and shown on Exhibit B attached hereto and incorporated herein by this reference. The Property contains a single-family residence, a detached garage, a small shed, a studio, a cabana, a swimming pool, stonewalls, fences and related access ways;

4. The following paragraphs (A-G) comprise the "recitals" or "whereas" clauses. These clauses should describe in detail the conservation values of the property, show the size and reference the legal description of the property, and describe the public benefit of the easement and show that it meets the IRC conservation purposes test.

B. The Property possesses relatively natural habitat and scenic open space values (collectively the "Conservation Values") of great importance to Grantor, the people of Columbia County and the people of the State of New York; the preservation of which will provide a significant public benefit. The Conservation Values, which are more fully described in the Baseline Documentation Report (Section 5.1), are further described below:

5. **(Exhibit A)** This exhibit contains the legal description of the property, taken either from a survey of the land, from the landowner's deed, or from the title work ordered for the property. If a legal description is short, it can be placed within the recital or whereas clauses, rather than in an exhibit.

1. Open Space. The Property qualifies as open space because it will be preserved for the scenic enjoyment of the general public; is supported by several clearly delineated government conservation policies; and will yield a significant public benefit:

i. Scenic enjoyment. The Property is located directly on XXXXXX Road, containing 2070.56 feet of frontage on XXXXXX Road, a public road, and contains portions of a prominent ridgeline that is visible from the hamlet of XXXXXXXXX and the Mount Lebanon Shaker Society National Historic Landmark, as well as County Route XX, US Highway XX and New York State Highway XX, all well traveled public roads;

**(Exhibit B)** This exhibit is the easement map and shows the easement boundaries, all man-made improvements on the property and the location and dimensions of any building envelopes and/or special use areas.

ii. Prime Farmland/Forest land. The Property contains "prime soils" and "soils of statewide importance" as determined by the United States Department of Agriculture Natural Resources Conservation Service (NRCS). In addition to the agricultural portions, the Property contains large areas of forestland, with potential for sustainable forestry operations, and is part of an area comprised of relatively large, unfragmented woodlands;

**(incorporated)** Note that the exhibits are named and incorporated by reference the first time they are mentioned in the easement.

iii. Clearly delineated government policies.

(a) Several state and local programs and laws have been implemented to recognize and encourage the protection of lands, like the Property, which contains scenically and ecologically significant acreage. New York State encourages the conservation of woodland and agricultural land through Article 49, Title 3, of the New York Environmental Conservation Law and tax exemptions (e.g., Real Property Law Section 480; Real Property Tax Law Section 481; and Article 25AA of the New York State Agricultural and Markets Law). Pursuant to Article 25AA, the Property has been designated by the New York State Department of Agriculture and Markets as part of Agricultural District #9;

(b) New York State recognizes the importance of conserving lands through the use of conservation easements by adoption of the Conservation Easement Tax Credit in 2006 (Personal Income Tax Article 22 Section 606(kk)), which gives landowners whose land is restricted by a donated conservation easement an annual refund of 25% of the property taxes paid on that land, up to \$5,000 per year;

(c) The Property is part of an ecological system of hills and wetlands of the Taconic Mountain Range and the Shaker Swamp. The Taconic Mountain Range, which runs along the eastern boundary of Columbia County adjacent to the Property, is a series of high ridges that straddle the New York, Massachusetts, Connecticut and Vermont borders. The approximately 70-mile portion of the Taconic Mountain Range that is located in New York State, including the section abutting the Property, is listed in the current New York State Open Space Conservation Plan (November 2006, New York State Department of Environmental Conservation) as a high priority area for protection, having “significant environmental or other natural qualities and features...worthy of conservation.” Specifically the Plan states “Protection of this area continues to be a high priority due to the region’s high biodiversity, scenic views, substantial recreational value...steeply sloping hillsides, unique geological segments, historic architecture, working farm landscapes and multiple connection opportunities...” The plan further states “...protection of the Route 22 corridor, which includes scenic vistas, productive farmland, and habitat supporting endangered and threatened species, continue to be important considerations...”;

(d) The Town of XXXXX has planning, zoning and land use laws that partially regulate the Property. The Town has adopted provisions in its planning and zoning laws that encourage the preservation of agricultural, rural open space and scenic resources. The stated goal of the current Town of XXXXXXXX Comprehensive Plan, adopted January 2005, is to “Protect and enhance the natural scenic vistas and the publicly visible aspects of the man-made environment, in keeping with the Town’s rural and “small town” character.” Among the stated objectives of the Plan is to “Preserve scenic vistas of the area’s natural beauty including vistas of woodlands, fields, ridgelines, hillsides, hilltops, and valleys” (Section III-1) and “Protect surface water, wetlands and groundwater from potential sources of pollution and reduce or eliminate existing sources of water contamination”; “Prevent

## Conservation Easement Diagram

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development of steep slopes that can lead to erosion”; and “Protect scenic vistas, open space and sensitive wildlife habitats” (Section III-5);

iv. Significant public benefit. The Property’s open fields, woodlands, rocky outcroppings, prominent ridgeline, and wetlands are rich in biodiversity and provide habitat for a variety of terrestrial and amphibious species. The Property is of particular importance as an ecologically diverse and scenic natural area, being visible from the Mount Lebanon Shaker Society National Historic Landmark and being part of an ecological system of hills and wetlands of the Taconic Mountain Range and the Shaker Swamp.

(a) The Property is visible from, and within XXXXXXXX miles of, the Mount Lebanon Shaker Society National Historic Landmark. The Mount Lebanon Shaker Society was the largest and most industrious Shaker community from 1785 until 1947, and the spiritual center of Shaker society in the United States. It was, at its apex, home to 600 Shakers who lived, worked and worshipped on approximately 6,000 acres containing more than 100 buildings, 26 of which are still in use. Mount Lebanon was registered as a National Historic Landmark on June 23, 1965. The site was recently designated part of the new “Shaker Historic Trail” by the National Park Service (NPS), and is part of the NPS National Register of Historical Places Travel Itinerary. With on-going and additional improvements planned for the Village including a new museum and restoration of an historic barn, the Village is expected to become an increasingly significant tourist destination in the County, drawing an excess of 70,000 visitors per year. With the increasing popularity of the site will likely come new types of commercial and other associated development pressures. The Mount Lebanon Shaker Society National Historic Landmark is a popular public attraction due to its historic nature, and protecting views from the National Historic Landmark will help maintain its historic significance.

(b) The 2006 New York State Open Space Conservation Plan designates the Taconic Mountain Range as a high priority area for protection “due to the region’s high biodiversity, scenic views, substantial recreational value...steeply sloping hillsides, unique geological segments, historic architecture, working farm landscapes and multiple connection opportunities...” (see Section B.1.iii.c. above)

(c) The Shaker Swamp has both ecological and historical significance, at one time, being a source of natural resources for the local native American population, the Shakers, and the Tilden Pharmaceutical Company. The Tilden Pharmaceutical Company was founded in 1824 and based its operations for more than a century on medicinal plant extraction knowledge gained from the Shaker community until it closed in the 1960s. As a result of the cultural and ecological significance of the Shaker Swamp, a study is currently underway by the Farmscape Ecology Program and other botanists and members of the community to conduct a full assessment of the Swamp’s ecological diversity and historical background. Among many other animal species noted to date as part of the on-going biological study, otters, Northern Harrier, Willow Flycatcher, and Red Loon have been observed there. The diverse plant community of Shaker Swamp is indicative of calcareous conditions and contains regionally rare or scarce plants

(according to Kiviat & Stevens, 2001) such as Blue Cohosh, Highbush Cranberry, Walking Fern, Northern Gooseberry, American Larch, and Mayapple (Knab-Vispo and Vispo, pers. com.).

(d) The permanent protection of the Property complements and enhances a larger open space protection effort in the area by the Grantee. The Property is part of a "Neighborhood Conservation Block" that is comprised of five (5) other properties protected with private conservation easements held by Grantee, within one-and-one-half (1.5) miles of the Property, totaling approximately 539.36 acres.

(e) By limiting development of the Property to levels that will not adversely impact the Conservation Values, this Conservation Easement will provide a more extensive and permanent buffer to the Property's fields, woodlands, ridgeline, wetlands and streams, as well as the neighboring Mount Lebanon Shaker Society National Historic Landmark, Taconic Mountain Range and the Shaker Swamp. There is a strong likelihood that if the Property were to be developed instead of preserved it would contribute to the degradation of the scenic and natural character, water resources and high quality aquatic habitats of the area. Preservation of the Property will continue to provide an opportunity for the general public to appreciate its scenic values.

2. Relatively Natural Habitat. The Property is of particular importance as an ecologically diverse and scenic natural area. The Property contains three distinct sections. The eastern boundary of the Property is comprised of a highly prominent ridgeline, which rises to a summit of approximately 1,485 feet, and is characterized by a mixed hardwood forest and rock ledges and outcroppings that provide important habitat for rare plants and wildlife (see Section 7.33 of the *Biodiversity Assessment Manual for the Hudson River Estuary Corridor*, Hudsonia Ltd.). The steep sloped ridge descends onto the central portion of the Property, which contains mixed hardwood woodlands, open fields used for the cultivation of hay, and hedgerows. The western portion of the Property contains open fields, woodlands, portions of an important 59.5-acre Class 2 wetland system (identified by the New York State Department of Environmental Conservation (NYS DEC) as XXX), and a perennial stream that connects the wetland on the Property to the Shaker Swamp, an important 495-acre Class 1 wetland system (identified as CA-4), which neighbors the Property (see Section B.1.iv.c. above). The NYS DEC ranks wetlands from Class 1 to Class 4, with Class 1 receiving the highest level of protection, accordingly with the 1975 Freshwater Wetlands Act passed by the New York State Legislature;

C. Areas of particular ecological significance have been identified and mapped as shown on Exhibit B, attached to this Conservation Easement, as Environmental Protection Areas, within which development is very restricted, including a prohibition of residential dwellings and most accessory structures. The Environmental Protection Areas cover the steep slopes, prominent ridgeline and wetlands on the Property;

D. Maintaining the Property's scenic beauty, ecological significance, and agricultural and woodland viability, and, in particular, maintaining the Property free from new structures that would substantially interfere with its scenic, open rural character, woodlands, and wetlands, and permitting only appropriate uses and limited development compatible with the natural surroundings and scenic beauty of the Property, are critical to the protection of this scenic ridgeline Property as well as the open and scenic character of the general area. The conservation of the Property, subject to the terms of this Easement, will yield significant

## Conservation Easement Diagram

6. This is a statement of the consideration paid for the easement, indicating that this easement was donated to the Columbia Land Conservancy. If an easement is purchased, whether at full fair market value or at a bargain sale, the purchase price would generally be inserted here.

7. In this section, the land trust demonstrates that it meets all state and federal requirements necessary in order to be considered a qualified holder of conservation easements intended to qualify for federal tax benefits.

8. This section contains the required words of conveyance necessary to create a valid conservation easement in New York, as well as a statement that the easement was donated rather than purchased. It also states that the duration of the easement is perpetual and cites the New York conservation easement enabling statute.

9. This section contains the purposes clause, summarizing the conservation values on the property, what the easement protects on the land, and the public benefit derived from this protection. It also specifically limits any future use or development of the land to those practices that are consistent with the preservation of the conservation values.

If not already described elsewhere in the easement (as this easement does in Sections 1.1 and 1.2), reference should be made to the state's conservation easement enabling statute and relevant IRC provisions.

Note that this purposes clause was inserted after the grant clause (Section 1.2) to ensure that it is an operative part of the easement, which is necessary in New York. A different way to draft the purposes clause is to place it at the very beginning of the easement (in the recital or whereas clauses [see number 4]) and incorporate it by reference in the easement after the grant clause. Be sure to check with a qualified attorney before choosing which method of locating a purposes clause to use.

benefits to the public by protecting the scenic beauty, prominent ridgeline, steep slopes, wetlands and woodlands of the Property in addition to buffering nearby streams and wetlands from incompatible development;

E. The parties have a mutual desire and goal to foster landscape-scale conservation, reduce land fragmentation, establish potential habitat corridors and provide blocks of protected land that may allow for agriculture and forestry in perpetuity;

F. The parties desire to conserve the Property by entering into this Conservation Easement pursuant to the provisions of Article 49, Title 3, of the Environmental Conservation Law of the State of New York; and Section 170(h) of the Internal Revenue Code; and

G. Grantor has received independent legal and financial advice regarding this Conservation Easement to the extent that Grantor has deemed necessary. Grantor freely conveys this Conservation Easement in order to accomplish its conservation purposes.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, the parties agree as follows: **6**

### 1. General Provisions.

1.1. Grantee's Representation. Grantee represents and warrants that it is a New York not-for-profit corporation within the meaning of Article 49, Title 3 of the New York Environmental Conservation Law (together with any successor statute, the "Conservation Law"), is organized for, among other purposes, conserving real property, is a tax exempt and qualified organization within the meaning of Sections 501(c)(3), 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code, and meets the requirements of a "qualified organization" to accept, purchase, and hold Conservation Easements under Section 170(h) of the Internal Revenue Code and U.S. Treasury Regulation Section 1.170A-14(c). **7**

1.2. Grant of Conservation Easement. Grantor voluntarily grants and conveys to Grantee as a gift without consideration, and Grantee voluntarily accepts, this Conservation Easement to run with the land in perpetuity as defined by Article 49, Title 3, of the New York Environmental Conservation Law for the Purposes outlined below. **8**

1.3. Purpose. The purpose of this Conservation Easement is to conserve and protect the Property's open and scenic character (as seen from the hamlet of XXXXXXXX and the Mount Lebanon Shaker Society National Historic Landmark, as well as from XXXXX Road, County Route XX, US Highway XX and New York State Highway XX, all public roads); protect the ecological integrity of Property's ridgeline, wetlands, perennial stream, and rocky ledges and outcroppings; maintain the Property's agricultural and woodland productivity and viability, wildlife habitat and ecological characteristics; and provide a buffer for the neighboring water bodies from incompatible commercial uses and residential development; as well as protecting the general natural character of the Property, and fostering landscape-scale conservation, reducing land fragmentation, and establishing potential habitat corridors, as referenced in the recitals above, while providing for its compatible use, including specifically reserved and limited further development consistent with such natural and rural character. **9**

1.4. Implementation. This Conservation Easement shall be implemented by limiting and restricting the development and use of the Property in accordance with the provisions described herein.

**10** 2. Definitions. When used in this Conservation Easement, the following terms shall be defined as follows:

2.1 Acceptable Accessory Structure Area (AASA). The area, as delineated on Exhibit B, in which Agricultural Structures and Improvements, Habitat Management Structures and Improvements, Incidental Agricultural Structures and Improvements, Incidental Landscape and Garden Structures and Improvements, and Recreational Structures and Improvements, as defined herein, may be placed to the extent provided below.

2.2. Acceptable Development Areas (ADAs). The areas, as delineated on Exhibit B, in which Residential Units and associated Accessory Structures and Improvements (as defined herein) for Home Occupations and Rural Enterprises (as defined herein), educational and recreational uses, and farm operations may be placed to the extent provided below.

2.3. Accessory Structures and Improvements. A Structure or Improvement (as defined below), the use of which is customarily incidental and subordinate to the Residential Units (as defined below) or necessary for permitted Home Occupations and Rural Enterprises (as defined herein). Accessory Structures and Improvements include, but are not limited to, detached garages, tool sheds, storage sheds, pool houses, cabanas, swimming pools, tennis courts, bocce ball courts, decks, educational structures and other structures and improvements customarily incidental to the residence(s) as well as those described in Section 2.17, below. Such Accessory Structures and Improvements must be located completely within the ADAs or the AASA.

2.4. Agricultural Activities. Agricultural Activities include, but are not limited to, producing crops, livestock and livestock products; establishing, reestablishing, maintaining and using cultivated fields, orchards, and pastures; animal husbandry; and conducting farm operations for personal, non-commercial purposes or for commercial purposes as defined in Section 301 of the New York State Agriculture and Markets Law ("the Agriculture and Markets Law"), as amended, or any successor law.

2.5. Agricultural Structures and Improvements. A normal and customary structure or improvement used for farm operations and on-farm production, preparation, and storage for personal, non-commercial purposes or for commercial purposes as defined under Section 301 of the New York State Agriculture and Markets Law, as amended, or any successor law. Agricultural Structures and Improvements include, but are not limited to, barns, garden sheds, greenhouses, animal "run-in" shelters (defined as a building or covered structure that houses, shelters or otherwise confines animals or livestock in a specific location for any period of time), loafing sheds, unenclosed feed storage areas, sap-boiling houses, bunker silos, grain drying facilities, pole barns, riding rings, equestrian facilities, equipment sheds, and other similar agricultural facilities.

2.5. (a) Large Agricultural Structures. An Agricultural Structure with a Foot Print (as defined herein) greater than 1,500 square feet but not exceeding 4,000 square feet in Foot Print (as defined herein).

2.5. (b) Small Agricultural Structures. An Agricultural Structure with a Foot Print (as defined herein) of 1,500 square feet or less.

**10.** The Columbia Land Conservancy chose to create a separate section in its easement that contains definitions for important terms used in the document. The land trust could also have chosen to define these terms the first time they are used in the easement, but CLC believes a separate definition section makes the document easier to read and understand for both land trust personnel and landowners. Whenever a defined term is used in the easement it is capitalized.

## Conservation Easement Diagram

2.6. Agroforestry. Agroforestry intentionally combines agriculture and forestry to create integrated and sustainable land use systems, taking advantage of the interactive benefits from combining trees and shrubs with crops and/or livestock. Agroforestry practices include such options as alley cropping (the cultivation of food, forage or specialty crops between rows of trees or shrubs), growing ginseng and gourmet mushrooms, combining forest management with livestock grazing, and selling specialty wood items. For purposes of this Conservation Easement, timber harvest is not included in this definition; see “Conservation Forestry,” below.

2.7. Baseline Documentation Report. The document entitled “Baseline Documentation Report”, incorporated by this reference, that the Grantor and Grantee mutually agree, as depicted by photographs, maps, and supporting text, describes the general condition of the Property, including Structures and Improvements, driveways, Acceptable Development Areas, Acceptable Accessory Structure Area, and Environmental Protection Areas located on the Property as of the date of this Conservation Easement.

2.8. Commercial. Any use or activity for which a financial benefit is sought or for which money is charged, whether or not the activity or use is profitable.

2.9. Conservation Forestry. The removal of forest products (such as, but not limited to, trees, logs, poles, posts, pulpwood, firewood, chips, seeds, pine straw, stumps, shrubs, and lesser vegetation) for Commercial purposes that perpetuate the forest resources on the Property as a sustainable working forest, encourage long-term, professional management of the forest resources, facilitate the biologically and economically sustainable production of forest resources, while minimizing the impacts on soil productivity, water quality, wetlands, riparian zones and the scenic character of the Property.

2.10. Environmental Protection Areas (EPAs). The areas as delineated on Exhibit B, which contain unique or special natural features including, but not limited to, streams, wetlands or steep slopes and their supporting buffer lands in which this Conservation Easement excludes the construction or placement of permanent or temporary buildings or improvements, except for incidental buildings and improvements necessary for agricultural and habitat management to the extent provided herein.

11. Rather than having to calculate the interior square footage of a building, CLC chose to measure buildings based on their exterior footprint, thus eliminating the need to enter buildings on a protected property and simplifying their monitoring.

2.11. Foot Print of Structures. The Foot Print of a structure shall be that measurement encompassing the enclosed ground floor area, as measured from the exterior, at the point of contact with, or extending/cantilevering above, the ground, and does not apply to unenclosed decks, patios or porches. 11

2.12. Forestry Best Management Practices (BMPs). Forestry practices that prevent or reduce the erosion of soil which adversely affect surface and ground waters. These management practices may have standards associated with their installation, operation or maintenance, but do not impose effluent limits for specific substances or specified techniques. 12

12. CLC defined “best management practices” so that the concept is definite, regardless of how the term may be interpreted in the future.

2.13. Forestry Harvest Plan. A plan that provides for the identification and application of water quality and soil erosion Best Management Practices associated with a specific Commercial timber harvest. The plan will describe the size and timing of a harvest and the management practices necessary to mitigate potential adverse impacts on soil erosion and water quality.

2.14. Forestry Management Plan. A plan that provides for the identification and application of resource specific managerial and/or structural Best Management Practices designed to enhance forest productivity and economic viability as well as to mitigate potential adverse environmental impacts of Commercial forestry activities.



- 2.15. Grantee. The term “Grantee” includes the original Grantee and its successor and assigns.
- 2.16. Grantor. The term “Grantor” includes the original Grantor her heirs, successors and assigns, and all future owners of all or any portion of the Property.
- 2.17. Habitat Management Structures and Improvements. A Structure or Improvement (as defined herein) used for enhancing or viewing wildlife and habitat. Habitat Management Structures and Improvements may include observation towers, deer stands, and bird blinds. When located outside of the ADAs and the AASA, such Habitat Management Structures and Improvements shall not include nor be served by any permanent utilities, and/or septic systems.
- 2.18. Hazardous Substances. For purposes of this Conservation Easement, Hazardous Substances shall be defined as: (a) any hazardous waste as defined by the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC s. 6901 et seq.) as amended; (b) any hazardous substance as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (15 USC s. 9601 et seq.) as amended; (c) any substance regulated by the Toxic Substances Control Act (TSCA) (15 USC s 2601 et seq) as amended; (d) any substance regulated by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 USC s. 136 et seq) as amended; (e) any pollutant as defined by the Water Pollution Control Act (33 USC s. 1251 et seq.) as amended; (f) any air pollutant as defined by the Clean Air Act (42 USC s. 7401 et seq.) as amended; (g) any hazardous waste as defined by §27-0901(3) and §27-1301 of the New York State Environmental Conservation Law and regulations promulgated thereunder; (h) friable asbestos or asbestos-containing material of any kind or character; (i) polychlorinated biphenyls; (j) any substances regulated under the provisions of Subtitle I of RCRA relating to underground storage tanks; (k) any other substance, pollutant or contaminant subject to any form of environmental law or regulation by any Federal, State or local governmental authority.
- 2.19. Height of Structures. The Height of a structure shall be determined by measuring the highest point of the roof or structure, excluding chimneys, as measured from the mean grade level prior to construction or grade alteration.
- 2.20. Home Occupations and Rural Enterprises. Home Occupations and Rural Enterprises, as permitted by local laws, are permitted, so long as their associated structures and improvements do not physically extend outside of the ADAs. Home Occupations and Rural Enterprises may include, but are not limited to, farm stands, lawful home occupations, professional home offices, bed and breakfasts, farm machinery and auto repair, restaurants, antique shops, saw mills, firewood distribution, campgrounds, schooling, day care and other educational programs. However, enterprises which market petroleum are prohibited. The construction of golf courses and other activities that significantly alter the terrain and soil profile and that adversely affect the open space and natural qualities of the Property are expressly prohibited outside of the ADAs on the Property.
- 2.21. Improvements. Improvements shall include anything that is constructed, installed or placed upon the ground or a structure, that is not a Structure (as defined herein), and includes but is not limited to, driveways, parking areas, gardens, ponds, wells, septic systems, drainage ways, utility lines, fences, stone walls, paths and walkways, and signs.

## Conservation Easement Diagram

2.22. Incidental Agricultural Structures and Improvements. A Structure (as defined herein) or Improvement used for, and subordinate to, farm operations including, but not limited to, pump houses, sap storage structures, irrigation equipment and associated pumps and pipes, bridges, farm and logging roads, and stream crossings.

2.23. Incidental Landscape and Garden Structures and Improvements. A Structure (as defined herein) or Improvement, used for landscaping and gardening purposes including, but not limited to, arbors, benches, bridges, boardwalks, foot paths, pergolas, gazebos, sculptures and landscape “follies.” Such Structures or Improvements are customarily incidental and subordinate to the residences and when such structures or improvements are located outside of the ADAs and the AASA, they do not include nor are they served by any permanent utilities, and/or septic systems.

2.24. Recreational Structures and Improvements. A Structure (as defined herein) or Improvement used for non-commercial recreational activities that, when such structure or improvement is located outside of the ADAs or the AASA, does not include nor is served by any permanent utilities, and/or septic systems. Recreational Structures and Improvements may include studios, ski cabins, tree houses, and hunting cabins.

2.25. Residential Units. A building or Structure that contains a kitchen, bathroom and sleeping area. Residential Units include single family Structures, a duplex, guest houses or rental units, apartments and trailers. Pursuant to local law, Residential Units may be established in existing structures within the ADAs including barns and garages. No Residential Units are permitted in the AASA.

2.26. Structures. A building or object constructed, installed or placed upon the ground, whether temporarily or permanently. Structures shall include, but are not limited to, residential units, garages, sheds, pool houses, cabanas, greenhouses, barns, animal “run-in” shelters, sap-boiling houses, sap storage structures, farm markets/stands, silos, grain drying facilities, equestrian facilities, observation towers, deer stands, studios, ski cabins, tree houses, hunting cabins, moveable buildings, and garden features such as arbors, pergolas, gazebos, and landscape “follies.”

2.27. Subdivision. The division, subdivision or partition of the Property into two or more parcels, by any legal or physical means, including, but not limited to, recording of a subdivision plan. (See Section 4.2 Subdivision).

3. Reserved Rights of Grantor. Grantor reserves for herself and her successors in interest with respect to the Property, all rights with respect to the Property except as provided herein, including, without limitation, the right of exclusive use, possession and enjoyment of the Property, and the right to sell, transfer, lease, mortgage or otherwise encumber the Property, subject to the restrictions and covenants set forth in this Conservation Easement. Nothing contained in Section 1.2 or elsewhere in this Conservation Easement shall be construed as a grant to the general public or to any other person or entity, of any right to enter upon any part of the Property, except as otherwise provided for in Sections 5.2 and 6.2 of this Conservation Easement.

4. Restrictions Applicable to the Property. The following restrictions apply to the Property.

4.1. Use. The Property shall not be used for residential, educational, or Commercial purposes except as permitted herein. Industrial uses are not permitted. Home Occupations, Rural Enterprises, and educational Structures consistent with the conservation values of the Property and purposes of this Conservation

13. In this section, the easement clarifies that the landowner retains all rights (“reserved rights”) not specifically limited by the easement, subject to the easement’s restrictions and covenants. The section also explicitly affirms that the easement does not grant public access to the property.

14. This easement is organized topically, with restricted and permitted uses discussed under headings (such as “subdivision” or “permitted structures and improvements”). Two other common types of easement organization include listing restricted uses in one section, followed by permitted uses in another section; or, listing the restricted and permitted uses by the easement land area to which they apply.

Easement are permitted only within the ADAs as specified below. Agricultural Activities are permitted on the Property, as are Conservation Forestry, Agroforestry, environmental management, educational programs, and passive recreation such as (but not limited to) walking, hiking, cross-country skiing and horseback riding, as well as institutional uses (including the use of the Property and its Structures for education, including museums) so long as they are not inconsistent with the terms and purposes of this Conservation Easement.

4.2. Subdivision. The Property is currently comprised of one (1) tax parcel, which is owned by Grantor. Subdivision of the Property without permission of Grantee is prohibited except as set forth below.

To minimize land fragmentation, and to facilitate effective easement stewardship of the Property, the Property may be subdivided into not more than a total of two (2) tax parcels or lots. Such subdivided parcels may be created and conveyed only in accordance with prior written approval of the Grantee, and upon compliance with the following conditions:

4.2. (a) Grantor has demonstrated that the proposed subdivision will not internally divide, partition or separate an ADA or the AASA.

4.2. (b) Such subdivided parcels shall remain subject to the terms and conditions set forth in this Easement. The remaining subdivision rights provided for in this Easement shall be allocated at the time of the proposed subdivision or conveyance, using the form attached hereto as Exhibit D, in a manner to be reviewed and approved by Grantee and set forth in the deed of each new subdivided parcel.

4.2. (c) The deed(s) of conveyance of all such subdivided parcels shall contain a metes and bounds description of the subdivided parcel(s) prepared by a licensed professional land surveyor at Grantor's sole cost, which description shall have been reviewed and approved by Grantee prior to conveyance of the subdivided parcel(s). If the Subdivision is activating, or initiating construction within, and ADA, Grantor shall provide a survey map delineating the ADA.

4.2. (d) All costs resulting from the Subdivision of the Property and conveyance of subdivided parcels, including but not limited to reasonable Grantee and associated staff time, including but not limited to time expended on legal review of documents, preparing associated Conservation Easement maps and updating of Baseline Documentation, are to be paid by Grantor.

Grantee may, however, in its sole discretion, grant approval, as provided in Section 5.2. (b), for boundary and lot line adjustments that do not create additional building lots nor increase the long-term easement stewardship and administration responsibilities of the Grantee. Notwithstanding the foregoing, Grantor may subdivide the Property for publicly accessible conservation purposes (such as the creation of a Public Conservation Area, trail corridor or park), if such resulting subdivided parcel(s) is to be conveyed to Grantee or, with Grantee's prior approval, to a public or non-profit organization.

15 4.3. Permitted Structures and Improvements. No permanent or temporary structures or other improvements shall hereafter be placed or maintained on the Property, except as specifically provided for below, with prior notice and/or approval pursuant to Section 5.2.

**15. (Permitted)** CLC has limited and defined the uses permitted by the landowner to ensure that they are not inconsistent with the protection of the conservation values.

**(prior notice)** This easement sets forth specific requirements for notice to and/or approval from the land trust prior to the development of new structures on the land, and thus complies with IRC requirements for notice when an activity might have an adverse impact on the property's conservation values.

## Conservation Easement Diagram

16. CLC uses identified and mapped building envelopes to limit development to areas that will not adversely affect the conservation values protected by the easement.

17. Special use areas (defined in this easement as Environmental Protection Areas) have greater restrictions on human use and development than other parts of the property, given the sensitive nature of the conservation values located in these areas. Each EPA is shown on the easement map and detailed in the baseline report.

4.3.1. Existing Structures and Improvements. The existing structures and improvements on the Property, including, without limitation, the existing residence, and accessory structures (detached garage, shed, studio, and cabana), swimming pool, stonewalls, fences, access and farm roads, and trails are permitted. The existing structures and improvements, including the residence may be maintained, repaired, removed, rebuilt, improved or replaced within their respective areas as defined below, provided that any such activities are not inconsistent with the restrictions set forth in this Conservation Easement. All existing residential structures and their accessory structures are located within ADA #1 or the AASA, as documented in the Baseline Documentation Report, and as described in Section 5.1.

4.3.2. Residential Units. Two ADAs are permitted on the property as depicted on Exhibit B. No more than three (3) Residential Units may be located in each of the permitted ADAs on the Property, for a total of six (6) Residential Units on the Property. The ADAs cannot be internally subdivided to create more than one ownership of the three Residential Units per ADA and the three Residential Units must be permanently, and completely, located within their respective ADA. 16

4.3.3. Accessory Structures and Improvements. Accessory Structures and Improvements are permitted so long as they are located completely within the ADAs or the AASA.

4.3.4. Agricultural Structures and Improvements. Agricultural Structures and Improvements are permitted and may be located on the Property subject to the following limitations:

4.3.4. (a) Agricultural Structures and Improvements are permitted without size limitations so long as they are located completely within the ADAs.

4.3.4. (b) Small Agricultural Structures may be located anywhere on the Property, with the exception of the EPAs in which such Small Agricultural Structures are prohibited. 17

4.3.4. (c) Large Agricultural Structures may be located anywhere on the Property, with the exception of the EPAs in which such Large Agricultural Structures are prohibited, and so long as they are located off “prime” and “important” agricultural soils, as defined and identified by maps prepared by the United States Department of Agriculture (or its successor agency), and are sited on the edges of fields or woodlands to the extent practicable.

4.3.4. (d) Incidental Agricultural Structures and Improvements that do not house, shelter or otherwise concentrate animals or livestock for any length of time and that do not exceed a Foot Print of 400 square feet, are permitted anywhere on the Property.

4.3.5. Recreational Structures and Improvements. Recreational Structures and Improvements are permitted, without size limitations within the ADAs and the AASA. Outside of the ADAs, such structures are permitted anywhere on the Property, with the exception of the EPAs in which such Recreational Structures and Improvements are prohibited, provided each is limited to 400 square feet in Foot Print or less, and less than 35 feet in Height.

4.3.6. Habitat Management Structures and Improvements. Habitat Management Structures and Improvements are permitted, without size limitations within the ADAs or the AASA. Outside of the ADAs and the AASA, such structures are permitted anywhere on the Property but are limited to 400 square feet in Foot Print or less, and less than 35 feet in Height.

4.3.7. Incidental Landscape and Garden Structures and Improvements. Incidental Landscape and Garden Structures and Improvements are permitted, without size limitations within the ADAs and the AASA. Outside of the ADAs and the AASA, such structures are permitted anywhere on the Property, but are limited to 400 square feet in Foot Print or less, and less than 35 feet in Height. Boardwalks and paths are permitted anywhere on the Property and are not subject to the 400 square foot size limitation.

4.4. Improvements. Improvements as reasonably necessary to serve the permitted Structures (including utility lines required to service the Property, but excluding transmission lines) may be located and maintained on the Property, with the exception of EPAs, in which such Improvements are prohibited. Notwithstanding the foregoing, utility lines serving the Property, boardwalks and unpaved trails, paths, and logging roads and farm roads, are permitted and may be located anywhere on the Property provided they are not inconsistent with the purposes of and uses permitted by this Conservation Easement. All permitted Improvements must be located and constructed so as to minimize their potential negative impacts (including soil erosion and fragmentation of agricultural fields or woodlands) on the Property's conservation values and the purposes of this Conservation Easement.

Driveways and roads, including farm and logging roads, may not be used to access or service other lands or properties without Grantee's prior written permission. Grantee shall give such permission only if Grantee finds that such use of roads on the Property is consistent with the conservation purposes of this Conservation Easement and that such use will not enable development of the other lands for purposes other than agricultural, forestry or recreational uses beyond what would have been possible without such access.

4.5. Home Occupations and Rural Enterprises. Home Occupations and Rural Enterprises as defined herein and as permitted by local laws, are permitted, so long as their associated structures and improvements do not physically extend outside of the ADAs.

4.6. Fences and Signs. Existing fences and stone walls may be repaired, relocated, and replaced anywhere on the Property. New fences, gates, stone walls and signs as are normal and customary for the uses permitted in this Conservation Easement may be erected anywhere on the Property, provided that any fences or stone walls are constructed, insofar as practicable, to (1) blend with the natural landscape and do not impinge materially on views of the Property from public roads, and (2), when located within the EPAs, allow for wildlife to readily pass over, under or through, unless said fences are part of an overall management plan for the Property which is consistent with the purposes and intent of this Conservation Easement.

4.7. Cutting and Clearing of Trees. There shall be no removal, destruction or cutting of live trees on the Property except as follows:

4.7. (a) Without prior notice to Grantee, trees may be removed anywhere on the Property that endanger public safety, are diseased, damaged or fallen, or need to be removed to ensure the health or productivity of other trees or ecological attributes of the Property, or in connection with the construction of permitted Structures. Trees may also be removed to maintain existing views, paths, utility lines, roads, trails, driveways, or open space, and for cutting firewood for use on the Property. New clearing within the ADAs and the AASA is also permitted in connection with landscaping and the establishment of new Structures and permitted uses as established herein.

## Conservation Easement Diagram

18. Specific criteria and a requirement for a forest management plan that meets specified standards required to protect the conservation values are necessary in order to permit an activity, such as logging, that may conflict with the purpose of this easement. Working lands (agriculture, forestry) easements often require management plans.

19. CLC used a performance standard here to limit the impacts of logging.

20. This section prohibits surface mining as required for an easement intended to qualify for federal tax benefits. CLC goes further by prohibiting all subsurface mining too, because the landowner owns all of the mineral rights to this property. If the landowner did not own all the mineral rights, a land trust would need to understand the potential for subsurface mining of the property and its impact on the conservation values. Such understanding is generally gained through a mineral remoteness letter. If a landowner wished to reserve the right to develop some of the minerals on his/her property, an easement should describe in detail limits on mineral development that would be necessary to protect the conservation values.

4.7. (b) With prior notice to Grantee, new open spaces for agriculture and views may be created. Grantee shall have forty-five (45) days, prior to initiation of logging for this purpose, to review the Forestry Harvest Plan and supporting materials to ensure it is in compliance with the terms of this Conservation Easement. Said clearing must be conducted to minimize soil erosion and negative impacts on the Property's, or neighboring, streams and water bodies. Said clearing must be promptly seeded, planted or covered to prevent soil erosion, and may not result in increasing visibility of any of the Property's Structures as seen from a public road or vantage point.

4.7. (c) With prior notice to Grantee, Conservation Forestry, as defined herein, may be conducted if in conformity with sound land and Forestry Best Management Practices (BMPs), pursuant to New York State Timber Harvesting Guidelines as periodically updated, as outlined in a Forestry Management Plan and Forestry Harvest Plan prepared by a certified forester who is a member in good standing of the Society of American Foresters and/or a Cooperating Consulting Forester with the New York State Department of Environmental Conservation. Any Conservation Forestry activities may not result in increasing visibility of any of the Property's Structures as seen from a public road or vantage point. Grantee shall have forty-five (45) days, prior to initiation of logging, to review the Forestry Management Plan and Forestry Harvest Plan, and supporting materials, to ensure they are in compliance with the terms of this Conservation Easement.

4.7. (d) All above mentioned cutting, logging, and removal of trees and vegetation shall be conducted in conformity with Forestry Best Management Practices, or its equivalent standard, and shall minimize soil erosion and adverse impacts on the Property's wetlands, streams, steep slopes and other natural resources. Grantee, its successors or assigns, reserves the right to inspect the site prior to the removal of trees and vegetation. If the Forestry Harvest Plan will adversely affect one or more purposes of this Conservation Easement, the Grantee reserves the right to require reasonable modifications to the Forestry Harvest Plan that will minimize such impacts.

4.8. Mining. There shall be no excavation or removal of topsoil, sand, gravel, rocks or minerals, in any manner, except as may be reasonably necessary and incidental to carrying out the improvements and uses permitted on the Property by this Conservation Easement. No sale of surface or subsurface minerals or mineral rights, including gravel, sand, rock or topsoil from the Property, including stone walls, is permitted. No quarrying, mining or drilling activities prohibited under applicable provisions of Section 170(h) of the Internal Revenue Code are permitted on or under the Property. This shall not prevent the installation of local and residential utility lines, wells, septic systems or other utilities as reasonably necessary to serve the Structures permitted herein, or the construction of ponds or driveways as permitted herein.

4.9. Chemicals. No pesticide, herbicide, fertilizer or other chemical treatment for land, water, vegetation or animals shall be used if the use shall violate any applicable state, local or federal law or regulation.

4.10. Dumping, Waste, Vehicles, Equipment and Storage. No dumping, burying, storing, applying or releasing of waste, sewage, garbage, vehicles or appliances, or any toxic, hazardous or offensive materials shall be allowed on the Property, except (i) appropriate routine storage of garbage and wastes from permitted uses of the Property pending transport for proper disposal, (ii) garbage and wastes which flow into proper septic or other appropriate waste disposal systems, (iii) materials, such as gasoline and diesel fuel, for use in vehicles which serve the reserved uses of the Property and are properly stored (in accordance

with applicable local, state and federal laws and regulations) pending such use, (iv) vehicles and farm equipment as necessary for permitted uses on the Property, and (v) biodegradable materials generated, utilized, and/or processed on the Property to further the permitted uses of the Property while maintaining the conservation purposes described herein, provided that all such materials comply with any applicable local, state, and federal law or regulation. Notwithstanding the foregoing, the above activities are not permitted within the EPAs.

4.11. Waterways and Wetlands. No waterways or wetlands located on the Property shall be in any way diverted, dammed or otherwise materially altered by Grantor, except with Grantee's prior approval as provided in Section 5.2. (b). Grantee shall grant such approval so long as Grantee determines that the waterway and/or wetland alteration proposed by Grantor will enhance the conservation goals of this Conservation Easement by, for example, increasing the size of the wetlands or waterway, increasing habitat diversity or assisting in the removal of exotic species. Grantee shall also grant approval if the purpose of the proposed waterway and/or wetland alteration is to restore or remediate the natural course of the waterway due to a naturally occurring alteration (such as those cause by beaver, floods or other similar natural events), subject to applicable local, State and Federal laws and regulations.

Notwithstanding the foregoing, naturally occurring alterations (such as those caused by beaver, floods or other similar natural causes) or alterations caused by third parties that enhance the conservation goals of this Conservation Easement are permitted without approval from Grantee, subject to applicable local, State and Federal laws and regulations.

4.12. Health and Safety Measures. Notwithstanding any other restriction contained in this Conservation Easement, the Grantor (or any relevant part thereof) may take such actions with respect to the Property as are necessary to protect the health and safety of the public and the persons using the Property; provided that if any such action is contrary to a restriction contained herein, the action shall be limited to the minimum variation necessary to afford the required protection. If notice would be required under this Conservation Easement to undertake such action, or if the action would otherwise violate any restriction contained herein, notice of the action shall be given to Grantee as soon as practicable, but the required action may be taken whether or not such notice has been given.

4.13. Extinguishment of Development Rights. Except as specifically reserved in this Conservation Easement (including, without limitation, the right to construct certain additional Structures heretofore set forth in Section 4.3. herein), Grantor grants to Grantee all development rights that are now or hereafter allocated to, implied, reserved or inherent in the Property, and the parties agree that subject to such reservations, such development rights are terminated and extinguished by this Conservation Easement, and may not be used or transferred to any portion of the Property as it is now or hereafter may be described, or to any other property, whether adjacent or otherwise, or used for the purpose of calculating permissible lot yield or building density of the Property or any other property.

### 5. Additional Covenants and Provisions.

**21** 5.1. Existing Conditions and Baseline Documentation Report. By its execution of this Conservation Easement, Grantee acknowledges that Grantor's present uses of the Property are compatible with the purposes of this Conservation Easement. In order to evidence the present condition of the Property (including both natural and man-made features) and to facilitate future monitoring and enforcement of this Easement, a Baseline Documentation Report describing such condition at the date hereof, has been

**21.** The baseline report prepared for this easement is referenced in this section and incorporated by reference. This section also describes the location of original copies of the baseline.



## Conservation Easement Diagram

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prepared and subscribed by both parties, is incorporated herein by this reference, and a copy thereof has been delivered to Grantor and an original copy will be kept on file with the Grantee.

5.2. Required Notice. Grantor agrees to give Grantee written notice before exercising any reserved right as delineated in this Conservation Easement as follows.

5.2. (a) Construction Notice. In order to facilitate the monitoring of this Conservation Easement, to ensure continuing communication, and to determine that new or modified permitted Structures conform to the terms of this Conservation Easement, Grantor shall submit to Grantee sufficient written information. Such information shall allow Grantee to confirm that the Structures proposed for construction: (1) conform to the use or uses permitted within that area; (2) are located within their permitted area, as marked on Exhibit B; (3) do not exceed the Foot Print or Height for such uses permitted within that area; if applicable, and (4) do not violate any of the terms or conditions of this Easement. Said information shall include the proposed location of the Structure. If the proposed Structure is a Residential Unit, such information shall be provided so as to document the number of existing Residential Units and verify that the proposed Structure conforms with, and does not exceed, the number and location of Residential Units permitted herein. If the contemplated Structure is to be located outside of the ADAs or the AASA, adequate information to determine its projected size (Foot Print), Height, and uses shall be provided to Grantee.

Grantee may, at Grantor's sole cost, request that Grantor provide a survey map delineating the ADAs or the AASA, and physically locate upon the Property the boundaries of the ADAs or the AASA. For Structures proposed within 100 feet of the EPA, Grantee may, at Grantor's sole cost, request that Grantor or its agent physically mark the boundaries of the relevant portions of the EPA and provide relevant survey information to delineate the boundary.

Such information shall be submitted to Grantee not less than forty-five (45) days prior to the anticipated site work/disturbance or commencement of construction.

5.2. (b) Approval. Pursuant to actions or activities requiring approvals in this Conservation Easement, Grantor shall submit to Grantee sufficient written information to allow for a determination by Grantee that such action or activity is in compliance with the purposes, terms and intent of this Conservation Easement. Grantee shall have forty-five (45) days from the receipt of the information, and an additional ten (10) days as provided in the following paragraph (or such longer period as the parties may agree to in writing) within which to review such materials and grant or deny approval.

Notice shall be pursuant to Section 5.3 herein. Grantee may review the proposed site to confirm that the proposed action or activity is in compliance with this Conservation Easement, and shall notify Grantor as to whether or not the proposal is in compliance with the terms of this Conservation Easement, not more than forty-five (45) days from receipt of the notice. If Grantee fails to respond within forty-five (45) days, Grantor will further contact Grantee to confirm that Grantee received the first notice, and if after ten (10) days Grantee does not respond, the proposals shall be deemed approved. In approving such proposals, Grantee may attach such conditions as it reasonably deems necessary to comply with the purposes, terms and intent of this Conservation Easement

5.3. Notice and Approval Requests, Responses, in Writing. Any written notice or approval request



required or desired to be given under this Conservation Easement by Grantor, and any subsequent response from Grantee, shall be in writing and shall be deemed given when received, or three (3) days after mailing by certified mail, or by FedEx or a similar public or private courier service which provides receipt of delivery, properly addressed as follows: (a) if to Grantee, at address set forth above; (b) if to Grantor, at the address set forth above, (c) if to any subsequent owner, at the address of the Property. Any party can change the address to which notices are to be sent to him, her or it by giving notice pursuant to this paragraph.

**22** 5.4. Enforcement. Grantee may enforce this Conservation Easement at law or in equity, including, without limitation, pursuant to the provisions of Article 49, Title 3 of the Conservation Easement Law, against any or all of the owners of the Property or any part thereof. If there is a violation, or threatened violation, of this Conservation Easement, Grantee shall notify the party in violation or threatening the violation, who shall, in the case of an existing violation, promptly cure the violation by (a) ceasing the same and (b) restoring the Property to the condition before such violation, or in the case of a threatened violation, refrain from the activity that would result in the violation.

If (i) a violation continues for more than thirty (30) days after notice specifying such violation is given (or in the case of a violation which cannot with reasonable diligence be remedied within a period of thirty (30) days but which the party in violation has commenced to remedy with all reasonable diligence within such 30-day period, then for such longer period as may be necessary to remedy the same with all reasonable diligence), or (ii) at any time, if Grantee determines, in its sole discretion, that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Property, Grantee may seek immediate injunctive relief and may pursue all its available legal remedies.

Grantee's remedies described in this Conservation Easement shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity. Such remedies include the right to recover any damages for violation of the terms of this Conservation Easement or injury to the conservation values protected by this Conservation Easement, including, without limitation, damages for the loss of scenic, aesthetic or ecological values and to require restoration of the Property to the condition that existed prior to any such injury.

The current Grantor (owner) shall reimburse Grantee for all reasonable expenses incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, including, without limitation, costs and expenses of suit and reasonable attorneys' fees, and any costs of restoration necessary to cure the violation.

**24** Should Grantor prevail in a judicial enforcement action, each party shall bear its own costs. Failure to enforce any restriction or covenant herein contained shall in no event be deemed a waiver of a right to do so thereafter as to the same violation or breach or as to one occurring prior or subsequent thereto.

5.5. Acts Beyond Grantor's Control. Grantor shall not be responsible for any injury to or change in the Property resulting from natural events beyond the control of the Grantor. Such natural events include fire, flood, storm, earthquake, tornado, landslide or Acts of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. This paragraph shall not be construed to relieve the Grantor of the obligation to clean-up garbage or materials dumped on the Property by third parties or to otherwise maintain the Property in a condition consistent with the purposes of this Easement.

**25** 5.6. Amendment. This Conservation Easement may be amended only upon the written consent of Grantee and the then current Grantor (owner) of the Property for that portion of the Property for which

**22.** CLC provides remedies for easement violations and recovery of attorneys' fees in the event of a violation. These remedies include the right to take immediate action to prevent serious harm to the property's conservation values.

**23.** This section gives the land trust the right to require restoration of the property in the event of a violation. All easements should contain a similar provision.

**24.** This is the waiver of defenses clause, prohibiting a landowner from defending himself/herself against a violation by claiming a land trust failed to act in a timely manner and thus waived its right of enforcement.

**25.** The State of New York requires an amendment clause in order for an easement to be amendable. CLC finds the clause helps educate landowners about what amendments it might consider and under what terms they will be considered. An amendment clause is recommended for all conservation easements.

For more examples of amendment clauses and a further discussion of issues a land trust should consider prior to amending an easement, see the Land Trust Alliance research report *Amending Conservation Easements: Evolving Practices and Legal Principles*.

## Conservation Easement Diagram

an amendment to this Conservation Easement is sought. Grantee, on a case-by-case basis, may agree to amend individual provisions of the Conservation Easement, subject to the following limitations:

5.6. (a) there shall be no amendment of the provisions of this Easement increasing the number of permitted Subdivisions, ADAs or Residential Units;

5.6. (b) there shall be no amendment (i) permitting the location of a Structure outside the ADAs or the AASA as marked on Exhibit B, or (ii) increasing the size limitations for any permitted Structure, unless Grantee determines that such size increase will have no greater adverse effect on the open space qualities and scenic beauty of the Property as seen from public areas, the water quality and ecological health of the Property's, and neighboring, wetlands and water bodies, the Property's agricultural and woodland productivity, and ecological health, than it would have if constructed as originally specified, or would result in strengthening the conservation goals and purpose of this Conservation Easement; and

5.6. (c) no amendment may be granted unless the Grantee determines that such amendment will not adversely affect the open and scenic character of the Property (as seen from the hamlet of XXXXXX, the Mount Lebanon Shaker Society National Historic Landmark, XXXXX Road, County Route XX, US Highway XX and New York State Highway XX); ecological integrity of Property's ridgeline, wetlands, stream, and rocky ledges and outcroppings; and the Property's agricultural and woodland productivity and viability, wildlife habitat and ecological characteristics and other protective goals of this Conservation Easement and is otherwise consistent with the overall purposes of this Easement.

Any amendment of this Easement shall be at the discretion of the Grantee (which may establish such requirements for the submission of plans and other documentation as it deems necessary to make the determination required or permitted of it hereunder) and shall comply with Article 49, Title 3, of the Conservation Law, and Section 170(h) of the Internal Revenue Code. Any such amendment that does not comply with Article 49 or Section 170(h) shall be void and of no force or effect.

Grantor requesting the amendment shall reimburse Grantee for all expenses, including staff time and reasonable attorneys' fees, incurred in preparing and executing the amendment.

**26.** CLC treats the remaining clauses in this easement as boilerplate, and it generally refuses to change or eliminate them.

Section 5.8 clarifies that a landowner still retains all the responsibilities of land ownership after the conveyance of an easement. CLC reserves the right to pay any taxes that might result in a public sale of the property (and possible extinguishment of the easement) and provides for repayment to itself of any such sums. Some states have adopted laws providing that conservation easements are not extinguished when foreclosed by a public trustee for failure to pay property taxes.

5.7. Notices of Property Conveyance, Lease or Transfer. Grantor shall give Grantee notice of any subsequent conveyance, including, without limitation, transfer, lease or mortgage of the Property, and any deed or other instrument evidencing or effecting such conveyance shall contain language substantially as follows: "This [conveyance, lease, mortgage, easement, etc.] is subject to a Conservation Easement which runs with the land and which was granted to Columbia Land Conservancy, Inc., by instrument dated \_\_\_\_\_, 20\_\_, and recorded in the office of the Clerk of Columbia County at Cartridge \_\_\_ of Deeds at Frame \_\_\_." The failure to include such language in any deed or instrument shall not affect the validity of this Conservation Easement or its applicability to such property. **26**

5.8. Taxes and Assessments. Grantor shall pay all taxes, levies, and assessments and other governmental or municipal charges, which may become a lien on the Property, including any taxes or levies imposed to make those payments. If Grantor fails to make such payments, Grantee is authorized to make such payments (but shall have no obligation to do so) upon ten (10) days prior notice to Grantor, according to any bill, statement or estimate procured from the appropriate public office without inquiry into the accuracy thereof. The payment, if made by Grantee, shall become a lien on the Property of the same

priority as the item if not paid would have become, and shall bear interest until paid by Grantor at two percentage points over the prime rate of interest from time to time charged by Citibank, N.A. or its corporate successor.

5.9. Severability. Invalidation of any provision of this Conservation Easement by court judgment, order, statute or otherwise shall not affect any other provisions, which shall be and remain in force and effect.

5.10. Binding Effect. The provisions of this Conservation Easement shall run with the Property in perpetuity and shall bind and be enforceable against the Grantor, and all future owners and any party entitled to possession or use of the Property or any portion thereof while such party is the owner or entitled to possession or use thereof. Notwithstanding the foregoing, upon any transfer of title, the transferor shall, with respect to the Property transferred cease being a Grantor or owner with respect to such Property for purposes of this Conservation Easement and shall, with respect to the Property transferred, have no further responsibility, rights or liability hereunder for acts or conditions arising thereafter on or with respect to such Property, but the transferor shall remain liable for earlier acts and conditions occurring during the period of his or her ownership or conduct.

27 5.11. Indemnification. Grantee has no obligations relating to the maintenance of the Property. Grantee shall not be responsible for injuries or damage to persons or property in connection with Grantee's administration and/or enforcement of this Conservation Easement or otherwise with respect to the condition of the Property, provided that the foregoing shall not absolve Grantee of any liabilities it might otherwise have, independently of this Agreement, for wrongfully and directly, without the participation or consent of the Grantor, causing any dangerous condition to come into existence on the Property. Except in the last-described instance, Grantor agrees to indemnify and hold Grantee and its trustees/directors, officers, employees, agents, and contractors and the heirs, personal representatives, successors, and assigns of each of them (collectively "Indemnified Parties") harmless from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' fees (collectively, "Losses"), arising from or in any way connected with: (1) injury to or the death of any person, or damage to any property or property interest, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, unless due solely to the actions of any of the Indemnified Parties as set forth in the previous sentence; (2) tax benefits or consequences of any kind which result or do not result from entering into this Conservation Easement; (3) the presence or release, discharge, remediation or removal of Hazardous Substances (as defined herein) on, under, from or about the Property; and (4) any other obligation, requirement or liability related to or arising from the presence of Hazardous Substances on the Property.

Grantor hereby releases, waives any rights, and covenants not to sue Grantee with respect to any Losses identified in this Section 5.11. Grantor's obligations to hold harmless, indemnify and defend Grantee as specified in this Conservation Easement shall survive indefinitely and shall not be abrogated if Grantee transfers this Conservation Easement to another party. Grantee shall have no liability to Grantor or any other owner for Grantee's acts, taken in good faith, in connection with the administration of this Conservation Easement.

5.12. Further Acts. Each party shall perform any further acts and execute and deliver any documents, including amendments to this Conservation Easement, which may be reasonably necessary to (a) carry out the provisions of this Easement, (b) qualify this instrument as a conservation easement

27. Indemnification or hold harmless provisions are important to include in easements, particularly in those states in which a conservation easement is an interest in real property. It is unlikely that a land trust will cause damage to property or individuals due to its ownership interest in an easement, but landowners may create liability for a land trust through their actions. Therefore it is important to have the landowner indemnify the easement holder for any claims that might arise through ownership of the land.

## Conservation Easement Diagram

under Article 49, Title 3, of the Conservation Law or any regulations promulgated pursuant thereto, and (c) if applicable, carry out the Grantor's intent that as of the date hereof this Conservation Easement shall be deemed a transfer of a qualified real property interest for conservation purposes as defined by Section 170(h) of the Internal Revenue Code.

5.13. Local, State and Federal Laws in Effect. The Property remains subject to all applicable local, state and federal laws and regulations.

### 6. Qualified Conservation Contribution Covenants.

6.1. Assignment and Continuity. Grantee agrees that it will assign or transfer this Conservation Easement only to an assignee that (a) is a Qualified Organization as defined in Section 170(h) of the Internal Revenue Code and which (b) agrees to continue to carry out the conservation purposes of this Conservation Easement as defined under Section 170(h) and the regulations thereunder. No assignment shall be made which adversely affects the status of the transactions herein contemplated under Section 170(h) of the Internal Revenue Code. Any assignee must be an entity able to enforce this Conservation Easement, having purposes similar to those of Grantee that encompass those of this Conservation Easement. If the Grantee ever ceases to exist or no longer qualifies under Section 170(h) or applicable state law, it will assign this Conservation Easement to a Qualified Organization. If it fails to do so, a court with jurisdiction may transfer this easement to another qualified organization having similar purposes that agrees to assume the responsibility. 28

28. This section conforms with federal laws limiting the transfer of tax-deductible easements.

6.2. Inspection. Grantee or its designees shall have the right to enter the Property for the purpose of determining whether the provisions of this Conservation Easement are being observed. Notice of such inspections shall be delivered to the Grantor, her designee(s) or agent(s) at least forty-eight (48) hours prior to such inspection. The inspection shall be conducted between the hours of 9 a.m. and 6 p.m. on a weekday that is not a legal holiday recognized by the State of New York or at a date and time agreeable to the Grantee and Grantor. 29

29. This section permits CLC entry onto the property without the need to seek permission from the landowner in order to monitor the easement. Every easement should have a similar provision.

Grantee or its designees shall also have the right to inspect the Property at any time, without prior notice, if Grantee has cause to believe the provisions of the Conservation Easement have been, or are being, violated.

6.3. Extinguishment. If all or part of the Property is taken by eminent domain, or if a subsequent unexpected change in the conditions surrounding the Property make impossible the continued use of the Property or any portion thereof for conservation purposes, the restrictions may only be extinguished in whole or in part, by judicial proceeding in a court of competent jurisdiction. Upon any subsequent sale, exchange or involuntary conversion by the Grantor of such Property, the Grantee shall be entitled to that portion of the proceeds as provided by New York State law, however, Grantee's share of the proceeds shall not be less than the proportionate value of the conservation restrictions, as provided immediately below. 30

30. This section is required for tax-deductible easements and sets forth the limited circumstances in which an easement can be extinguished, as well as the payment due to the land trust (and landowner) in the event of such extinguishment.

For such purposes only, Grantor agrees that the conveyance of this Conservation Easement to Grantee gives rise to a property right, immediately vested in Grantee, with a fair market value that is equal to the proportionate value that the conservation restrictions hereby created at the date hereof bears to the value of the Property as a whole at the date hereof (subject to reasonable adjustment to the extent permissible under Section 170(h) of the Internal Revenue Code for any improvements which may hereafter be made on the Property), based on the appraisal to be obtained on the Property in connection with this grant of

Conservation Easement. Grantee agrees to use its share of such proceeds in a manner consistent with the conservation purposes of this Conservation Easement.

6.4. Interpretation. This instrument is intended to create a "qualified real property interest" for "conservation purposes," as defined in Article 49, Title 3, of the New York Environmental Conservation Law and Section 170(h) of the Internal Revenue Code, and shall be interpreted consistently with such intention. In the event any provision has been omitted from this instrument necessary to qualify the interest hereby granted as such a "qualified real property interest" for "conservation purposes," such provision shall be deemed incorporated herein to the extent necessary to cause the interest hereby granted to be so qualified. If any provision of this Conservation Easement is deemed contrary to the provisions of Section 170(h) of the Internal Revenue Code, such provisions shall be modified or excluded to the extent necessary to cause the interest hereby granted to be so qualified.

31. This section is an economic hardship clause, intended to prevent extinguishment of an easement based solely upon a property's potential monetary value.

31 6.5. Perpetuation of Easement. The fact that any use of the Property that is expressly prohibited by the terms of this Conservation Easement may become greatly more economically valuable than uses permitted by the terms of the Conservation Easement, or that neighboring properties may, in the future, be put entirely to uses that are not permitted by this Conservation Easement, has been considered by Grantor in granting this Conservation Easement and by Grantee in accepting it. Grantor believes that any such changes in the use of neighboring properties will increase the benefit to the public of the continuation of this Conservation Easement, and Grantor and Grantee intend that any such changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Conservation Easement. In addition, the inability of Grantor, her successors and assigns, to conduct or implement any or all of the uses permitted under the terms of this Conservation Easement, or the unprofitability of doing so, shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment.

32. This is where the habendum clause is inserted ("To have and to hold, etc....") if required by state law or convention.

32 IN WITNESS WHEREOF, the parties have executed and delivered this instrument on the date or dates set forth below their respective names.

Grantor: 33

XXXXXXXX

Date: \_\_\_\_\_

Grantee: COLUMBIA LAND CONSERVANCY, INC.

By: Peter R. Paden, Executive Director

Date: \_\_\_\_\_

33. All owners of an interest in the land to be protected must sign the conservation easement and have their signatures notarized. Land trusts determine, either through their bylaws or adopted policies, which land trust personnel are authorized to sign easements on behalf of the organization.

34  
STATE OF NEW YORK )  
 )ss.:  
COUNTY OF )

34. These are the notary or acknowledgment blocks. Each state specifies the form necessary for this attestation, but they generally conform to the language shown here.

## Conservation Easement Diagram

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On the \_\_\_\_ day of \_\_\_\_\_ in the year 2007, before me, the undersigned, personally appeared **XXXXXXXX**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK     )  
  )ss.:  
COUNTY OF COLUMBIA    )

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2007, before me, the undersigned, personally appeared **Peter R. Paden**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
Notary Public

EXHIBIT A

**35** DESCRIPTION OF PROPERTY

(legal description from the deed and/or survey)

**35.** If a legal description is long it is generally placed in an exhibit to the easement and incorporated by reference into the easement itself. If the legal description is short, it can be placed in the body of the easement. If water rights are protected by an easement they are generally described here as well. Title exceptions are also sometimes described in this section.

## Conservation Easement Diagram

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### EXHIBIT B

#### CONSERVATION EASEMENT MAP **36**

(To be drawn at 1" = 200', reduced and attached to the easement)

**36.** If an easement map summarizes reserved rights and restrictions contained in the easement, it should clearly state that the specific provisions of the easement apply, not the map summary. In addition to the easement boundaries, a thorough easement map will show all improvements on the land as of the date of the easement and the locations of any building envelopes and special use areas.



## Additional Resources

### Drafting Easements

*The Conservation Easement Handbook*, 2005, by Elizabeth Byers and Karin Marchetti Ponte (The Trust for Public Land and the Land Trust Alliance).

Internal Revenue Code §170(h) — [www.irs.gov/taxpros/index.html](http://www.irs.gov/taxpros/index.html)

Treasury Regulations §1.170A-14 — [www.access.gpo.gov/nara/cfr/waisidx\\_03/26cfr1v3\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/26cfr1v3_03.html)

### Hazardous Materials

The Trust for Land Restoration publishes an online legal guide and related legal articles pertaining to conservation easements and hazardous waste liability ([www.restorationtrust.org](http://www.restorationtrust.org)).

For sample land trust hazardous materials assessment forms, see appendices for Practice 9C, Environmental Due Diligence for Hazardous Materials, located in the digital library on The Learning Center (<http://learningcenter.lta.org>).

### Working Lands Easements

“Working Ranchland Conservation Easements: Results from the Working Ranchland Conservation Easement Learning Circle” (Land Trust Alliance, Sundance, Utah, 2001).

“Working Forest Conservation Easements: A Process Guide for Land Trusts, Landowners and Public Agencies,” by Brenda Lind (Land Trust Alliance, 2001).

### Project Planning

#### References and Information Sources

##### Aerial photographs

- Your state GIS clearinghouse
- Your state department of transportation
- Environmental Air Force (or similar volunteer pilot organization). For two examples, see <http://www.lighthawk.org/index.htm> and <http://www.col-east.com>
- <http://earth.google.com>

### **Topographic maps (digital or print versions)**

- Local bookstores (for prints)
- United States Department of Agriculture (check your regional office)
- <http://cugir.mannlib.cornell.edu/>; <http://www.topozone.com/>; <http://topomaps.usgs.gov>

### **Vegetative analysis/cover type/location (digital or print versions)**

- Aerial photographs
- Stereoscope analysis (see local universities, for assistance from students)
- Field visits (college interns, volunteers, consultants)
- Black-and-white photographs
- Soil data are available at <http://www.ncgc.nrcs.usda.gov/products/datasets/ssurgo>
- Wetland data and maps

### **Property boundary delineation**

- Survey maps (filed in courthouse, records, etc.) and supporting descriptions
- Survey maps and supporting descriptions, held by surveyors
- Tax maps (can often have errors, but can give you a general idea of the area); check your local real property office or town clerk/town office
- Plat maps (similar to tax maps, used in the Midwest and West); less likely to have errors, but not as reliable as surveys; check your local real property office or town clerk/town office
- The landowner may have copies of survey, tax, or plat maps

### **Water bodies**

- Topographic maps
- Black-and-white aerial photographs
- Aerial photographs
- Hydrologic mapping (if it exists — depends on the area of the country)
- Landowner interview

### **Cultural information**

- Local historical society(s) and/or regional/state organizations
- Local residents
- Published materials (check libraries, Internet, etc.)
- Landowner interview

**Wildlife and plant species information**

- State wildlife departments, colleges and natural history museums
- Natural Heritage Programs (located in every state)
- Horticultural societies
- Local offices of The Nature Conservancy
- Wetlands data: <http://wetlandsfws.er.usgs.gov/wtlnds/launch.html>

**Scenic viewshed information**

- Scenic byway departments of state government
- National Park Service scenic surveys
- Local planning departments, master plans, comprehensive plans
- Historic commissions or historic preservation groups
- Local conservation commissions or similar community groups

**GIS information and general sources (data layers)**

- <http://www.mass.gov/mgis/giswww.htm> (GIS around the world, links to GIS data by state)
- Local, county, regional or statewide planning, agricultural, forestry, wildlife and/or conservation organizations
- Universities and colleges
- Natural Heritage Programs or other similar state or federal programs
- Planning or mapping consultants
- <http://www.terraserver.com>
- <http://www.topozone.com>
- <http://topomaps.usgs.gov>
- <http://earth.google.com>
- <http://www.esri.com/data/data-maps/overview.html>

## Check Your Progress

Before moving on to the next chapter, check that you are able to:

- Understand why creating a project plan helps a land trust craft an easement that meets all legal requirements, satisfies the land trust's and the landowner's conservation goals, and is capable of being monitored and enforced in perpetuity
- Understand what preliminary steps must be taken prior to drafting a conservation easement
- Draft a conservation easement that:
  - Follows the project planning decisions made during the process described in Practice 8G
  - Documents the important conservation values to be protected
  - Creates a public benefit and documents the public benefit served by the easement
  - Uses clearly defined terms and measurable standards (or refers to accepted standards)
  - Describes the purposes, prohibited uses and reserved rights
  - Allows only permitted uses and/or reserved rights that will not significantly impair the important conservation values of the property
  - Contains restrictions that the land trust is capable of monitoring and enforcing
  - Specifies when grantee review or approval is required
  - Contains enforcement and grantee remedies
  - Has an adequate legal description and description of any special use areas
  - Clearly identifies the owner(s) of the property
- Understand the importance of including a specific provision on amending the easement
- Use a template easement, knowing what elements are boilerplate and why, and what elements must be tailored to the specific property and why



