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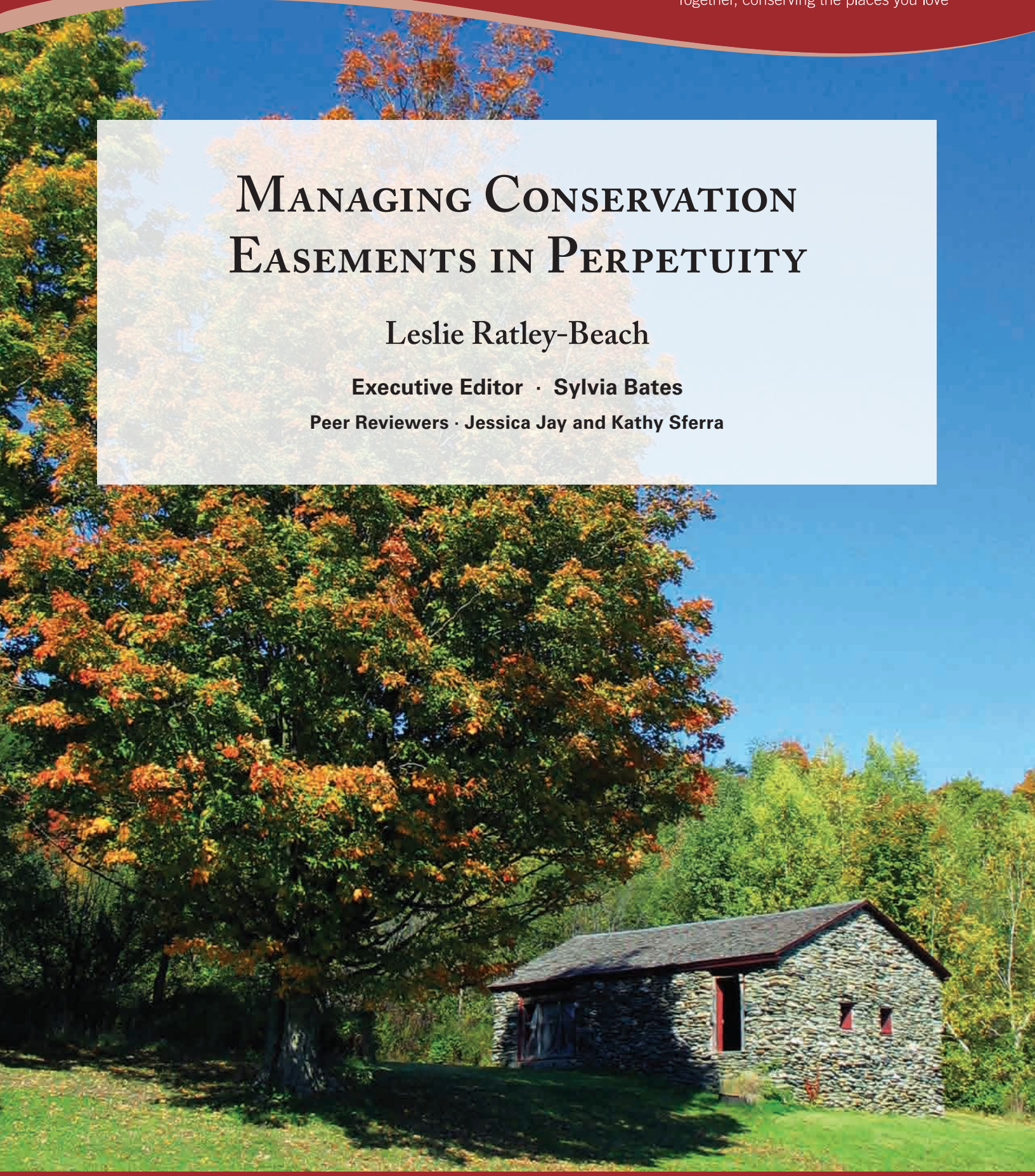

Managing Conservation Easements in Perpetuity

Leslie Ratley-Beach

Executive Editor · Sylvia Bates

Peer Reviewers · Jessica Jay and Kathy Sferra

STANDARDS AND PRACTICES CURRICULUM

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Managing Conservation Easements in Perpetuity: Fulfilling the Promise of Permanence through Keeping Records, Managing Amendments and Upholding Conservation Easement Integrity

Practice 9G: Recordkeeping
Practice 11I: Amendments
Practice 11E: Enforcement of Easements

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Managing Conservation Easements in Perpetuity

Fulfilling the Promise of Permanence through Keeping Records, Managing Amendments and Upholding Conservation Easement Integrity

Leslie Ratley-Beach

Land Trust Alliance

The Land Trust Alliance's mission is to save the places people love by strengthening land conservation across America.

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C O N T

E N T S

C O N T E N T S

A Note on the Standards and Practices Curriculum and Accreditation

"Managing Conservation Easements in Perpetuity" is part of the Land Trust Alliance's Standards and Practices Curriculum and is designed to provide you with guidance and tools to implement Practices 9G, 11I and 11E.

This course will:

- Help you understand the practices
- Provide you with tools to implement the practices in your organizations
- Inspire organizational change
- Help you save more land for the long term

The Standards and Practices Curriculum is made up of 15 courses that cover the accreditation indicator practices. Indicator practices demonstrate that a land trust is operating in an ethical, legal and technically sound manner, and ensure the long-term protection of land in the public interest. Voluntary land trust accreditation will provide independent verification of these practices.

The evaluations contained in this book are for training purposes only. They are not designed or intended to determine if your land trust is ready for accreditation.

Completing a course does not necessarily demonstrate that an organization is actually carrying out the practice. Therefore, the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance, will examine documents and information in project files to verify that each indicator practice is being carried out in the land trust applying for accreditation. For specific guidance on how to interpret Practice 9G for land trust accreditation and how the Commission will evaluate policies covering practices 9G, 11E and 11I, see www.landtrustaccreditation.org. This course and others in the curriculum are designed to help your land trust understand how to implement the practices.

Please note:

- The curriculum is *not* required for accreditation
- Completing the curriculum will *not* guarantee accreditation

For more information on accreditation, visit www.landtrustaccreditation.org. To learn more about the Land Trust Alliance's training and assistance programs, visit www.landtrustalliance.org.

Sylvia Bates
Executive Editor, Standards and Practices Curriculum
Director of Standards and Research, Land Trust Alliance

Summary

When a land trust accepts a conservation easement, it promises to preserve that land forever. Fulfilling the promise of perpetuity means adopting and implementing good recordkeeping practices and upholding the land trust's easements.

Organizing those stacks of papers and jumbled boxes of files into an orderly recordkeeping system, digital or paper, will make a land trust more efficient and better able to defend its conservation easements. Well-organized and secure records that contain all essential documents (and nothing extraneous) will increase your land trust's chance of success in court should your group ever find itself in litigation, defending or enforcing a conservation easement. Efficient and effective records management can also prove worthwhile if the Internal Revenue Service calls and your land trust must immediately produce a decade's-old baseline and related documents, or when a landowner asks complicated questions about his or her reserved rights and you must access the necessary files to answer the queries promptly and accurately. Alternatively, think of the embarrassment and trouble that will arise if you cannot find the baseline the IRS requested or the landowner's easement file. Getting serious about good recordkeeping means that it is an organizational priority for which everyone within the land trust has responsibility.

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.

Sound decisions about easement amendments are critical to the future of your conservation programs and to the success of the organization as a whole. If your land trust cannot demonstrate that it manages easement amendment requests in a way that is fair and transparent, upholds the conservation purposes of the easement, and confers no impermissible private benefit or private inurement, you may lose the support of your landowners and community and may even face sanctions from the IRS. Actions taken on a local level also affect easement

Conservation purposes: The purposes a conservation easement must serve to be a tax-deductible donation, as defined by Internal Revenue Code (IRC) §170(h) and the associated Treasury Regulations.

programs nationwide. Good amendment decisions demonstrate to members, donors, regulating agencies and the public that easements can be changed in ways that continue to protect land and benefit society.

Remember, conservation easements are only paper and ink if your land trust does not enforce them. Failure by a land trust to uphold conservation easements may:

- Disqualify a land trust from accepting additional tax-deductible conservation easements
- Result in fines from the IRS or revocation of the land trust's charitable status
- Jeopardize the deductibility of conservation easement gifts already made to your land trust
- Cast doubt about the efficacy of conservation easements for the entire conservation community

Perhaps most important, failure to uphold your land trust's conservation easements will undermine your land trust's credibility within the community and with the landowners and donors who are critical to accomplishing your mission.

This course covers three practices from *Land Trust Standards and Practices* that will guide you in keeping records, managing amendments and enforcing your land trust's easements:

- Practice 9G: Recordkeeping
- Practice 11I: Amendments
- Practice 11E: Enforcement of Easements

Chapter 1 will help you identify which land trust records are essential to managing your organization's conservation easements and how to store these records. Chapter 2 will help your land trust develop a conservation easement amendment policy and procedures to guide your organization through the complex risks of amending conservation easements. In addition, the chapter will provide practical advice on, and alternatives to, amendments. Finally, chapter 3 teaches you how to develop a violation resolution policy and accompanying procedures and prevent unnecessary litigation to best uphold your organization's conservation easements and preserve landowner relationships.

Introduction

Eternity is a long time.
Especially towards the end. — Woody Allen

Living Up to Our Obligations

Forever is only as long as landowners and the public have confidence in the integrity and competence of the land trust, its staff and volunteers. The permanence of conservation easements depends on the community's support of land conservation. This course discusses how to earn and keep public confidence and landowner support through the conscientious management of your organization's conservation easements, ensuring that they survive forever.

Landowners who want to leave a legacy for the future by granting a conservation easement usually do so because they love their land. Many land trusts work with three or more generations of a family who have lived on and from that land or have grown to see themselves as stewards in the time they have owned it. Their lives are interwoven with the growth of the grass and trees, crops and weather cycles and the lives of the creatures that share the land with them. When a landowner signs a conservation easement with tears of gratitude in his eyes because he knows your land trust will uphold that legacy, you have just made a commitment to that family to ensure that the property's conservation values survive forever.

Conservation values or attributes: The features or characteristics of a property that provide important benefits to the public and make the property worthy of permanent conservation.

How does your land trust plan to live up to that obligation forever? Will that family still be proud to have granted an easement to your land trust 10, 50 or 500 years later? Will your financial supporters continue to be proud of their investment? Will the new owners who come to live, play or work on that protected land also be delighted that the original owner conserved the land? How will your land trust decide to invest its resources in upholding its obligation to enforce and defend the easement in perpetuity? How will your land trust make decisions about changes in circumstances over time? How will you document those decisions so that the people who come after you know what happened and why? How will your organization navigate the

Good relationships with landowners, thorough baseline documentation reports, annual monitoring visits and strong recordkeeping systems form the foundation of successful and permanent land protection.

Conservation easement monitoring or annual visit: The land trust's ongoing inspection of land to determine compliance with easement, visit with the landowner and document the organization's findings. Monitoring ensures the protection of the land's conservation values over time.

Stewardship: Those steps necessary to preserve a conservation easement forever, including the creation of baseline documentation, regular monitoring, landowner relations including successor landowners, addressing amendments and enforcing easements.

Successor landowner: An owner who acquired protected property and was not the original grantor of the conservation easement.

See volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts" for guidance on other aspects of land trust recordkeeping.

increasingly complex legal and regulatory land conservation environment? What obligations does your land trust believe it has to the larger community to balance community needs and conservation while still upholding the integrity of the conservation easement and the original owner's intentions?

Good relationships with landowners, thorough baseline documentation reports, regular (at least annual) easement monitoring visits and sound recordkeeping systems are the foundation of your land trust's land protection efforts and fundamental to upholding its obligations. As your land trust matures, you must also be prepared to address issues such as amendments and violations quickly and appropriately. Putting sound procedures and policies in place before encountering these difficult situations is time well spent because you may prevent misunderstandings or even litigation.

Developing and maintaining recordkeeping systems and policies can be challenging. Doing the deal is fun, but the hard work of stewardship is essential to ensure that future generations appreciate the land you and the landowner worked so hard to save. This book addresses the fundamentals of recordkeeping for conservation easement projects. See volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts" for guidance on other aspects of land trust recordkeeping.

Guiding Principles

Meeting your land trust's obligations to the public it serves means planning thoughtfully both for today and tomorrow. Your land trust should start with a strategic plan that describes what results your organization wants to achieve through its conservation easement program. From these results, the land trust can develop stewardship principles that guide decisions regarding annual monitoring visits, recordkeeping systems, amendment requests, conservation easement enforcement and landowner relationships. All of your land trust's programs, including its conservation easement stewardship program, must comply with all applicable laws, be consistent with *Land Trust Standards and Practices* and support your organization's mission. Land trusts should routinely evaluate the goals and activities of their easement stewardship programs to check for consistency with the organization's mission and revise those programs appropriately.

Course Road Map

This course covers the essentials of recordkeeping, managing amendments and enforcing your land trust's easements. It covers Practices 9G, Recordkeeping, 11E, Enforcement of Easements, and 11I, Amendments, and touches on 11D, Landowner Relationships. For more information on developing good landowner relationships, see the Land Trust Alliance course "Conservation Easement Stewardship."

Chapter 1 addresses the definition of records and guiding principles on recordkeeping as it applies to conservation easement projects, including the importance of adopting and following a written records policy. The central section of this chapter covers records identification, document management and digital recordkeeping. It also includes assistance in developing procedures that will help your land trust meet its responsibilities. You will have a chance to review and apply what you learn through a case study and exercise.

Dealing with conservation easement amendments is the focus of chapter 2. Because amendments are complex and risky, we spend some time on laws affecting amendments, the various risks you should assess before amending a conservation easement and how the original conservation easement affects amendment decisions. Next we look at the principles, policies, processes and tests for making sound judgments regarding amendments. After a quick stop to review impermissible private benefit and private inurement questions, we are back on track with amendment drafting issues and then conclude with alternatives to amendments and specialized amendment situations, such as condemnation and estoppel. The chapter contains a template that will guide your land trust in crafting an amendment policy specific to your organization's needs.

Upholding conservation easements (conservation easement enforcement) is the subject of chapter 3. We discuss enforcement costs, rates of violations and practical lessons learned about easement defense. We then move on to discuss the important elements of a violation policy and procedures so we can understand the critical steps in resolving these issues. We will address why making good choices when drafting conservation easements helps prevent violations and enhances the land trust's enforcement capability. The chapter contains a template

All of your land trust's programs, including its conservation easement stewardship program, must comply with all applicable laws, be consistent with *Land Trust Standards and Practices* and support your organization's mission.

Private inurement: Occurs when a person who is an insider to the tax-exempt organization, such as a director or an officer, derives a benefit from the organization without giving something of at least equal value in return. The IRS prohibition on inurement is absolute.

Impermissible private benefit: Occurs when a tax-exempt organization provides more than an "incidental" benefit to a non-insider.

Insiders: Board and staff members, substantial contributors, parties related to those individuals, those who have an ability to influence decisions of the organization and those with access to information not available to the general public.

that will guide your land trust in crafting a violation policy specific to your organization's needs.

Finally, we look at next steps you might take to implement the material presented in this book and offer a practical "to do" worksheet to help you implement the most important items for your land trust.

Audience

This course is for land trust board members, staff and volunteers who manage a conservation easement portfolio and wish to uphold high standards in conservation easement recordkeeping, amendments and enforcement.

This course is suitable for a wide range of participants, and there are no prerequisites. However, to get the most out of this course, you should be familiar with drafting conservation easements, understand the importance of records policies and be conversant in the subjects covered in the Land Trust Alliance courses "Conservation Easement Drafting and Documentation" and "Conservation Easement Stewardship."

Using the Book

You may use this book in a training or self-study program, and for review and reference. You can use it at home, in the office or in class. This book was specifically designed to contain a wealth of information that you can use over many years in managing your land trust's conservation easements. This course is designed to be taught in 12 hours of classroom training. A student can usually complete this course in slightly less time if studying alone, either online or with this book.

If using this book for self-study, you should read the chapters and work through the evaluations, exercises and case studies. You should also take advantage of the additional resources identified in each chapter for further study.

Course Resources

This course includes the following resources:

- Sample land trust documents
- Templates to guide you in writing your own policies
- Exercises to practice what you learn
- Case studies to demonstrate how other land trusts have implemented the practice
- Lists of additional resources for further study
- Glossary of key terms
- Index for easy reference

Implementing the Training

The summaries included at the beginning of this book and before each chapter can be used as briefing tools for your board, land trust committees or community groups. They succinctly present the importance of the topic and highlight major points. The book also contains templates to help your land trust develop, approve and implement recordkeeping, amendment and enforcement policies and procedures. This book will walk you through the steps necessary to prepare amendment and enforcement guidelines.

Consult an attorney and other experts when creating and adopting your policies and procedures.

Independent Legal Advice

The following materials provide only an overview of the legal and operating principles involved in recordkeeping, amendments and enforcement. Many of the legal tenets mentioned vary from state to state, particularly regarding issues related to litigation. Recordkeeping requirements and technology will change over time as will a land trust's business needs. Amendment and enforcement laws will evolve as the land trust and legal communities gain more experience with conservation easements. Your land trust should consult an attorney, as well as other appropriate experts (such as technology experts, business managers, tax or accounting specialists, marketing professionals), for specific guidance in creating and adopting your policies and procedures.

Chapter One • Recordkeeping

I'm a bit of a stickler for paperwork. Where would we be if we didn't follow the correct procedures? —Sam Lowry, Brazil *(1985)*

Practice 9G. Recordkeeping.
Pursuant to its records policy (see 2D), the land trust keeps originals of all irreplaceable documents essential to the defense of each transaction (such as legal agreements, critical correspondence and appraisals) in one location, and copies in a separate location. Original documents are protected from daily use and are secure from fire, floods and other damage.

A land trust should prepare and maintain complete written documentation of transactions. It needs to have two sets of documents: (1) documents that are accessible and can be used for monitoring or as problems and issues arise ("working" files); and (2) documents that are safely stored in a way that ensures that they will last and be acceptable evidence in the event of a court proceeding ("permanent" files). Originals of important documents (such as legal agreements, critical correspondence, or one-of-a-kind studies) that are part of the permanent file should be kept in a secure place, such as a safe-deposit box or fireproof file cabinet. For additional protection, working files should be kept in one location and permanent files should be kept at a separate location. See also 2D.

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

Learning Objectives

After studying this chapter, you should be able to:

- Explain the benefits of a sound recordkeeping system
- Craft a purpose statement that articulates why your land trust keeps records
- Create a list of irreplaceable documents held by your organization
- Develop, in consultation with an attorney, a records retention strategy appropriate for your land trust

- Develop a strategy for labeling records
- Explain how to manage digital records
- Explain how to manage tracking of reserved rights, approvals and other related paperwork
- Describe why it is important to keep two sets (originals and copies) of irreplaceable documents in different locations
- Identify the type of records storage options available to your organization
- Describe the type of damage (fire, floods and so forth) that might harm documents held by your organization
- Explain the basics of the business records rule and how it affects how you manage records
- Describe how your records policy addresses Practice 9G

Summary

Everyone is responsible for good records.

Good records tell an accurate story of the conserved land, the people who own it and the land trust that manages the easement. The process of developing a records system gives your land trust the opportunity to agree on organizational priorities, identify the level of risk you are willing to accept and decide on the essential documents that must be retained. The process also builds cohesion among volunteers, staff and board by focusing their efforts and clarifying the desired results of a land trust's protection efforts. An excellent records system also allows the land trust to immediately and accurately answer questions about the status of conservation easements and current ownership of land. Getting serious about good records means that recordkeeping is a top priority for your land trust, and that everyone in the organization is responsible for good records.

For every conservation easement your land trust holds, there should be an accurate and complete record of the transaction and the subsequent status of the conserved land, including its ownership. A complete record of title and the condition of the land at the time of the easement's conveyance and in succeeding years will help your land trust provide excellent service to landowners, build trusting relationships, prevent violations, assess problems quickly and accurately, and defend the conservation easement as necessary. Every land trust should develop, periodically review and update its recordkeeping systems and related practices. All policies and procedures should be cross-checked against the land trust's mission and capacity.

Records must be kept so that in 50 or 500 years people managing your easements will have the information they need to make informed decisions. Your land trust's records are your land trust's institutional memory. These records must survive turnover of your land trust's board, staff and volunteers. Litigation about the intentions of the original landowner and the easement drafter will most likely occur many years after those people are no longer available to testify in court about their intentions. Your land trust records must clearly and accurately document these intentions for them to be upheld by a court.

Capacity: The resources an organization has at its disposal to carry out its programs and activities, including human resources, financial resources, systems, equipment and the like.

Land trusts strive to create excellent relationships with owners of conserved land and resolve issues in a manner that upholds the conservation easement and prevents unnecessary litigation. Land trusts, however, must anticipate that at some point in the course of forever, they will be called upon to defend their practices and their conservation easements in court. When this point comes, the court and opposing counsel will scrutinize all aspects of a land trust's operations. Your land trust's records are your first line of defense. To prepare for this eventuality, your organization must take prudent steps to establish a records system that will survive scrutiny and assist your land trust in upholding its conservation easements.

This chapter addresses recordkeeping for conservation easement projects. It does not address recordkeeping with respect to finances, personnel, board records or other organizational matters. For more information on these topics, see volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts."

Evaluate Your Practices

Conduct a quick evaluation of your land trust's current approach to recordkeeping. Give yourself one point for every "yes" answer. Scores are explained at the end.

Does your land trust:

1. Have a written records policy?
2. Define what it considers to be an irreplaceable document essential to the defense of each transaction?
3. Consult with a litigator periodically to ensure that the records system will support, if needed, a judicial enforcement action?

4. Consider costs and capacity when developing and implementing its records systems?
5. Have an accurate list of every conservation easement it holds and a complete record of each transaction?
6. Have an easement map and a baseline documentation report for every conservation easement it holds?
7. Know how to reach all current owners of conserved land?
8. Have written annual monitoring records for every conservation easement it holds?
9. Track any reserved and permitted rights and approvals for each conservation easement?
10. Have a secure backup records storage system that is safe from loss through mishandling or disaster?
11. Keep original documents in a separate location from the duplicates?
12. Take steps to remain current with relevant state and federal laws affecting records management and evidentiary requirements for maintaining records?

Scores

If your land trust scores:

12: Congratulations! Your land trust has put much time, effort and thought into its systems, policies and procedures. Share your success stories with the Land Trust Alliance so others may learn from them (e-mail learn@lta.org).

9–11: Good job! Keep at it. Identify the few places where your organization could improve and implement some of the suggestions in this course.

5–8: Your land trust is on the right track and has tackled some of the basics. Use this course to help you take the next steps so that your organization has a complete system for managing its conservation easement records.

0–4: By taking this course, you will learn how to design and implement sound recordkeeping practices that will ensure the permanence of your conservation easements.

Guidance

1. A written records policy ensures that everyone in the land trust manages the organization's records consistently. Doing so is critical for landowner relationships, long-term accuracy and for complying with the business records rule exception to the hearsay rule.
2. The records policy should define what the land trust considers to be an irreplaceable document essential to the defense of each transaction. For conservation easements, these will include legal agreements, critical correspondence and baseline documentation and monitoring reports, among others.
3. Assistance from a litigator can give you confidence that your records will be admissible in court should that need arise. It is worth the money and effort to have a pragmatic litigator review your land trust's recordkeeping system and easement files periodically and advise you on the admissibility of your records in the event of a court action.
4. The system you develop must fit your land trust. Developing an elaborate records system that you cannot implement is a waste of time and money. Size your system to fit your needs and capacity and any growth that you anticipate.
5. Your land trust cannot fulfill its obligation to uphold its conservation easements if it does not know what easements it holds, the location of the land and the names and addresses of the landowners. All project files should be complete.
6. Every conservation easement must be thoroughly documented. Without a baseline documentation report and an easement map, your land trust's conservation easements will not reflect the actual condition of the land at the time the easement was granted and your land trust will not be in a position to track, or demonstrate to others, whether changes to the land are consistent with the conservation easement.
7. If you do not know the current owners of protected properties, you cannot build a relationship with them, nor can you assist them to be the best possible stewards of their land and prevent violations.
8. Not only must a land trust schedule a visit to each parcel of conserved land annually to discuss landowners' plans for the land, monitor the landowner's compliance with the conservation easement, and keep track of changes to the land, but a land trust must also keep a written record of these visits so

Business records rule: The business records rule allows a record (in any form) to be included in evidence in a judicial proceeding only under certain conditions (see page 62).

Hearsay: A statement made (or a document offered) in court that is based on the statement made by another who is not under oath or in court and that is offered to prove the truth of the matter stated. While hearsay evidence is not generally admissible to prove the truth of the statement, there are exceptions that allow the evidence if there is support for its authenticity.

that the organization can document to the IRS, a state attorney general or other interested person that it is fulfilling its obligation to uphold the conservation easement. This written record will also help a land trust preserve its rights should it need to pursue a judicial remedy.

9. Many easements contain specific reserved rights or require that the land trust approve certain landowner actions. It is essential that land trusts track these rights and approvals to evaluate their capacity to manage the easements, respond to landowner information requests and prepare for any enforcement or defense actions.
10. Bad things happen, and once in a while disasters such as floods or fires strike. Therefore, you must back up your land trust's recordkeeping system. If your land trust uses both paper and electronic systems, then both systems need to be backed up.
11. Original documents that are part of the permanent file and essential to the defense of each transaction (such as legal agreements and critical correspondence) must be stored in a separate location from the duplicates. Records kept in the same building do not meet the separate storage standard.
12. Federal and state laws change, and you must stay abreast of changes in laws and rules that affect your land trust's records. The Land Trust Alliance can assist with general changes in federal law, but you will need to delegate this responsibility to someone in your land trust to ensure your organization stays current with all applicable changes in the law.

The long-term health and success of your land trust rests upon having sufficient records to ensure that your land trust upholds conservation permanence forever.

Understanding Records Systems

A good recordkeeping policy is essential for providing important guidance about what records to keep, how to keep them and for how long they must be kept. Most land trusts do not think about records when starting out because they are eager to put all of their energies into conserving land. What land trusts eventually discover is that they cannot conserve land forever without good records. Recordkeeping may not have the glamour of closing a conservation deal, but the long-term health and success of your land trust rests upon having the essential records to ensure that your land trust upholds conservation permanence forever.

Good relationships with the owners of conserved land are also essential and have been shown to reduce not only the frequency but also

the severity of conservation easement violations. To build those relationships, you must know your landowners and how to contact them and be able to track changes in land ownership. In the event your land trust is forced to go to court to enforce or defend a conservation easement, your organization will need a credible recordkeeping system and sufficient records to prevail. Good recordkeeping is comparable to good personal hygiene: flossing your teeth, cleaning your clothes and scrubbing your fingernails are not a lot of fun, but they are necessary if you want to effectively function in society. Similarly, without a reliable recordkeeping system and adequate records, courts will not uphold your land trust's easements and it will be more difficult to maintain good landowner relations over time. A good recordkeeping system for your conservation easement projects can save your organization time, money and headaches, so take the time to clean up and organize your land trust's records.

Benefits of Good Records

Well-designed records systems:

Reduce space and storage needs. Often we keep records much longer than necessary. You should purge unimportant records according to your land trust's records retention and document destruction policies. A good recordkeeping system can cut land trust expenses by reducing the costs of storage, file drawers, the time and labor involved with managing too much paper and electronic material, and lost opportunities associated with searching too many records to find essential information.

Improve operational efficiency. A systematic and consistent recordkeeping system helps board, staff and volunteers promptly locate vital documents and provides guidance on the destruction of valueless documents. Such a system improves efficiency, provides the material necessary to serve your landowners well, allows your land trust to report accurately to funders, the IRS and the public regarding your use of money and helps your land trust conserve more land.

Provide organizational consistency and continuity. A good recordkeeping policy and associated procedures will provide consistency for the land trust over time, no matter who is working with the data and records. This issue becomes increasingly important as a land trust grows and personnel (whether volunteers or staff) changes. In addition, a good

recordkeeping system that includes storage of duplicates of essential records in locations safe from damage or destruction will prove invaluable to land trusts in managing easements and ensuring that the organization's institutional memory survives.

Protect your land trust in the event of litigation or government investigation. Your land trust cannot predict when it will face litigation or be audited by the IRS or by your state attorney general, nor can you predict what records will be critical in the event of a lawsuit or audit. A good records system includes a retention policy based on a risk management analysis and the requirements of applicable laws so that your land trust keeps all essential records and disposes of extraneous ones. Your organization can then demonstrate a consistently implemented and credible records system in court or in an audit.

Comply with federal, state and local requirements. Every land trust must comply with all legal requirements for recordkeeping and disclosure of organizational information. The Alliance offers a separate course, "Nonprofit Law and Recordkeeping for Land Trusts," that covers this topic in detail.

Ensure good landowner relations. Every land trust should strive to build and maintain good relations with the owners of protected properties. Doing so has been shown to reduce not only the frequency but also the severity of easement violations. For more information on developing strong landowner relations, see the Land Trust Alliance course "Conservation Easement Stewardship."

Landowner Relations and Recordkeeping

Recordkeeping is a key part of maintaining good relations with your landowners. Annual monitoring visits are not only a good time to strengthen these relationships, they are also a good time to update your records concerning the landowner's contact information, changes the landowner plans to make on the property, natural changes to the land and other vital information necessary to monitor and enforce the easement over time. Acquiring and maintaining records about a landowner's interests and land management needs often allow a land trust to provide information and anticipate requests, both of which can go a long way toward maintaining good relations with the landowner.

Eventually, the original easement grantor will transfer the property to another owner. Therefore, it is critical that land trusts implement

systems for tracking changes in land ownership. There are various techniques to track these changes, and land trusts should adopt several to ensure that if one system fails, others will succeed. Some examples include checking the public records for transfers and scanning newspaper listings of local land transfers. For a detailed discussion of this topic and more information about building and maintaining good landowner relationships, see the Land Trust Alliance course "Conservation Easement Stewardship."

Tracking Reserved Rights, Approvals, Interpretations and Other Related Matters

Every land trust should consider in advance what additional information will be necessary to forever manage its conservation easements. In addition to annual monitoring reports, amendments and violation resolution, many land trusts will issue approvals for reserved rights, answer landowner questions about how the conservation easement is interpreted and possibly issue waivers or other similar writings that affect the perpetual management of the conservation easement.

It is easier to collect information at the time a project is completed or an action is taken than to go back and review every file for that piece of data later. A land trust should also be able to answer the question about how many reserved rights each conservation easement includes and the status of those rights at any given moment. If the conservation easement requires a management plan, then the plan must also be tracked to ensure that it is current and approved, if required. Check all of your conservation easements because they may have other items that also should be tracked and managed.

A database — whether simple or complex — is the easiest way to track all these moving pieces of essential information. A database is easy to manage and query, especially for programs with more than 50 easements. At a minimum, a land trust should keep a list, master file or database of its completed projects, with pertinent identifying and location data. Some land trusts keep separate master project files for tracking ongoing transactions and completed land protection projects. Others separately track:

- Monitoring assignments and status
- Easement amendments
- Requests for interpretations or approvals

***At a minimum*, a land trust should keep a list, master file or database of its completed projects, with pertinent identifying and location data.**

- Violations and resolutions
- Exercise of house site rights and other reserved rights
- Landowner relationship information
- Maps and photos
- Policies, procedures and guidelines

In planning your database, remember that information is data that you retrieve, organize and present in a meaningful way. You store data. You retrieve information. Data is stored so that users can obtain meaningful information. This concept is important because you have to know what information you need and how you need to use it to determine what data to store in the database.

This task is more difficult than it sounds. Organizations that have developed databases report that they all overlooked important items or connections when they designed them. They recommend budgeting for a few iterations and for backfilling data. They also experienced an increase in information requests once their funders and partners understood that they had a database that could be queried for interesting combinations of information.

Before creating a database, a land trust should consider:

- Conversion and compatibility
- Access to training and customer support
- Users and locations
- Communication with other databases
- Queries and reports

Tips for Creating and Using a Database

One person should be in charge of managing the database. That person should also have a well-trained and involved backup manager who can answer questions when the lead manager is unavailable.

Training and timing are critical. Whoever enters data must be well trained, and your land trust must have solid protocols for data entry and a clear, understandable system. Timing is also critical. For example, if you enter all data only at year's end, you will not have the necessary information for approvals, violation resolutions or any mailings throughout the rest of the year.

Establish protocols for organizing and entering data and write them down. These standards should be in a user's manual for your database. Clearly define the fields you will use. What the database fields represent should be obvious to everyone. Do not use random codes and acronyms because no one will know what they mean after the original creator leaves the organization.

Keep a record of how you structured your database. Maintain all the lists, diagrams and other materials you used to set up your database, particularly if it is custom-designed. This information will be vital should the database structure need to be modified in the future and the original creator has left the organization.

Back up your database regularly! One designated volunteer or staff member should take a backup copy of the database offsite every time it is updated. This backup should be stored in accordance with the land trust's records policy.

Connectivity. Think about how all the data relates to each other and how to make the information readily accessible to appropriate staff and volunteers. Staff or volunteers working with a particular landowner should be able to quickly view information on the parcel, such as landowner contact information, violation history, approvals and interpretations issued, amendments, financial information, funding restrictions, reserved rights exercised and remaining and landowner comments.

Land trusts function best when all the necessary essential records are integrated as a unified system. As your land trust grows, the challenge of maintaining seamless information sharing increases exponentially. Having integrated databases is one way to meet that challenge. For example, before making an appeal to a major donor, your fundraising staff should be able to quickly check to see if the donor has contributed an easement or land parcel. Similarly, if your land protection staff approaches a landowner, they should know if this landowner has made a recent financial donation.

Accurate and complete records tracking can avoid embarrassing mistakes. It can also reduce redundant information, which will make responses to litigation and investigation easier to manage. Clean integrated systems can also make people more aware of connections and help prevent or mitigate conservation easement violations.

Laws Affecting Recordkeeping

In addition to your land trust's general counsel, be sure to have an experienced litigator review your recordkeeping policy and procedures.

There are a number of state and federal laws that must be considered when developing a records policy, and these laws will affect how you design your land trust recordkeeping system. These laws change frequently, as does public sentiment about the transparency of nonprofit recordkeeping. Land trusts should consult their attorneys regarding these laws before designing or implementing a recordkeeping system. It is also advisable to have an experienced litigator (an attorney who specializes in litigation rather than real estate transactions or other specialties) review your recordkeeping policies and procedures. He or she will have substantial experience in court rules of evidence and can help your land trust ensure that its practices will meet the standards necessary to uphold its easements over time. Remember, you wouldn't go to an eye doctor to get a heart bypass operation. Lawyers are similar. Hire the correct expertise for your land trust in different situations. For a detailed discussion of the laws and requirements regarding recordkeeping, see the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts."

Risk Management

Recordkeeping is basically risk management, because an organization must choose which documents to keep and which ones to destroy. The risk, of course, arises from the fact that an organization may find that, despite its best efforts, it made the wrong decisions about the documents it retains and those it destroys. In performing your recordkeeping risk assessment, you should assess:

- The risk of different storage systems (will the records themselves being damaged, destroyed or lost?)
- The risks your land trust will face if a record is not available
- The likelihood that a particular document will be critical in court or necessary to answer an essential question in conservation easement management

You also need to assess what information you will need, how often you will need it, how irreplaceable it is and, finally, what laws govern certain records and their retention.

See volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts" for further discussion of risk, litigation and liability.

Policies and Procedures

There are many ways to create, identify, collect, store, use, maintain, retrieve, retain and purge or destroy records. Your land trust records systems must be tailored to your land trust needs, mission and capacity, as well as future anticipated growth. The issues applicable to records systems, however, are similar for every land trust. A recordkeeping policy and procedure can help you keep records in order so that, if needed, you will only have to trawl through a reasonable amount of relevant information to find the answers you seek.

For guidance on drafting a records policy, see volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts." The sections below only pertain to conservation easements.

Purpose Statement

Before addressing the details of keeping your easement records in a policy, your land trust should clarify why it keeps these records. A purpose statement will guide the specific details of your land trust's easement recordkeeping policy and procedures, such as what categories of documents to keep for how long and in what manner (digital or paper), and will articulate the organizational goals for maintaining such records. Different land trusts will have different reasons for keeping easement records because they will have different missions, different cultures and communities, and different assessments of potential litigation and other risks.

The following examples demonstrate two approaches to crafting purpose statements.

Example

A General Purpose Statement: Vermont Land Trust (VLT)

VLT emphasizes a broad purpose for its recordkeeping systems and specifically includes good landowner relationships as one purpose. The statement also demonstrates VLT's commitment to perpetuity by recognizing that records must exist forever and must be kept in both paper and electronic form.

> VLT's Conservation Stewardship Office is the repository of all the completed conservation work of the organization. Our paper and electronic records serve the organization's legal and information needs regarding all conserved land and its owners. We also exist

to serve owners of conserved land and maintain records in order to answer inquiries promptly regarding their conserved land. Our records must exist forever to fulfill our conservation easement stewardship responsibilities as well as legal needs. We keep only those records that are essential to these functions in paper and electronic form.

More Detailed and Specific Purpose Statement: Minnesota Land Trust

This purpose statement provides the Minnesota Land Trust with flexibility because it does not specify *how* the records will be kept. The statement also sets a standard of ease of use of the records by specifying that anyone should be able to understand a particular project simply by referring to the records.

The goals of the Minnesota Land Trust's filing and record management procedures for its *land conservation project files* are to make sure that:

1. The Minnesota Land Trust has the information necessary to complete its conservation projects and to manage and monitor its ongoing conservation easement obligations
2. All documents and important materials related to conservation easement projects are securely kept and relatively easily retrieved or reproduced when necessary
3. Anyone unfamiliar with a project or file can understand the history and status of the project

Recordkeeping Procedures for Conservation Easements

Once a purpose statement has been crafted for your land trust's easement recordkeeping policy, the next step is to examine your organization's system of land conservation from initiating a transaction through to closing and perpetual stewardship. Itemizing each step in the system in a flowchart, decision tree or a checklist will highlight:

- What records need to be kept for each part of the process
- What records should be kept forever
- Who needs access to the records and when
- Who creates what records
- What records are destroyed by whom and when

Think about It

What is the purpose of your land trust's easement records system? Take a moment to jot down any words or phrases that describe your land trust's purpose for keeping documents related to the conservation easements it holds. We will return to your notes later to see how you might use these thoughts to develop your recordkeeping purposes, policy and procedures.

_____

_____

_____

_____

_____

This process will help your organization establish its recordkeeping procedures and ensure they accurately reflect your land trust's needs and capacity.

Easement transactions can be divided into two parts: pre-closing work and post-closing work. Creating two major recordkeeping categories that reflect the two parts of land conservation projects can be useful for a number of reasons. For example, some projects start but are never completed or may take 20 years to close the deal; your land trust will need to be able to track records relating to such transactions over time. In addition, records needs are different prior to closing than after closing. For example, prior to closing, you should keep all drafts of the conservation easement deed as a reference while you negotiate the agreement, but after closing, most litigators recommend purging all drafts and only retaining the final document.

Creating divisions within these two main categories can also be helpful for document management. Within the pre-closing work, your land trust might decide to have systems to track prospects, a system for those projects that are actively progressing to closing and a system for tracking those projects that are dead or dormant. For more information on recordkeeping related to land transactions, see the Land Trust Alliance course "Acquiring Land and Conservation Easements."

Itemizing each step in your land trust's conservation easement development process can help you identify what records you need, for how long and for whose use.

After closing, most litigators recommend purging all easement drafts and only retaining the final document.

Post-Closing Easement Stewardship Files

Post-closing work includes all the steps necessary for the perpetual stewardship of the conservation easement, including maintenance of landowner relations and tracking changes in landownership, annual monitoring of the easement, keeping track of approvals and the exercise of rights reserved under the easement, and addressing amendment and violation issues. At minimum you must be able to track:

- Changes in landownership and current contact information for all owners
- Changes to the land (both natural and manmade)
- Approvals of exercise of reserved rights, answers to landowners' inquiries and details about any easement interpretations, amendments or violations

To facilitate tracking, you may wish to create two distinct divisions within the post-closing or stewardship folder:

Essential documents generated at closing

- The recorded conservation easement
- The baseline documentation report
- The easement map or survey
- Any critical correspondence interpreting the conservation easement or approving the exercise of a reserved right, resolving a violation or other activity
- The appraisal
- IRS Form 8283 (if the easement was a donation or bargain sale)
- Landowner names and contact information
- Landowner contact preferences, if known

Subsequent Stewardship Activities

- Monitoring reports
- Amendments (if applicable)
- Grant or legal agreements (if applicable)
- Violation resolution
- New landowner names and contact information
- Other documents, including management plans or environmental inventories. Your land trust will have a variety of additional documents unique to your region, landowners, mission and resource base for which you will need to determine if they are essential to the perpetual stewardship of an easement and, thus, kept as a part of the post-closing records.

To ensure that you retain important stewardship documents, create a documentation checklist that is front and center in each folder. Each time you update the folder, you also record the completion date and initials of the person doing the recordkeeping. While the specific items on these checklists may vary depending on the conservation goals of the land trust and the characteristics of the easement, the lists can help land trusts identify and rectify any omissions or failures to include or discard documents. The more detailed the checklists, the fewer the opportunities for oversights or errors, but it should not be so detailed that users fail to complete the procedure. You can customize the sample documentation checklist on page 139 for your land trust's easement program.

Easement Management Policies

In addition to conservation-project-specific records, every land trust should record its essential policies, practices, procedures or guidelines related to its conservation easement program. These written records should be maintained in accordance with your land trust's records policy and include:

- Recordkeeping procedures for conservation easement project files
- Baseline documentation preparation, storage and updating or periodic additional documentation
- Stewardship fund contributions, investment, management and use
- Legal defense fund contributions, investment, management and use
- Annual monitoring procedures, including sharing of reports and their storage
- Enforcement, or any response to violations
- Amendments
- The management, evaluation and tracking of the exercise of reserved rights, approvals, discretionary approvals, estoppels and interpretation
- Landowner relationships and data tracking
- Sales or transfers of easements
- Easement contingency plans, serving as backup holder to or as co-holder of conservation easements
- Condemnation and extinguishment

Stewardship fund: A separate, dedicated fund established by a land trust to provide financial resources for easement stewardship costs. If the fund is not a true endowment, the principal as well as the earnings of the fund may be withdrawn.

In some organizations, the stewardship fund may include funds for legal defense, or the organization may set up a separate easement legal defense fund.

In most cases, your land trust's policies and guidelines should be available to the public upon request to ensure maximum transparency. When drafting policies, keep in mind how the public might view these documents. Procedures, or at least a general summary of the process a land trust follows in making its decisions (such as a project selection process), should also be available to the public.

If legal counsel advises you not to make certain policies or procedures publicly available in their entirety, then work with counsel to devise a summary explanation of the policy or process that is suitable for the public. Transparent and ethical procedures are critical to maintaining public confidence in your land trust. Land trusts should think carefully before restricting public access to their policies.

Store the policies, practices, guidelines and procedures in a central location in either paper or electronic form so that they are easily accessible to everyone in your land trust as well as to the public. All policies and procedures should be known and followed by all land trust personnel, whether staff or volunteer — not just stuck in a binder and forgotten. You should also determine how often you will review and revise these polices and develop a process for how you will disseminate and store any revisions.

Transparent and ethical procedures are critical to maintaining public confidence in your land trust.

Records Retention and Destruction

Records retention (what records to keep and what records can be destroyed) is the most critical issue facing land trust records management today. The passage of the Sarbanes-Oxley law, Congressional scrutiny of The Nature Conservancy's practices, and the ongoing IRS conservation easement audits have all served to prominently elevate this issue. In addition, as land trusts mature, they naturally accumulate more records, and as these records become unwieldy, managing them becomes a priority. Finally, easement violations and other challenges (such as tracking reserved rights) demand good and easily accessible records to address problems appropriately.

Some land trusts decide that rather than struggle with determining what records to keep, and what to destroy, they will save and archive, forever, anything and everything — just to be safe. While that strategy may appear tempting, land trusts should understand the consequences of such an approach. The reality is that, with records retention, there is no "safe side." Keeping too much information is as much of a risk as

Keeping too much information is as much of a risk as destroying too many records or destroying them too soon.

Federal law prohibits the destruction of documents once you receive notice or suspect a particular case will be litigated.

destroying too many records or destroying them too soon. If your land trust retains records for too long or retains records that have no value, it will waste money and possibly expose itself to unnecessary litigation risks. For example, if an easement ends up in court, in the course of the portion of the pre-trial actions referred to as "discovery," your land trust will be required to share with opposing counsel the entire file (with the exception of letters from your attorney) relating to the easement and the property. So if your land trust retains extraneous, ambiguous material in the file, opposing counsel may use such documents to create doubt about your land trust's actions and credibility in court.

In 2002, Congress passed the Sarbanes-Oxley Act in response to the scandals and economic catastrophes caused by the financial misdeeds and accounting inaccuracies of some major corporations. This law prohibits your land trust from destroying any document once you have notice of, or suspect, that a particular case will be litigated. If your land trust is caught destroying documents in anticipation of specific litigation or investigation, you and your organization may be subject to severe penalties, including, in some cases, criminal sanctions. If caught, the fallout from the government and public over destroying the documents may be far worse than the consequences of the file being made public.

Discovery: The court-required process used by each side in a lawsuit to obtain from the other side any relevant facts, information, documents, statements, images and other material about the case to assist each other with trial preparation.

Example

The Dangers of Discovery

Dickson Mountain Land Trust (a fictional land trust with a "keep everything" records policy) receives notice that a successor landowner is challenging the organization's interpretation of a reserved right allowing another house on the easement-protected land.

The land trust believes the integrity of the easement demands that the organization uphold its version of the clause and goes to court. The successor owner's attorney demands and receives through discovery the land trust's entire project file, including all drafts of the easement. Because the land trust keeps everything, it still possesses every draft of this conservation easement, all e-mails and all correspondence with the landowner and her attorney about this clause. The land trust spends hundreds of dollars and hours of time to copy and deliver the files to the opposing attorney.

The reserved right clause was contentious and highly negotiated during the creation of the conservation easement. The land trust and landowner spent months and completed eight drafts of the easement before agreeing on the

final wording of the clause. The seventh draft included a version of the clause that supports the successor owner's interpretation. The opposing attorney proceeds to use the different drafts against the land trust to show the various ways the clause could be interpreted, to suggest that the land trust made a drafting mistake, to suggest that the land trust defrauded the prior owner by taking unfair advantage and any other legal point he can dream up using the land trust's own drafts as ammunition. If the Dickson Mountain Land Trust's records policy called for the destruction of drafts, the parties would have to address the clause as written. The land trust's discovery expenses would have been significantly less, and the opposing attorney would not possess extraneous material that he could use to promote his client's erroneous perspective on the meaning of the clause in the easement.

A Cautionary Note: A View of Land Trust Records from the Other Side

When your land trust decides that it must pursue a judicial remedy for an easement violation, or when someone files a court case against your land trust, the opposing parties will have access to the land trust's files through discovery. As a result, your land trust should consider how your files might be used against you.

- A clever note written on the margin of an internal memo may look simply foolish or worse later
- An unsubstantiated opinion of a monitor on a monitoring report form may cause credibility problems if it is later contradicted
- Multiple records on the same topic may end up being contradictory and cause a land trust problems

Some attorneys caution a land trust to keep only those documents and records that are absolutely essential—rather than keeping as much information as possible in case it might be useful.

Similarly, experts encourage land trusts to construct policies and procedures that a land trust has the capacity to implement. Policies and procedures that are adopted by a land trust, but are not followed, may be used as evidence that the land trust is not a credible organization. Just as keeping too much information costs your organization, keeping too little information, the wrong information or keeping the information in a manner that is not credible can cost your land trust.

Attorney Jessica Jay in Colorado advises land trusts to choose a policy and business practice and apply them consistently: "If your land trust is in litigation, courts and opposing counsel will scrutinize your documents as well as the consistency of application and adherence to your policies and practices."

How will your records hold up under such scrutiny?

Determining What Records to Keep

Is it good business practice to retain all those scraps of paper, voicemails, e-mails and other items related to the conservation easement to document the donor's intent, state of mind and the course of the easement's negotiation? When evaluating what records to keep and what to destroy, some questions to ask include:

- Will the record be critical in resolving an ambiguity in the executed conservation easement?
- Will it be critical to the land trust in understanding the intent of the original landowner and easement drafter and the context of the transaction?

All land trusts should strive to ensure that the intent, purpose and context of the easement transaction are clearly reflected in the conservation easement itself (through the recitals and purposes clause) and in the baseline documentation report (through a description of the history or background of the project), but, if not, other documents that reflect these important matters should be retained. Any retained document, however, must not create new ambiguities or cloud the issues.

Keep only those records that the court will find helpful to resolve an ambiguity in the executed conservation easement or will be critical to the land trust in understanding the intent of the original landowner and easement drafter and the context of the transaction.

Current easement drafting standards have eliminated the need for most extraneous supporting documentation. Attorney Karin Marchetti Ponte, general counsel for the Maine Coast Heritage Trust, encourages land trusts to draft easements that will stand on their own without reference to external records of the land's condition. However, she emphasizes that "there will always be situations that will rely on land trusts' records." Unfortunately, many older easements were not drafted to current standards. As a result, many land trusts should maintain extraneous records to support documents with deficiencies or ambiguities. For example, if easement negotiations have been particularly difficult or if you anticipate a challenge to the validity of the easement from the heirs of the original grantor, you may want to keep

certain documents, such as letters or other correspondence from the grantor or the grantor's representatives, expressing the grantor's intent to convey a perpetual easement protecting certain values, or evidence of competency. Remember to keep only correspondence that shows a clear intent and contains unambiguous statements. Anything else may be damaging to the land trust's interests in court.

Creating a Records Retention Schedule

Assign a work team to inventory all the various types of documents now contained in your land trust's easement files. Each file will contain similar documents, such as conservation easement drafts, correspondence, budgets, board resolutions and so forth. Create an alphabetical list of all the document titles — not a list of every document, but of every document *type*. Then sit down with your attorney, board chair, executive director, stewardship director and financial officer to decide what to keep, for how long and why.

Records Retention Principles

Choosing which records should be retained by a land trust may seem self-evident, but sometimes the decisions about what records to keep and what records can either immediately or eventually be destroyed can be difficult. Before your land trust decides what documents can be purged, it must first determine what records are essential to its operations and the defense of each easement transaction. Some generally accepted record retention principles include:

Destroy drafts and duplicates. This recommendation includes drafts of the conservation easement, the baseline documentation report, maps, preliminary appraisals and any other draft document. All final agreements should be contained in the final executed documents. A draft document that shows the course of negotiation is rarely helpful, and often damaging, because it introduces doubt and ambiguity.

Destroy transmittal letters, scraps of paper with notes, jottings, partial thoughts, cryptic phone or e-mail messages and similar records that are not clear and unambiguous. If the notes are not helpful, clear and concise, destroy them. Remember, people deciding a court case or IRS agents auditing your land trust are all strangers to the transaction. They will scrutinize the records from their own perspectives, not yours.

Identify records accurately. A record is something that your land trust needs to keep for a set period of time for regulatory, legal or business reasons. Some land trusts use a spreadsheet to keep track of where and in what medium information is stored.

Ensure records management is supported and followed by everyone in the organization. Your land trust should have a reasonable policy that your board, volunteers and staff can follow. If your organization's retention guidelines are not workable, land trust personnel, whether staff or volunteer, will not bother to maintain the system. It is better to have a simple policy that your land trust can follow than a complex one it cannot.

The conservation easement itself may be the most important document in an easement project file, but it may also be the one most easily replaced by obtaining a copy from the official land records. In contrast, a letter sent to a landowner noting an easement violation may be impossible to reproduce if the land trust has not kept a copy in its file. Some records can be found elsewhere (such as in the land records), so consider that keeping all recorded copies of deeds from the title examination may not be necessary. Before destroying any documents, though, your land trust should ask how much inconvenience such action may cause for land trust personnel, whether staff or volunteer, should they have to retrieve those records later, and ask your attorney what legal nightmares you can avoid by keeping particular documents.

Essential, Clear and Unambiguous Records

A critical first step in making recordkeeping decisions and establishing recordkeeping procedures is to implement a system that will help your land trust determine what documents are essential, clear and unambiguous and thus necessary for your land trust to retain. Your attorney should help you understand the laws of your state regarding evidence and issues likely to arise in court to help your land trust with this critical records evaluation.

Records that are unambiguous are clear, concise and complete on the face of the document without interpretation, implied meaning or special knowledge. An unambiguous document will not be open to different meanings by different, reasonable people. For example, the phrase "a small house" can mean different sizes to different, reason-

If essential records can always be secured from an outside source, such as documents recorded in the land records office, a land trust does not necessarily have to keep such documents as part of its recordkeeping system. Conservation easements are an exception and should be kept.

able people depending on life experience and income. To a wealthy person, a "small house" might be a house 5,000 square feet in size. To a middle-income family, a "small house" might be 1,500 square feet, and to an urbanite, it might be 1,000 square feet. Therefore, the phrase "small house" would fail the ambiguity test, while the phrase "a house measuring 2,000 square feet in footprint, as measured according to its exterior dimensions, excluding attached decks, porches and breezeways" would pass.

In determining what clear, unambiguous and essential documents your land trust should retain in its easement files, consider those materials that address these legal points:

1. Original easement grantor's intent
2. Funder's intent or requirements (for purchased easements)
3. Land trust's intent
4. Original grantor's mental capacity to comprehend what he or she signed
5. Original grantor's representation by independent legal counsel and advice from a financial expert
6. Evidence that the land trust dealt with the original grantor in an ethical, honest and open manner (may be necessary to address potential claims of fraud or misrepresentation)
7. Land trust's legal obligation to uphold the conservation easement in perpetuity as required by IRC Section 170(h)

The first three items are usually addressed in the conservation easement itself and in the baseline documentation report and easement map. Funding requirements are often addressed through a memorandum of understanding, funding contract or letter of agreement. The fourth item is usually addressed (depending on your state's laws) by having a witness and notary testify to the capacity of the easement grantor, so no additional documentation may be necessary. As a rule, a separate document does not help prove mental capacity, but if you have a particularly old or infirm landowner, then your land trust may want to take extraordinary steps, in consultation with legal counsel, to address this issue (for example, videotaping the landowner articulating his or her intent to protect the property with a conservation easement).

Item 5 may be documented by a simple letter signed by the original landowner, or by a copy of a letter from the landowner's advisor(s).

Some land trusts include this representation by the landowner in the baseline documentation report signature page or in the conservation easement recital clauses. At a minimum, the project file should include a letter from the land trust to the landowner, recommending that he or she obtain independent legal and tax advice. For tax deductible easements, this letter should also notify the donor that the project must meet the requirements of IRC Section 170(h) and the accompanying Treasury Department regulations and inform the donor of the IRC appraisal requirements.

Addressing item 6 may be more difficult. Here you need to anticipate litigation and think about what risks are inherent in this particular transaction. Was it highly negotiated? Were the owners motivated almost exclusively by financial interests? Were the heirs involved and supportive or hostile to the grant of a conservation easement on land they stood to inherit? Are you confident the landowners understood what they were doing? Were there serious points of contention in the easement negotiations? The answers to these questions may require the land trust to obtain and keep additional documentation.

Item 7 concerns the future enforceability of the conservation easement and the documents needed to demonstrate that the land trust is fulfilling its legal obligations. In addition to keeping annual monitoring reports, photos and related data, reserved right and other approvals, interpretation letters, amendments and violation resolution documents, a land trust's completed Form 990 will also contain information relating to its fulfillment of its obligations with respect to tax deductible easements.

The IRS Form 990 now requires information on how land trusts fulfill their stewardship obligations.

For more assistance in determining what records your land trust must keep and examples of what other land trusts have done, see the Sample Documents beginning on page 105.

Records Retention Decision Tree

The following questions may help your land trust evaluate whether a document is essential. While not necessarily specific to your land trust, they can assist you and your attorney in constructing the right questions to determine if a record should be retained and for how long.

1. Does the law require that the record be retained for a period of years (for example, contracts must be kept for seven years

in some states; IRS forms and related documentation [Forms 8283, 8282, 990, appraisals, discharges of tax liens and so forth] should also be kept for seven years). If yes, keep the record for those years plus one year. If no, go to the next question.

2. Is it a record that will help the land trust administer the conservation easement (for example, appraisals to determine the condemnation percentage in case of a public taking)? If yes, then retain the record forever. If no or not sure, go to the next question.
3. Is the record *not* available from the land records (title clearing documents, for example)? If no, then go to the next question; if yes, keep it. The one exception to this rule is the actual conservation easement deed because, as a practical matter, it is your central document. As a legal matter, you can obtain a certified copy from the land records to admit in court.
4. Is the record a basic document that you will need forever, such as the conservation easement, the baseline documentation report or map, annual monitoring reports, amendments, supplements to the baseline or violation resolutions? If yes, keep it forever. If no, go to the next question.
5. Does the record address a core element of the conservation easement (for example, a no-subdivision clause that was highly negotiated and central to the land's conservation, such as in *MET v. Gaynor*, the case study that follows). If yes, then retain it forever. If no, go to the next question.
6. Does the record expressly, clearly and unambiguously address the intent of the original conservation easement grantor in a way not documented in the conservation easement or baseline documentation report (for example, the signer writes a letter clearly and unambiguously stating that she donated the conservation easement expressly for the purpose of making sure that no more houses were ever built on the land)? If yes, then retain it forever. If no, go to the next question.
7. Can anyone articulate a clear detailed example of a situation in which the document would be essential to prove a point in court not covered by the conservation easement or baseline documentation report? Fear is insufficient here. If in doubt, check with your attorney, and throw the document out if it is anything less than overwhelmingly helpful. (For example, The Trustees of Reservations in Massachusetts recently used a detailed written chronology of the negotiation and sign-

Proper record destruction maintains confidentiality.

ing of a conservation easement to stop an heir of the original easement grantor from claiming that the Trustees fraudulently induced the then-older woman to sign something she did not understand. In the detailed chronology, several points were clear and unambiguous that the woman had legal and financial counsel, understood what she was doing and did it intentionally. This document prevented litigation.) If yes, then retain it forever. If no, go to the next question.

8. Could the document in any way be construed against the land trust and potentially damage the land trust or the conservation easement (for example, internal memos or other communications that slight the grantor or the grantor's family)? If yes, throw it out. If no or unsure, then go to the next question.
9. Is it a financial record? If yes, financial records are usually kept for seven years. If no, go to the next question.
10. Is it a corporate or administrative record, such as bylaws, annual reports, newsletters, incorporation records, board minutes and resolutions, secretary of state filings and so forth? If yes, keep forever. If no, go to the next question.
11. Is the record an organizational policy or procedure? If yes, keep for as long as it is current. If no, go to the next question.
12. Is it a court order or other violation resolution? If yes, keep forever. If no, go to the next question.
13. Is it a management plan? If yes, keep until you receive a full replacement update. If only partial updates, then keep the original plan. If no, go to the next question.
14. Is it an unexercised option to purchase, a right of first refusal or some other contingent interest in real estate? If yes, keep for the term of the interest or forever. If no, go to the next question.
15. Is it a government permit or approval? If yes, keep forever. If no, go to the next question.
16. Is it a survey or map? If yes, keep forever. If no, go to the next question.
17. Is it a title certificate, opinion, policy or similar title document? If yes, keep forever. If no, go to the next question.
18. Is the record essential, clear and unambiguous correspondence, e-mail or phone message regarding the original grantor's intent, representation or competency? If yes, keep forever. If no, go to the next question.
19. Is the record essential, clear and unambiguous correspondence, e-mail or phone message regarding a violation or

Land trusts should shred and properly dispose of purged documents.

Recordkeeping practices are essentially risk assessment and management.

violation resolution, the exercise of a reserved right or an interpretation of the conservation easement? If yes, keep forever.

If you have made it through to the last question and you answer "no" to that question, then shred the document. If you are unsure, consult your attorney. You can also tag unsure documents for review at two years and eight years. If after that time, you still feel they do not meet any of the criteria and your attorney does not feel they are essential, then shred them.

Maryland Environmental Trust v. Gaynor

This case study can be completed in a training or self-study program. This case study shows the importance of good recordkeeping practices, including keeping materials that are clear and unambiguous, to the perpetuity of an easement.

Read the case study and answer the questions below. Guidance on the answers follows.

In 2000, the Maryland Environmental Trust was sued by a landowner claiming that MET did not explicitly state that it would accept a conservation easement from the landowner without a no-subdivision clause. The Gaynors claimed that MET fraudulently induced them into signing the conservation easement with a no-subdivision clause by not telling them explicitly that the board would take the easement without it. In this case, a letter kept in the MET files allowed the land trust to prevail against the Gaynors' demand to extinguish the easement.

The Gaynors originally sought out MET to conserve their 25-acre parcel. However, MET's project selection criteria usually required a minimum of 50 acres, so the project did not qualify on its own. The Gaynors then sought the participation of their neighbors to meet the 50-acre minimum. Each conservation easement was separately negotiated.

On one of the neighboring easements, MET required a no-subdivision clause, but on the others the clause was a request, rather than a requirement. The MET board voted on the package of conservation easement projects with direction to staff to implement the board's action. Staff wrote a letter to the Gaynors, which MET kept in its files, stating that the board "wanted" the no-subdivision restriction and "felt strongly about it." The Gaynors assumed this statement meant the no-subdivision clause was a requirement and they did not inquire further. However, on one property on which the landowner objected to the clause, MET agreed to accept a conservation easement without the no-subdivision language. This property happened to be next door to the Gaynors, and the permitted site for the subdivision and second house happened to be directly in the Gaynors' view.

Eleven years after the easements were accepted, MET reviewed and approved the house site and subdivision on the property adjacent to the Gaynors. The land trust reviewed the proposal strictly from a natural resource and mission perspective without anticipating how the subdivision and new house site might affect neighbors.

When the house was built, the Gaynors took MET to court claiming that they were defrauded and, therefore, the easement affecting their property should be extinguished. Interestingly, Mr. Gaynor was a trustee of MET at the time of the lawsuit.

Two lower courts found that MET's failure to expressly state the board's vote on the no-subdivision clause had the effect of defrauding the Gaynors; although one lower court judge dissented, stating that the letter precisely conveyed the board's meaning. The Supreme Court of Maryland, however, ruled in MET's favor, stating that the facts were legally insufficient to support a finding that MET made false or misleading representations that constituted fraud or fraudulent inducement. The court further found that the letter made clear by its plain language that MET requested the clause, not required it. The court found that MET had no duty to state explicitly that the board would accept the conservation easement without the clause.

Questions

1. Why do you think MET keep a copy of the letter it sent to the Gaynors?

2. What lessons can be learned from MET's experience?

Guidance

1. In applying its document retention procedures, MET determined that the letter was crucial to understanding the conservation easement and administering it over time and helped clarify a provision in the easement that was highly negotiated. The letter conveyed the board's request for certain provisions in the final conservation easement and helped provide background for understanding the differences between this easement and the easement associated with the neighborhood block of easements assembled by the Gaynors.

2. Clear communication about a land trust's selection criteria, easement standards and protection goals, as well as consistency in applying them, may have helped avoid the lawsuit while still achieving the land trust's goals for conservation. Land trusts should consider examining the effect of their approval of new building sites on adjacent landowners; the Gaynors' reaction to the loss of their views by virtue of the land trust's actions is not unique.

Final Thoughts on *Maryland Environmental Trust v. Gaynor*

This lawsuit was a long, expensive road for MET. The result demonstrated that courts can have different views of the law and may apply the law differently, depending on their view of the equities of the situation. Sometimes no amount of evidence will overcome a court's bias for one side. Such bias is evident in this example, where, despite an unambiguous letter, two lower courts felt that the destruction of the Gaynors' view by the land trust's approval of a new home on an adjacent protected parcel warranted redress. MET kept the letter because the provisions of the conservation easement were highly negotiated, and the statements in the letter were clear, unambiguous and addressed central conservation values. Retaining the letter helped MET finally win in the Supreme Court, but the lower courts' interpretation of the letter hurt the organization earlier by implying the land trust misled the landowners.

Litigation can arise at any point and often because of an economic factor not apparent to the land trust at the time of the property's conservation. Obviously the Gaynors were upset about the new house blocking their view when they assumed that all neighboring parcels would remain the same. To anticipate and possibly avoid this kind of problem, land trust personnel, whether staff or volunteer, should look beyond an individual parcel and consider the effect on neighbors.

People close to the Gaynor transaction and subsequent litigation feel that this litigation was both unavoidable and surprising. The landowner became angry over a decade after the transaction and had the resources to vent his antagonism on the land trust. This type of litigation may be unpredictable for land trusts. It is also an example of how retaining records that clearly and unambiguously show intent was critical to the land trust.

Document Management

Labeling Records

Another essential part of any records procedure is determining how your land trust creates and labels its records. Your land trust's naming and numbering system should be used for all paper and electronic records, as well as databases, so you can access all records systems consistently and rapidly. If your land trust faithfully follows it naming and numbering system, it can improve its stewardship efforts significantly.

Label your materials! It may seem obvious that a photograph is of Samantha Yoder's northwest field last summer, but it may not be obvious to the stewardship director 100 years from now. If you find the field paved over during a yearly monitoring visit, the best way to prove its former condition is an authenticated photograph and written description. From a legal defense viewpoint, accurate identification of records and the data they contain is critical. Proper labeling will also save time (and money). For example, labeling your backup electronic storage files with the general contents and date will relieve you (or your successor) of hours reading the contents of electronic storage files.

Many land trusts use databases to manage their stewardship obligations. As the complexity of databases increases, so does the need to clearly identify everything in the databases. A good naming convention makes that task possible. Following the guidelines below will help when naming documents, files and database tables:

- Keep names simple, but with enough information to distinguish the file from others with the same or similar name.
- If you use the names of landowners, consider how you will adapt the system when landownership changes. Is it important that the file names and database reflect current ownership? Or would you prefer the original landowner's name to be the identifier for that file forever?
- Think about how you use the files and refer to them in conversation, and use those names.
- For databases, delete spaces in names.
- Eliminate symbols (for example, ♣ or ¥).
- Eliminate reserved keywords such as "date," "text," "time."
- Use descriptive names.
- Capitalize the first letter of each word (compare the

readability of "StwCurrentLandownerNames" with "stwcurrentlandownernames").
- If your land trust works in more than one town, include the town's name.
- If your land trust works in more than one state, include the state's name.
- If you use numbers, be sure to give yourself enough digits so you can expand.
- Numbers usually are not intuitive and are easily transposed, so you will need a system to make numbers user friendly.

Every project file should have a unique identifying name and/or number.

Your records policy and procedures should address protocols for document creation and identification.

Paper document protocols might address:

- Handling copies versus originals
- Naming files
- Labeling documents
- Ensuring consistency with organization computer files
- Identifying author
- Dating all records and files
- Securing papers within a file

Computer protocols might address:

- Naming and labeling files and folders
- Ensuring consistency with organization paper files
- Identifying author
- Dating all documents (beware of the automatic date function)
- Eliminating the visibility of "changes" or "comments" that may have been tracked while a document went through various drafts

The purpose of developing a system of naming records is to ensure consistency and to minimize opportunities for misplacing or omitting data. Name records in a way that makes sense to users of the system and for the long term. Your land trust will need to decide for itself how deep into the electronic system you wish to carry naming protocols. If you have multiple users, having rigid naming protocols for all levels of work may be counterproductive. On the other hand, for essential documents and for entry points into files and databases, you should have consistent protocols or the systems will not function.

Land trusts should identify all projects in a manner that will allow the organization to track conservation easement projects into perpetuity, recognizing the following:

- Properties will have new landowners
- Some easement-protected land may be divided into multiple parcels with different owners
- The land trust may need to transfer its conservation easements to another organization
- Easement-protected land may be merged into other conserved land or may be divided and part of the land merged with another conserved parcel
- The land trust may amend its conservation easements, or actions by government jurisdictions may alter easements (such as eminent domain)

Each project file should have a unique name (and/or number). Many land trusts like to use that same name on all correspondence and documents. This practice can help keep files in order. How far you go is for your land trust to decide. It is not essential to name absolutely everything, so long as you have a system sufficient to ensure that documents you have identified as essential are kept in the correct file. Once your land trust decides upon its naming protocol, you should also use that name in all databases and electronic and paper file systems.

Example

Recordkeeping Naming Conventions: Two Strategies

Strategy 1

The Vermont Land Trust (VLT) uses numbers and names to identify projects for its databases and electronic and paper file systems, but it does not name and number every single document or record. The organization uses a unique identifying number on its essential documents that it keeps forever according to its retention policy and uses the unique identifier in its tracking databases. The land trust uses the following naming convention for its conservation easement projects:

- File numbers are assigned sequentially; they have no meaning other than to identify the project. To ensure there are enough numbers to identify all existing and future projects, the land trust uses a six-digit identifier, such as 400080.
- Suffix identifiers designate different parcels of land comprising the

project; -00 identifies the first parcel. So building on the above example, the ID becomes 400080-00. The land trust follows this practice because the organization often has multiple parcels within one project.

- The land trust then adds a two-digit suffix to identify any subdivision of the parcel. The suffix "-00" indicates a parcel that has not been subdivided. If, in the example, the first parcel is divided, the full number of the parcel would be 400080-00-01.
- The file name begins with the town where the property is located. Sometimes VLT uses the county if the property encompasses more than three towns. If the property is located in two or more towns, the town name where the most acres are located is used. So, if a property is located in Springfield, the file name starts with "Springfield."
- Following the town name, the land trust includes the name of the *original* easement grantor, such as "Yoder." The original grantor's name remains as the permanent file name of the project regardless of the names of successor owners.
- If the property has changed hands, the current landowner's name appears next in parentheses, for example, 400080-00-01 Springfield-Yoder (Luke).

More than 41 percent of VLT's conservation easement properties are no longer owned by the original easement grantor. Some of the successor owners are sixth- and seventh-generation owners; however, VLT has not experienced any significant trouble managing the turnover with its naming system. The multiple reference system allows the land trust to search for properties by town name, by original grantor name, by current owner name and by number. As a result, whenever someone calls with only one piece of information, the land trust can query its database and locate the correct file.

Strategy 2

The Minnesota Land Trust, an accredited land trust, uses the following system: as projects are completed, the land trust assigns formal project file ID numbers. Project ID numbers do not change except when tracts are divided. The land trust also identifies conservation projects by site name and original easement grantor. The site name generally reflects a geographic or ecological location or other commonly known features of the land. The land trust assigns site names to a project at its inception and before the project goes to the land trust board for approval. Generally, once assigned, site names will not change. The easement grantor's name follows the site name in parentheses. Project ID numbers are assigned chronologically as projects are completed and indicate the year of completion and the sequential number of the next completed project.

- Rum River (Jensen) 1999-139
- Fish Lake (Gould) 1999-140

Once assigned, the land trust labels the file folders and writes the name/number in pencil on the recorded easement. When permitted subdivisions of original tracts occur, the new parcels retain their original name but receive a new file number with an alphabetical identifier. A portion of the original tract is designated "A" and the other portions are alphabetically identified as they are created.

- Original tract = Rum River (Jensen) 1999-139
- Original tract is divided into two parcels:
- Rum River (Jensen) 1999-139A (the portion remaining in the original ownership) and
- Rum River (Jensen) 1999-139B (the portion in new ownership)

At what stage of project development a land trust names/numbers its paper and electronic files and databases is also an important consideration. Some land trusts assign a name and number immediately upon the project's inception. This system allows a land trust to track projects through their entire life cycle (including those projects that are never completed). Other land trusts wait until projects are completed to assign names/numbers, at which time they receive a formal project file identification number. This system prevents the land trust from assigning numbers to projects that are never completed. The Minnesota Land Trust assigns project identification numbers chronologically as projects are completed. Prior to closing, projects are tracked by file name (site name plus landowner name) only. How project files are named before and after the project's completion is an important consideration because it affects the tracking systems and procedures, as well as the ability to locate records years later.

It is important to determine when the project file will be named and numbered — at the beginning of the project or after closing.

Maintaining Records

For a records system to succeed over the long term, land trusts must ensure that staff, volunteers and board members are all committed to maintaining the records system. Records maintenance is the manner of treating, handling and controlling records. No matter what storage system you choose, your land trust will always have to update records while at the same time ensuring that its system is perpetually accessible, stable, safe and secure. Recordkeeping responsibilities

must be assigned to appropriate land trust personnel, whether staff or volunteer, and the land trust's records policy and procedures should reflect who in the organization is responsible for recordkeeping and record destruction. For more on recordkeeping responsibilities, see volume two of the Land Trust Alliance course "Nonprofit Law and Recordkeeping for Land Trusts."

Permanent Files and Safe Storage

A land trust's permanent file includes those records that constitute the essential and irreplaceable record of a transaction and any subsequent activity related to that project that your land trust needs to keep forever. These documents include easement monitoring reports, approval and enforcement records as well as records of the initial transaction. Permanent files must be reasonably protected from fire, flood and other natural disasters and from mishandling or tampering by individuals or destruction by pests. Ensuring that permanent files are properly managed when removed from their secure location is critical to preventing loss or damage.

There are several different options for securely storing your land trust's easement files, including:

Fireproof file cabinet in an office. At a minimum, permanent files should be protected from fire and other disasters. Many small land trusts store their permanent files in a fireproof file cabinet in the land trust office. When choosing this option, though, a land trust must realize that "fireproof" cabinets have limits on their ability to protect their contents. Usually, these cabinets are rated for only two hours, and sometimes less, especially in extremely hot fires. Also, fireproof cabinets do not necessarily protect from water damage that may occur when firefighters extinguish a fire. While a useful option, they do not guarantee records safety and you should consider these limitations in your risk analysis. If you choose this option, a duplicate set of essential records should be stored at a separate location.

Do not store permanent files — even temporarily — in personal residences.

Land trusts that do not have an office need to find a secure location to store their permanent files. As tempting as it may be, permanent files should never be stored in personal residences. Residences are not secure storage sites. Storing records in someone's home means that they may be inaccessible to land trust personnel, whether staff or volunteer, on a timely basis. As volunteers change or move on, records stored in their homes may be forgotten or lost. A disgruntled volunteer could also

intentionally destroy critical records or fail to turn them over to his or her successor. For example, the founder of one East Coast land trust kept all the land trust records in the back of her car. Eventually, the land trust experienced a major violation of one of its easements and litigation ensued. The land trust board felt that it was time to hire staff and asked the founder to relinquish control of the organization as well as possession of the files. Unfortunately, the founder was reluctant to follow the board's directive. It took years for the land trust to obtain all the records from the founder. Other land trusts discovered they lost entire boxes of important files from volunteers' homes only when those files were needed urgently, at which point the land trusts realized it was too late to retrieve them. This situation is not simply inconvenient but a crisis! The loss of these files damaged these land trusts' ability to uphold their conservation easements.

Fireproof file cabinet in another location. Some land trusts keep their permanent files in a fireproof file cabinet in a separate location from the land trust office, such as an attorney's office (used by some groups in Colorado) or town hall (used by the Harding Land Trust in New Jersey and the Greensboro Land Trust in Vermont).

Safe-deposit box. Some land trusts choose to keep their permanent files in a bank safe-deposit box (used by some groups in Montana, for example). Size and expense may limit this option to only a few records, but it is a good choice for a land trust with few records.

Formal archive facility. Several land trusts choose the convenience and safety of a formal archival facility (used by the Columbia Land Conservancy in New York). This option is more expensive than others but may be a good choice if your land trust relies entirely on paper records and does not use digital records as backup. A formal archive facility implements important measures to preserve documents as long as possible (such as maintaining certain levels of humidity or restricting light).

Digital systems. Land trusts are increasingly digitizing information and documents and implementing a variety of systems to protect that data, such as using off-site storage for discs or drives or backup data or even online backup systems. The advent of large megabyte flash drives and portable free-standing plug-in disc drives gives land trusts a wide variety of secure, movable storage options. Even with a digital system, remember that your land trust will need to keep some original paper documents permanently that will require safe, off-site storage.

Combination system. Several land trusts use a combination of paper and electronic storage. They store all irretrievable and essential permanent records in an electronic document system that is backed up and stored off-site. This system is also easily accessible to staff and volunteers but tamperproof because the documents are scanned into the system. Land trusts using this storage method should also ensure that paper documents are stored off-site in a secure location.

Storage units. Some land trusts store their records off-site in file cabinets stored in storage units that are protected from fire, restrict light and pest damage and, if elevated, are safe from flooding. These facilities have security systems to guard against tampering.

Example

Pines and Prairies Land Trust: A Success Story

The Pines and Prairies Land Trust, founded in 2001, holds two conservation easements and owns three properties in Central Texas as of 2007. The land trust's service area covers four counties. In 2003, it hired one of its founders as its first executive director.

When PPLT decided to hire its first staff member, the board realized that, as a volunteer organization, its records were in jeopardy because they were scattered around in many people's homes, and no one knew what anyone else had in storage. Near this time, PPLT also lost its first treasurer, and many of the organization's financial records were lost, too. Recognizing that recordkeeping would be critical to PPLT's future success, the organization made the commitment to consolidate all of its paper records and back them up with digital copies.

Once they established an office, board members gathered all the unique paper records from people's homes and developed a hard-copy filing system and a linked digital record system. All the PPLT's records are currently kept in a digital format that is backed up regularly. PPLT keeps its core original documents in a safe-deposit box donated to the organization by a supportive local bank. PPLT feels this combined system is essential to safe recordkeeping.

Threats

The list of threats to records may seem endless, but for each land trust some threats will be more likely than others. Your land trust should tailor its records policy to address the most likely threats facing its permanent files. For example, earthquakes are a concern in California,

but not in many other areas of the country. Hurricanes are of concern in the Southeast, and ice damage in the Northeast. Floods can occur almost anywhere. Use local government maps to identify the location of federal flood zones and avoid storing your records in those areas. Urban areas may be more prone to human tampering and rural areas may be more prone to pest damage. A land trust in a modern office with a firefighting sprinkler system may be more concerned about water damage than fire. Alternatively, fire may be more of a concern for land trusts with offices in an old house. Fire, insects, mold, dust, wear or tampering are common threats across the country. Identify and assess the potential risks for your land trust, the likelihood of their occurrence and your organization's tolerance for risk. Then develop a records policy to address your particular situation. You should reevaluate threats and your organization's risk tolerance periodically.

Copies

For day-to-day use, land trust staff or volunteers should have copies of the permanent records, whether paper or electronic, for conducting land trust work. This practice preserves the permanent records from unnecessary handling, damage and loss, and allows daily use of the copies. Your land trust's records policy should address proper use of copies and preserving the confidentiality of any information reflected in such documents.

A land trust will need different numbers of copies for different types of documents. For example, for easement stewardship, some land trusts keep three sets of all relevant documents: one for the office staff, one to take in the field and one constituting the permanent file that is kept in a separate location.

At a minimum, land trust personnel, both staff and volunteer, should update the field and office copies annually at the time of the annual monitoring visit. It may be more efficient to add copies to the field and office folders at the same time that the final record is archived — when you issue the approval, resolve the violation, interpret a clause or receive a notice from a landowner.

You should also check the archive records prior to starting an amendment, when investigating a violation and before issuing an approval to ensure that you are working from the most current information.

You should check the archive records prior to starting an amendment, when investigating a violation and before issuing an approval to ensure that you are working from the most current information.

Retrieving Documents

Documents need to be safe and secure, but they must also be accessible to the land trust. Some land trusts believe their permanent records should be locked and accessible only to the custodian of records. This practice allows the custodian of records to testify in court, if necessary, that the records are managed to prevent tampering. Other land trusts feel that this policy is unnecessarily rigid and wastes too much organizational time given the low likelihood of this risk. Whatever system you choose, remember that the need for access can often be in opposition to the need for confidentiality or security. It is more difficult for larger land trusts to balance these competing concerns, because large land trusts have greater numbers of staff who need access to the organization's data. Internal computer networks and external websites can make access to records easier, but they require additional attention to security and confidentiality.

Some land trusts have a designated records manager who takes care of storage and retrieval according to the organization's board-approved retrieval policy. Smaller land trusts may assign this task to the person responsible for records management and then monitor the work so that it does not become an overwhelming task for one person.

The Nature Conservancy adopted a formal policy for retrieving records due to the complexity of records management for a large, multinational organization. TNC's policy on retrieving records provides that:

> Records may be retrieved from off-site storage once a week through the Records Manager. Emergency requests may be made, and in these cases the cost of retrieval will be borne by the requestor. Keep in mind that even on weekly retrieval the Conservancy is charged for each request so it is important to plan accordingly. To retrieve records, complete the Record Management Request Form, available from the Office Services file cabinet. Indicate in the space provided on the form when the box will be returned to storage. Since the Conservancy is continually charged for box space even if the box is temporarily removed, boxes that will be kept on-site for more than one month should be removed from the storage listing. When the box is ready to be returned to storage, complete a new storage request form. For records that will be kept on-site for less than one month, it is not necessary to complete a new form and the box may be returned directly to the Records Manager.

The principles underlying TNC's records retrieval policy highlight important issues that are relevant to land trusts of all sizes.

Cost is a factor if you use a professional storage facility, so take that into account when devising your land trust records storage system. Records management is a series of tradeoffs in assessing risk and capacity; therefore, your land trust needs to consider costs as well as access and security.

Every land trust should designate one person who is responsible for records management.

Designate a records manager. Regardless of the size of the land trust, one person should be responsible for keeping the organization's documents organized. Too often organizations implement a system, only to have it deteriorate because no one was responsible for keeping track of who took what document and where it was taken.

Create a tracking system for checking out permanent stored files, and make sure the records manager follows up on documents removed from storage. This system must be managed in a way that is reasonable for your land trust.

Staff and volunteers will need to have emergency access to records on occasion. Agree on what constitutes an emergency so that people plan ahead to the fullest extent possible.

Finally, think about the length of time you want permanent records to be out of storage. The point of keeping permanent records off-site is to keep them safe. If you think you will need them longer than a day or two, then have the records manager copy or scan the documents you need and return the permanent records to off-site storage promptly.

Consider taking samples of your conservation easements, baseline documentation report, monitoring reports, maps, photos and approval letters to a litigator for a full review with an eye toward admissibility and credibility. He or she should also review your tracking, storage and management systems, both electronic and paper.

Managing Records for Litigation

Most conservation easements created in the United States are written to be perpetual in duration. Upholding this promise of perpetuity means land trusts must prepare for the future so that their successors have the tools they need to enforce or defend the conservation easements in court. All land trusts should manage their records so that they can minimize an opposing attorney's challenges to their documents' admissibility as evidence in future legal proceedings. Consider taking samples of your conservation easements, baseline documentation report, monitoring reports, maps, photos and approval letters to a litigator for a full review with an eye toward admissibility and

credibility. He or she should also review your tracking, storage and management systems, both electronic and paper.

In this section, we will discuss some basic rules of evidence that apply to the admission of documents most likely to be involved in conservation easement litigation. We will also review some best practices for records systems that are supportable in court and sustainable for the long-term. Federal rules of evidence apply, as well as individual state's evidentiary rules (which are modeled after the federal rules to some degree). You should work with your land trust's attorney to understand what state and local laws apply to conservation easement litigation and real estate transactions in your region.

Hearsay and Business Records Rules

Hearsay is like children playing the telephone game — the message (or evidence) gets more garbled as it passes from person to person. That is why courts do not generally admit it unless based on firsthand knowledge (with some extremely specific exceptions).

The business records rule is an exception to the "hearsay" rule. The hearsay rule regarding the admissibility of documentary evidence requires testimony from witnesses with direct knowledge of a document or the facts contained in a document, before the document can be admitted into evidence. If such a witness is not available, the document may be deemed inadmissible hearsay by a court, in which case the document cannot be used to assist in the enforcement of a conservation easement. Because conservation easements are written to last forever, at some point in time no one with direct knowledge of any of the facts or documents affecting a particular conservation project will still be alive and able to testify; therefore, to be able to enforce easements in perpetuity, land trusts must act to ensure that their permanent files will be admissible into evidence, regardless of when a court action involving a particular conservation easement arises.

The typical business records rule allows a document or record to be included in evidence in a judicial proceeding without direct testimony, but only under the following conditions:

- The record was created at or near the time that is the subject of the dispute (rather than later in anticipation of litigation)
- The record was created by someone with direct knowledge of the facts of the particular situation that is the subject of the record — or was created by someone who was given the information by someone knowledgeable

- The record was created and kept by the organization in the *ordinary course of regularly conducted business*

The reliability of a business record is based on the fact that the people who created the record are required by the land trust's policies to make accurate entries that the land trust then relies on in the ordinary and regular course of doing business. To satisfy this rule, the custodian of the records or other qualified witness must testify to the creation and recordkeeping activities of the land trust and that its records were regularly kept in the organization's ordinary course of business. To meet this standard, it will be critical to demonstrate that a land trust not only has a records policy that requires the creation, retention and safe storage of its records but also that the land trust consistently follows the policy.

To help ensure a baseline report meets the business records rule exception to the hearsay rule, the baseline narrative should emphasize the multiple uses of the baseline.

A record that the court views as having been made in anticipation of litigation may not be admitted into evidence under the business records exception. If the record was not prepared in the normal course of business, then a court is likely to see it as an opinion of a person made in anticipation of litigation and deny admission of the record. If it was made in the ordinary course of business and serves more purposes than anticipating litigation, the document is more likely to be admitted as evidence. Some litigators believe that baseline documentation reports may be questioned as a document designed exclusively for litigation. To help overcome this objection, land trusts should emphasize in the baseline narrative that the document has multiple uses for stewardship and for landowners. For more information on the multiple uses of baselines, see the Land Trust Alliance course "Conservation Easement Stewardship."

The business records rule covers only the admissibility of a record. It does not address its credibility.

The business records rule exception to the hearsay rule covers information in any form. For example, it covers individual reports or memoranda as well as compilations or databases. Business records for land trusts are anything that industry standards require. Industry standards for land trusts include IRS requirements and *Land Trust Standards and Practices*.

The business records rule covers only the admissibility of a record. It does not address its credibility. The credibility of the document will determine whether it is helpful or harmful to your land trust's position, so be sure to take steps to ensure that appropriate standards are adopted and implemented with respect to any of the records your land

trust prepares. A commitment to accuracy and completeness in records preparation makes documents, data, photos, maps and witnesses credible in court. If your land trust creates, manages and stores records in a way that they are protected from being manipulated or changed after everyone has accepted them, you have established credibility. Content is also critical to the issue of credibility, so the content of a document must be relevant to the issue at hand and must be as objective as possible. Accuracy is also critical to credibility. If documents appear to be inaccurate or incomplete, the credibility of the document will be damaged. For example, baseline documentation reports are often seen as critical records, both for understanding the condition of the land and the landowner's intent at the time of conservation, for assisting the landowner to understand the effect of the conservation easement on the land and potentially for comparing the state of the land before and after a violation. To be accurate and credible, the baseline documentation report must be complete with no missing information, blanks or serious errors in names or locations. It must be stored in a manner designed to protect it from changes or tampering. A land trust's policy must be to not change the original baseline. Supplements may be added, but the original must not change. The landowner should have a duplicate original for comparison purposes. Internal document checks, such as photograph numbers, table of contents and narrative, should all be internally consistent and complete.

Authentication

If your land trust ends up in court defending or enforcing a conservation easement, and your attorney needs to introduce a business record into evidence, someone from the land trust may need to authenticate the record. Authentication means that a knowledgeable person must testify that the land trust regularly maintains such records in the course of its business and the particular record in question came from the land trust files. A land trust representative will not need to have personal knowledge about the particular document being introduced, only about the business practice of keeping records.

A document may be authenticated by any of the following methods (not a complete list):

- Testimony of a witness with knowledge
- Proof of custody; for example, public records (including real estate records) are regularly authenticated simply by proof of custody

- Evidence that a document is at least 20 years old, is in such condition as to create no suspicion concerning its authenticity, and is in a place where it would likely be if authentic
- A date and signature of all parties

To ensure your land trust can take advantage of the business records rule exception to the hearsay rule, you should adopt and follow a thorough records policy, and it is also advisable to have important documents signed and dated, and have the signatures on the documents notarized or witnessed according to your state laws. Documents that have notarized signatures may be more readily admissible into evidence without personal testimony related to the document, an important consideration with respect to perpetual conservation easement enforcement and defense. Conservation easements are always signed and dated and the signatures notarized, but such practices are not always followed for other critical land trust records, such as baseline documentation reports, annual monitoring reports, maps and photographs. Land trusts should consider which documents should be signed and dated and which ones should be notarized as part of the organization's risk assessment in developing its records policy. For example, the Columbia Land Conservancy in New York authenticates its baseline reports by preparing a thorough list of all the contents of the baseline, including descriptions of all maps and photographs, and places this list on the same page as the certification statement signed by the landowner and land trust. The signatures of both parties to the baseline are then notarized. By this method, CLC hopes to authenticate the entire contents of its baseline reports.

The best way to balance litigation preparedness and land trust capacity is to be sensible, be prepared and avoid overreacting. If you have solid systems in place for all aspects of your conservation work, you can fulfill your land trust's obligation to uphold its conservation easements and prevent almost all litigation. While you should be reasonably prepared for litigation, do not let this threat drive your systems to the extent that you disable effective conservation work. You do not need (and cannot achieve) 100 percent perfection in all of your practices. You need an overall system that is solid and effective so that you are more likely than not to prevail in court. Following the suggestions contained in this and other Land Trust Alliance courses will go a long way to ensuring that your land trust's practices will withstand the challenges of time.

Essential Conservation Documents and Their Admissibility

A land trust will retain a number of documents in its post-closing stewardship files (see page 34), but the following documents are the most significant and require attention to ensure their future admissibility in the event of a court action to enforce or defend a conservation easement:

- Conservation easement and any subsequent amendments
- Baseline documentation report and any supplements
- Photographs
- Maps
- Annual monitoring reports

Admitting these documents into evidence in court may be critical to establishing the intent of the original grantor of the easement (key to any determination of the appropriateness of the land trust's actions relating to easement interpretation or defense), the condition of the land as of the date of the easement and the scope of reserved rights and prohibited uses.

Conservation Easement

The conservation easement and any subsequent amendments should be relatively easy to admit into evidence because they are always recorded in the public records for the community in which the land is located, and because recorded land records relating to real estate are a clear exception to the hearsay rule.

Baseline Documentation Report

Whether the baseline documentation report is recorded generally depends on the organization and region of the country in which the land trust operates. Many land record offices will not accept the baseline documentation report for recording even as an appendix to the conservation easement, particularly those that contain lengthy reports with photographs and maps. Some land record offices will accept these documents if they determine that the document directly affects title to the land, regardless of length or complexity of reproduction of photographs and maps. In other jurisdictions, baselines that contain maps or surveys cannot be recorded unless the maps/surveys were prepared by a state-licensed surveyor. This requirement ensures that multi-

ple, conflicting maps of a particular property cannot be recorded in public records, creating confusion and perhaps rendering a property unmarketable.

In addition, the baseline documentation report may have information that a landowner or land trust may not want to become public record, such as the location of endangered species or the presence of hazardous waste on the property. Maps may also show different acreages than the local taxing authority, which may adversely affect the landowner's real estate tax bill. Recording the baseline documentation report or map places it in the chain of title, which may affect a landowner's ability to sell his or her land or obtain financing and title insurance. Finally, baselines often contain personal information (such as photographs and house plans) that landowners do not want placed in the public records. The emphasis of baseline preparation should be to create a report that supports and explains the conservation easement, not to ensure the ability to record the baseline in the land records.

The business records rule exception to the hearsay rule should make it possible for the land trust to have a baseline documentation report admitted into evidence even when it is not recorded. If the baseline is prepared in the land trust's ordinary course of business according to its adopted policies, and if the landowner signed the document as an accurate representation of the condition of the land at the date of the easement and his signature is notarized, the document should be admissible under the business records rule exception (see discussion of the hearsay and business records rules on page 62). Also, the fact that the Internal Revenue Code and attendant Treasury Regulations under 1.170A-14(g)(5) require documentation of the property's condition at the time of closing for easement donations intended to qualify for federal tax benefits, and that *Land Trust Standards and Practices* require a baseline report for all easements, whether purchased or donated, will help make baselines admissible because these are laws and industry standards. These industry standards increase the likelihood that a land trust's reports will be considered a business record—but only if your land trust adheres to the standards. If you are missing baseline documentation reports from prior transactions, prepare them now with a current date, noting when you prepared the report, and file them in your records.

If you are missing baseline documentation reports from prior transactions, prepare them now with a current date, noting when you prepared the report, and file them in your records.

For more information on drafting and using baselines, see the Land Trust Alliance courses "Conservation Easement Drafting and Documentation" and "Conservation Easement Stewardship."

Photographs

Photographs are critical components of complete baseline documentation reports and can be important tools in proving what improvements existed on a property at the time of its conservation and the land's condition on that date. Therefore, photographs may be important to future conservation easement defense or enforcement actions, and land trusts should take all necessary steps to ensure they will be admissible as evidence.

Courts have long recognized the validity of the technologies behind photography. To introduce a routine photograph, courts do not typically require testimony on how cameras work or how you create photographs. At most, courts may require the person who took the photograph to testify with respect to the following:

- When was the photograph taken?
- How was the photograph taken?
- Where was the photograph taken?
- Is the photograph an accurate representation of what is shown at the time the photograph was taken?

If the photographer is not available to testify to the accuracy of the photograph, it can also be introduced under the business records rule exception to the hearsay rule (like any other record). To do so, the requirements of the business records rule must be met. You should include the following information in the appropriate file:

- Who took the photo
- When it was taken
- Under what circumstances the photo was taken (for example, annual monitoring visit, inspection of a possible violation and so on)
- Clear identification of the subject and location of the photograph

Some land trusts have the landowner sign and date the photographs as accurate representations of the protected property. Other land trusts incorporate this acknowledgment into the baseline documentation

acknowledgment clause or the baseline documentation text for all materials contained in the baseline. Land trusts should take care to ensure that the landowner has an opportunity to review the photographs and maps with the narrative prior to signing the baseline documentation report. Courts are always concerned about tampering with records — any record, no matter how created or stored. Film and digital photography are now generally considered equivalent, as are electronic and paper maps. Aerial photographs are also readily admitted in court if you follow the customary procedures for business records. The system your land trust uses to handle all of these records, no matter what medium you use, should be one that protects all documents from manipulation or tampering. This concept should be included in your written records policy.

Maps

Maps, like photographs, can be important in showing what manmade features existed on a property at the time it was conserved and other information, such as the location of building envelopes, which might be vital in an easement defense or enforcement action. For maps to qualify for the business records rule exception to the hearsay rule, your land trust should prepare its maps consistently and in accordance with an adopted policy, use legends to explain the contents of the map, and ensure that both the landowner and the land trust sign the map. Again, the landowner's acknowledgment of the map's accuracy can be part of the overall baseline documentation report acknowledgment or it can be included on the map itself.

If your land trust obtains a survey from a licensed surveyor, then that should also be included in the records and the baseline documentation report. To avoid later disputes, you may still want to label the survey and have it acknowledged by the landowner as complete, correct and delineating the land to be conserved or excluded. Usually surveys can be recorded independently in the land records, but maps that the land trust prepares itself generally cannot stand on their own because they are not prepared by a licensed surveyor. This limitation varies from state to state, so have your attorney check your state's recording statutes. If a survey does become an issue in court, then you may need to call the surveyor as a witness to testify about the survey because it was prepared external to the land trust and its policies and procedures.

Maps created using established techniques are also often easily accepted into evidence. Courts now routinely admit information derived from GIS and GPS into evidence and find it persuasive. The critical factors

for admitting GIS-driven maps into evidence include the underlying sources of the data, testimony from a GIS expert and the storage site of the GIS system.

As discussed above, many states have specific recording criteria for maps, so if your land trust intends to record its maps, you should ensure it prepares them according to required protocols.

Annual Monitoring Reports

Annual monitoring reports are important because they document changes to protected land over time and can show if a conservation easement has been violated. As such, these documents can be critical in a conservation easement defense or enforcement action and every care should be taken to ensure they are admissible into evidence according to the business records rule exception to the hearsay rule. To qualify for this exception, the reports must be:

- Prepared according to an adopted policy
- Consistently prepared for every conserved property
- Signed and dated by the monitor

Some land trusts also ask the landowner to sign the monitoring reports. Other land trusts do not and often use their reports for other purposes unrelated to easement defense, such as helping the landowner with land management recommendations. Discuss with your attorney whether your land trust should have both the monitor and the landowner sign and date the annual monitoring report.

In summary, to meet the business records rule exception to the hearsay rule, your land trust should have written policies and procedures regarding the preparation and storage of baseline documentation reports, monitoring reports, photographs and maps that are consistent with the industry standard (*Land Trust Standards and Practices*), and you should ensure that these policies are consistently applied. A land trust concerned about litigation will want to honestly assess its ability to follow its own policies and procedures before formally committing to those practices. For more information on preparing baseline reports, see Practice 11B and the Land Trust Alliance course "Conservation Easement Drafting and Documentation." For more information on easement monitoring, see Practice 11C and the Land Trust Alliance course "Conservation Easement Stewardship."

Records Retention

This exercise can be used in a training or self-study program. This exercise will give you practice in determining what records to keep and what to destroy. Guidance on the exercise begins on page 97.

Assume that you are responsible for recordkeeping at your land trust. The project staff just closed a conservation easement transaction and handed you the file. Your job is to purge the file of all extraneous material, organize the retained documents for transfer to the stewardship staff and tag all the documents for the length of time each needs to be retained. Assume that you will keep the original conservation easement, baseline documentation report, signed map, appraisal and IRS Form 8283 and board resolution forever. Also assume that you will purge all draft materials. Note: only the purposes, restrictions and reserved rights are provided here, not the entire easement.

Methodology

- Read the conservation easement and understand what is being protected
- Read the baseline documentation report and understand the property's attributes as well as the landowner's and land trust's intentions for the property
- Think about what will be needed for ongoing stewardship
- Anticipate potential disputes

Review the following five documents and determine how you will treat them. As you read them, consider whether any other essential documents are missing from this list.

1. E-mail dated July 2, 2007 (page 86)

   _____

   _____

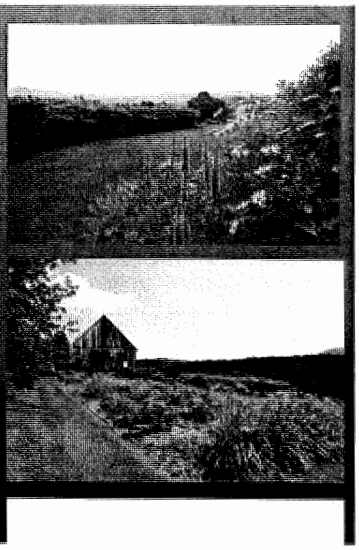
   _____

2. Letter dated April 23, 2007 (page 88)

3. Letter dated October 15, 2007 (page 89)

4. Key Bank letter dated October 17, 2007 (page 90)

5. February 28, 2007 title letter (page 92)



On 623+- acres of both open, rolling countryside and wooded forest, the [redacted] rests at the end of a public road. The 1880's renovated homestead is classic with exposed, handhewn beams and offers the option of a separated living situation. Adjacent to the house, the two-story dairy barn has been partially converted to include a workshop area on the first level.

- Panoramic mountain views
- Historic two-story dairy barn
- Beautiful perennial gardens
- Natural landscaping, open fields
- Private, end of the road location

One of the few large farms left in central Vermont, the [redacted] is conveniently located to Montpelier and Interstate 89. A picturesque Vermont experience is for the taking with this rare opportunity.

Tonya Metivier
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COLDWELL BANKER
HENEY REALTORS

81 Main Street, Montpelier, VT 05602

[redacted] ROAD, [redacted]

PRIVATELY SITUATED ON 623+- ACRES OF ROLLING COUNTRYSIDE WITH SOUTH, SOUTHEAST EXPOSURE AND PANORAMIC MOUNTAIN VIEWS, THIS RARE PARCEL ENJOYS 122+- ACRES OF OPEN LAND AND A NICE MIX OF BOTH HARD AND SOFT WOODS. TWO STREAMS FLOW THROUGH THE PROPERTY INTERSECTING DOWN BY [redacted] ROAD AND A BEAVER POND RESTS TOWARD THE NORTH SECTION OF THE PROPERTY. [redacted] ROAD, A NON-TOWN MAINTAINED ROAD BISECTS THE LAND TO THE NORTH SECTION OF THE PROPERTY.

CONSTRUCTED IN 1880, THE CAPE STYLE HOME POSITIONED AT THE TOP OF [redacted] ROAD WAS STRATEGICALLY PLACED TO ENJOY SOME OF THE BEST VIEWS ON THE PROPERTY. RENOVATED WITH HISTORIC CHARM, THE HOUSE HAS HAD RECENT IMPROVEMENTS INCLUDING NEW WINDOWS, WIDE BOARD FLOORS, AND SOME CHERRY CABINETRY. THE EASTERLY SIDE OF THE HOUSE COULD BE SEPARATED AS AN IN-LAW APARTMENT HAVING ITS OWN ENTRANCE, A KITCHENETTE AND PRIVATE TWO-STORY LIVING SPACE. THE MAIN SECTION OF THE HOUSE INCLUDES A LARGE LIVING ROOM, KITCHEN, DINING, BEDROOM AND FULL BATH ON THE FIRST LEVEL. UPSTAIRS IS A LARGE SITTING AREA AND ANOTHER BEDROOM. THIS HOME IS SERVICED BY AN OIL HOT AIR HEATING SYSTEM WITH THE OPTION OF USING A WOOD FURNACE, 100-AMP ELECTRICAL SERVICE, SEPTIC AND SPRING.

THE 87' X 41', TWO-STORY BARN BOASTS A LOWER LEVEL THAT COULD DOUBLE AS A GARAGE AND A MAIN LEVEL THAT INCLUDES A 27' X 18', 486+- SQUARE FOOT WORKSHOP. THIS SPACE WAS DESIGNED AS AN ARTIST STUDIO AND DOES INCLUDE NEW VINYL REPLACEMENT WINDOWS.

SITUATED BETWEEN BOTH THE RURAL RESIDENTIAL/AGRICULTURAL AND FORESTRY/CONSERVATION ZONING DISTRICTS, THIS PROPERTY HAS FRONTAGE ON [redacted] ROAD AND SURROUNDS THE MAJORITY OF [redacted] ROAD. AMPLE ROAD FRONTAGE AND ZONING REGULATIONS SUGGEST DEVELOPMENT POTENTIAL.

GRANT OF DEVELOPMENT RIGHTS, CONSERVATION RESTRICTIONS, and PUBLIC ACCESS EASEMENT

On [redacted] 1:00 P.M.
Book 79 Page 37-45
Edwina Valenzo Asst
Town Clerk, Marshfield, VT

KNOW ALL PERSONS BY THESE PRESENTS that the **VERMONT LAND TRUST, INC.**, a non-profit corporation organized under the laws of the State of Vermont, with its principal offices in Montpelier, Vermont, on behalf of itself and its successors and assigns (hereinafter "Grantor"), pursuant to Title 10 V.S.A. Chapters 34 and 155 and in consideration of the payment of Ten Dollars and other valuable consideration paid to its full satisfaction, does freely give, grant, sell, convey and confirm unto the **VERMONT LAND TRUST, INC.**, a non-profit corporation organized under the laws of the State of Vermont, with its principal offices in Montpelier, Vermont, and the **VERMONT HOUSING AND CONSERVATION BOARD**, an independent board of the State of Vermont with its offices in Montpelier, Vermont, and their respective successors and assigns (hereinafter "Grantees") as tenants in common, forever, the development rights, perpetual conservation easement restrictions, and public access easement (all as more particularly set forth below) in a certain tract of land (hereinafter "Protected Property") situated in the Town of [redacted] Washington County, State of Vermont, the Protected Property being more particularly described in Schedule A attached hereto and incorporated herein.

The development rights hereby conveyed to Grantees shall include all development rights except those specifically reserved by Grantor herein and those reasonably required to carry out the permitted uses of the Protected Property as herein described. The development rights, perpetual conservation easement restrictions, and public access easement hereby conveyed to Grantees consist of covenants on the part of Grantor to do or refrain from doing, severally and collectively, the various acts set forth below. It is hereby acknowledged that the development rights, perpetual conservation easement restrictions, and public access easement shall constitute a servitude upon and shall run with the land.

I. Purposes of this Grant and Management Plan.

A. Statement of Purposes.

Grantor and Grantees acknowledge that the purposes of this grant are as follows:

1. To conserve forestry values, agricultural values, wildlife habitats, biological diversity, natural communities, riparian buffers, aquatic habitats, wetlands, soil productivity, water quality, and native flora and fauna on the Protected Property, and the ecological processes that sustain these natural resource values as these values exist on the date of this instrument and as they may evolve in the future, and non-motorized, non-commercial recreational opportunities, open space values, and scenic resources associated with the Protected Property for present and future generations.

2. These purposes will be advanced by conserving the Protected Property because it possesses the following attributes:

(a) includes 500 acres of forest available for long-term sustainable management for the production of forest products;

(b) contains 4 acres of prime agricultural soil and 92 acres of statewide important agricultural soil, of which 37 acres are tillable land and 25 acres are pasture land;

(c) contains several miles of undeveloped frontage on King Brook, Guernsey Brook, and unnamed streams;

(d) abuts 260 acres of land previously conserved by Grantee and is within one mile of over 1,000 acres of land previously conserved by Grantee;

(e) contains 2,950 feet of frontage on [redacted] Road (TH [redacted]), 875 feet of frontage on [redacted] Road (TH [redacted]), 1,020 feet of frontage on [redacted] Road (TH [redacted]), 2,200 feet of frontage on [redacted] Road (TH 43), and traversed by 2,850 feet of frontage on the portion of the old [redacted] Road (TH [redacted]) that is now town trail, all public highways that provide beautiful scenic vistas of the Protected Property;

(f) contains over 7,000 feet of the Vermont Association of Snow Travelers 14S trail, and 2,700 feet of connector trail from the14S trail to the 214 trail, parts of Vermont's popular statewide snowmobile trail network;

(g) contains a diverse array of natural communities that provide habitat for a broad spectrum of flora and fauna, including a number of vernal pools that are especially important for spring breeding habitat for reptiles and amphibians; other wetlands; and upland natural communities, some of which provide important winter deer habitat;

(h) is considered by [redacted] town residents to be one of the most important properties for dispersed recreational use in town, because it provides exceptional opportunities for a wide variety of non-motorized recreational uses like skiing, hiking, hunting, and birdwatching;

(i) has the ability to provide environmental, recreational, and historical education opportunities for local schools; and
(i) contains numerous old stone foundations, cellar holes, and stone walls from rural colonial American history.

Grantor and Grantees recognize the Purposes of this Grant and share the common goal of conserving these values of the Protected Property by the conveyance of conservation restrictions, and development rights, to prevent the use or development of the Protected Property for any purpose or in any manner which would conflict with the Purposes of this Grant. Grantees accept such conservation restrictions, development rights and public access easement in order to conserve these values for present and future generations. The purposes set forth above in this Section I are hereafter collectively referred to as the "Purposes of this Grant".

B. Management Plans.

Grantor will, from time-to-time develop comprehensive Management Plans, including updates, revisions and amendments, for the Protected Property (hereinafter "Management Plans"). The Management Plans shall:

1. Provide for the use and management of the Protected Property in a fashion which is consistent with and advances the Purposes of this Grant; and

2. At a minimum, the Management Plans shall identify actions necessary to accomplish the following and shall appropriately balance all the resource attributes of and human uses for the Protected Property:
   a. identify and address the management needs of the recreational uses that may need special or more intensive management focus;
   b. provide for meaningful recreational links to private and public lands;
   c. details of sustainable forest management activities;
   d. provide a plan for road, sign, trail and sanitary facility use that has minimal impact on water quality and plant, wildlife and aquatic habitat;
   e. provide for the sustainable use of fish and wildlife resources;
   f. provide for the identification and protection of natural communities, plant, wildlife and aquatic habitat and other ecologically sensitive or important areas;
   g. provide for parking areas; and
   h. provide for the construction and use of any minor recreational structures.

3. Otherwise be consistent with this Grant.

Prior to the final adoption of each Management Plan, including updates, revisions and amendments, Grantor shall: (a) secure appropriate public input from the Town of Marshfield and from the general public, (b) develop the Management Plans in a timely and responsive manner, and (c) provide Grantees with a copy of each such Management Plan as well as a copy of each final adopted Management Plan.

II. Restricted Uses of Protected Property.

1. The Protected Property shall be used for forestry, agricultural, educational, non-motorized, non-commercial recreation, habitat conservation, natural area and open space purposes only, except as otherwise specifically permitted under this Grant. No residential, commercial, industrial or mining activities shall be permitted. No building or structures shall be constructed, created, erected or moved onto the Protected Property, including but not limited to, telecommunication towers, except as specifically permitted in both Section III below and the Management Plans.

2. No rights-of-way, or easements for ingress or egress, driveways, roads, utilities or easements or rights shall be constructed, developed, granted or maintained into, on, over, under, or across the Protected Property without the prior written permission of Grantees, except as otherwise specifically permitted under this Grant and as appear of record prior to the date of this Grant. Grantees may grant permission for any rights-of-way, or easements for ingress or egress, driveways, roads, utilities, or other easements or rights, if they determine, in their sole discretion, that any such rights-of-way, easements for ingress or egress, driveways, roads, utilities, or other easements or rights are consistent with the Purposes of this Grant.

3. There shall be no signs, billboards, or outdoor advertising of any kind erected or displayed on the Protected Property; provided, however, that Grantor may erect and maintain

reasonable signs including but not limited to signs indicating the name of the Protected Property and its ownership by Grantor, boundary markers, directional signs, memorial plaques, informational and interpretive signs, and signs limiting access or use (subject to the limitations of Section VI, below). Grantees may erect and maintain signs designating the Protected Property as land under the protection of Grantees, with the prior written permission of Grantor.

4. The placement, collection or storage of trash, human waste, or any other unsightly, or offensive material on the Protected Property shall not be permitted except at such locations, if any, and in such a manner as shall be approved in advance in writing by Grantees and shall be consistent with the Grant and the Management Plans. The temporary storage of trash in receptacles for periodic off-site disposal, shall be permitted without such prior written approval.

5. There shall be no disturbance of the surface, including but not limited to filling, excavation, removal of topsoil, sand, gravel, rocks or minerals, or change of the topography of the land in any manner, except as may be reasonably necessary to carry out the uses permitted on the Protected Property under this Grant. In no case shall surface mining of subsurface oil, gas, or other minerals be permitted.

6. Grantor shall not give, grant, sell, convey, subdivide, convey in separate parcels, transfer, mortgage, pledge, lease or otherwise encumber the Protected Property without the prior written approval of Grantees which approval may be granted, denied or conditioned in the Grantees' sole discretion.

7. There shall be no operation of motor vehicles on the Protected Property except for uses specifically reserved in Section III below, such as agriculture, wildlife and forest management, trail grooming, maintenance, handicap access, and for safety or emergency purposes. Snowmobiling may be permitted at the discretion of Grantor.

8. There shall be no manipulation of natural watercourses, marshes, wetlands or other water bodies, nor shall there be activities conducted on the Protected Property which would be detrimental to water purity, or which could alter natural water level or flow, except as reasonably necessary to carry out the uses permitted on the Protected Property under this Grant.

9. No use shall be made of the Protected Property, and no activity thereon shall be permitted which, in the reasonable opinion of Grantees, is not or is not likely to be consistent with the Purposes of this Grant. Grantor and Grantees acknowledge that, in view of the perpetual nature of this Grant, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Grant. Grantees, therefore, in their sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Grant, or (b) alterations in existing uses or structures, are consistent with the Purposes of this Grant.

III. Permitted Uses of the Protected Property.

Notwithstanding the foregoing, Grantor shall have the right to make the following uses of the Protected Property:

1. The right to use the Protected Property for all types of non-motorized, non-commercial recreational purposes including, but not limited to, bird-watching, cross-country skiing, fishing, hiking, hunting, snowshoeing, walking and wildlife observation consistent with the Purposes of this Grant. Use of the Protected Property for snowmobiling, and for non-motorized, mechanized recreation such as mountain biking and by animals capable of transporting humans (including, but not limited to, horses) may be permitted in the discretion of Grantor if such uses are regulated in the Management Plans and are consistent with the Purposes of this Grant and Section IV, below.

2. The right to use the Protected Property to conduct all activities allowed by the Management Plans, provided that such activities are reasonably necessary to carry out the Purposes of this Grant and are consistent with the Purposes of this Grant, and provided further that such activities are provided for in the Management Plans, such activities may include, but shall not be limited to the management of vegetation and wildlife, and the use and management of the Protected Property for non-motorized, non-commercial recreation. This Section III(2) shall not be construed to authorize the construction of new structures not otherwise specifically permitted by this Grant.

3. The right to establish, maintain and use fields, orchards and pastures for agricultural purposes, recreational, scenic or open space purposes and/or for the purpose of maintaining or

BASELINE DOCUMENTATION REPORT

Vermont Land Trust

[redacted] PROPERTY

[redacted] Vermont

VLT Project No. [redacted]

VHCB No. [redacted]

Prepared by:
Vermont Land Trust
Conservation Stewardship Program
8 Bailey Ave.
Montpelier, VT 05602
(802) 223-5234

[redacted] Property ◆ [redacted] Vermont

Vermont Land Trust ■ Conservation Stewardship

The Conservation Stewardship Program is staffed by a director, stewardship agricultural manager, paralegal, special assistant, conservation and stewardship assistant, two stewardship foresters and conservation field assistants.

The responsibilities of the Conservation Stewardship Program include maintaining land related records, tracking changes in land ownership, monitoring conserved properties at least annually, photo-documenting land uses periodically, answering landowner questions, interpreting or approving permitted activities, and correcting violations through voluntary compliance or, if necessary, legal proceedings.

The Conservation Stewardship Program publishes a quarterly newsletter, *Stewards of the Land*, for all owners of property protected by conservation easements. Stewardship Program staff also support landowners as stewards of their land by offering information and advice on sound and sustainable uses of conserved properties.

This Report Contains the Following Information:

- Introduction and description of the current uses of the property
- Summary of Grantor's and Grantees' rights
- References
- Signature pages
- Conserved property location map
- USGS topographic map
- Orthophoto map
- Agricultural soils map
- Conservation Easement map
- Photopoint map
- Photographic Documentation

[redacted] PROPERTY
[redacted] Vermont

Introduction

The purpose of the enclosed information is to describe the physical features and current land uses of the [redacted] Property, on which the development rights, perpetual conservation easement and restrictions, and public access easement will be conveyed to the Vermont Land Trust, Inc. (VLT) and the Vermont Housing and Conservation Board (VHCB) and recorded in the Marshfield Land Records.

This report is based, in part, on a documentation visit by [redacted] (Conservation Field Assistant) for the Vermont Land Trust on August 27 & 28, and September 7, 2007. [redacted] assembled the report and digital photographs; maps were prepared by [redacted] and GIS staff.

Description and Current Use

The [redacted] property has a long history of agricultural use since the founding of the town of [redacted]. Several cellar holes and miles of stone walls are testimony to its agricultural past. In the late 1960s it was acquired by [redacted] and was part of a larger property that included the current [redacted] Hill Farm, which was sold and conserved in 1983. [redacted] passed away in 1993, and after putting the property on the market for $1.5 million, her family decided to sell the property to Vermont Land Trust at a deep discount to facilitate transfer of the property to the Town of [redacted] as a town forest. The protected property consists of ±620.3 acres of forest and open fields. A 4.2 acre parcel with the existing house and barn off [redacted] Road has been subdivided from the property and will be transferred to the long-term tenants with affordability covenants placed on the parcel.

The property is bisected north to south by [redacted] Road, portions of which are classified by the Town of [redacted] as a 4th class road and town trail. Access to the property is via [redacted] Road, from [redacted] Road on the south and [redacted] Road on the north. There is also frontage on [redacted] and [redacted] Roads on the southeast. The town plans to create parking areas off [redacted] and [redacted] Roads. The Vermont Association of Snow Travelers (VAST) maintains [redacted] Road and a connector trail to the east as a snowmobile trail in the winter.

The property boundaries are well marked by stone walls and old fence lines. A full perimeter survey of the property was prepared by [redacted] in 1993 and is recorded in the Town of [redacted] land records.

The property encompasses the headwaters of Guernsey and King Brooks, which are both tributaries of the Winooski River. An undisturbed and vegetated buffer of 50 feet on both sides of these streams will be maintained to protect water quality, provide shade and enhance wildlife habitat. There are a number of wetlands on the property, some of which appear on the National and State Wetlands Inventory Maps and are therefore considered significant wetlands (Class II). Wetlands

located on the property include at least five vernal pools, several beaver marshes, alder swamps and an extended seepage forest wetland.

The property was enrolled in the current use program in the 1980s, with the last forest management plan written in 1987. No timber harvesting has occurred since that time. There are sizeable blocks of mature maple forest in at least two distinct locations, both of which have supported commercial maple sugaring. Each of the blocks is estimated to be between 15 and 20 acres and both are accessed by well- maintained woods roads. Some commercial sugaring has occurred here within the past 25 years. Much of the forested portions of the property are mapped deeryard.

There are two hay meadows currently in use on the farm, near the farmhouse off [redacted] Road, totaling about 25 acres, plus about 5 acres of pasture. A twelve acre hay meadow is located in the interior of the property and has not been hayed for many years, and approximately 20 acres of former pasture, not yet grown back up, are adjacent to the meadow.

There are several old cellar holes and old barn foundations, and numerous stone walls throughout the property. Maps from 1870 show several farmsteads on the west side of [redacted] Road north of the open fields. By 1940, the maps reference only cellar holes.

Purposes of the Grant

The primary purposes of the conservation easement are to conserve forestry and agricultural values, wildlife aquatic and habitats, biological diversity, natural communities, riparian buffers, wetlands, soil productivity, water quality, native flora and fauna, the ecological processes that sustain these natural resource values , non-motorized, non-commercial recreational opportunities, open space values, and scenic resources associated with the protected property.

The purposes of the Grant will be advanced by conserving the protected property because it possesses the following attributes:

- includes 500 acres of forest available for long-term sustainable management for the production of forest products;
- contains 4 acres of prime agricultural soil and 95 acres of statewide important agricultural soil, of which 37 acres are tillable land and 25 acres are pasture land;
- contains several miles of undeveloped frontage on King Brook, Guernsey Brook, and unnamed streams;
- abuts 260 acres of land previously conserved by Grantee and is within one mile of over 1,000 acres of land previously conserved by Grantee;
- contains 2,950 feet of frontage on [redacted] Road (TH [redacted]), 875 feet of frontage on [redacted] Road (TH [redacted]), 1,020 feet of frontage on [redacted] Road (TH [redacted]), 2,200 feet of frontage on [redacted] Road (TH [redacted]), and 5,700 feet of frontage on the portion of the old [redacted] Road (TH [redacted]) that is now town trail, all public highways that provide beautiful scenic vistas of the Protected Property;
- contains over 7,000 feet of the Vermont Association of Snow Travelers 14S trail, and 2,700 feet of connector trail from the14S trail to the 214 trail, parts of Vermont's popular statewide snowmobile trail network;

- contains a diverse array of natural communities that provide habitat for a broad spectrum of flora and fauna, including a number of vernal pools that are especially important for spring breeding habitat for reptiles and amphibians; other wetlands; and upland natural communities, some of which provide important winter deer habitat;
- is considered by [redacted] town residents to be one of the most important properties for dispersed recreational use in town, because it provides exceptional opportunities for a wide variety of non-motorized recreational uses like skiing, hiking, hunting, and birdwatching
- has the ability to provide environmental, recreational, and historical education opportunities for local schools; and
- contains numerous old stone foundations, cellar holes, and stone walls from rural colonial American history.

Management Plans

The landowner is required to develop a comprehensive Management Plan including updates, revisions, and amendments. The landowner shall solicit public input from residents of Marshfield and the general public. The Management Plan should be developed in a timely and responsive manner and the Vermont Land Trust shall be provided a copy of each Management Plan and a copy of each final adopted Management Plan.

The Management Plan will:

- Present a plan for the use and management of the property that is consistent with the easement's purpose. The management plan will identify actions to accomplish the following and will balance all the resources attributes and of human use of the property.

    1. Identify and address recreational uses that may require more intensive management focus.
    2. Provide for meaningful recreational links to private and public lands.
    3. Details of sustainable forest management activities.
    4. Provide a plan for road, sign, trails, and sanitary facilities which will have minimal impact on water quality and plant, animal, and aquatic habitat.
    5. Provide for the sustainable use of fish and wildlife resources.
    6. Identify and protect the sensitive natural communities.
    7. provide for parking areas; and
    8. provide for the construction and use of any minor recreational structures.

Inventory of Existing Structures

There are no structures on the protected property, with the following exceptions:

Deer stand (Photo # 38)

[redacted] Property ◆ [redacted] Vermont

Collapsed sugar house (Photo # 51)

Storage shed (Photo # 52)

Excluded Parcels

The ±4.2 acre parcel with house and barn off [redacted] Road that were originally part of the property is excluded from the protected property and is being retained by VLT and conveyed to the current tenants.

Natural Resources

The VLT Site Assessment process has identified the following: wetlands and deer wintering areas.

Surface Water Buffer Zones.

Those areas, in forest cover or in other natural vegetation, lying within fifty feet (50') of each bank or shore of the perennial streams, rivers, lakes, ponds, vernal pools, and other wetlands, or within wetlands themselves, on the Protected Property depicted as "SWBZ" on the [redacted] Conservation Plan, or any successor maps approved by Grantors and Grantee depicting the Protected Property, as those waters move from time to time, shall be designated as Surface Water Buffer Zones (hereinafter "SWBZ").

Within the SWBZ described herein, the goals, prescriptions and restrictions of this Section IV are in addition to the provisions of Sections II and III, and where inconsistent, the provisions of this Section IV shall supersede the provisions of Sections II and III.

The principal goal for management within the SWBZ is the establishment and maintenance of a high quality forested buffer that provides an array of ecological benefits including but not limited to:

1) buffering aquatic and wetland plants and animals from disturbance;
2) preventing wetland and water-quality degradation;
3) providing important plant and animal habitat; and
4) providing organic matter, nutrients, and structure to aquatic systems.

Within the SWBZ the following restrictions shall apply:

1) With the exception of existing or subsequently approved roads and landings, where relocation is not feasible or where negative impacts would be increased by relocating, there shall be no machinery operated within the SWBZ as depicted on the Stranahan Town Forest Conservation Plan.

2) Harvesting of single trees is allowed provided the residual stocking level within 100 linear feet parallel to the shoreline or streambank, in and along the SWBZ, equals or exceeds the A-line as determined by applying the protocol set forth in the current U.S. Department of Agriculture, Forest Service Silvicultural Guidelines for the Northeast or by applying a similar, successor standard approved by Grantee. There shall be no harvesting or other forest management activities conducted in those areas of the SWBZ lying within 50' of each bank or shore of the perennial streams, rivers, and vernal pools,

or within wetlands themselves, as depicted on the Stranahan Town Forest Conservation Plan

3) Stream crossings, for the purpose of constructing roads for transporting machinery and harvested timber, are exempt from this restriction, but the number and width of such crossings shall be kept to a minimum and said crossings shall include the installation of all erosion control devices and employ all recommended practices described in the AMPs.

Vernal Pool Special Treatment Area.

The Vernal Pool Special Treatment Area consists of five (5) vernal pools that may be significant as a breeding area for sensitive amphibians, and an area of 600 foot radius surrounding the pool measured from the edges of the vernal pool. The vernal pools are found in three (3) areas of approximately 94.5 acres, and are generally depicted as "Special Treatment Area" on the [redacted] Conservation Plan (hereafter "the STA").

The STA shall be subject to the following limitations, which limitations shall supersede Sections II, III and IV, above:

1. Protection of the ecological values and functionality of the vernal pools shall be Grantor's highest priority in planning and conducting all activities within the STA. Forest management prescriptions within the STA shall be planned and implemented with the goal of perpetuating the vernal pool and the surrounding forest with interior forest conditions, and supporting the pool's function as amphibian breeding habitat.

2. All forest management activities planned and conducted within the STA, including the silvicultural system, harvest timing, equipment employed, and harvest intensity, shall be focused on the goals of retaining soil integrity, natural hydrology, water quality values, adequate shade, high levels of large diameter downed coarse woody debris and the natural structure and species composition of the vernal pool and the surrounding forest encompassed by the STA.

3. The accumulation of large diameter downed material (coarse woody debris or "CWD") is critical to the maintenance and enhancement of soil productivity as well as providing critical salamander habitat and an array of habitat values. Portions of the STA may not currently have a sufficient amount of CWD and it may take time to recruit acceptable levels of CWD. Target densities per acre of CWD within the entire STA shall be at least 5 logs of at least 20" diameter and 16 feet long and ten additional logs at least 14" in diameter and 16 feet long distributed throughout the STA.

4. Throughout the STA limbs and tree tops shall be left on site, and none should be felled into the pool itself.

5. All timber harvesting within this STA shall take place under frozen snow-covered ground conditions during the period December 1 – March 31. Grantees, in their sole discretion, may permit a silvicultural treatment of the STA outside the silvicultural parameters described in this section V, provided Grantor demonstrates to Grantees' satisfaction that the alternative treatment

is consistent with the Purposes of the Grant and this Section V, and that the treatment will achieve the objectives set forth in paragraphs (1), (2) and (3), above.

6. No agricultural activity shall be conducted within the STA.

7. The vernal pool itself and its immediate edge shall be left undisturbed;

8. Harvesting and all other forest management activities shall be prohibited within this 100' buffer, with the exception of existing or subsequently approved roads and landings, where relocation is not feasible or where negative impacts would be increased by relocating, then machinery operation should be minimized.

9. Adjacent to the 100' buffer in #8 above an additional buffer of 500' is established where the stocking level of at least 85% of the 500' buffer is B-line or greater as determined by applying the protocol set forth in the current U.S. Department of Agriculture, Forest Service Silvicultural Guidelines for the Northeast or by applying a similar, successor standard approved by Grantee. Canopy openings shall be no more than 0.2 acre in size nor affect more than 1% of this buffer per year for each year between harvests. The goal of this buffer is to develop and maintain a forest structure and downed CWD similar to mature conditions by using silvicultural techniques to replicate disturbances that create the small gaps typical of this forest community.

Public Access

The landowner agrees that the protected property shall be available to the general public for all types of non-motorized, low impact, low density, dispersed recreational activities (including bird-watching, primitive camping, hiking, hunting, trapping, snowshoeing, and skiing) and educational activities consistent with the easement's purposes and the Management Plan. The landowner may limit or restrict public access to the protected property to assure compliance with the easement, to protect natural wildlife and habitat, or to protect the public health or safety (including hunter safety).

If VLT approves a conveyance of the protected property, to an individual or entity that does not, in writing, provide for non-commercial recreational opportunities to the general public, The Town of Marshfield will convey a public access easement to VLT before transfer of protected property.

Summary of Grantor's[1] Rights and Restrictions

Conservation rights and restrictions allow the protected property to be used for agricultural, forestry, education, non-commercial recreation, and open space purposes. The following is a summary of the restricted and permitted uses included in the grant (referred to as the easement throughout this document).

RESTRICTED USES OF THE PROPERTY

The following are limitations on the landowner's use of the conserved property:

1. **General:** A conserved property may be used for forestry, agricultural, educational, non-motorized, non-commercial recreation, habitat conservation, natural area and open space

[1] Grantor is the **VERMONT LAND TRUST, INC.**, its successors, and assigns.

[redacted]

From: Tonya Cher [tmetivier1@verizon.net]
Sent: Monday, July 02, 2007 11:48 AM
To: [redacted]
Cc: susan_read@keybank.com; kmcmahon@vt-law.org
Subject: [redacted] to VLT - Funding Extension+

Good morning, [redacted]

I hope you enjoyed your vacation!

I have received a call from [redacted] regarding the Phase II Assessement. She will be e-mailing it to me early this week, so upon your return we should have received a copy. Thank you.

After speaking with KeyBank again surrounding the extension for fundraising efforts, they will extend the deadline to August 30th to coincide the dates with [redacted] contract to purchase. The concern remains, however that pushing these deadlines closer to the closing will inevitably mean that the closing will, too, be delayed. Timing is of issue here for a variety of reasons. We all appreciate the efforts VLT is putting forth to make this transaction happen and are happy to be able to participate in such a phenomenal real estate transaction that will benefit so many. We are very much in hopes to keep the closing on schedule so that it may occur.

If you prefer to prepare the addendum, no problem. It is our understanding that this addendum will extend the deadline for funding to 8/30 and to release the following contingencies:

1) Receipt of leases; 2) Satisfaction of no hazard substances; 3) Satisfaction of Engineer, inspection and title reports (title report excepting the discharges being corrected by Kathy from [redacted] to Mesereau & Williams, Dutil, Yett & Vicent; 4) Satisfaction of appraisal; 5) Selectboard approval of the town forest lot; 6) *ideally, the subdivision --- I have not heard anything on status on this one, but I know the application was submitted later than expected.

Also, do we have any update as to the progress with [redacted]?

Thanks a bunch!

Best always,

Tonya

==========
From: [redacted]
Date: 2007/06/28 Thu PM 03:59:53 CDT
To: tmetivier1@verizon.net
Cc: susan_read@keybank.com
Subject: RE:

Tonya and Sue,

I'm sorry that I have not responded to you sooner. I am leaving for vacation now and will return to the office on Monday, July 9th. I will have someone send Tonya and the Phase II report in my absence - we only have a hard copy so it will be sent via regular mail tomorrow or Monday.

I will follow up on the fundraising deadline when I return but we'd prefer to at least extend the deadline to align with the other outstanding condition which is the Aug. 30th deadline to enter into a contract with [redacted] for the purchase of the house.

1

Since VLT drafted the contract it is my preference to prepare the addendum revising the dates which I can do upon my return assuming the Aug. 30th deadline is acceptable. If not, let's discuss this further after the 9th.

Thanks.

[redacted]
Paralegal
Vermont Land Trust
8 Bailey Avenue, Montpelier, VT 05602-2161 Direct Line: 802-262-1217
Fax: 802-223-4223
www.vlt.org

-----Original Message-----
From: Tonya Cher [mailto:tmetivier1@verizon.net]
Sent: Tuesday, June 26, 2007 10:10 AM
To: [redacted]
Cc: susan_read@keybank.com
Subject:

Good morning, [redacted]

Could you please forward a copy of the Phase II Assessment report that you had received from [redacted]? An electronic copy is fine, unless it is a larger report in which case I would be happy to pick it up.

We have discussed the request for an extension for fund raising efforts and had really hoped that this issue in particular was on track in terms of timing. There is significant concern that should an extension be granted until 9/15 than our hopes of closing on time may be in jeopardy.
KeyBank is willing to extend this timeline, but the contingency must be satisfied no later than 8/15.

Please let me know if this is acceptable and I will prepare an addendum that will extend the timeline in addition to noting the satisfaction of all other contingencies met to date.

Best always,

Tonya

Tonya Cher Broker, ABR
Cher Real Estate
E-mail: Tonya@CherRealEstate.com
(802)479-6996 (office)
(802) 479-0099 (fax)
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Vermont Land Trust

CONSERVING LAND FOR THE FUTURE OF VERMONT

April 23, 2007

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Brattleboro, VT 05301
(802) 251-6008

Southwest Vermont
and Mettowee Valley
10 Furnace Grove Road
Bennington, VT 05201
(802) 442-4915

[redacted]
Trust Officer
Key Bank
PO Box 10099
Toledo, OH 43699

Re: [redacted] **Trust**

Dear [redacted]:

Enclosed is the Trust's copy of the appraisal report prepared by Lamprey Appraisal. I am sending an electronic copy to Kathy and Tonya. Please advise if anyone else should receive a copy.

I'm sorry it has taken longer than expected to receive the appraisal. Thank your patience.

Sincerely,

[redacted]
Paralegal

Enclosures
C: Kathy McMahon, Esq.
Tonya Metivier

Vermont Land Trust

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October 15, 2007

[redacted] Town Clerk
[redacted]
[redacted] VT [redacted]

Re: [redacted] Property, [redacted]

Dear Bobbie:

Enclosed for recording in the [redacted] land records please find the following documents in the above-referenced matter:

1. Letter from Tara Duval with recording instructions & fees for the Trustee's Deeds, Trustee's Certificates, and conveyance to VLT
2. Corporate Resolution (1 page)
3. Act 250 Disclosure Statement (2 pages)
4. Warranty Deed – VLT to [redacted] (2 pages)
5. Vermont Property Transfer Tax Return
6. Housing Subsidy Covenant (6 pages)
7. Mortgage Deed (2 pages)
8. Second Mortgage Deed (5 pages)
9. Grant of Development Rights, Conservation Restrictions and Public Access Easement – VLT to VLT/VHCB (9 pages).
10. Vermont Property Transfer Tax Return
11. Warranty Deed – VLT to Town of [redacted] (2 pages)
12. Vermont Property Transfer Tax Return – *please be sure to sign this as Buyer on page 2 on behalf of the Town*

Also enclosed is a check in the amount of $256.00 to cover the recording fees.

Please return all of the original documents to my attention at our Montpelier office. A self-addressed stamped envelope is enclosed for your convenience. Thank you.

Sincerely,

[redacted]
Paralegal

Enclosures

Key Private Bank

7475

RECEIVED OCT 2 2 2007

COPY

FOR YOUR FILES

Susan E. Read
Assistant Vice President
Real Estate Dept.
Trust Services

KeyBank National Association
Member FDIC

Three SeaGate
Post Office Box 10099
Toledo, OH 43699-0099

Toll Free: 800-542-1402

Ext. 8516
Direct: (419) 259-8516
Fax: (419) 259-8716

October 17, 2007

Town of [redacted]
Town Clerk's Office
[redacted]
[redacted] VT [redacted]

RE: 623.8 ac [redacted] Rd.
Parcel [redacted]

To Whom It May Concern:

As I am sure you are aware, KeyBank National Association, Trustee has conveyed the above described property to Vermont Land Trust (VLT). The same property, less 4.2 ac, was subsequently conveyed to the Town of [redacted] at a bargain price. The property is now to be known as the "[redacted] Town Forest"

We are pleased to have been involved in such a unique transaction that benefits all of [redacted] and beyond. Through the generosity of our clients, this lovely piece of property will be enjoyed by many for years to come. Through the hard work of my colleagues at KeyBank, and my associates at Vermont Land Trust, we worked diligently to ensure that the goals and desires of our clients were met.

As the prior property owner, we always paid the real estate taxes in a timely manner. In fact, for years, we paid the entire annual tax bill in August. Again this year, true to course, we paid the entire tax bill of $14,526.39 on 8/7/07 despite the prospect of a 4th quarter closing. On the chance that a closing could be delayed until after the second tax payment due date (11/9/07), we decided to make payment-in-full as in the past to avoid the possibility of interest and penalties being assessed on a late payment.

We are dismayed to learn that the Town of [redacted] will not refund to KeyBank NA, Trustee, the taxes paid but not yet due as of the 10/12/07 closing date. It is also unfair to expect Vermont Land Trust-BUYER to prorate to KeyBank NA, Trustee-SELLER an amount for taxes which VLT could never recoup from the Town, in the transaction whereby the property was conveyed to Marshfield.

Given this great benefit which the Town of [redacted] has received, we believe that consideration should be given to reimbursing KeyBank NA, Trustee for the taxes paid but not yet due.

I thank you in advance for your consideration this matter and will look forward to receiving a response.

Respectfully submitted,

[redacted]

CLOSING SUMMARY [redacted] PROPERTY
[redacted] Vermont
Vermont Land Trust to [redacted]
October 12, 2007
VLT No. [redacted]
VHCB Nos. [redacted]

I. Documents

Local Subdivision Permit (VLT) - recorded

State Wastewater Permit (VLT) - recorded

Subdivision Mylar (VLT) - recorded

VLT Corporate Resolution & Certificate of Good Standing (VLT)

Warranty Deed (VLT)

Vermont Property Transfer Tax Return (VLT)

Act 250 Disclosure Certificate (VLT) - None

Smoke Detector/CO2 Detector Certification (VLT)

Lead Paint Notice (VLT)

Promissory Note to VLT (VLT)

Mortgage to VLT (VLT)

Housing Subsidy Covenant (VLT/VHCB)

2nd Mortgage to VLT and VHCB (VHCB)

Promissory Note to KeyBank, Trustee (JC)

3rd Mortgage to KeyBank, Trustee (JC)

Settlement Statement (VLT)

IRS Form 1099 (VLT)
IRS Form 8283 (VLT)
IRS Form 8282 (VLT)

Vermont Land Trust

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February 28, 2007

VIA EMAIL & U.S. MAIL

[redacted]

Re: KeyBank National Association, Trustee to VLT
[redacted] Property, [redacted] Vermont

Dear Kathy:

As required under Paragraph 5(a) of the Purchase and Sale Agreement in the above-referenced matter, I am writing to inform you of the results of the due diligence work that VLT has completed to date.

1. Title Clearing Issues: I enclose a copy of the title report setting forth the encumbrances that need attention in the above-referenced matter. We require the following:

- *Parcel A – Land from Mersereau*: Mortgage from [redacted] to [redacted] in the amount of [redacted] dated November 13, 1981 and recorded in Book [redacted], Page [redacted] that has not been discharged of record. Please obtain a discharge for recording prior to closing.
- *Parcel B – Land from William, Dutil, Yett & Vincent:* there is a lengthy description noted on page 2, paragraph 3 of what amounts to two old mortgages that were not properly discharged of record. Please obtain the necessary discharges for recording prior to closing.
- *Parcel C – Land from Whitcomb*: The deed from Mahlon & Louine Whitcomb to [redacted] dated August 13, 1975 and recorded in Book [redacted], Page [redacted] references a partial survey entitled "Whticomb to Linder" dated May 1975, prepared by Keller and Lowe of Waterbury but it is not available in the land records. Do you have a copy of this survey in your records? If so, VLT would appreciate receiving a copy of it.
- Please be sure to provide VLT with a trustee's certificate, authorizing the transfer of title to VLT and appointing an individual to execute the Transfer Documents on behalf of the Trust.

- Please confirm that the Harmon chain of title is not part of the property to be sold to VLT. The deed information for this chain was provided to VLT by the Trust but does not appear to be referenced in the property description in the Purchase and Sale Agreement. I believe the Harmon chain is for the Weaving School parcel located on [redacted] Road which will be retained by the Trust.

2. Home Inspection: No issues to report and no further action required.

3. Hazardous Materials Inspection: As already discussed, VLT has hired Brad Wheeler to do the Phase II work to determine if there was any soil or water contamination as a result of the #2 fuel spill in 1996. Due to the extremely cold weather followed by heavy snowfall this work has not yet been completed. We expect it will be completed as soon as the ground conditions permit and a report will follow shortly thereafter. The Phase II work will include obtaining soil samples using a hand auger and a water sample from the house followed by testing of both the soils and the water for contamination. We do request an extension of the February 15th deadline for this item in the contract. Please advise if an extension of this deadline to April 15, 2007 will pose any problems.

4. Engineering Reports: The soils technician reports that there should be no problem designing a replacement septic system within the proposed boundaries for the Affordable House Lot. However, we have not been able to identify the well location. We have been advised b[redacted]n that the well is located in the front yard under the maple tree but because the well head is buried we are unable to confirm this information. I have not been able to obtain any conclusive well log data from the State indicating that a well was drilled for the benefit of the house. The next step is to hire someone to locate the well. I plan to call Fowler Septic Service to inquire about their willingness to do this work. I am informing you of this now since being able to locate and document the well location and map a well isolation area are critical to the septic design necessary to obtain the wastewater permit required for subdivision of the property. Your assistance in confirming the well location would be appreciated. If we are unable to locate the well, it may be necessary to drill a well but I'm hopeful we will locate it.

I also want to report that the three members of the [redacted] Selectboard are unanimous in their support of the Town taking title to the Town Forest Parcel. The Selectboard plans to present this opportunity at Town Meeting on Tuesday, March 6th. A town vote is not required for the Selectboard to accept ownership of the property but they feel that getting public input and support for the acquisition would be a good idea. Therefore, VLT requests an extension of the deadline of March 30th for contingency 5(e) which reads as follows:

a) The Buyer receiving from the Town of [redacted] Selectboard by March 30, 2007 an indication of the Town's willingness to accept the "Town Forest Lot" for use as a town forest.

VLT now requests that this deadline be extended until April 30th in order to give the Town more time for a public process. The Selectboard plans to ask for volunteers to join a committee to be formed at Town Meeting next week and further discuss the benefits of owning this parcel and using it as a town forest. Providing another month for this committee to do some work and report back to the Selectboard would solidify the Selectboard's decision to accept the property.

Thank you for your attention to this matter. Please feel free to call me if you have any questions or need anything further.

Sincerely,

[redacted]

Paralegal

Enclosures
C: [redacted] (via email)
[redacted] (via email)

[redacted] TRUST PROPERTY
CONSERVATION VISION AND SUMMARY
(October 27, 2006)

Neighborhood Land Use:
The [redacted] property is located in the heart of [redacted] on [redacted]. Several permanently conserved properties are located in the immediate area, all conserved by private landowners with the assistance of the Vermont Land Trust. These properties contain a mix of agricultural fields, pastures, wetlands, and forests. On most, the fields and pastures are used by local dairy or beef farmers, and the forests are managed by professional foresters who oversee periodic, low-impact timber harvests on a sustainable basis.

The [redacted] property historically supported several farms, as evidenced by the numerous stone walls, cellar holes, old apple trees, abandoned fields and pastures, and the existing fields and pastures still in production near the farmhouse. Many years ago the forest land was enrolled in Vermont's "Use Value" (or "Current Use") program, which provides a property tax reduction in exchange for a landowner generally agreeing not to develop the land (although they can withdraw from the program after paying a penalty) and for hiring a forester to develop a forest management plan on ten-year cycles.

Local vision:
Based on direct and anecdotal comments received by VLT over the past few years, it is clear to us that the property is well-known to residents throughout [redacted], not just the immediate neighbors. The property is bisected by the [redacted] Road, which serves as a snowmobile trail for a segment of the statewide VAST snowmobile network. This maintained and groomed trail is also used for cross-country skiing and snowshoeing in the winter, as well as for mountain-biking and hiking in the warm months of the year. Informal, unmaintained trails on the property are used regularly for hiking, birdwatching, dog walking and other recreational pursuits.

Vermont Land Trust vision:
The Vermont Land Trust is very excited about the conservation of the [redacted] family property. We have been aware of this property for two decades, both for its own attributes, as well as how its conservation would make great strides towards completing the conservation of the beautiful [redacted] landscape.

Generally speaking, the conservation work of the Vermont Land Trust can be divided into four categories, one of which is joining with local communities to help conserve land that communities have identified as important. The [redacted] property is a perfect example of this type of property, and VLT is pleased to be able to assist in the conservation of the land. Integrating the local vision and VLT's vision will occur through many public meetings and discussions that will occur over the course of the next several months.

Implementing these visions through VLT's conservation easement:
Other than the existing house site, VLT expects to transfer the remainder of the property to the Town of [redacted], subject to VLT's perpetual conservation easement. We hold many conservation easements in Vermont on town-owned land. In these instances our conservation easements include special provisions to allow ongoing discussions within the town and with VLT to allow appropriate modifications to how the land is managed by the town, all under the standard framework of our easement. This is accomplished through a Management Plan that balances resource attributes and human use of the property. At a minimum the Management Plan:

1. considers recreational uses of varying levels of intensity, both those exclusively on the property and any that logically link to adjoining lands;
2. identifies and protects natural communities, plant, wildlife and aquatic habitat and other ecologically sensitive or important areas;
3. includes details of farming and sustainable forest management activities;
4. considers hunting and fishing possibilities; and
5. creates a plan for road, sign, trail and sanitary facility use that has minimal impact on water quality and plant, wildlife and aquatic habitat;

The conservation easement will prohibit:

1. residential, commercial, and industrial development;
2. driveways being constructed over the property to access other private lands;
3. signs and billboards other than those appropriate for a town forest, like those for trails;
4. trash dumping;
5. the sale of portions of the conserved land;

The conservation easement will allow the town to permit, either generally or in a regulated manner:

1. non-motorized recreational use of the property, along with the use of snowmobiles;
2. agricultural uses of the farmland;
3. maple sugaring operations;
4. other forest management activities that are part of a forest management plan, that has been reviewed and approved by VLT, and that essentially is focused on sustainable timber management under the context of the other uses identified in the general Management Plan for the property;
5. the maintenance of existing trails and the creation of new ones;
6. the town to build incidental structures (like trail shelters) related to the recreation uses of the property
7. the town to build one or two size-limited, gravel-topped parking lots at logical entrance points to the property.

Guidance

1. The e-mail messages regarding the Phase II environmental assessment, purchase and sale contract extension and contingency satisfaction cover important topics. However, the messages contain nothing of long-term value, so they can be purged. The messages suggest that a Phase II report exists and that the parties are negotiating an extension of closing. You should locate the Phase II report and retain it in the permanent file because it affects long-term liability and management issues for the property.
2. The April letter suggests that the land trust has an appraisal in hand. In and of itself the letter is useless, so it can be purged. Find the appraisal and keep it in the permanent file.
3. This letter's only usefulness is to make sure that you find and evaluate all the records listed in the letter for retention or purging. The letter does not need to be kept. Recording of the referenced documents is verified only by entry of the documents in the land records, not by the suggestion that the land trust mailed the documents.
4. The Key Bank letter is troubling. It reveals a multithousand dollar potential liability for the land trust and a dispute with the town, which is also the new landowner of the 600-plus-acre easement property. This situation is troubling, and the letter clearly indicates that future measures will need to be taken to address the issues raised in it. You should keep all documentation related to this potential liability until the matter is resolved. Depending on the resolution of the dispute and the final documentation, you may need to keep some evidence in the file for at least a few years after resolution. If the town or bank later makes a claim against the land trust, you do not want to have purged the evidence of resolution. You will need to know the relevant statute of limitations in your state for such claims, as well as what is definitive evidence of payment of real estate taxes for court evidence, to determine what other documentation related to this dispute should be retained and for how long.
5. This letter, reflecting title matters and other due diligence items, is important in that it reveals several significant issues that need resolution. The letter itself does not need to be kept because it does not resolve any of the matters. However, it can be used as a checklist to ensure that all the final documents for each of the issues identified are in the permanent file, after which this letter can be destroyed.

What other records referenced in these documents are missing? The following documents should be tracked down and evaluated for retention:

- Phase II environmental assessment report
- Appraisal
- Closing documents listed in the October 2007 letter
- Resolution of the real estate tax proration
- Items related to the February 28, 2007 letter, such as mortgage discharges, trustee certification, plan showing location of the well on the Affordable House Lot and minutes of the select board and/or town meeting showing support for the project

Statute of limitations: The maximum period of time after an event that one can initiate legal proceedings.

Developing a Records Purpose Statement

This exercise is for land trusts to complete after returning home upon completion of the course. It is particularly helpful to a land trust developing a records policy and procedures.

Start by reviewing the sample purpose statements on pages 31–32 and the other recordkeeping considerations covered in the chapter. Then spend some time developing your initial ideas into a records philosophy using what you have learned from this chapter. Remember to look at the ideas you noted in the exercise on page 33.

Plan three or four two-hour conversations on the topic that build on each other. The first meeting could be a brainstorming conversation in which everyone simply talks about ideas, concerns and matters that are important to them in their conservation work. You could start with the ideas you have developed from this chapter. Ask someone to record all the comments and organize them for a focused discussion at the next meeting. During the next meeting or two, distill these ideas into a list of concise values and identify the results you want from your recordkeeping system. In the final meeting, weave the values together into a statement, list or story that guides the development of your records system and procedures.

Evaluate Your Knowledge

Answer the questions below using the information in this chapter as a guide. Guidance on the questions follows.

1. List three reasons for creating a written records policy.

   _____

   _____

   _____

2. List four factors that will affect how your land trust designs its record system. Which are the two most important and what are the possible consequences of that choice?

   _____

   _____

   _____

   _____

3. List four laws or rules that might affect your land trust's records systems design and maintenance. Which do you see as the most important?

   _____

   _____

   _____

   _____

4. Describe the two competing perspectives on keeping or destroying document drafts and what makes that analysis

important to records retention. Which approach makes most sense for your land trust and why?

_____

_____

_____

5. Describe what makes a records system philosophy important.

_____

_____

_____

6. List four important considerations in developing a records retention policy. Select the top three for your land trust.

_____

_____

_____

_____

7. Describe how your land trust will identify what people need to be involved in your records system design team.

_____

_____

_____

_____

Guidance

1. A written records policy:
    - Provides answers for your board, staff and volunteers when making decisions about maintaining necessary records
    - Reduces space and storage needs
    - Improves operational efficiency
    - Provides organizational consistency and continuity
    - Protects the land trust's interest in litigation and under government investigation
    - Complies with federal, state and local requirements
2. Factors that affect how land trusts design their recordkeeping systems include:
    - Nature of the land trust mission and work
    - Size of the staff, or number of volunteers and annual budget
    - Number and types of land conservation projects completed
    - Location of land trust office, multiple regional offices or staff and volunteers and geographic size of land trust service area
    - Type of existing recordkeeping system
    - Capacity (and willingness) to embrace digital recordkeeping
3. Laws or rules that might affect your land trust's records systems design and maintenance include:
    - Internal Revenue Code and Treasury Regulations
    - Sarbanes-Oxley Act
    - State laws
    - Donor restrictions
    - Grant and contract restrictions
    - Hearsay rule and exceptions
    - Case law
4. The two competing perspectives on record retention are:
    - Keep all drafts and notes
    - Destroy everything except the final signed closing documents.

    The difference between these two perspectives is important because it will determine which systems you need for document retention, as well as your land trust's philosophy on easement drafting (either you will rely on outside evidence

to interpret the easement grantor's intent and the easement, or the conservation easement will stand on its own). The approach you choose also determines how much effort and expense your land trust must expend to ensure drafts and notes are stored so they will be admissible in court, if necessary.

5. A recordkeeping philosophy is important so that land trust personnel, whether staff or volunteer, have a clear direction and purpose in designing and implementing the records system.
6. Important considerations in developing a records retention policy include:
    - Identifying a record
    - Understanding the legal requirements (be sure to vet your records policy with your land trust's legal counsel)
    - Involving the entire organization in a records policy that your board, volunteers and staff can reasonably follow
    - Saving money through proper records destruction and document purging processes
    - Keeping records so that, if needed, you will only have to trawl through a reasonable amount of relevant information, thus saving staff/volunteer time and costs
7. Identify all users (the creators and suppliers of the information), customers (the recipients of the information) and designers (the creators of the paper or electronic structure) of the system. Form a committee consisting of a representative of each group to determine the needs of the system.

Conclusion

Recordkeeping is an essential component of good management of conservation easements. Without good records, your land trust will not be able to keep its promises to landowners and the public. Good records will help your land trust:

- Answer questions quickly and accurately
- Prevent violations
- Uphold easements
- Protect conserved lands in case of litigation
- Preserve conserved land forever

Land trusts that are serious about their long-term obligations will take the time to develop and implement good recordkeeping policies and practices that support the organization's mission and strategic goals.

Sample Documents

These sample documents will help you develop a records system and procedures, but they must be tailored to your land trust. Please be thoughtful about this process and do not merely copy what is presented here without adapting it to your particular circumstances. Additional samples may be found on the Land Trust Alliance's online library located on The Learning Center (http://learningcenter.lta.org).

Conservation Files Schematic, Brandywine Conservancy, Pennsylvania and Delaware (*page 108*)
The Brandywine Conservancy is a large, staffed, accredited land trust in the Mid-Atlantic region that protects more than 40,000 acres in Pennsylvania and Delaware. The land trust uses a schematic to show the progression of its records system from project development to stewardship. The system also includes a clever color-coding system and filing procedures. This schematic is a simple and clever way to show not only the paper and work flow, but also the naming system at each stage of the process, as well as what documents are retained and how they are managed.

Policies and Procedures for Creation of Computer Filing System, Mountain Conservation Trust of Georgia (*page 110*)
Since 1991, the Mountain Conservation Trust of Georgia, an accredited land trust, has protected land in the mountains and foothills of North Georgia through land protection, collaborative partnerships and education. The land trust has set up a streamlined all-electronic system for a staff of three. The land trust chose to maintain all its records digitally without any paper archiving. The group consulted with its attorney, who felt that this method was sustainable, admissible and sufficient for legal purposes in Georgia. The executive director also feels the system addresses all the organization's internal landowner relationship and stewardship needs. This land trust definitely pushes the boundaries of current custom and practice, but the group is comfortable with its recordkeeping system.

Conservation Stewardship Program Records Philosophy, Naming Decision Tree and Computer Document File Structure, Vermont Land Trust (*page 115*)
The Vermont Land Trust, a large statewide land trust that has protected more than 470,000 acres and has multiple offices and a large staff, uses a paper filing and archive system, a duplicate electronic document

management system, a database to hold and update tracking information about each easement and landowner, and a GIS mapping system. This system allows multiple staff to enter information and records with a single manager and a backup to ensure quality and completeness. VLT's system is also nimble and adaptive, allowing a wide variety of meaningful information to be extracted from the system to track trends, anticipate capacity needs, avoid violations, develop relationships and report to the board, the legislature, partners and funders.

Records Management Policy, Marin Agricultural Land Trust, California (*page 119*)
Founded in 1980, the Marin Agricultural Land Trust has a staff of 13 and has preserved more than 40,000 acres of farmland in Marin County. MALT's policy is comprehensive and addresses its philosophy of the importance of recordkeeping, off-site storage and computer backup of paper records. In 2008, the land trust decided to move to an all-digital recordkeeping format and use The Nature Conservancy's Conservation Track. Land trusts who prefer the paper route will find this policy comprehensive.

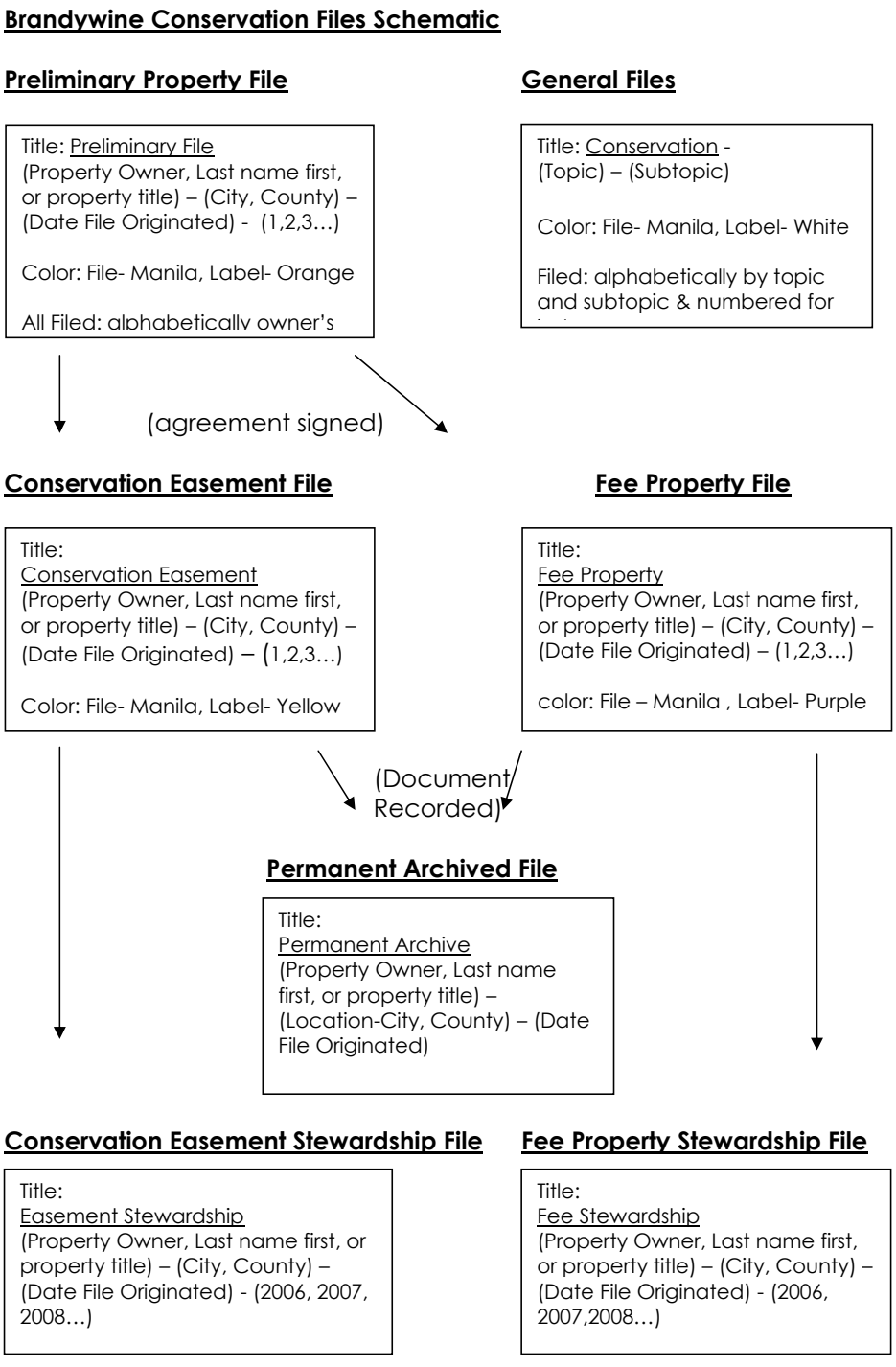
Statement of Policies (excerpt on recordkeeping), Greensboro Land Trust, Vermont (*page 126*)
The Greensboro Land Trust, working in the northeast corner of Vermont, is an all-volunteer, accredited organization. The group has a strong, active board of directors led by an energetic long-time president. The land trust has a portfolio of 13 conservation easements as of 2007. Its policy statements are simple and direct, sized for the organization's capacity and needs. The town of Greensboro allows the Greensboro Land Trust to store its permanent records in a locked file cabinet in the town's safe. Keys to the file cabinet are held by the Greensboro town clerk. Any member of the executive committee and the chair(s) of the monitoring committee are authorized to borrow the key and access documents in the file cabinet. This policy is a good start on essential recordkeeping. It addresses off-site storage, access, electronic backup and essential documents to retain, as well as the person responsible for file maintenance.

Record-Keeping Policy, Columbia Land Conservancy, New York (*page 128*)
The Columbia Land Conservancy made a conscious decision to use a paper-based primary archival system. With this decision came the determination to spend the resources necessary to ensure the longest

life possible for its paper records. CLC chose to use high quality and more expensive archival materials and store its paper records in a professional environmentally controlled facility — a more expensive option, but effective. CLC has also determined and documented what essential documents to keep and for how long and instituted a routine document destruction program for nonessential and expired documents. This is a thoughtful example of a paper-based system.

Recordkeeping System Examples, Vermont Land Trust (*page 135*). These documents show how the Vermont Land Trust established systems for organizing paper and electronic files. In addition, a list of essential conservation easement documents is included to assist land trusts in creating a checklist for their own essential document retention policies.

Brandywine Conservancy: Conservation Files Schematic



Document Filing Policy

Document Filing Policy

General Files - Documents are placed in file, not secured. New documents are placed in front of file.

Preliminary Files, Conservation Easement and Fee Property Files, and Stewardship Files - Documents are secured by two prong attachments. Correspondence is kept on the left side and all other documents are kept on the right side.

Permanent Archived Files – Documents are placed in file, not secured. Documents include (1) Baseline Documentation with original signatures including Environmental Assessments, (2) Recorded Easement or Deed with original signatures, (3) original Letter of Intent, (4) Appraisal, (5) copy of signed Form 8283, (6) important correspondence, (7) Minutes and Resolutions from Land Conservation Committee and Board Preliminary Approval and Final Approval. Any other important documents should be kept in these files.

MOUNTAIN CONSERVATION TRUST

Mountain Conservation Trust of Georgia's Mission

The Mountain Conservation Trust of Georgia is dedicated to the permanent preservation of the natural resources and scenic beauty of the mountains and foothills of North Georgia through land protection, collaborative partnerships and education.

POLICIES AND PROCEDURES FOR CREATION OF COMPUTER FILING SYSTEM

Compliance with "Legal Admissibility and Evidential Weight of Information Stored Electronically" Standards & Principles for Original Documents

BSI DISC PD 0008 is a benchmark for procedures that business should follow in order to achieve best practices, and therefore, legal admissibility of their electronic documents.

> ***Records may be preserved on optical imaging systems, and the originals either discarded or given to a third party, provided that what is retained in digital form represents a complete and unaltered image of the underlying paper document.***

Optical storage of all original documents will be accomplished by using a digital scanner and Adobe® Acrobat© 7.0 software. In order to store these documents in a compatible, tamper-proof form, all archival images will be saved in portable document file (.pdf) format. To further ensure authenticity, a digital signature (bearing contact information and date of document creation) will be added to each document that bears original signatures.

Creating & Archiving Operational Files – Infrastructure

Infrastructure files are the basis of day-to-day operations, and are kept in the following directory:

C:\Documents and Settings\rkeller\Desktop\MCTGA Documents

Within this directory, examples of the following information will by stored:

Ex. Minutes of Board Meetings (partitioned by year)
Procedures
Bylaws
Tax-Exempt Status Confirmation
Articles of Incorporation
Job Descriptions

In order to store these documents in a tamper-proof form, all files will be transformed into portable document file (.pdf) format.

Creating & Archiving Operational Files – Conserved Properties

Once an initial meeting between a potential conservation easement donor and the Trust has been arranged, it will be necessary to create placeholder files for facilitation of easement creation during the property acquisition phase.

You will create a folder in the following directory:
C:\Documents and Settings\rkeller\Desktop\MCTGA Properties
***for ease of location, a folder icon bearing this name exists on the desktop of the computer named "GIS Computer"**

For example:
C:\Documents and Settings\rkeller\Desktop\MCTGA Properties\Hammond Property

Within the "Hammond Property" subdirectory, the following subfolders will be created:

- All Other Reports and Documents
- Baseline Documentation Report
  - Baseline Documentation Report – Drafts
  - Baseline Documentation Report – Final
  - Literature Cited
- Conservation Easement
  - Conservation Easement – Drafts
  - Conservation Easement – Final
- GIS Data
- Maps
  - Baseline Documentation Maps
  - All Other Maps
- Annual Stewardship & Monitoring Report
- Photographs
  - Photographs – Annual Monitoring
  - Photographs – Baseline Documentation
  - Photographs – Other

***for ease of duplication, a folder icon bearing the name of "Template Folder" exists on the C:\Documents and Settings\rkeller\Desktop\MCTGA Properties**

Creating & Archiving Operational Files - Compiling Annual Stewardship/Monitoring Report Files

Within this folder, the following subfolders exist:

- Amendments
- Checklists, Forms & Summaries
- Exercise of Reserved Rights
- Letters and Memos
- Monitoring Reports
- Monitoring waypoints
- Violations

Within the "Annual Stewardship & Monitoring Reports" subdirectory, documents should be filed in the subfolders as follows:

Amendments Directory
Ex. Summary of Amendment Form

Checklists, Forms and Summaries
Ex. Document Checklist
Ownership Log and History
Review of CE with New Owner

Exercise of Reserved Rights
Contains any correspondence regarding the reserved rights, including any approvals.
Ex. Reserved Right Summary Form

Letters and Memos
Contains any non-monitoring related correspondence, issues affecting the easement, and internal memos.

Monitoring Reports
Contains all of the monitoring documents, organized by year.
Ex. Compliance Letter
Monitoring Report
Notice of Monitoring
Site Visit Memo

Monitoring waypoints
Contains all waypoints created during annual stewardship & monitoring event

Violations Directory
Ex. Summary of Violation Form

Creating & Archiving Operational Files - ArcView Geographic Information Systems (GIS) Shapefiles

All generalized ArcView GIS shapefiles are kept in a GIS folder in the following directory:
C:\Documents and Settings\rkeller\Desktop\GIS Data

Within that directory all statewide data is filed in the "State data" folder:
C:\Documents and Settings\rkeller\Desktop \GIS data\State data - Georgia

All County-wide data is stored in the specific county folder:
C:\Documents and Settings\rkeller\Desktop \GIS data\County data – Ben Hill
County data - Clarke
etc.

Creating & Archiving Operational Files - Compiling Specific ArcView Geographic Information Systems (GIS) Maps

All generalized ArcView GIS shapefiles used in creation of specific maps for the "MCTGA Properties" operational files will be copied into the corresponding specific "GIS Data" subfolders.

For example:

C:\Documents and Settings\rkeller\Desktop\MCTGA Properties\Hammond Property\ GIS Data

Creating & Archiving Operational Files - Archiving Specific ArcView Geographic Information Systems (GIS) Maps Within Specific Operational Files

Each specific ArcView map document is kept in each specific subfolder:

C:\Documents and Settings\rkeller\Desktop\MCTGA Properties\Hammond Property\Maps

For example:

C:\Documents and Settings\rkeller\Desktop\MCTGA Properties\Hammond Property\ Maps\Baseline Documentation Maps\Hammond property.mxd

POLICIES AND PROCEDURES FOR ARCHIVAL OF COMPUTER FILING SYSTEM

Proximate Backup of All Pertinent Computer Files - Main Computer

By pressing the button labeled "backup" on the external hard drive, all pertinent computer filing system data folders (MCTGA Documents, MCTGA Properties & GIS Data) will be automatically copied to the F: drive. These archived data folder can be accessed by opening "My Computer/Remote Disk (F:)"

To ensure complete security and protection, this "Remote Disk (F:)" external hard drive will be removed from the premises each evening by the Executive Director.

Ultimate Backup of All Pertinent Computer Files - Main Computer

By simultaneously highlighting the three computer filing system data folders (MCTGA Documents, MCTGA Properties & GIS Data) on the Desktop and copying them into the Z: Drive, all pertinent MCTGA data files are copied to the dataserver of the Edge Group Inc. These archived data folders can be accessed by opening "My Computer/mctga on 'tyr' (Z:)". This dataserver, by contract, is physically removed from the premises of The Edge Building every weekend. All pertinent MCTGA files will be copied into the Z: Drive at the end of each business week.

Proximate Backup of All Pertinent Computer Files – Executive Assistant Computer

All pertinent Executive Assistant computer filing system data folders (Microsoft Office ACCESS Application – "mctg", QuickBooks. Financial Records "MCTQuickbks.qbb") will be

copied to the removable SanDisk 2.0 Gigabyte F: drive that is attached to the Executive Director's keychain. These archived data folders can be accessed by inserting the removable device into the USB port of any computer. These files are archived each and every Friday at the end of the business day.

This device leaves the premises daily in the possession of the Executive Director.

Ultimate Backup of All Pertinent Computer Files - Executive Assistant Computer

By individually archiving these two pertinent Executive Assistant computer filing system data folders (Microsoft Office ACCESS Application – "mctg", QuickBooks. Financial Records "MCTQuickbks.qbb") into the Z: Drive of the Executive Assistant's computer, these MCTGA data files are copied to the dataserver of the Edge Group Inc. These archived data folders can be accessed by opening "My Computer/mctga on 'tyr' (Z:)". This dataserver, by contract, is physically removed from the premises of The Edge Building every weekend. All pertinent MCTGA files will be copied into the Z: Drive at the end of each business week.

Separate Location Storage

Per Standard 9: Ensuring Sound Transaction, subsection G. Recordkeeping, a separate copy of all digital Mountain Conservation Trust of Georgia files are archived to a dataserver maintained by The Edge Group, Inc. At any given time, two mirror image copies of the dataserver are utilized: one "operational" copy in place at 104 North Main Street, one "reserve copy" at the physical residence of the Edge Group, Inc. owners. Every weekend, the "operational copy" is removed from the premises. Alternatively, the "operational copy" becomes the "reserve copy". This allows for a weekly updated copy of the dataserver to always be stored offsite.
In addition to the weekly achival operations by the Edge Group, Inc., a copy of the dataserver is stored quarterly in a safety deposit box located at Jasper Banking Company.

Retention Period of Original Records & Documents

Original documents and records will be retained as follows: for the current fiscal year, plus two previous years or until audited, whichever is longer.

Destruction of Original Records & Documents

Original documents and records may be destroyed if 1) an optical scanned image has been made of the document (if necessary), and 2) the document is over three years old. Original documents pertinent to the direct defense of land transactions (conservation easements, baseline documentations, etc.) will be retained indefinitely.

Vermont Land Trust Conservation Stewardship Program Records Philosophy

Philosophy. VLT's Conservation Stewardship Office is the repository of all the completed conservation work of the organization. Our paper and electronic records serve the organization's legal and information needs regarding all conserved land and its owners. We also exist to serve owners of conserved land and maintain records in order to answer inquiries promptly regarding their conserved land. Our records must exist in perpetuity to fulfill our conservation easement stewardship responsibilities as well as legal needs. We keep only those records that are essential to these functions in paper and electronic form.

Principles

1. All paper files are stored in one-hour fire-safe four-drawer file cabinets
2. All paper files remain in the stewardship office except copies designated for field use.
3. All files are organized for completeness of pertinent information only, ease of use and compact storage.
4. Only essential information is stored. Essential information is determined by reference to our guiding philosophy and to the conservation easement or other conservation document.
5. No drafts are kept as the conservation easement and supporting documentation must stand or fall based on the four corners of the documents. If we have made an error, then we take responsibility for the error and learn for the future to do better work.

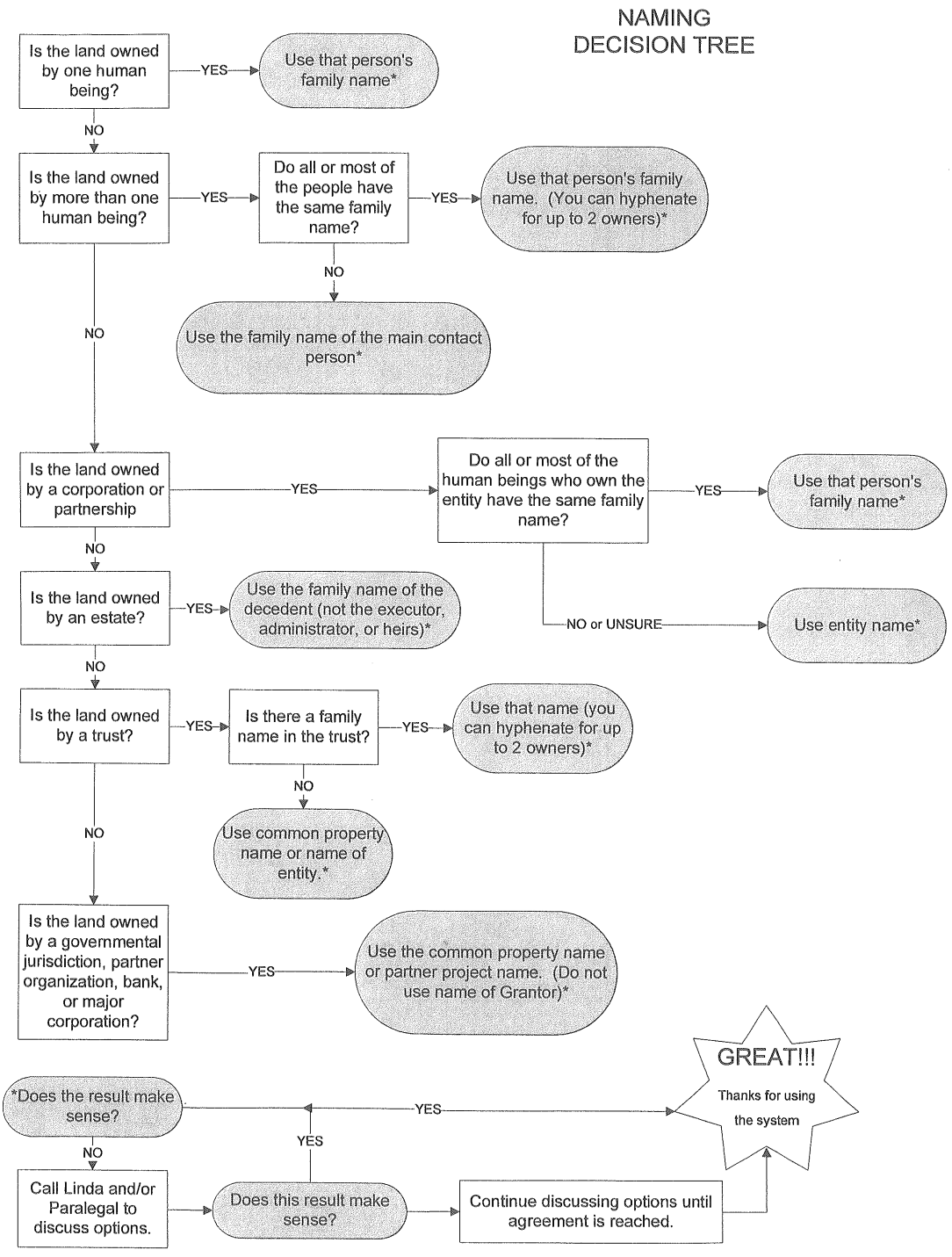
Records Organization and Considerations:
Paper Files are organized into Legal Files and Monitoring Files alphabetically by Town and within Towns by the conserving landowner name. Electronic data is organized in a relational database with the Project Cost Code as the unique identifier and has three sections of tables: budget tables, parcel tables and stewardship tables. The database is backed-up and is stored off-site in a secure network. Fully electronic files and secure archiving are the challenges we are working on now. Our goal is to have all current work in electronic form for ease of transmission to field offices and to allow original paper files to be stored in permanently secure storage. All archived paper documents are accessible within a few days of request. The detailed organization of the paper files and database has been important in order to serve our internal and external customers and so is here in list form.

Legal File: Legal size hanging folder with file name on tab at right front corner; holds legal size manila folder (with two-prong fasteners front and back)
Front: Original recorded or legal documents or copies of originals, as appropriate, for waivers and subordinations only. Approvals, permissions, key correspondence, etc. go in monitoring.
Back: Recorded originals with recording stamps (or copies of recorded originals); includes: conservation easement, transfer return, title policy, partial release of mortgage, etc.

Monitoring File: Letter size hanging folder with file name on tab at right front corner; holds letter size classification folder (six sections with two-prong fasteners and two pockets) and green vinyl protector (for use by monitors in the field)
Section 1: Monitoring forms – each annual report added
Section 2: FIS, Grand List Description, Project summary, news clippings, key letters; personal

	information about owner
Section 3:	Conservation Easement copy plus any amendments
Section 4:	Approvals, permissions, appraisal summary
Section 5:	Management Plans (forest, agricultural, recreation)
Section 6:	Baseline Documentation Report (BDR) - original
Pockets:	Folded maps
Protector:	Copies of portions of BDR, approvals sand plans; for use by monitors in the field

Last revised February 2003


NAMING
DECISION TREE
Is the land owned by one human being?
YES
Use that person's family name*
NO
Is the land owned by more than one human being?
YES
Do all or most of the people have the same family name?
YES
Use that person's family name. (You can hyphenate for up to 2 owners)*
NO
Use the family name of the main contact person*
NO
Is the land owned by a corporation or partnership
YES
Do all or most of the human beings who own the entity have the same family name?
YES
Use that person's family name*
NO
NO or UNSURE
Use entity name*
Is the land owned by an estate?
YES
Use the family name of the decedent (not the executor, administrator, or heirs)*
NO
Is the land owned by a trust?
YES
Is there a family name in the trust?
YES
Use that name (you can hyphenate for up to 2 owners)*
NO
Use common property name or name of entity.*
NO
Is the land owned by a governmental jurisdiction, partner organization, bank, or major corporation?
YES
Use the common property name or partner project name. (Do not use name of Grantor)*
GREAT!!!
Thanks for using the system
*Does the result make sense?
YES
NO
YES
Call Linda and/or Paralegal to discuss options.
Does this result make sense?
Continue discussing options until agreement is reached.

VERMONT LAND TRUST
COMPUTER DOCUMENT FILE STRUCTURE
1/1/07

A Projects
- Abrams
- Ackelford
- Axeminster
- Azur
  - Archive (all final documents according to retention schedule)
  - Correspondence (project work only)
  - Financial (project work only)
  - Map (links to GIS database)
  - Photographs (links to photo database)
  - Project (drfts and other project work only material)
  - Publicity
  - Stewardship (used only after closing)

B Projects
C Projects
D PRojects

Marin Agricultural Land Trust
Records Management Policy

Records Management refers to the systematic control of information and documentation that is required in the administration and operation of an organization. By assuring that valuable records are preserved and readily available, records management promotes economy and efficiency. Records management involves determining what records should be retained; how long those records need to be retained; who in the organization is responsible for the records; whether the records are to be retained in an office or transferred to an off-site archive; and whether the records should eventually be destroyed.

Official records constitute original text documents, photographs, recordings, faxes, emails, or any form in which data are held, that are created, received and used by an organization in carrying out its functions. Draft editions of records may be helpful in documenting the decision-making process, though they are generally not considered records.

The purpose of this Records Management Policy is to ensure that authentic, reliable, complete and usable information and documentation that MALT generates and receives in the course of its business are properly managed and maintained in an effective and secure manner for as long as they are required. The objectives of the policy are to:

- ensure the preservation of records of permanent value
- maintain continued access to and readability of historical records
- preserve long-term transparency in the decision-making process
- ensure that all records that have regulatory, statutory or business value are effectively stored and protected against damage, loss, tampering, or unauthorized access for appropriate periods of time
- uphold confidentiality of information pertaining to MALT documents and conditions on private properties

Off-site Storage
The storage needs for each record type covered by this policy depend on factors such as the nature of the record. the type of media used, and access requirements. MALT's offices provide sufficient security and protection for most of our needs, but records that require longevity with a higher degree of protection from fire and environmental factors may be archived at appropriate facilities away from MALT's offices. Unless otherwise indicated, the following locations and procedures will be used for off-site archival storage.

A and P Records Management

Location: 111 Hamilton Drive, Novato, CA 94949; 415-884-7720, 883-2391
Designated Manager (DM) of records at this site: Tony Nelson, Stewardship Coordinator
Condition of stored materials is to be examined every 6 months.
Materials must be clearly identified with the name and title, including signature, of the creator and the date the record is created or updated.

All materials must be signed in and out with the DM. The DM will maintain a record sign-in and access sheet.
Access to records at this site is limited to the DM, Executive Director, Associate Directors, and Office Manager.

Bank of Petaluma

Location: 11400 State Route One, Point Reyes Station, CA 94956; 415-663-1713
Designated Manager (DM) of records at this site: Julie Evans, Membership Director
Digital/electronic media stored at this site are updated monthly. The DM coordinates updating with staff.
Media must be clearly initialed and dated by the creator when created or updated.
Access to safe deposit boxes at this site is limited to the DM, Executive Director, and Office Manager.
Bank of Petaluma registers date and name when access occurs and maintains these records until seven years after the box account is closed.

A. Computer Backup

- All computers used by staff are automatically backed up every evening onto a central server housed in the annex building (with Stewardship and Education department offices).

B. Administration

1. Incorporation documents, bylaws, policies, and related
   - Final drafts of these records are maintained in perpetuity at A and P. A copy is kept on file in MALT's offices.
   - These documents are printed or copied onto archival, acid-free paper. Office copies are on plain paper.
   - Access is not limited.

2. Tax-exemption documents (application Form 1023, IRS determination letter, related)
   Federal law requires that copies of these documents be held at MALT's headquarters office, and that they be made available for public inspection upon request.
   - Originals of these records, on plain paper, are kept on file in MALT's offices.
   - Copies on archival, acid-free paper are kept at A and P.
   - Access to office copies is not limited. The public must request access from Executive or Associate Directors.
   - Regular backup is not required and these documents should not be destroyed.

3. Board meeting agendas, minutes, and related
   These records document MALT's decisions and organizational history. Pertinent records should be included, but care should be taken to retain only necessary

information. The Office Manager has primary responsibility for copying these documents and maintaining records in the office.

- The current years records are maintained in file drawers in MALT's offices. At the end of the fiscal year, they are compiled and transferred to A and P and kept perpetually. Copies of records from all years are maintained on file in MALT's offices.
- Records to be kept at A and P are copied onto archival, acid-free paper. Office copies are on plain paper.
- Access is limited to staff and Board members.
- The records at A and P will be recopied as needed to ensure integrity.

4. Easement Documents

After easement documents are signed, the landowner has it recorded by the County. MALT is then given the original copy. Along with the easement document, title insurance policies and documents created during acquisition, such as draft easements and correspondence, are also important to retain.

- The original copy of the easement document and the title insurance policy are archived at A and P and a copy of each is retained in the "Legal" file in MALT's office. Additional copies can be acquired from the office of the Marin County Recorder.
- All copies are on plain paper.
- Easement documents include MALT's address and phone number, landowner information, and dates signed and recorded.
- Accessible by all staff and Board members. Access by others restricted without Executive Director or Associate Director approval.
- Regular backup is not required and these documents should never be destroyed or altered.

C. Finance

1. Source Documents

These records include items such as invoices, canceled checks, and investment statements. The Office Manager has primary responsibility for managing these documents.

- MALT files source documents for the current year alphabetically in a cabinet drawer. At the end of each fiscal year, all source documents are put into file boxes and stored in MALT's offices for at least 7 years.
- These records are generally on plain paper.
- Access to these records is limited to MALT staff and Board members.
- Backup is not required. After 7 years, the source documents will be either recycled or destroyed by the Office Manager

2. Annual Audits

An independent accountant audits MALT's finances annually. Board members receive copies of the final audit, and granting agencies are provided copies of the most recent audit on request.

- Audits are retained by the independent accountant for 5-7 years, as professional standards require. MALT retains audits in perpetuity.
- Audits are printed on plain paper and kept in file boxes in MALT's offices.
- These records are accessible to all persons, though prior communication with Executive Director is required for access by the public.
- Backup is not required, except when documents begin to color or fade.

3. Forms 990

   These forms are filed with the federal IRS annually. The public has a right to access portions of the forms and schedules.

   - Forms for each year are filed in boxes with source documents as described in #1 above.
   - Forms are printed on plain paper and will be kept for 7 years.
   - These records are accessible to all persons, though prior communication with Executive Director is required for the public.
   - Backup is not required. After 7 years, these records will be either recycled or destroyed by the Office Manager.

D. Easement Stewardship

1. Baseline Documents

   Baseline Documentation Reports ("Baselines") record the condition of easement properties when an easement is conveyed. They are created by the Stewardship Coordinator and the information should be available in perpetuity. Baselines have a standard format and include text, maps, aerial photographs, and photographs. Baselines may play a vital role in defending an easement in legal proceedings. (Refer to the Easement Stewardship Handbook.)

   - The landowner is given one copy. MALT keeps two copies: one is managed in the Stewardship Coordinators office for routine use, and one is archived at A and P.
   - Prior to 2002, all copies were made on plain paper. Beginning in 2002, MALT copies are on acid-free, archival quality paper. Landowner copies are on plain paper.
   - All baselines are labeled with standard title pages and covers, and include property name and date.
   - Accessible by all staff and Board members. Access by others restricted without Executive Director, Associate Director, or Stewardship Coordinator approval.
   - Regular backup is not required and these documents should never be destroyed or altered.

2. Baseline Photograph Negatives

   Photos are taken when the baseline is created and are re-taken approximately every ten years. Negatives must be kept as long as possible.

- Only one set of standard 35mm photo negatives exists for each year they are taken.
- All negatives are archived at A and P in archival quality, acid-free sleeves.
- Sleeves are labeled with Easement name and date.
- Access by Stewardship Coordinator, Executive Director, and Associate Director is allowed. Access by others restricted without approval by one of the above.
- Backup is not required and these records should never be destroyed.

3. Baseline Original Photographic prints

   Photos are taken when the baseline is created and are re-taken approximately every ten years. Prints must be kept as long into the future as possible.

   - One set of 4"x6" 35mm prints exists for each year they are taken. Beginning in 2002, photographs are also scanned onto CD-R disks by the developer.
   - All original prints are archived at A and P in archival quality, acid-free sleeves. Prints are labeled on the back with easement name, date taken, subject, photo location and number, and photographer initials on archival quality labels.
   - CD's and an index print for photos taken after 2001 are stored in binders in the Stewardship Coordinator's office for routine use. Easement name and date are labeled directly onto the CD's.
   - Access by Stewardship Coordinator, Executive Director, and Associate Director is allowed. Access by others restricted without approval by one of the above.
   - Backup is not required and the prints should never be destroyed or altered.

4. Easement Aerial Photographs

   Photos are ordered from commercial aerial photography sources that maintain stock inventory for easy re-ordering. Many of these are large and would be awkward and expensive to store off-site. Copies of the aerial for each property, with infrastructure and pertinent information drawn on them, are included in the baseline documents stored at A and P.

   - Original aerial photographs and all copies made are maintained in a metal, oversized cabinet within MALT's offices.
   - Original photographs are labeled by the aerial photograph company with their name and address. Property name, date, and approximate scale are also labeled on each photograph.
   - Access is restricted to staff and Board members. Original photographs do not leave MALT's office and are never written on or altered.
   - New aerial photographs for a given property are acquired approximately every ten years.

5. Annual Monitoring Reports

   Each property encumbered by a MALT easement is examined by the Stewardship Coordinator every 1-2 years. A standard paper form is used to record observations, and copies of aerial photographs or maps with notations may be included.

Monitoring reports may play a vital role in defending an easement in legal proceedings. (Refer to the Easement Stewardship Handbook.)

- Original monitoring reports are stored at A and P for a minimum of twenty-five years. Copies of reports are maintained in the Stewardship Coordinator's office for routine reference.
- All reports are on plain paper.
- Each monitoring report is labeled with property name, date, and monitor name or initials. The Executive Director initials the report after reviewing findings.
- Accessible by staff and Board members. Access by others restricted without Executive Director, Associate Director, or Stewardship Coordinator approval. Landowners are not given a copy of the monitoring report.
- Backup is not required, except if documents begin to color or fade, and these documents should not be altered.

6. Annual Monitoring Photographs

   Photographs may be taken during monitoring visits to document pertinent observations. Monitoring photographs may play a vital role in defending an easement in legal proceedings.

   - One set of original, 4"x6" 35mm prints are stored at the Stewardship Coordinators office in archival quality, acid-free sleeves or file box. Each print is labeled with property name, date, subject, and photographer's initials on archival quality labels.
   - Photos taken after 2001 are also scanned onto CD-R disks by the developer. CD's and an index print are stored in binders in the Stewardship Coordinator's office for routine use. CD's are labeled with easement name and date photographs are taken. CD's are kept for their useful life but are not backed up.
   - Annual monitoring negatives are stored at A and P in archival quality, acid-free sleeves in perpetuity. Sleeves are labeled with easement name and date photographs are taken.
   - Accessible by staff and Board members. Access by others restricted without Executive Director, Associate Director, or Stewardship Coordinator approval. Landowners are not given a copy of the prints.
   - Regular backup is not required and these materials should never be destroyed or altered.

7. Easement Stewardship Handbook

   The handbook describes established policies and protocols for managing easements through time, including property evaluations, baseline and monitoring program guidelines, and easement violation procedures. It is important to maintain the handbook in order to establish formal, consistent practices, to document decisions regarding stewardship, and to inform future staff members.

   - A copy of the handbook is archived at A and P. One copy is managed in the Stewardship Coordinators office for routine use. Electronic files are also backed up monthly.

- The copy at A and P is created on acid-free, archival quality paper. The office copy is on plain paper.
- The handbook is labeled with MALT's name and address and title. Pages are printed with date of creation in the header.
- Access not limited.
- Regular backup is not required and these documents should never be destroyed. Updated versions of the handbook will be sent to A and P as soon as practical. Older versions will be retained with the newer version.

8. Stewardship Assistance Program (SAP) Landowner Agreements

   The SAP provides grants to easement landowners of up to $25,000. When a grant is accepted, MALT and the landowner enter into a ten-year agreement that documents the project undertaken, the amount of funds granted, and any required management activities.

   - Original agreements are stored at A and P. One copy of each agreement is maintained in the Stewardship Coordinator's office, and one copy is given to each landowner that receives a grant.
   - All agreements are printed on plain paper and should be retained for a minimum of 15 years.
   - Accessible by staff and Board members. Access by others restricted without Executive Director, Associate Director, or Stewardship Coordinator approval.
   - Backup is not required.

[From Greensboro Land Trust Statement of Policies]

6. RECORDS. [Adopted by GLT Board on April 6, 2007 and December 6, 2008]

The Town of Greensboro is allowing the Greensboro Land Trust to store its permanent records in a locked file cabinet in the Town safe. Keys to the file cabinet are held by the Greensboro Town Clerk. Any member of the Executive Committee and the chair(s) of the Monitoring Committee are authorized to borrow the key and access documents in the file cabinet.

It is the policy of the GLT to store the records listed below in the file cabinet as soon as they become available. Moreover, as of April 2007, GLT management has been charged with loading as much of this material as is available in electronic form onto one or more Compact Disks and storing it/them in the file cabinet.

	Type of Record	Retention Period (Years - from current year end)
1	Accreditation documentation and correspondence with the LTA Commission	Permanently
2	Internal and external auditors reports	Permanently
3	Bi-annual filing on GLT with the Vermont Secretary of State	Permanently
4	Easement and land ownership records including project evaluation reports, baseline documentation reports, deeds, easement agreements, maps, appraisals, monitoring reports and all related correspondence	Permanently
5	Determination letter the from IRS regarding GLT's 501c3 status	Permanently
6	Financial statements - annual	Permanently
7	GLT newsletters (Includes board membership information)	Permanently
8	Insurance records, claims, accident reports	Permanently
9	Minute books, charter, by-laws	Permanently
10	Planned Gifts, codicils to wills, other donor trust documents	Permanently
11	Tax returns, worksheets and all supporting documents	Permanently
12	Bank deposit slips, reconciliations, statements, cancelled checks	4
13	Credit and debit memos on transfers between GLT accounts	4
14	Donor records	4
15	Expense reports and invoices	4

16	Financial statements - interim	4
17	Committee and other board reports	4
18	Invoices	4
19	Litigation files - inactive	4
20	Insurance policies - expired	3
21	Budgets	2
22	Correspondence, general	2
23	Financial Statements - interim	2

COLUMBIA LAND CONSERVANCY, INC.

RECORD-KEEPING POLICY

Adopted April 30, 2005

Guiding Principles: This Policy is intended to embody the functional principles of Columbia Land Conservancy, Inc.'s (CLC) record-keeping policy, and to address the creation, collection and storage of CLC's vital records in the ordinary course of CLC's business. CLC's Record-Keeping Policy shall serve to guide staff in preserving those records necessary to document and guide the organization's activities, to collect and store documents in a manner that may assist the land trust in any future legal proceeding, and to preserve CLC's institutional memory in order to provide for the smooth transition of staff and board members over time. Although CLC recognizes that a record-keeping policy is beneficial for various components of the day-to-day work of the organization, it is particularly important with regard to conservation easements, fee-owned lands, and tradeland transactions.

CLC is committed to operating in an efficient manner that reflects the best current standards of practice in the field of land conservation, while preserving its right to enforce the conservation easements it accepts. In recognition of the fact that CLC's conservation easements are perpetual in duration, CLC understands that adherence to certain standards for which records are kept by the organization will be key to preserving and upholding these easements in perpetuity.

In addition to accepting conservation easements, CLC owns and manages certain properties in fee ownership, currently including an office building and several public conservation areas. The fee ownership of lands carries responsibilities, including the ability of the organization to provide safe public access to the properties when appropriate, the requirement that CLC maintain its fee-owned lands in accordance with any applicable local laws and the necessity that CLC be a "good neighbor" with respect to the public conservation lands it owns, in recognition of the fact that CLC is a community-supported organization. Furthermore, CLC periodically receives donations of lands (referred to as "tradelands"), which CLC resells per the donor's intent, to help fund the organization's programs. Tradelands also carry obligations and responsibilities that CLC must uphold.

CLC staff shall abide by this Policy as amended from time to time by CLC's Board of Trustees. Staff shall update procedures to implement this Policy as staff finds necessary and advisable in the course of the day-to-day work for the organization, and, if so updated, compliance with such procedures shall be a condition of continued employment with the organization. At a minimum, staff shall have procedures for identification and location of records. Staff shall revisit this Policy and its implementation procedures on an annual basis to determine whether the Policy should be amended to reflect changing national standards and Land Trust Alliance standards or to otherwise upgrade its contents, and shall make recommendations to the Board accordingly.

Records Creation: In order to confirm the accuracy of a document, CLC's Critical Records (as listed below) should contain sufficient information as to determine who created the document and, if possible and appropriate, be signed and dated by the party creating such record. No CLC staff member, Board member, volunteer or contract employee shall sign a record as accurate unless she or he personally created or participated in the creation of the document.

Copies/Back-ups: All CLC Conservation Easement Records, Fee Owned Property Records, and Tradelands Records (as listed below) shall be duplicated with at least one copy kept in CLC offices for daily use and reference, and the original shall be kept in an off-site archival storage facility subject to control by the Custodian of Records. Other Critical Records shall be archived as necessary to address the risk of loss from computer-related problems, fire, flood or other disaster. A back-up tape containing all CLC computer files contained on the network server shall be taken off-site on a weekly basis.

Photographs: Photographs taken for conservation easement baseline documentation or pursuant to ground monitoring visits shall be accordance with national standards or Land Trust Alliance standards. At this time, CLC is using black and white professional quality film designed to avoid rapid degradation over time and which has adequate resolution to allow such photos to remain clear when enlarged. CLC's current procedures using black and white film when possible is based on CLC's recognition that digital photographs may provide more challenges should they be needed in legal proceedings, and requires a greater commitment to maintain the most current technology to make them readily accessible for the long term. Color slide film is acceptable for aerial monitoring of easement properties and may be used for baseline documentation only if the project is extremely time-sensitive given extenuating circumstances (such as serious health concerns of one of the involved parties). Conservation easement baseline and monitoring photographs, slides and negatives shall be archived in an off-site archival storage facility that is preferably fireproof and temperature/humidity controlled.

Maps: A paper copy of every CLC conservation easement map and additional maps contained in the baseline documentation, as well as other pertinent maps related to fee owned property and tradelands, shall be stored in the off-site archival storage facility. Other maps may be stored digitally provided a back-up copy of the CD-ROM, or other format, is stored off site.

Archival techniques: CLC Critical Records shall be maintained in a form designed to protect such records for the time they are to be preserved by the organization in accordance with this Policy. Therefore, staff shall avoid the use of metal fasteners, such as staples, paperclips and binders, with documents to be archived. The organization shall utilize archival quality plastic sleeves, acid-free paper, trace paper separators for mylar maps, plastic fasteners and similar techniques for the preservation of the archived Critical Records. Critical Records shall be archived in an off-site archival storage facility with a copy of all such records kept in-house.

Irreplaceable items for each Conservation Easement Record (such as CLC's copy of the original signed conservation easement, original signed baseline photographs, and baseline and ground monitoring photograph negatives) and other critical documents, as appropriate, shall be placed in a lockable fireproof filing cabinet located in CLC's office immediately following the creation of such item. These items shall be archived off-site in accordance with this Policy at the

next regularly scheduled bi-annual archiving visit, or sooner as staff determines necessary. Other Critical Records, once complete, shall be archived on at least an annual basis, or more frequently as staff determines necessary.

Critical Records: The following list of records shall be those records that, at a minimum, are kept by CLC in the ordinary course of business pursuant to this Policy (see Duration of Record-Keeping, pg. 6). The items listed for each record may not be applicable for every individual project. The list is not a comprehensive list of such records, but rather serves as a guide to CLC staff as to which additional records used by the organization should be preserved in accordance with this Policy:

► Organizational Records:

- Development and membership records, including databases, records of contributions, solicitations, and correspondence acknowledging contributions in accordance with Internal Revenue standards
- CLC Newsletters and publications
- Personnel records, including resumes from successful job candidates, interview notes, resumes, etc. from any person interviewed for a position but not hired, staff evaluations, correspondence regarding employment issues, insurance and benefit records, and job descriptions
- CLC Policies adopted by the Board of Trustees
- Articles of Incorporation
- Bylaws
- NYS Tax Exempt Certificate
- Internal Revenue Service determination letter, public support filings and any related correspondence
- Materials pertaining to any legal proceedings involving CLC

► Financial Records:

- Foundation/government grant agreements
- Contracts and all related correspondence
- Insurance policies and all related correspondence
- Paid invoices and receipts for purchases
- Budgets, annual balance statements, audited financial statements
- Tax returns, notices from taxing authorities, Form 1099
- Employee payroll

► Board Records:

- Board of Trustees records, such as board and committee meeting materials, agendas, meeting minutes, board profiles, job descriptions and pertinent correspondence

► Conservation Easement Records:

- Correspondence with landowners regarding their conservation easement
- Notes and memos from phone calls and meetings with landowners, or their representatives, about their conservation easement
- Meeting minutes containing Board approval for project
- Drafts of conservation easements and accompanying draft maps or land planning sketches that were sent to landowners as correspondence or that have comments on them per discussions with landowners or landowners' representatives, or CLC's attorney(s)
- Recorded original conservation easements, subordination agreements, loan documents and the like
- Appraisals or related materials
- Surveys
- Original Baseline Documentation and Supplemental Baseline Documentation
- Mylar copy of conservation easement map
- Photographs and negatives for Baseline Documentation
- Title commitments and exceptions to title, title policies, Ownership & Encumbrance reports, as appropriate
- Environmental Assessments and any supporting records or data
- Annual monitoring reports, photographs and slides with supporting map(s) (with negatives if ground monitoring); monitoring follow-up correspondence
- Conservation easement interpretations
- Reserved rights requests and responses
- Requests for amendments and responses
- Correspondence and memos relating to alleged or actual violations of conservation easements
- Closing documents and copy of all checks for filing fees, payment of services to CLC, donations to CLC's Conservation Easement Stewardship Endowment, transfer fee payments
- Internal Revenue Form 8283s

► Fee Owned Property Records (including public conservation areas, office building, etc.):

- Warranty deeds, loan documents
- Partnership agreements, memorandums of understanding
- Meeting minutes containing Board approval for project
- Management plans, contracts related to management, as appropriate
- Documentation of payment in lieu of property taxes
- Environmental assessments
- Title report and exceptions
- Survey maps
- Closing documents and copy of all checks written
- Tax filings, Form 8283, Form 8282
- Appraisals or related materials
- Leases

- Inspection reports
- Documentation on donor pledges and list of contributors
- Acquisition-related correspondence

► Tradelands Records:

- Pledge letters and/or related documents
- Meeting minutes containing Board approval for project
- Warranty deeds, loan documents
- Survey maps
- Environmental assessments
- Title report and exceptions
- Closing documents and copy of all checks written at closing
- Tax filings, Form 8283, Form 8282 (if applicable)
- Property tax receipts
- Appraisals, price documentation
- Correspondence with land donor and land purchaser
- Sales contracts
- Conservation easement documentation, if applicable

Record Storage: Critical Records shall be kept off-premises in an archival storage facility that is preferably temperature/humidity controlled and fireproof in order to avoid deterioration of the documents, prevent inadvertent loss of the records due to fire, flood, storm or other hazards that may happen to CLC's office and avoid tampering with the records, to the greatest extent possible. CLC staff shall use its discretion to determine which, if any, of CLC's other records should also be archived off-site to prevent risk of loss or tampering. Such records shall be kept in paper form, but may be archived or otherwise electronically stored in the future.

For paper records, staff shall determine appropriate means to store such records with their longevity in mind (such as using acid free paper, archival quality film, archival plastic sleeves, restricting light, addressing humidity levels in storage areas, etc.), and shall revisit alternative types of storage methods periodically to ensure staff has chosen the best available methods of preserving paper records. In addition, staff shall ensure that the physical methods of storing archived documents preserves those documents from damage to the greatest extent practicable (as, for example, keeping aerial photos flat rather than rolling them up, storing maps in map boxes rather than in file drawers).

Should other methods of record-keeping be adopted in addition to, or in place of, paper form, CLC shall either store the technology needed, or commit to updating the technology periodically, to ensure such records are accessible in perpetuity.

Storage of Non-Critical Records: Due to limited storage space in CLC's office, the organization's non-critical records may also be stored off-site in the archival storage facility. Storage of such records will not be subject to the standards contained in this Record-Keeping Policy. Non-critical records may include, but are not limited to, CLC's consulting work and

other special projects, publications and reference materials, files of inactive/incomplete projects, records that exceed the Duration of Record-Keeping as outlined in this Policy, or other materials not addressed by this Policy and deemed non-critical.

Electronic Mail Records: Paper copies shall be made of all pertinent electronic CLC records and stored with other critical organizational records. Alternatively, CLC may record such electronic documents on floppy disc, CD-ROM, DVD, ZIP discs or other format, so long as the technology to retrieve such electronic documents is preserved or updated so the files remain accessible.

Custodian of Records: The Executive Director shall designate a staff member to act as custodian of records. The custodian shall be charged with the safekeeping of all original Critical Records, as listed above. The custodian shall adopt a system of record sign-out and use for original Critical Records in order to preserve original records and ensure that such records are free from loss or susceptibility to tampering in the event that a record needs to be removed from the archival storage facility. At a minimum, such system shall include the name and signature of the person retrieving or using original records, the date of the retrieval or use and the title of the documents removed. Removal of Critical Records from the archival storage facility shall be discouraged except in extraordinary circumstances (e.g. documents needed in legal proceedings, replacement of lost and damaged documents) and removal of Critical Records from the temporary in-house archive storage shall be restricted. The custodian of records shall also be charged with safeguarding highly confidential Critical Records to ensure only authorized personnel have access.

Maintenance and Inspection: Staff shall inspect archived documents at least every three (3) years to determine whether such documents are adequately preserved, and to provide the opportunity to repair damage and prevent further loss or damage to materials.

Duration of Record-Keeping: Although suggested or mandated retention periods differ based on the type of document and applicable local, state and federal government laws and regulations, CLC will keep all documents longer than is legally required due to capacity issues with managing a more complex retention schedule based on specific document types. The following guidelines shall apply to the length of time for which CLC records shall be kept in accordance with this Policy:

1. Organizational Records shall be maintained in perpetuity; however, personnel records shall be maintained for as long as an employee works for CLC and then for at least twenty-five (25) years after their separation from the organization.

2. Financial Records shall be maintained for at least twenty-five (25) years following the record's creation, unless the provisions of the particular financial record requires a longer period of time for maintenance. Payroll records shall be maintained for as long as the organization exists.

3. Conservation Easement Records shall be maintained for as long as each easement is in effect and held by CLC.

4. Tradelands and Fee Owned Property Records, or any fixed asset, shall be maintained for as long as the organization exists.

5. Board Records shall be maintained in perpetuity.

Disposal of Records: All critical records that have exceeded their minimum retention period, as stated in Duration of Record-Keeping clause above, and that are in compliance with CLC's Recording-Keeping Policy, as amended from time to time, may be destroyed. CLC will hire a professional (such as Albany Business Archives or similar business) to conduct certified destruction and disposal services of all critical records to ensure compliance with governmental laws and to protect the confidentiality of CLC's documents. Such services are not required for the destruction and disposal of non-critical records.

RECORDKEEPING SYSTEM EXAMPLES

Example 1: Paper Stewardship Files

Paper Files are organized into Legal Files and Monitoring Files alphabetically by Town and within Towns by the conserving landowner name. Electronic data is organized in a relational database with the Project Cost Code as the unique identifier and has three sections of tables: budget tables, parcel tables and stewardship tables. The database is backed-up and is stored off-site in a secure network. All archived paper documents are accessible within a few days of request.

Legal File: Legal size hanging folder with file name on tab at right front corner; holds legal size manila folder (with two-prong fasteners front and back)

- Front: Original recorded or legal documents or copies of originals, as appropriate, for waivers and subordinations only. Approvals, permissions, key correspondence, etc. go in monitoring.
- Back: Recorded originals with recording stamps (or copies of recorded originals); includes: conservation easement, transfer return, title policy, partial release of mortgage, etc.

Monitoring File: Letter size hanging folder with file name on tab at right front corner; holds letter size classification folder (six sections with two-prong fasteners and two pockets) and green vinyl protector (for use by monitors in the field)

- Section 1: Monitoring forms – each annual report added
- Section 2: File Information Sheet, real estate tax assessment description, project summary, news clippings, key essential letters; personal, information about owner
- Section 3: Conservation easement copy plus any amendments
- Section 4: Approvals, permissions, appraisal summary
- Section 5: Management plans (forest, agricultural, recreation)
- Section 6: Baseline documentation report (BDR) - original
- Pockets: Folded maps
- Plastic Protector: Copies of easement, BDR, approvals and maps for use by monitors in the field

Example 2: Paper Stewardship Files

The Conservation Easement Program Administrator will serve as Custodian of Records, unless otherwise designated by the Executive Director, and will be charged with safeguarding the records kept in the fireproof filing cabinet. The cabinet will be locked at all times. Only the Custodian of Records and Executive Director will have access to the filing cabinet. Should another staff member need a file from the cabinet, the staff member must obtain prior approval from the Custodian of Records. If granted, the Custodian of Records will retrieve the file and request the staff member sign-out the file. Staff members will be accountable for any such files in their possession until it is hand-delivered to the Custodian of Records and signed back in.

Records to be Stored

Conservation Easement Records:

- Original signed conservation easement baseline documentation report and supplemental baseline report
- Original recorded conservation easement
- Baseline and monitoring photograph negatives
- Signed copy of Internal Revenue Form 8283

Organizational Records:

- Personnel records as deemed appropriate by Executive Director
- Pertinent materials pertaining to any legal proceedings involving the land trust
- Documentation regarding Wills, bequests, etc.

Fee Owned Property Records:

- Materials as deemed appropriate by staff

Tradeland Records

- Sales contracts and other material as deemed appropriate by staff

Highly confidential or irreplaceable records deemed appropriate by Custodian of Records and/or Executive Director

Note: Interestingly, this land trust considers organization records, tradeland records and other records not normally considered to be "stewardship" records to be within the purview of their stewardship program. This is an example of each land trust tailoring its record systems to meet its needs. This land trust takes a broad view of what constitutes stewardship records. Other land trusts take much narrower views. Either is appropriate if it serves your organizational needs, complies with applicable laws and supports your land trust in the event of litigation.

Example 3: Computer Folder Structure

- LAND TRUST PROPERTIES
  - Adams Property
  - Byrne Property
    - Baseline Documentation Report
      - Baseline Documentation Report - Drafts
      - Final Baseline Documentation Report
    - Conservation Easement
      - Conservation Easement - Drafts
      - Conservation Easement – Final
    - Monitoring Reports
    - All Other Reports and Documents
    - Photographs
      - Baseline Documentation Photographs
      - Annual Monitoring Photographs
        - 1998 Monitoring Photographs
        - 1999 Monitoring Photographs
        - 2000 Monitoring Photographs
      - All Other Photographs
    - Maps
      - Baseline Documentation Maps
      - All Other Maps
  - Kemp Property
  - Loer Property
  - Preuss Property
  - Ruppert Property

Example 4: Computer Folder Structure

- LAND TRUST PROJECTS ALPHABETICALLY BY PROJECT NAME
  - Adams 100000-00-00
  - Byrne 100001-00-00
    - Archives (all the final permanent records for the project)
      - Conservation easement as signed and recorded
      - Baseline Documentation Report
      - Property Map
      - Title opinion or certificate
      - Annual visit reports
      - Project Summary
      - Appraisal Report and 8283 if applicable
    - Correspondence
      - All project development correspondence
      - All pre-closing correspondence
    - Finances
      - Budget
      - Fundraising
    - Legal
      - Drafts (conservation easement, baseline documentation, title clearing)
      - Finals
    - Maps
      - All draft maps
    - Photos
      - BDR photos
      - Fundraising photos
      - Publication photos
    - Project Development
      - All pre-legal work
    - Public Relations
      - Press releases
      - Media coverage of project
      - Community relations issues and objectives
    - Stewardship
      - Working folder for post-closing correspondence, drafts, etc
  - Colby 100002-00-00

Sample Documentation Checklist

- ☐ Conservation easement*
- ☐ Baseline documentation report*
- ☐ Easement summary/abstract
- ☐ Title certificate or opinion*
- ☐ Mortgage subordinations*
- ☐ Annual monitoring reports*
- ☐ Landowner contact record*
- ☐ Site management plan
- ☐ Project checklist
- ☐ Landowner's stewardship goals
- ☐ Wetland delineation report
- ☐ Environmental site investigation report
- ☐ Wetlands, stream and shoreline buffers map
- ☐ Dominant vegetation identification map
- ☐ Hydrology map
- ☐ Pasture, road and fence map
- ☐ Stewardship finances*
- ☐ Property appraisal report*
- ☐ Conservation buyer's package
- ☐ Board property profile
- ☐ Aerial photograph of property
- ☐ Photo-point location map*
- ☐ Photographs of property*
- ☐ Soils map
- ☐ Contour or elevation map*
- ☐ Vicinity map*
- ☐ Geology map
- ☐ Wetlands map
- ☐ Reserved building sites map
- ☐ Easement map (surveyed when possible)*

*Required to satisfy legal requirements and/or basic stewardship needs.

Additional Resources

"The Admissibility of Digital Photographs in Court," by Steven B. Staggs, accessed at http://www.crime-scene-investigator.net/admissibilityofdigital.html.

Database Design for Mere Mortals: A Hands On Guide to Relational Database Design, 2nd edition, by Michael J. Hernandez (Indianapolis: Addison-Wesley Developers Press, 2003).

Mapping Systems: General Reference, Trimble Navigation Limited, 2002. http://gisgeek.pdx.edu/G425-FieldGIS/MapSys_Jan2002_GenRef.pdf.

"You Won't Believe Your Eyes: Digital Photography as Legal Evidence," by Roderick T. McCarvel, accessed at http://www.seanet.com/~rod/digiphot.html.

Exchange Articles

"Better Ways to Map Conservation Lands Through Improved GIS and Online Mapping," by Larry Orman, Ryan Branciforte, Chris Davis and Christopher Walter, *Exchange*, Spring 2006.

"Digitally Documenting Baseline and Stewardship Data," by Eric Erler, *Exchange*, Fall 2000.

"The Legal Efficacy of New Technologies in the Enforcement and Defense of Conservation Easements," by Melissa K. Thompson, *Exchange*, Summer 2004.

"Legal Viewpoint: Inquiring Minds Want to Know: How Do Public Disclosure Laws Apply to Land Trusts?" by Burnet R. Maybank III, Esq. and Alexandra P. Eikner, *Exchange*, Fall 2006.

"Preparing for Future Litigation of Conservation Easements," by Elizabeth L. Wroblicka, Esq., *Exchange*, Winter 2005.

"Records Policy and Management: A Key Aspect of Protecting Land 'in Perpetuity,'" by Darla Guenzler, *Exchange*, Fall 2000.

Software

Conservation Track
This software provides a secure, central archive, accessible from anywhere on the web, which frees up limited staff to focus on conservation work rather than struggle to find, share, organize and analyze information. Modules are being refined that support and follow a conservation action from the first landowner inquiry through the transaction into ongoing stewardship and, if appropriate, final disposition. http://community.conservationtrack.com/Pages/Default.aspx.

External Archival Services

There are a number of online archival services with which land trusts can contract; however, be wary of the free services, because these groups can go out of business quickly and take your data with them.

TechSoup contains information and suggestions for online data backup services. For more information, see http://www.techsoup.org (search "data storage").

Spideroak: This company offers 100GB of storage permanently for a one-time $1,000 fee. https://spideroak.com/forever.

Symantec Online Backup provides web-based backup and restoration of critical data for small and medium-size businesses. Costs are based on the amount of gigabytes stored and ranges from $110–13,750 per year (as of 2008). http://www.symantec.com/business/products/spn/index.jsp.

Check Your Progress

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

- ☐ Explain the benefits of a sound recordkeeping system to land conservation
- ☐ Craft a purpose statement that articulates why your land trust keeps records
- ☐ Create a list of irreplaceable documents held by your organization
- ☐ Develop, in consultation with an attorney, a records retention strategy appropriate for your land trust
- ☐ Develop a strategy for labeling records
- ☐ Explain how to manage digital records
- ☐ Explain how to manage tracking of reserved rights, approvals and other related paperwork
- ☐ Describe why it is important to keep two sets (originals and copies) of irreplaceable documents in different locations
- ☐ Identify the type of records storage options available to your organization
- ☐ Describe the type of damage (fire, floods and so forth) that might harm documents held by your organization
- ☐ Explain the basics of the business records rule and how it affects how you manage records
- ☐ Describe how your records policy addresses Practice 9G

Notes

Chapter Two • Amendments

Otis B. Driftwood: *Now pay particular attention to this first clause because it's most important. It says the, uh . . . "The party of the first part shall be known in this contract as the party of the first part." How do you like that? That's pretty neat, eh?*

Fiorello: *No, that's no good.*

Driftwood: *What's the matter with it?*

Fiorello: *I dunno. Let's hear it again.*

Driftwood: *It says the, uh . . . "The party of the first part shall be known in this contract as the party of the first part."*

Fiorello: *That sounds a little better this time.*

Driftwood: *Well, it grows on you. Would you like to hear it once more?*

Fiorello: *Er . . . just the first part.*

Driftwood: *What do you mean? The . . . the party of the first part?*

Fiorello: *No, the first part of the party of the first part.*

Driftwood: *All right. It says the, uh, "The first part of the party of the first part shall be known in this contract as the first part of the party of the first part shall be known in this contract . . ." look, why should we quarrel about a thing like this? We'll take it right out, eh?*

A Night at the Opera, 1935

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.

While easement amendments are not common, land trusts should expect to receive requests for amendments and may, in certain circumstances, wish to initiate an amendment to strengthen an easement or clarify language. Most land trusts, when faced with their first amendment request from a landowner, wish they had a policy to guide their actions. This practice encourages land trusts to develop an amendment policy to help ensure that amendments meet the mission of the organization and maintain the land trust's credibility. A policy should prohibit private inurement or excess private benefit, clarify board and staff roles, and ensure that all amendments result in either a positive, or not less than neutral conservation outcome. Many other standards are involved in reviewing amendment requests, including 1, 4, 6, 8, and 9, and practice 3F.

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

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This chapter is adapted from the Land Trust Alliance research report "Amending Conservation Easements: Evolving Practices and Legal Principles." Further information about the complexities of conservation easement amendments can be found in that report.

Learning Objectives

After studying this chapter, you should be able to:

- Explain the value of having a written policy or procedure for when and how your land trust will amend conservation easements
- Describe the role of various parties (board members, staff, volunteers, attorneys and others) in amending conservation easements
- Determine what costs are involved in amending a conservation easement
- Know how to draft an original conservation easement to allow for the potential to amend
- Explain the limitations on conservation easement amendments imposed or implied by federal and state law
- Understand how the concept of private inurement can come into play in a conservation easement amendment
- Understand the amendment principles that form the core of any amendment policy
- Help your land trust find the resources to draft a conservation easement amendment policy or procedure that:
  - Includes the conditions under which the organization would consider an easement amendment
  - Includes a prohibition against private inurement and impermissible private benefit
  - Requires compliance with your organization's conflict of interest policy (see Practice 4A)
  - Requires compliance with any funding requirements
  - Addresses the role of the board
  - Is consistent with the organization's mission
  - Is legally permissible
  - Ensures the amendment is consistent with the conservation purposes of the easement
  - Contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome

- Understand the different kinds of amendments and where they fall in the amendment "risk spectrum"
- Explain when a discretionary approval letter is preferable to an amendment

Summary

When a land trust accepts a conservation easement, it promises the original easement grantor, its land trust members, its funders and the public it serves that it will uphold the conservation easement forever. How, then, is it possible to amend "perpetual" easements? What does *forever* mean in the context of conservation easements? How do we prevent unsound or abusive decisions on amending easements? How do we permit sound amendments without sliding down the slippery slope to unsound amendments? What can be learned from experience? What criteria do we consider, and what process do we follow when considering an easement amendment? How do state and federal laws affect land trust decisions in this area? How will the land trust community manage change with integrity and be appropriately responsive to unanticipated needs and events? How do we determine whether an amendment to a conservation easement is in the public interest?

The fundamental principle we must all keep in mind is that conservation easements were created to serve public interests. Any decision to amend or not to amend a conservation easement must also serve public interests. The fact that easements are perpetual in duration does not constrain improvements in the easement when such improvements clearly serve the public interest better than the easement as originally written. Any amendment must also be consistent with the land trust mission, and uphold the purposes of the conservation easement and the original grantor's intent. Because easements are perpetual, land trusts must protect the public interest by ensuring that conservation easements not only endure but also are enforceable and fair, both to the public and to the landowners who are partners with land trusts in protecting the land.

The occasional need to amend an easement is rooted in our inability to predict all the circumstances that may arise in the future; however, any change to a conservation easement should be approached with great caution and careful scrutiny and should always uphold the purposes of the conservation easement. The concept of *amendment* recognizes

that neither the original grantors nor the land trusts are infallible, that natural forces can transform a landscape in a moment or a century, and that amendments can protect more as well as less. Exceptional circumstances sometimes warrant amendments. A land trust should be prepared for that possibility, while at the same time ensuring that the conservation values of a property are protected. Time brings many changes, and humility suggests that we cannot anticipate all eventualities in even the best written conservation easement.

Who among us ever wrote an easement anticipating 70,000 people would attend jam band Phish's last outdoor festival and concert? That is just what happened on a conserved farm in Vermont. The conservation easement governing uses of the farm did not even come close to addressing this issue. Can we really create a document that will last forever and anticipate today what uses of the property a landowner will want and legitimately need in the future?

Change is inevitable. If we resist all change and refuse to consider any easement amendments, we will be faced with situations that will make land trusts look bureaucratic, concerned more with facing the challenges of the past than those of today. We will be in an unnecessarily adversarial position with our landowner partners and, perhaps, the public. On the other hand, if easements may be changed upon a whim, we undermine the confidence that landowners and the public have placed in our organizations. Sound decisions about conservation easement amendments demonstrate to members, regulating agencies and the general public that easements can respond to change in ways that continue to protect land and serve the public interest while still upholding the purposes of the conservation easement in a manner consistent with the land trust mission and with the intentions of the original grantor. Sound decisions about individual conservation easement amendments benefit easement programs nationwide, while unsound decisions about conservation easement amendments jeopardize all easement programs.

This chapter will give your land trust the knowledge and the tools to make ethical, legal and sound decisions about amending its conservation easements. There are basic elements that should be included in an amendment policy, which this chapter covers. It also provides an in-depth look at amendment principles and discusses how an amendment policy may be adjusted to reflect the organizational mission and comply with state and federal law. The Land Trust Alliance does not have all the answers to these complex issues — no one does.

Conservation easement amendments involve an evolving area of law, and each amendment arises in a unique context of facts and laws.

Each land trust must consult its own experienced legal counsel and exercise great caution in addressing conservation easement amendments. Land trusts must always uphold the purposes of each conservation easement, as well as the documented intent of the original grantor, and serve the public interest. Conservation easement amendments require land trusts to use their best judgment in evaluating risks, serving the public interest and maintaining landowner relationships.

Evaluate Your Practices

Conduct a quick evaluation of your land trust's current approach to amendments. Give your land trust one point for every "yes" answer. Scores are explained at the end.

Does your land trust:

1. Have a written amendment policy?
2. Have an amendment policy that prohibits private inurement and impermissible private benefit in all amendments?
3. Require compliance with your land trust's conflict of interest policy and with any funding restrictions?
4. Take steps to remain current with relevant local, state and federal laws affecting conservation easements?
5. Address the role of the board, staff, volunteers and landowners in considering amendments?
6. Require that amendments be consistent with the land trust's mission and the original grantor's documented intent?
7. Require that amendments enhance conservation values and public interest or have at least a neutral effect on the purposes of the conservation easement and the conservation values it protects?
8. Know whether the Uniform Conservation Easement Act, the Uniform Trust Code or the charitable trust doctrine applies to conservation easements in your state?
9. Consider costs and capacity issues for the land trust when examining amendment requests?
10. Have a system for evaluating what level of risk particular types of easement amendments pose to the conservation easement purposes, the public interest and the land trust itself?

11. Have a system to learn from experiences with managing conservation easements and to evaluate conservation easement drafting?

Scores

If your land trust scores:

11: Congratulations! Your land trust has put much time, effort and thought into its systems, policies and procedures. Share your success stories with the Land Trust Alliance so others may learn from them (e-mail your policies to learn@lta.org).

9–10: Good job! Keep at it. Identify the few places where your organization could improve and implement some of the suggestions in this course.

5–8: You are on the right track and have tackled some of the basics. You are ready to take the next steps so that your amendment policies and procedures comply with *Land Trust Standards and Practices*.

0–4: By taking this course, you have taken the first step toward learning about the complexities of conservation easement amendments and how to develop a policy for your land trust. Keep at it — you will be pleased with the results.

Guidance

1. A written amendment policy ensures that everyone in the organization addresses amendments consistently. A consistent approach to the subject is critical for landowner relationships, public perception of the land trust's integrity and for complying with all laws.
2. Your land trust must avoid violating the IRS prohibitions on charities conferring private inurement and impermissible private benefit. IRS and public scrutiny of land trusts has increased in recent years, and even the perception of such a violation may subject your land trust to audits and loss of public confidence.
3. Your land trust will encounter conflicts of interest in managing its conservation easements. It is best to have a policy to

deal with conflicts of interest in place before you encounter this issue, so that everyone feels treated fairly and some of the pressure of the situation can be avoided. Your land trust must adhere to funding restrictions and grant conditions with regard to amendments and discretionary approvals. Establish a system for routinely checking any restrictions and conditions prior to issuing discretionary approvals or amendments.

4. Laws change, as do the interpretation of those laws. Your land trust must stay abreast of changes in laws and rules (local, state and federal) that affect your land trust's amendment practices. The Alliance can assist with general issues, but your organization will need a local attorney expert in this area to ensure your land trust stays current with the specifics of any changes to local, state and federal laws.
5. Your land trust can prevent many problems associated with amendments if your organization has clearly assigned roles and review standards for all proposed easement amendments. It is important to involve your land trust's board in developing and implementing an amendment policy, and the board should formally act on all easement amendments.
6. Your land trust's mission guides the organization's operations. Your land trust cannot amend a conservation easement in a manner contrary to its mission or contrary to the documented intentions of the original grantor.
7. All amendments must have a positive or neutral effect on the conservation easement purposes and the conservation values the easement protects. No land trust should agree to amend a conservation easement if that amendment has a negative effect on the express purposes of the conservation easement without prior approval of the state attorney general or a court with the appropriate jurisdiction.
8. The 2007 commentary to the Uniform Conservation Easement Act and the charitable trust doctrine may place significant restrictions on the ability of land trusts to amend their easements. You must be aware if these restrictions apply in your state.
9. A land trust's amendment policy and procedures must fit the organization. Developing an elaborate system that your land trust cannot implement effectively is a waste of time. Size your amendment policy and procedures to fit your land trust's capacity, while taking care to address all the necessary components.

10. Understanding the implications of any proposed amendment is fundamental to upholding the purposes of the conservation easement and the original grantor's documented intent. Many people struggle with what they perceive as a "slippery slope" of amendments, where approval of completely appropriate amendments may dispose a land trust to agree to increasingly inappropriate amendments. To guard against such a situation, a land trust should have procedures in place to accurately assess the risks and appropriateness of any amendment proposal.
11. We can always learn from experience. Establish a routine system that enables the land trust's board and easement drafters to learn about the effect of particular conservation easement restrictions and requirements from the land trust's stewardship personnel, whether staff or volunteer. This feedback will help ensure that your organization's easements fit your land trust's capacity and meet its mission without excessive stewardship burdens.

The Context of Conservation Easements

The Dilemma of Change

All land trusts eventually will face the issue of conservation easement amendments at some point. Imagine how you might have worded a conservation easement 100 or 200 years ago, and then look at it from today's vantage point. Would it still be relevant? Would it address the challenges we face today? Unanticipated change arises from many quarters, including:

- Natural causes
- Landowners, especially those who make a living from the land and need to adjust to business cycles
- New information not available when the easement was drafted
- Development of new technologies
- New breakthroughs in conservation science

With change come new and unanticipated challenges that land trusts must successfully address to remain effective in conserving land and serving their communities.

The challenge for each land trust when responding to change is to develop criteria and procedures to address unexpected or evolutionary changes in a manner that honors the organization's legal and ethical obligations to protect the conservation values of the land and the intent of the original grantor of the easement, and maintains public confidence in the land trust's easement program. We all want to prevent abuse and unsound, ill-advised amendment decisions. The challenge is to do so while still allowing those amendments that are appropriate, uphold the conservation easement purposes and original grantor intent, and are consistent with all applicable laws.

There is no "one-size-fits-all" approach, primarily because each conservation easement amendment question involves unique facts and variations in state law. The extent to which state and federal laws are applicable to easement amendments and the content of these laws is unresolved to some degree, as explained in this chapter. To craft effective amendments and refuse inappropriate requests, land trusts should:

- Study, consult and share experiences with colleagues
- Confer with their own legal counsel
- Seek guidance from the state attorney general or the courts when required or appropriate
- Request rulings from the IRS as needed
- Be prepared to explain their decisions to easement grantors, land trust members, affected landowners, federal and state regulators and the general public

Legitimate amendment requests can be opportunities for positive change.

While the legal framework for some types of easement amendments is uncertain, caution is always strongly advised. Over time, however, land trusts may want to explore whether it would be beneficial to work with state legislatures, the IRS and Congress to clarify the applicable laws and regulations governing easement amendments.

Despite these cautions, legitimate amendment requests can be opportunities for positive change. Amendments may allow a land trust to respond to change in ways that can increase the public benefits of an easement, to improve and upgrade outdated easement language to increase resource protections and to create positive conservation results.

The Dilemma of Uncertainty

For now, conservation easement amendment decisions will be made without legal certainty about risks and legal limitations in most states. In 2007, the State of Maine comprehensively addressed easement amendment with new legislation that states that an easement cannot be terminated or amended in such a way as to materially detract from the conservation values intended for protection without prior approval of a court through an action in which the attorney general is included in the lawsuit. New Hampshire and Vermont are also considering state attorney general review of conservation easement amendments. While these rules may help conservation practitioners in Maine, New Hampshire and Vermont navigate the legal challenges associated with easement amendments, the law remains unsettled in the rest of the United States. The unsettled nature of what laws apply to easement amendments is due in part to the fact that conservation easements are a relatively new tool, so little legal precedent exists to guide amendment decisions. In addition, overlapping federal and state laws impose requirements that may be difficult to translate into practice on the ground. Further, the IRS has not issued any guidance related to conservation easement amendments, although representatives of the IRS have publicly expressed concerns about the practice of amending easements, except amendments to add additional acreage to the easement's protections or to correct scrivener's errors.

The IRS has publicly expressed concerns about the practice of amending easements, except amendments to add additional acreage to the easement's protections or to correct scrivener's errors.

In the face of this uncertainty, land trusts still must act in ways that minimize the risk of error. Conservative land trusts may elect to adopt and follow conservative amendment policies that satisfy the most stringent federal and state requirements that might apply. Their risk is limited to doing extra work or being overly rigid in considering, drafting and processing amendment requests. Other land trusts that adopt less stringent amendment policies or interpretations of relevant requirements run the risk that at some point, their transactions may not comply with legal or ethical requirements, their nonprofit status may be in jeopardy, they may lose donors and community respect, and other significant harm may arise. That tipping point between being too rigid and too liberal in addressing amendment issues may be far easier to see in hindsight than in practice. Moreover, the tipping point is easily obscured when a land trust has internal reasons to act that may be unrelated to conservation, such as the desire to settle a dispute or lawsuit, the desire to eliminate an undue monitoring burden, or the anticipation of obtaining a collateral benefit. Advice from a neutral

source can be invaluable in these circumstances, but each land trust must reach its own assessment of the best course of action in consultation with experienced legal counsel.

Each amendment decision presents a spectrum of varying degrees of risk versus safety, burden versus ease, and public versus private interests. A land trust selects a place along this spectrum each time it makes a decision about an amendment. Selecting a place along this spectrum is best done consciously and deliberately, in light of all known factors and possible risks. External uncertainty does not require land trusts to refuse to amend all conservation easements, but it does require thoughtful consideration of multiple legal, policy and practical issues and risks before a land trust decides. Some types of amendments should never be permitted, and these should be recognized quickly so no time is wasted considering them. For more information on the risk spectrum, see tables 2-1 (pages 176-7), 2-2 (page 190) and 2-3 (page 191).

Four Broad Perspectives

Experts generally take one of four perspectives on how to approach amendments, although some have a more nuanced approach to the issue. Some advocate "just say no" as the best practice in almost all circumstances. They believe that conservation easement perpetuity forbids changes to the original document because in almost all cases more can be lost by amendment, in terms of both conservation values and public perception, than by upholding the original language. These experts are concerned that once they start approving amendments, land trusts will rapidly slide down the slippery slope to approving unsound or abusive amendments.

Others believe that land trusts can allow some change but only with the express permission of a court for all but the most routine amendments. These experts believe that the "charitable trust doctrine" applies to conservation easements, which requires a judicial process before changing anything in the conservation easement except to the extent the easement permits deviation from its terms or its purpose. (See the discussion on page 167 and *Amending Conservation Easements: Evolving Practices and Legal Principles* for more details on the charitable trust doctrine.)

A third group of experts believes that conservation easements are a private real estate transaction and an unrestricted transfer of property

rights. This view of conservation easements allows amendments at will and at the discretion of the owners of the full fee simple property interest (the land trust and the landowner), subject to federal and state laws regarding charitable purposes.

Avoid unsound amendment decisions and the "slippery slope" by implementing a thorough written amendment policy and procedures.

The fourth group of many organizations and some land conservation experts have philosophies somewhere between the extremes of "never amend," "charitable trust doctrine always applies" and "amend at will." These organizations and experts struggle with when it is appropriate to amend and when to say no, recognizing that, in certain limited circumstances, an easement amendment may be appropriate, legal and ethical. We will discuss how to analyze easement amendment proposals and how to keep your land trust solidly on the road to making sound amendment decisions.

Current Debate

The history of the current debate about amendments exploded into public view a few years ago when the media, the IRS and Congress began questioning whether certain practices by national land conservation organizations really served the public interest. Until 2003, the land trust community had quietly debated whether and how to amend conservation easements, but now that debate is being conducted under intense scrutiny by the IRS and Congress. Your organization may find it helpful to understand these public policy issues when drafting and implementing your amendment policy, because decisions made on the national level affect actions at the local level. Similarly, actions taken on the local level may influence national decisions. Because each conservation easement amendment request involves unique facts, and because each land trust has a unique mission and service area, no one policy or set of rules applies to all situations; each land trust should thoughtfully adopt and implement an easement amendment policy and procedures that fit its own unique situation.

Legal Considerations When Amending Easements

When considering conservation easement amendments, your land trust and its legal counsel must consider limitations imposed by federal and state law as well as by the organizational documents and policies of your land trust. There is a wide variety of possible easement amendments, some of which raise few issues with respect to the risk of running afoul of legal, ethical or other constraints (amendments

to add acreage or correct scrivener's errors and so on). At the other extreme are amendment proposals that land trusts should not consider at all (for example, amendments that result in the creation of an impermissible private benefit). No amendment should be approved without serious consideration of the ramifications of the decision to amend the conservation easement. Many amendment requests require the land trust to restructure them to avoid negative effects on the conservation easement purposes or to counteract impermissible private benefit or otherwise bring the amendment request into alignment with the land trust's written amendment policy.

A land trust should not approve an amendment without serious consideration of the ramifications of the decision to amend the conservation easement.

As noted above, much of the law regarding the amendment of conservation easements remains unsettled, but land trusts must be aware of the laws affecting easement amendments and, working with their attorney, make informed decisions about how these laws may or may not affect their ability to amend. Land trusts that ignore clear legal limitations on easement amendments run the risk of potential legal sanctions and liabilities, including actions for breach of fiduciary duties, penalties levied by the IRS, and audits or investigations by state officials charged with oversight of nonprofit organizations. These penalties are potentially severe and, in the most egregious cases, include the possible loss of tax-exempt status for a land trust. The following is a summary of the important legal issues affecting easement amendments. See *Amending Conservation Easements: Evolving Practices and Legal Principles* for more details on these complex legal issues.

Land trusts that ignore clear legal limitations on easement amendments may face IRS penalties and audits or investigations by state officials charged with oversight of nonprofit organizations.

Legal constraints on land trusts considering conservation easement amendments may include:

- Land trust governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents
- Federal law (Internal Revenue Code and Treasury Regulation requirements for perpetuity and prohibitions on private inurement and impermissible private benefit)
- State law (conservation easement enabling statutes)
- State laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts
- State laws on fraudulent solicitation, misrepresentation to donors and consumer protection and state laws regulating the conduct of fiduciaries
- State and local laws governing land use, real estate conveyances and contracts
- Contractual and other obligations to third-party interests

In the absence of a final decision by the highest court of the state or federal regulations, the most conservative approach to addressing legal constraints on easement amendments would be to assume that the laws and doctrines discussed in this section apply to amendments, especially amendments that could diminish one or more protected conservation values or that contravene one of the easement's conservation purposes. Your land trust should consult with experienced legal experts in your state to determine the best approach for your land trust. The decision about the degree of risk that your land trust wishes to accept is for your board to carefully consider in each circumstance based on the best legal advice available to you.

Related Considerations

In addition to the legal constraints noted above, land trusts must consider other serious consequences of conservation easement amendment decisions:

- Land trusts are accountable to conservation easement grantors with whom they have undertaken obligations as set forth in their respective state laws
- Land trusts are accountable to funding sources
- More broadly, land trusts are accountable to their members, neighbors of easement lands and the communities the land trusts serve (both today and tomorrow)

If land trusts disregard donor, grantor, member and public opinion when making amendment decisions, they may lose public and financial support and jeopardize future easement conveyances.

Land trusts cannot disregard donor, grantor, member and public opinion in their conservation easement amendment decisions. If they do, they may lose public and financial support, suffer negative publicity and loss of goodwill in their communities, and jeopardize future easement conveyances. An angry donor, landowner or land trust member may generate enormous adverse publicity sufficient to chill a donation program for many years. Nevertheless, land trusts must also treat those who seek amendments reasonably and with respect, whether the amendment is possible or must be denied. Being excessively rigid and unreasonable out of fear of the unknown, rather than a rational analysis of the risks, can also chill donations and purchases of conservation easements.

The following is a brief overview of federal and state laws that may affect conservation easement amendments.

Organizational and Governance Documents

Before adopting an easement amendment policy, a land trust should review its articles of incorporation and bylaws to ensure that the policy is consistent with these governing documents. The land trust's board of directors should approve any amendments, and it is the board's responsibility to ensure that the amendment conforms to all organizational and governance documents, including the conflict of interest policy, amendment policy and mission statement, and that the amendment is consistent with the land trust's organizational values and culture, as well as the values of the community the land trust serves.

When the IRS confirms a land trust's charitable status under the provisions of the Internal Revenue Code, it may include conditions or limitations that must be considered when amending conservation easements, so land trusts should also examine their original tax exemption statement.

When the IRS confirms a land trust's charitable status, it may include conditions or limitations that must be considered when amending conservation easements, so land trusts should examine their original tax exemption statement.

Federal Law

Land trusts should be familiar with a number of federal laws that affect easement amendments and seek appropriate counsel to clarify important nuances of the law.

Internal Revenue Code Section 170(h) and the Treasury Regulations

When a conservation easement results in a federal income tax deduction or allows a landowner to secure federal estate tax benefits, then Internal Revenue Code (IRC) Section 170(h) and the Treasury Regulations Section 1.170A-14 apply to the easement's creation and management. Although both the IRC and Regulations are silent with respect to the question of conservation easement amendment, it is important to review these federal laws before determining your land trust's approach to easement amendment proposals. Easements that qualify for federal tax benefits must be "granted in perpetuity" and "the conservation purpose [of the contribution must be] protected in perpetuity." The easement can only be extinguished by the holder through a judicial proceeding, upon a finding that continued use of the encumbered land for conservation purposes has become "impossible or impractical," and with the payment to the holder of a share of proceeds from a subsequent sale or development of the land to be used for similar conservation purposes. To the extent an amendment amounts to

an extinguishment, the land trust must satisfy these requirements. For example, a town wishes to redirect a dangerous section of road where several fatal accidents occurred over the last few years. To do so will require taking about a half of an acre of land subject to a conservation easement. The entire community, including the land trust and the landowner, all agree that the road needs to be fixed and that there are no alternatives. The land trust and landowner are willing to sign a deed in lieu of condemnation. The town initiates the taking process and delivers the deed for signature. Because this step is part of a court-supervised, statutory-based extinguishment process, the land trust may properly sign the deed. The condemnation proceeds are split according to the percentage stated in the conservation easement between the land trust and the landowner.

In addition, to be eligible to accept tax-deductible conservation easements, a land trust "must . . . have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions." The exact limits these requirements place on a land trust's ability to amend conservation easements are unclear, but the outer boundaries of permitted and forbidden amendments can be discerned. Both a Congressional committee and the IRS have expressed concern about how tax-deductible easements have been amended and how land trusts make amendment decisions, particularly when "tradeoffs" (loosening or eliminating one restriction in return for a new restriction or a restriction on previously unprotected land) are involved. Care must be taken in every case to ensure that your land trust satisfies the perpetuity requirements. For example, a bed-and-breakfast inn surrounded by easement-protected land needs additional parking space. The inn and the easement property are owned by the same people. The inn is excluded from the easement area and sits on a few acres of land. No suitable parking is available on the excluded area to service the inn. In fact, developing a portion of the exclusion for parking would damage a buffer area for the conserved land. The owner is willing to protect an additional 25 acres of adjacent land with significant conservation value in exchange for extinguishing the easement on one acre of land with no conservation value that would be ideal for a parking area. Before proceeding with such an amendment, the land trust must carefully weigh the perpetuity requirements and ensure that any such tradeoff does not damage the conservation purposes of the easement, enhances conservation and addresses impermissible private benefit.

Guidance on Completing IRS Form 990

Schedule D of Form 990 contains several questions regarding conservation easements. Note the detailed questions on amendments and terminations in Part II, question three.

3. Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the taxable year.

The revised instructions, issued in August 2008, state:

> **Line 3.** In general, a grant of a **conservation easement** to a qualified organization is required to be made in perpetuity. Enter the total number of conservation easements held by the organization that were modified, transferred, released, extinguished and/or terminated during the tax year. For example, if 2 easements were modified and 1 easement was terminated during the tax year, enter the number 3. For each easement that was modified, transferred, released, extinguished, or terminated, explain the changes in Part XIV. *An easement is modified* when the terms of easement are amended. For example, if the deed of easement is amended to increase or decrease the amount of land subject to the easement and/or to add or remove restrictions regarding the use of the property subject to the easement, the easement is modified. *An easement is transferred* when the organization assigns the deed of easement whether with or without consideration. *An easement is released or terminated* when it is condemned, extinguished by court order, transferred to the land owner, or in any way rendered void and unenforceable.

Excerpt from 2008 Form 990 Instructions for Schedule D at http://www.irs.gov/pub/irs-tege/schdinstructions.pdf.

IRS Form 990, "Return of Organization Exempt from Income Tax," the annual report filed by tax-exempt organizations with annual revenue exceeding $25,000 a year, now requires land trusts to provide detailed information about their easements and any modifications, transfers or terminations of those easements. The completed 990 forms are available on the Internet and must be made available for public inspection and copying on request so that land trust members, grantors, funders, state regulators and the public can easily retrieve and review the information contained. Form 990 may vary from year to year; the most recent version makes amendments and related actions readily accessible public information and underscores the IRS's current interest in easement amendments. In December 2008, the IRS finalized a new Form 990 and instructions (see http://www.irs.gov/charities/article/0,,id=185561,00.html).

Land trusts, as tax-exempt charities, are prohibited from engaging in any transaction that results in the creation of private inurement or impermissible private benefit.

Private Inurement and Impermissible Private Benefit Prohibitions

Federal law prohibits tax-exempt nonprofit organizations from dispensing their assets in ways that create impermissible private benefit or private inurement. This prohibition means that a land trust cannot participate in an amendment that conveys either a net financial gain or more than incidental private benefit to any private party or any measurable benefit at all to a board or staff member or other land trust "insider" (other than fair compensation for services). A land trust that does so risks losing its tax-exempt status or suffering intermediate sanctions (fines imposed on those who approved the illegal benefits and those who received them).

These prohibitions apply to all amendments to conservation easements, regardless of the easement's initial tax-deductible status, and IRS scrutiny on these grounds is not limited by the three-year statute of limitations that governs challenges to the deductibility of easements. In

Private Inurement and Impermissible Private Benefit

The private inurement and impermissible private benefit prohibitions are designed to ensure that your land trust uses its charitable assets exclusively to further public (or charitable) purposes and not private ends. Both private inurement and impermissible private benefit may occur in many different forms, including, for example, payment of excessive compensation, payment of excessive rent, making inadequately secured loans or receiving less than fair market value on the sale or exchange of a land trust property. Violation of impermissible private benefit and private inurement rules may result in monetary penalties and, in extreme cases, the loss of the charity's tax-exempt status.

Private inurement. The doctrine of private inurement prohibits a tax-exempt organization from using its assets to benefit any individual or entity that has a close relationship to the organization, such as a director, officer, key employee, major financial contributor or other "insider." The issue of private inurement often arises when an organization pays unreasonable compensation (more than the value of the services) to an insider, but the inurement prohibition is designed to reach any transaction through which an insider unduly benefits, either directly or indirectly, from his or her position in an organization. The private inurement prohibition does not prohibit transactions between a publicly supported charitable organization and those who have a close relationship to it. Instead, such transactions are tested against a standard of "reasonableness," which calls for a roughly equal exchange of benefits between the parties and compares how similar charitable organizations, acting prudently, conduct their affairs. Historically, the only sanction for a private inurement violation was

other words, these prohibitions apply to easements that did not qualify for federal tax benefits, including easements that were purchased at full fair market value by the land trust or reserved by the land trust when it sells land it owns in fee to a third party, or easements for which the landowner did not claim any federal tax benefits.

Land trusts and their counsel should scrutinize every conservation easement amendment proposal to determine if its approval will result in prohibited private inurement or an impermissible amount of private benefit.

Land trusts and their counsel should scrutinize every conservation easement amendment proposal to determine if its approval will result in prohibited private inurement or an impermissible amount of private benefit. If approval of the amendment would result in the conference of such prohibited benefits, the amendment must be denied or modified to avoid the benefit. Land trust board members, staff and legal counsel often have little or no expertise in determining the financial ramifications of proposed amendments. Accordingly, if a private benefit issue might arise, or the land trust has any concern regarding impermissible private benefit, the land trust should consult an experienced tax attorney and then get an opinion from a qualified appraiser,

revocation of the organization's tax exempt status. However, the intermediate sanctions rules enacted in 1996 permit the IRS to impose an excise tax on insiders who improperly benefit from transactions with a charitable organization and on the managers of the organization who approved the benefit.

Impermissible private benefit. The doctrine of impermissible private benefit prohibits a tax-exempt organization from using its assets improperly to benefit any individual or entity who is not an insider. Accordingly, the doctrine of impermissible private benefit is broader than (and includes) the private inurement prohibition. However, unlike the absolute prohibition against private inurement, *incidental* private benefit is permissible. To be considered incidental, the private benefit must be "incidental" to the public benefit in both a qualitative and quantitative sense. To be qualitatively incidental, the private benefit must occur as a necessary part of the activity that benefits the public at large; in other words, the benefit to the public cannot be achieved without necessarily benefiting private individuals. To be quantitatively incidental, the private benefit must be insubstantial when viewed in relation to the public benefit conferred by the activity. For example, the benefit to a landowner whose property lies next to conserved land would be considered incidental. A charitable organization that violates the private benefit limitation risks losing its tax-exempt status or incurring financial penalties.

For more information on this subject, see the Land Trust Alliance courses "Avoiding Conflicts of Interest and Running an Ethical Land Trust" and volume one of "Nonprofit Law and Recordkeeping for Land Trusts."

if necessary. A complete appraisal may not be required; a restricted use appraisal report prepared by a qualified appraiser or a letter of opinion may suffice.

Both attorney and appraiser can assist a land trust in determining what level of appraisal is required to make the determination with respect to the benefit arising from an amendment. For example, suppose an easement landowner with no inside relationship to the land trust, whose protected land is located in a suburbanizing environment, proposes an amendment to allow a new house to be constructed on easement property where none is currently allowed by the easement's terms. This proposed amendment would clearly put dollars in the landowner's pocket by increasing the fair market value of the property. The amendment, as proposed, would convey impermissible private benefit in violation of law, and the land trust can either refuse or modify such an amendment, but should not accept it as presented. On the other hand, suppose a landowner proposes to amend an easement by adding additional land to the easement's protection. Neighbors to the property (who are not related to the easement landowner) will enjoy an increase in their property value as a result of this amendment. This increase in value of the neighboring property is considered incidental private benefit because, both qualitatively and quantitatively, the public benefit received by the protection of additional land outweighs the incidental increase in property values to the neighbors. Conveyance of incidental private benefit is not prohibited and may be unavoidable by the very nature of land trust activities.

As noted above, the prohibition on private inurement applies to land trust "insiders." Many land trusts wonder if conservation easement donors are considered "insiders." The IRS has not published an answer to this particular question; however, taking into account the intent of the various regulations, it is reasonable to conclude that being a conservation easement donor alone, without any other factor, does not qualify the donor as an insider. *Insider* is generally defined as an individual who has the ability to exercise control, or influence control, over the activities of a charitable organization, or a close relative of such an individual. Most conservation easement donors do not exercise such control or have such influence or potential for influence over land trust actions that would cause that person to be considered an insider. There may be unique circumstances, however, in which an easement donor's actions may elevate the donor to the position of an insider. A person who made a very large cash donation, or land or easement donation, to a land trust may cross the threshold and become an insider by virtue of

the unique and significant size of his or her gift. Similarly, if the easement donor is also a land trust board member, he or she is an insider. A land trust should consult with its counsel if it wonders if an easement donor could be considered an insider.

State Law

Easement Enabling Statutes

All 50 states have enacted some form of conservation easement enabling statute. Many provide that a conservation easement may be modified or terminated "in the same manner as other easements," some are silent as to modification or termination, and others require approval of a public entity — a court, a state agency or even the state legislature. The State of Maine, for example, recently adopted changes to its enabling statute requiring court approval and attorney general participation for any amendment or termination that "materially detract[s] from the conservation value" of the protected property. As of 2008, however, laws on whether, when and how easements may be amended are unclear in numerous states.

A minority of states have conservation easement enabling legislation that expressly requires the consent of the court, a state agency, municipality or some public entity before accepting, modifying and/or terminating conservation easements, including Massachusetts, Louisiana and New Jersey. If your land trust is located in one of these jurisdictions, any easement amendment will require the consent of the named entity. Failure to follow this procedure could void the amendment and cause the land trust and landowner to face penalties. In states with governmental consent policies, land trusts should draft flexibility into the easement document by giving the easement holder certain limited discretionary rights to approve uses or changes consistent with the easement purposes. Such flexibility may prevent the need for an actual amendment to the easement, while permitting appropriate modifications to the document.

In states with governmental consent policies, land trusts should draft easements to give the easement holder certain limited discretionary rights to approve uses or changes consistent with the easement purposes.

If legislation does not address amendment specifically but does require approval for the termination of an easement, a court or a government official might interpret certain types of easement amendments as a partial "termination" and, therefore, might require approval from the governmental entity. The types of amendments that some experts view as partial terminations include amendments that loosen or remove easement restrictions with or without an exchange for restrictions on

another piece of unprotected land (such amendments are discussed further in this chapter and are considered by some experts as extremely risky). Your land trust should determine if your state attorney general has issued an opinion on this issue, or if it has been addressed by a state court.

Where governmental approval is required, even if the statute does not expressly limit the government's discretion to act, the governmental entity must still abide by certain principles. If the overseeing agency is a municipality, some state laws permit aggrieved taxpayers to challenge certain acts. In addition, under the "doctrine of public trust," the misuse of important public resources by government officials is subject to legal challenge by the public. In most states, the public trust doctrine allows the general public to file a lawsuit to stop a government action that would destroy or diminish a public resource, such as parkland. Public officials charged with easement oversight and land trust officials should justify their amendment decisions in writing to demonstrate that the public interest will not be harmed. Typically, land trusts document their amendment decision by recitations in the actual amendment. These recitations can take the form of an introductory background statement, explaining the context of the amendment, the essential facts and circumstances, any approval the land trust obtained and so forth. The object of the background statement is to show transparency of the process, adherence to land trust policy and principles and continued permanence of the public benefit of the conservation easement. The board resolution approving the amendment should also document these same points. The baseline documentation supplement likewise would also document the preservation of the purposes of the conservation easement and continued public benefit, as well as adherence to the original grantor's intentions to the extent known.

All land trusts should review their state's conservation easement enabling statute to inform the contents of their easement amendment policies and procedures.

State easement enabling statutes typically have significant variation. The Uniform Conservation Easement Act (UCEA) seeks to reduce that variation. The National Conference of Commissioners on Uniform State Laws studies state laws to determine which areas of law should be uniform and promotes the principle of uniformity by drafting and proposing specific statutes in areas of the law in which uniformity is desirable, such as the UCEA. The commissioners can only propose changes — no uniform law is effective until a state legislature adopts it. The commissioners approved the original UCEA in 1981, and the UCEA has been adopted, in some form as of the review on January 1, 2009, by 27 states, the District of Columbia and the Virgin

Islands. The states are Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin and Wyoming. Overall, 13 state enabling statutes, some based on the UCEA and some not, expressly address in some fashion amending and/or terminating conservation easements. These state statutes are Arizona, Iowa, Maine, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New York, Pennsylvania, Rhode Island, Virginia and West Virginia. The remaining state statutes are either silent on amendment and termination or adopt the UCEA's language, leaving the matter to common law or other statutory treatment.

If your state is listed in the previous paragraph, your state's laws will give your land trust and legal counsel some guidance (it may be limited) on how to address conservation easement amendments. Land trusts located in other states must wrestle with a bit more uncertainty with respect to easement amendments and thus may have to act more conservatively until their state adopts the UCEA or other laws regulating amendments.

State Laws Governing Charitable Organizations

In addition to easement enabling laws, all 50 states have laws governing the activities of nonprofits formed under their laws or operating in their jurisdictions. These laws seek to ensure that nonprofits operate in accordance with their governance documents, honor the intent of their donors and fulfill their public purposes. A division of each state's attorney general's office usually has oversight of nonprofits, although some states assign regulatory oversight to other agencies or departments. States vary significantly in the number of staff assigned to this purpose and in their focus.

Charitable Trust Doctrine and *Cy Pres*

Land trusts are charitable organizations, and conservation easements qualify as charitable gifts that are eligible for federal tax benefits. Accordingly, some authorities believe that conservation easements that are donated in whole or in part constitute restricted charitable gifts and/or "charitable trusts" subject to state charitable trust law. Few, if any, conservation easements are formally written as charitable trusts. Even if not expressly so written, however, it is possible that conservation easements may be construed as charitable trusts by the state attorney general, other public officials or the courts. If conservation

Exaction: The regulatory requirement of an act in order to comply with a permit or obtain a governmental approval usually where the government compels a person or entity to grant a conservation easement in exchange for a permit. See also quid pro quo.

Quid pro quo: The exchange of benefit where one valuable thing is given in exchange for another.

Be sure that your records clearly document how your land trust acquired each conservation easement it holds, because charitable trust principles may more likely apply to donated or bargain sale easements.

easements are viewed as charitable trusts, a land trust may have limited discretion to amend conservation easements without court approval and without involvement of the state attorney general or other officials. The nature of the limitations depends on the state, the manner in which the easement was acquired, the nature of the amendment, the authority to amend included in the easement and other circumstances.

Conservation easements may be created in at least five different ways:

1. By donation
2. By purchase or bargain sale, with or without donated funds or funds obtained from government sources
3. Through "reservation," by which land trust property is transferred to another entity subject to a reserved conservation easement
4. By "exaction," as a result of land use regulatory processes
5. Through settlement of a dispute or enforcement proceeding

Federal and state law, including the charitable trust doctrine, may apply differently to amendments to conservation easements of different origins; therefore, any legal analysis of an amendment request must consider the origin of the easement. Easements with some donative component may be more likely to be subject to charitable trust principles than easements purchased at their full fair market value.

If a conservation easement is a charitable trust, a land trust must consider state charitable trust law when contemplating amendments. The details of charitable trust law vary from state to state, and a land trust must consult with qualified legal counsel. The overriding principle of charitable trust law is that both the grantor's expressed and implied intent be honored. As a general rule, if a conservation easement deed contains an amendment provision, the land trust has the express power

Charitable trust: A trust established for charitable purposes. In this context, the text refers to a conservation easement as a possible charitable trust, subject to the charitable trust doctrine. When a gift is made to a charitable organization to be used for a specific charitable purpose, the organization may not deviate from the charitable purposes of the gift without receiving judicial approval. This principle holds true whether the donor is treated as having created a charitable trust or merely as having made a restricted charitable gift under state law.

to agree with the owner of the encumbered land to amend the easement as permitted by that provision. Absent an amendment provision, the land trust may have certain implied powers to agree with the landowner to amend the easement. To the extent changed circumstances necessitate amendments to the easement that exceed the land trust's express or implied powers, the land trust can seek judicial approval of amendments pursuant to the doctrines of administrative deviation or cy pres, as the case may be.

Every conservation easement should contain an amendment clause.

Cy Pres and Administrative Deviation Doctrines

Under the doctrine of *cy pres*, if the purpose of a restricted charitable gift becomes "impossible or impracticable" due to changed conditions, and the donor is determined to have had a "general charitable intent," a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is as close as possible to the original purpose specified by the donor. The doctrines of administrative deviation and *cy pres* are distinct in that the former applies to modification of administrative terms of a charitable gift or trust, while the latter applies to modification of the charitable purpose of a charitable gift or trust, although in practice the line between the two doctrines is less than precise.

Whether the charitable trust doctrine applies to conservation easements and their amendment has not been definitively decided in any state. However, in the Myrtle Grove case, in which the National Trust for Historic Preservation was sued by a landowner who sought a substantial amendment to a conservation easement, the Maryland Attorney General intervened to oppose amendment of the conservation easement on charitable trust grounds. And, in a recent challenge to the termination of a perpetual conservation easement in Wyoming, *Hicks v. Dowd* (Wyoming Supreme Court, May 9, 2007), the trial court held that charitable trust principles applied. The parties did not challenge the ruling on appeal, and the Wyoming Supreme Court proceeded on the assumption that the easement was a charitable trust without determining the issue independently. (As of January 2009, the attorney general in this case filed a new complaint with the district court where the case originated, asserting the charitable trust doctrine and seeking to have the easement termination set aside.) Some state attorneys general, legal scholars and others believe the doctrine does apply, while others disagree and many have not taken any position. This area of law remains unsettled in almost every state as of 2009, and land

trusts and their counsel must carefully consider what effect, if any, this doctrine has on the organization's ability to amend its easements. For more details on the charitable trust and cy pres doctrines, see *Amending Conservation Easements: Evolving Practices and Legal Principles*.

For a more detailed discussion of the charitable trust doctrine as it may relate to conservation easements, see "Rethinking the Perpetual Nature of Conservation Easements" and "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," both by Nancy A. McLaughlin. For a contrary opinion, see "Conservation Easement Amendments: A View from the Field," by Andrew C. Dana. All three articles are available at The Learning Center (http://learningcenter.lta.org).

Uniform Trust Code

The UCEA Commissioners amended the comments to the UCEA in 2007 to clarify its intention that conservation easements be treated as charitable trusts, conforming the UCEA to comments to the Uniform Trust Code §414 in 2000, which state that a conservation easement "will frequently create a charitable trust." To date, the Uniform Trust Code (UTC) has been adopted in 19 states (Alabama, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming).

Although Section 414 of the UTC, which allows for the modification or termination of certain "uneconomic" trusts, specifically provides that it does not apply to "an easement for conservation or preservation," the UTC drafters explain in their commentary:

> Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.

Although these and other Uniform Laws are not "the law" in their own right, they are the law in states that have adopted them, and they

are respected in other states. Your land trust must determine if your state has adopted either or both the UCEA or the UTC and what changes, if any, your state made to those model acts that will affect the contents of your land trust's amendment policy. These laws and comments are correctly focused on preventing abuse and ill-advised terminations or modifications not consistent with the purposes of the conservation easement and the original grantor's intent. They also underscore the importance of a legal analysis of each amendment to determine whether the amendment is consistent with the purposes of the conservation easement and the grantor's intent.

Restatement (Third) Property: Servitudes

In addition to the UTC and the UCEA, another well-respected source of information about conservation easements is the Restatement (Third) Property: Servitudes §7.11, adopted by the American Law Institute in 2000 (reproduced in appendix 4 of *The Conservation Easement Handbook*). Section 7.11 has special provisions limiting modification or termination of conservation easements based on changed conditions, consistent with the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explain that "[b]ecause of the public interests involved, these servitudes [conservation easements] are afforded more stringent protection than privately held conservation servitudes."

Land trusts should have their own qualified legal counsel analyze the law in their state with respect to amendments rather than relying exclusively on national publications and sources, because all of these principles have varying application in different states.

Conflict of Interest Laws and Requirements

Nonprofits must comply with state laws and requirements prohibiting certain actions by land trust board and committee members and staff who have a conflict of interest. The definition of a conflict varies to some degree across the country, but it may arise in circumstances that involve neither private inurement nor impermissible private benefit. For example, a board member conserved her land and retained certain reserved rights. Some years pass, the board member, still serving, would like to rearrange her reserved rights, reducing some, increasing others and changing their location. The staff analysis indicates that all the suggestions in total have a net positive affect on the conservation purposes and do not result in any impermissible private benefit or private inurement. Nonetheless, the land trust wants to ensure that the public perception of the process and the amendment is also positive. Therefore, the land trust scrupulously follows its conflict of interest policy and disclosures to ensure transparency and uphold public confidence. In addition to the risk of private inurement, a land trust considering an amendment proposal by a land trust insider such as a board or

staff member must also ensure that it properly addresses any conflict of interest. For more on conflicts of interest and insiders, see the Land Trust Alliance course "Avoiding Conflicts of Interest and Running an Ethical Land Trust."

Consumer Protection, Fiduciary and Common Law Protections

An issue related to the charitable trust doctrine is the nature and content of state and local laws on solicitation of charitable funds and the application of these laws to conservation easements and their amendment. States prohibit the fraudulent solicitation of charitable gifts and funds through either state statutes that specifically prohibit fraudulent solicitation or by the application of common law. A variety of consumer protection laws may also apply to conservation easement amendments. Some attorneys believe that a land trust that publicly describes its conservation easements as perpetual in duration, while occasionally granting amendments that diminish conservation easement protections of conservation values, risks running afoul of fraudulent solicitation laws or other similar provisions. Other attorneys feel that, unless there is clear evidence of fraud or the original easement grantor has a specific interest in the result of a decision by a land trust with respect to an easement amendment, such a determination is unlikely and the attorney general will generally decline to get involved.

The issue is complicated by possible variations in the extent to which states recognize charities as fiduciaries who owe a fiduciary responsibility to easement grantors. For example, California declares that "there exists a fiduciary relationship between a charity or any person soliciting on behalf of a charity, and the person from whom the charitable contribution is being solicited" (Cal. Bus. & Prof. Code §17510.8). Some other states reach this result through court decisions. Even if state law does not recognize a fiduciary relationship in all interactions between charities and donors, specific relationships and interactions can be found to create a fiduciary duty because of their particular circumstances. For example, fiduciary duties are commonly recognized as more likely to arise and as imposing higher obligations if the donor and beneficiary of the relationship is an older person because there may be more questions about that person's state of mind and competency. Land trusts should be aware of such a possibility, because many conservation easement donors are older individuals.

Given the legal uncertainties in application of fraudulent solicitation laws and fiduciary duties, how does a land trust proceed? Land trusts

should consult with experienced legal counsel and other land trusts active in their home states and other states in which they operate. In addition, they may wish to consult with their state's attorney general for guidance.

State Land Use, Real Estate and Contract Law

In most states a conservation easement is considered a deed that, when executed and delivered, conveys an interest in real estate. In other states, however, a conservation easement is an indenture or contract, a legally enforceable promise that must be performed and for which, if a breach of promise occurs, the law provides a remedy (not an interest in real estate). In some states, a conservation easement is both a contract and a deed. How a conservation easement is drafted is critical to the determination of whether it is a deed, contract or both and, in turn, to whether and how the easement can be amended.

Conservation easement amendments are subject to all applicable state laws and thus should be treated in the same manner as the original conservation easement concerning compliance with these laws. All appropriate due diligence must be conducted prior to finalizing an easement amendment, including subordination of mortgages and signing and recording the amendment in the real property records of the county or town in which the property is located. Local or state land use laws may also affect an easement amendment.

Conservation easement amendments must follow all standards applicable to the original conservation easement, such as adequate due diligence, subordination of mortgages, and signing and recording the amendment in the real property records of the county or town in which the property is located.

Third-Party Interests

Several parties may have a legal interest in a conservation easement amendment, including funders (either private or governmental), affected landowners, third-party beneficiaries of an easement, co-holders, backup grantees and the original grantor. Some land trusts believe that the consent of the original easement grantor to an amendment is critical, either for legal reasons or public perception, or both. In some cases, the easement may be written so that it requires the consent of the original grantor (or the heirs) to an amendment, or state law may impose this requirement. Some land trusts believe they should discuss an amendment proposal with the original grantor, even if neither state law nor the easement require the grantor's consent, as a courtesy and as tangible evidence of the land trust's commitment to upholding the original donor's intent.

Another group who might have an interest in an easement amendment are those whose land is affected by the easement (in addition to

the landowner). For example, if the amendment only applies to one parcel of an easement property that was subdivided after the original easement was executed, the owners of the other parcel(s) may have a right to object. Each owner might be considered a third-party beneficiary of the restrictions on their neighbor's land, just as lot owners in a restricted subdivision have the right to expect deeded covenants to apply to their neighbors. Again, this issue is an unsettled area of law and a land trust must consult qualified legal advisors.

If the conservation easement was created through mitigation or as a requirement of a zoning permit or other land use law, there may be additional parties, such as government entities, that must approve and/or sign any easement amendment. If the easement was acquired through a grant program, there may be funding requirements or other contractual obligations that your land trust must address. Funders may have policies or grant conditions that limit or direct the nature of amendments. Co-holders of conservation easements must also approve and sign all amendments and should be directly involved in the amendment process. Groups with third-party rights of enforcement or any designated backup holders of an easement must also be consulted about an easement amendment, and they may need to approve and sign the final document. Your organization's amendment policy should identify these situations and the procedures to follow when there are third-party interest holders.

Given the complex legal landscape of easement amendments, land trusts should be extremely careful in responding to amendment requests. Before making a final decision on an amendment, review the legal risk spectrum in tables 2-1, 2-2 and 2-3 (pages 176–77, 190-91) that illustrate risks in public perception and land trust capacity. Note that the tables reflect the spectrum of lowest to highest risk for each of a number of decision points relating to the amendment of a conservation easement. An amendment that falls on the low-risk side for each point is likely to be appropriate in most states and in most circumstances. As amendments increase in complexity, the land trust should take increasing care to evaluate the issues carefully; to involve appraisers, other experts and neutral advisors; and to consider alternatives, including denial of the amendment. The points are not of equal value; for one, the risk may be loss of nonprofit status, for another, the risk may be adverse publicity. Some risks can be mitigated or avoided by a land trust that is conscious of the risk, while others are unavoidable consequences of the transaction. Moreover, the points cannot

be added up to reach a decision; for example, impermissible private benefit or private inurement must be addressed or eliminated prior to proceeding with an amendment, even if there is a low-risk finding on all other points. In practice, individual amendments may have elements of more than one category.

Keeping Good Traction on the Slippery Slope: Crafting Sound Amendment Policies

An amendment policy helps the land trust comply with the law, address amendment proposals consistently over time and further the mission of the organization. It also informs landowners, donors, organizational members, funders, supporters and the general public about the land trust's intent to honor the permanence of the protections afforded by a conservation easement while maintaining limited and appropriate flexibility to respond to unanticipated change. An amendment policy can demonstrate that the land trust is prepared to address changes that easement lands inevitably face over time in ways that respect the grantor's documented intent, the public interest and specific easement program goals, and that are in full compliance with law.

Amendment policies can be as simple as refusing to consider any and all amendment requests. However, most land trusts will find that a more detailed amendment policy provides solid principles for determining which amendments the land trust should approve, rather than prohibiting all amendments.

Some conservation easement amendment decisions are easy to make — most land trusts prefer to at least correct errors in the easement. However, land trusts first need to define what constitutes an "error." For example, a middle initial omitted, a word misspelled or a few lines of text dropped in printing the final document are errors everyone would probably agree could be corrected with an amendment. But what if the easement listed two reserved house rights, but the landowner believes he intended to reserve four? Such a claim presents the dilemma of a possible substantive error that affects the conservation values. How will your land trust deal with these types of amendment requests? If you wish to correct errors, then your policy must provide guidance on what errors may be corrected and how. The policy should also define what errors constitute more substantive issues that, if "corrected" with an amendment, may violate the purposes of the conservation easement or the original grantor's intent, or even be legally impermissible.

Table 2-1: Legal Risk Spectrum					
	Less Risk	**>**	**More Risk**	**>**	**Highest Risk**
IRC/Reg Concerns: impact on conservation purposes	Amendment does not affect conservation purposes protected in perpetuity or affects in positive ways only		Amendment affects conservation purposes protected in perpetuity both positively and negatively	Amendment might harm conservation purposes protected in perpetuity	Amendment definitely harms or negates conservation purposes protected in perpetuity
IRC/Reg Concerns: impact on conservation values	Amendment has a beneficial effect on conservation values of the easement land	Amendment has a neutral effect on conservation values of the easement land			Amendment has a negative effect on conservation values of the easement land
IRC/Reg Concerns: commitment and resources	Land trust clearly has both commitment to protect conservation purposes and resources to enforce restrictions				Land trust lacks commitment to protect conservation purposes or resources to enforce restrictions
IRC/Reg Concerns: extent of language change	Amendment corrects a scrivener's error	Amendment makes de minimis changes or clarifications			Amendment alters basic provisions and protections
Private Inurement	No land trust insider is involved at all	Land trust insider involved but receives no benefit at all		Amendment might benefit land trust insider modestly/ remotely	Amendment clearly benefits land trust insider
Private Benefit	No financial benefit at all to any private party	"Incidental" private benefit to unrelated parties; risk grows by liberal construction of "incidental"	No net financial benefit to any private party; any benefit is offset by detriment	Possible financial benefit to a private party	Clear financial benefit to a private party
Impermissible Private Benefit/ Appraisal	Full independent appraisal shows lack of impermissible private benefit	Appraisal to confirm lack of impermissible private benefit is clearly unnecessary	No consideration of appraisal to assess possible benefit to private party	No appraisal despite possible benefit to private party	No appraisal despite clear benefit to a private party or amendment when appraisal reveals impermissible private benefit

	Less Risk	>	More Risk	>	Highest Risk
State Nonprofit Law Requirements	Amendment furthers or is consistent with land trust's mission		Amendment is not inconsistent with land trust's mission	Land trust's mission is unclear; difficult to see whether amendment furthers mission	Amendment is contrary to land trust's mission
State Easement Enabling Laws	State law permits easement amendment			State law is uncertain	State law forbids easement amendment or this type of amendment
State Charitable Trust Requirements	Easement cannot be considered a charitable trust	Easement is or might be a charitable trust; requirements are satisfied		Easement might be a charitable trust; requirements are not satisfied	Easement is a charitable trust; requirements are not satisfied
Compliance with State Fraudulent Solicitation Laws	Amendment is consistent with land trust solicitations for fee land, easements or funds				Amendment is contrary to land trust solicitations for fee land, easements or funds
Compliance with Local Ordinances	Amendment is not contrary to local law and meets current zoning/similar requirements				Amendment is contrary to local law or inconsistent with current zoning/similar requirements
Compliance with Conservation Easement	Easement expressly permits this amendment or this type of amendment	Easement expressly permits amendments in general	Easement is silent, but state law clearly permits easement amendments	Easement is silent and state law is uncertain	Easement expressly forbids this amendment or all amendments
Violation of Third-Party Rights Created by the Easement	Amendment protects third-party rights in the easement and is approved by those third parties		Amendment is not inconsistent with third-party rights		Amendment abrogates third-party rights
Donor/Grantor Approval	Donor/heirs/ grantor approves this amendment	Donor/heirs/grantor approves this kind of amendment	Donor/heirs/ grantor knows and is unconcerned	Donor/heirs/ grantor does not know/is not consulted	Donor/heirs/ grantor opposes this amendment
Funder Approval	Funders fully approve this amendment	Funders approve this sort of amendment	Funders know and are unconcerned	Funders do not know/are not consulted	Funders oppose this amendment

Your land trust policy and procedures most likely will be inadequate if they prohibit all easement amendments. Errors will occur, and your land trust needs a policy to address what degree of error it is willing to correct through amendments. The example in the previous paragraph poses significant problems, especially if the conservation easement was donated and your land trust signed the IRS Form 8283 (confirming the receipt of a charitable donation) based on the conservation easement as written with two reserved home sites. The length of time that passed from easement closing to the landowner informing you of the error will also affect your land trust's ability to determine if, in fact, an error had been made. For example, is it an error or a change of heart if the landowner takes three years to bring up the matter of the reserved home sites?

As you can see, even correcting "errors" can put a land trust on a slippery slope toward making poor decisions about amendments. An amendment policy, which includes the amendment principles discussed below, provides a structure in which to consider a proposed amendment, make a decision and document the supporting reasoning and justifications. A written amendment policy sets or identifies standards by which the land trust accepts or rejects amendment proposals. The policy should contain amendment procedures that land trust personnel, whether staff or volunteer, use to evaluate the amendment proposal and guide the overall decision-making process.

Contents

Every land trust should have a carefully prepared written amendment policy.

Amendment policies address overall policy guidelines and criteria for making amendment decisions and specific procedures for evaluating amendment requests. Some land trusts meld these into one document; others keep them as separate pieces. The overall policy is usually in a form that can be shared with landowners, potential easement grantors, funders and the public. Some land trusts keep the amendment procedures in a separate document to be used internally and shared with others only on request. Either format is acceptable.

Amendment policies typically include:

A statement of the land trust's philosophy on easement amendments. An amendment policy should declare that easements are considered perpetual, consistent with applicable law and the donor's documented intent, and that any amendment should change the easement to enhance its protection or at least be neutral with respect to impacts on

protected conservation values and the original easement's conservation purposes. The statement can also express the land trust's mission and goals as they relate to amendments.

Amendment principles. An amendment policy should include the standards or thresholds that a proposed amendment must meet to be deemed acceptable (they are your screening test). Seven amendment principles are discussed on page 180, and should be made a part of every land trust's amendment policy.

Additional requirements. The policy properly includes all additional requirements of the land trust, such as compliance with the organization's conflict of interest policy, compliance with donor and funder requirements and the means by which the land trust's costs will be covered.

Allowable purposes of amendments. Many amendment policies list circumstances under which an amendment request may be considered, such as to address mutual errors, add acreage, add restrictions and remove reserved rights. Others provide a more open-ended statement of the types of amendments that may be allowed.

Practical details. The amendment policy usually explains how a landowner may make an amendment request, identifies materials that must be submitted with the request and any required fees. The policy should also indicate who will review the request, who will make the decision whether to grant or deny the amendment request, and how the decision will be communicated to the landowner. Additional practical details include when and how the baseline documentation and title search will be updated (or supplemented) and who will pay for the updates.

Amendment procedures typically include a detailed explanation of how the land trust evaluates the amendment request. Essentially, this section defines the roles of volunteers, staff, committees, the board and legal counsel in reviewing the amendment proposal. See page 186 for more discussion of amendment procedures.

Amendment Principles

Amendment principles form the core of the amendment policy. By applying these principles, a land trust ensures compliance with the

law and sets limits on how substantially an amendment may modify a conservation easement. To be acceptable, an amendment should satisfy all the amendment principles. If a proposed amendment fails to comply with all the principles, the land trust should reject or modify the amendment in accordance with the organization's amendment policy.

An amendment to a conservation easement should satisfy all of the following:

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

Principle 1 underscores a land trust's ethical and legal obligation to only engage in activities that benefit the public and further the organization's mission. By fulfilling this obligation, a land trust honors its commitments to its members, landowners, funding sources, donors, the general public and the landowner with whom it negotiated the original easement. By complying with principle 1 in every amendment decision, a land trust upholds the perpetuity requirement of conservation easements.

Land trusts must draft conservation easements carefully so that the documented intentions of the original grantor and reasonable expectations of funders are explicit and clear and directly related to the land trust's mission.

Principles 2, 3 and 4 ensure that the land trust fulfills all legal requirements, including all laws relevant to conservation easements, fraudulent solicitation laws and charitable trust laws. Principle 3 focuses on a land trust's status as a charitable, nonprofit tax-exempt entity under federal and state law. At a minimum, the land trust must protect its continued existence and ability to hold conservation easements. Principle 4 addresses two major violations the land trust should avoid: bestowal of any benefit on a land trust insider and bestowal of an impermissible private benefit on any person.

Principles 5, 6 and 7 tie the amendment decision to a particular conservation easement and the land it protects. Principle 5 requires the land trust to consider the stated purposes and implied intent in

Determining Impermissible Private Benefit or Private Inurement

Figuring out whether an amendment will confer impermissible private benefit or private inurement can sometimes be tricky. Use the following questions to help identify impermissible situations.

- Who is asking the land trust to amend the easement? A donor, a board member, the spouse of a staff member? If yes, be especially careful!
- What will that person gain, and why is he or she asking?
- If the easement is amended, will the public benefit? If yes, how much?
- If the easement is amended, will the landowner receive some benefit? If yes, how much compared to the public benefit?
- If the landowner gains, is that gain significant?
- Can the landowner achieve his or her goals without land trust involvement?
- If the land trust will benefit from this transaction, are the landowner's benefits relatively insignificant?
- If I cannot answer these questions, who can? An appraiser?

Trust your instincts. If you feel that the requesting party is somehow using the land trust, be careful. If you cannot be sure of the relative public and private benefits gained from the action, be *very* careful. If whoever asks is a land trust friend or insider, be *very, very* careful.

But remember: A land trust can confer some private benefit; it just may not confer "more than incidental" private benefit.

Where the degree of private benefit is difficult to determine, a land trust may want to consider obtaining a ruling from the IRS, or paying for a written opinion from a recognized legal expert on federal taxation. In most circumstances, the land trust should also obtain an appraisal to determine the financial extent of any possible benefit.

Penalties: In egregious cases, the land trust can lose its tax-exempt status. IRC §4958 also permits "intermediate sanctions," which are penalties and fines assessed on the nonprofit organization, including board members and officers who approve the illegal transaction, and on the disqualified person who received the benefit.

Adapted from material provided by Andrew C. Dana, Esq.

the easement document, and to ensure that an amendment will not erode the overarching purposes and intent of the original easement.

Principle 6 protects the land trust against claims of fraudulent solicitation and alleged violation of the terms of the donation of the easement or funds to acquire the easement. Whether a donor gives money or an interest in land, representations by the land trust upon soliciting funds and accepting gifts are binding, both legally and ethically.

Principle 7 defends the actual, on-the-ground resources protected by the conservation easement while at the same time allows the land trust some flexibility. This principle acknowledges that some conservation values of an easement property may evolve over time including, for example, species composition, habitats, recognized best agricultural practices or other features or circumstances present when the easement was conveyed. The principle refers to "relevant conservation values protected by the easement" and thus requires a land trust to use its best judgment in determining what conservation values are present and relevant when determining the potential effects of the amendment in light of the other principles. For example, a land trust has many conservation easements on forested land in a rural state dominated by an agricultural and timber economy. The primary purpose of one of these easements is to ensure the continuation of active forestry, production of a steady stream of high quality saw logs and the preservation of rated forestry soils. Secondary purposes are scenic, riparian protection and habitat protection. The timber operation on the property is expanding to survive the current economic downturn and slide in log prices. The landowner proposes a temporary sawmill to add value to his products. None of the structures would be permanent and are considered part of traditional forestry activities. Together, the landowner and the land trust locate a rocky site, with no rated soils and no other conservation values, that is shielded from public view and agree on a winter-operation-only, temporary portable sawmill for the current season. No residential structures are permitted. The winter-only condition protects all the easement's secondary purposes.

The amendment principles, taken as a whole, set a solid "bottom line" for considering proposed amendments. They provide the foundation on which a land trust can methodically analyze a proposal and document how the decision to accept or reject an amendment is made. Including these principles in any policy and implementing them will give land trusts traction to avoid the slippery slope.

Land trusts should incorporate all seven amendment principles into their easement amendment policies.

No amendment policy should be more permissive than these principles; however, some land trusts may choose to adopt more strict amendment guidelines. Keep in mind that these principles comprise only part of the overall amendment policy; other parts of the policy should be tailored by each land trust to its own organizational mission and needs and the laws of the state in which the land is located.

The "Four Corners" Question

Suppose a landowner proposes an amendment to allow a new use on easement land and, as part of the proposal, offers to place additional, currently unprotected land under easement. This example is a classic "four corners" situation. Should the land trust consider the benefits of the additional land protection when assessing the potentially negative effects of the proposed amendment on the conservation purposes of the original easement?

The amendment principles generally allow appropriate flexibility for land trusts to consider lands outside of the original easement as they assess the effects of the amendment on the ground. Some land trusts choose to limit amendment considerations to just the land encumbered by the original easement (referred to as "within the four corners" of the original conservation easement). The traditional and conservative interpretation of the "four corners" question is that an amendment must have a neutral or positive conservation result with respect to the land inside the original easement boundaries. That is, as a land trust weighs the potential positive and negative effects of a proposed amendment on the conservation values of an easement property, it considers the conservation result strictly within the four corners of the original easement. A number of land trusts implement amendment policies with this understanding. (See part six of *Amending Conservation Easements: Evolving Practices and Legal Principles* for case studies illustrating this issue.)

In contrast to the "four corners" perspective, some legal experts believe that a land trust can, if it chooses and if certain conditions are met, look beyond the original conservation easement and consider the conservation benefits of additional land to be conserved outside of the original easement ("outside the four corners"). Some land trusts consider it appropriate to reduce restrictions on one parcel in exchange for adding restrictions on an entirely unrelated parcel, but because this approach is very risky, land trusts should only rarely consider granting such a proposal and may need to seek attorney general or court

approval before doing so. In such a case, the amendment proposal should offer extraordinary conservation benefits and not violate the original grantor's intention or any funder requirements. Keep in mind that such a change can garner negative publicity and sour public opinion about the land trust and easements in general.

There are, however, sometimes compelling reasons to look beyond the four corners of the easement. Spillover benefits are one such reason. Spillover benefits are enjoyed by a conservation property when neighboring property is also protected. Many conservation attributes of protected land — scenic values, wildlife habitat and water quality protection, for example — can be enhanced when the land is part of a larger block of protected land. To illustrate, a 40-acre parcel with breeding habitat for a rare bird may benefit when the abutting 40-acre parcel is protected as well, buffering the breeding habitat from encroachment by development. Spillover benefits, though difficult to quantify, can be a compelling reason to protect related parcels of land and thus may factor into a land trust's decision as to whether it will consider amendments within, or outside, the four corners of the original easement.

Each land trust must decide whether lands outside the original conservation easement may be considered when evaluating potential amendments. No court decisions address the four corners and spillover benefits questions, and the IRS has not issued any guidance on the subject, so land trusts that look outside the four corners assume additional risk in those transactions.

No court decisions address the four corners and spillover benefits questions, and the IRS has not issued any guidance on the subject, so land trusts that look outside the four corners assume additional risk in those transactions.

When considering proposals "outside the four corners," a land trust should, at a minimum, consider:

Federal law. The Internal Revenue Code and Treasury Regulations require that easements resulting in income tax deductions must be granted in perpetuity and that the conservation purposes of the easement must be protected in perpetuity. Does consideration of factors outside the four corners conform to or violate federal law? Would reducing or eliminating restrictions on a conserved parcel in exchange for restrictions on a new parcel conform to or violate federal law?

State legal context. State law may directly address this matter, or there may be legal precedents involving other circumstances that are relevant. The charitable trust doctrine, fraudulent solicitation rules or related restrictions may apply with different or special force to the

easement or the amendment in a four corners case. At a minimum, land trusts should ask: does consideration of factors outside the four corners conform to or violate state law?

Organizational capacity, mission and goals. Is the land trust equipped to address the potentially more complex analyses implied by consideration of lands outside the original boundaries of the easement? Does it

Outside the Amendment Principles

In some extraordinary circumstances, land trusts may consider amendment proposals that do not comply with one or more of the amendment principles. Such situations include:

Threat of condemnation. When part of an easement property is to be condemned by a public entity, the easement may be amended, or terminated in part or whole, in lieu of engaging in full condemnation proceedings, provided that the land trust determines that the exercise of eminent domain would be lawful, the best interest of all parties would be better served by negotiating a settlement with the condemning authority, and the land trust receives reasonable compensation for lost conservation values and uses the funds in a manner consistent with the conservation purposes of the original easement.

Substantial alteration or elimination of a conservation purpose. An unanticipated major change can create situations where a conservation purpose is no longer relevant, or must be sacrificed to meet another significant conservation purpose. For example, the eruption of Mount St. Helens, the indisputable death of the last of an endangered species, the next great earthquake or other major changes not contemplated by the easement may wholly or effectively defeat a conservation purpose. An amendment may be seen as the best way to address the problem, and may be acceptable under the *cy pres* doctrine and the related doctrine of changed conditions.

Both these cases often involve amendment proposals that are inconsistent with or harm a purpose or purposes of the original easement, or result in a net negative conservation result to the easement property. In such amendments, land trusts should strongly consider seeking the review and approval of a public entity or a court, if they are not already required to do so by law. External review may help to ensure that the land trust achieves the overall public purposes despite possible diminution of the conservation benefits of the amended conservation easement. The approval of a public entity also may help to protect the land trust from jeopardy or criticism and from future challenges to the amendment. Amending under any of these conditions is very high-risk territory, both legally and in terms of public perception.

have the advice of qualified attorneys and experts to address the issues? Would such an approach further or harm the mission of the land trust?

Public perception. Will its landowners, members and other constituencies understand and support the broader approach of considering lands outside the original easement? Should outside the four corners amendments be approved by a representative of the public, such as the state attorney general?

Easement grantor perception. Will existing and prospective easement grantors react negatively, harming the land trust's ongoing conservation easement program?

Amendment Procedures

Written amendment procedures set out practical steps to evaluate proposed amendments using the amendment principles, other requirements of the amendment policy and applicable law. Having a written procedure helps a land trust address all components of the policy consistently and fairly. Because most land trusts see few amendment requests, each new request may be reviewed by board or staff members with little or no prior amendment experience; therefore, written procedures help carry forward a land trust's institutional knowledge. Along with its conflict of interest policy, written amendment procedures also provide "backbone" to a land trust faced with an amendment proposal from an insider, close friend or supporter whose relationship might pressure the land trust to approve the amendment.

Doctrine of changed conditions: Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified by a court if they no longer substantially achieve their purpose due to the changed conditions.

Documenting the procedural steps and decisions in the amendment consideration process also provides the land trust with a written record to demonstrate the reasoning behind its decision. A detailed written record may diffuse claims from disgruntled landowners that they were not afforded "due process" or fair treatment or that the land trust's amendment decisions were arbitrary. A detailed written record may also enable a land trust to respond to criticism and challenges by federal and state authorities and other third parties.

While certain key steps are common, much variation exists in the details and order of the steps involved in considering an easement amendment. The particulars of the amendment review process depend on the staffing level, board governance style and individual organizational experience with amendments and are influenced by the legal

context in which a land trust operates. No universal amendment procedure fits every organization; each land trust must tailor its own amendment review process to its particular organizational requirements and applicable laws.

Creating written amendment procedures offers a land trust many benefits and assists a land trust in considering amendment requests in an efficient, consistent and knowledgeable manner.

Some organizations prepare a written procedure similar to the outline below that includes the basic steps and key questions that a land trust should use in evaluating amendment proposals and completing amendments. Other organizations' written procedures are more general and address the critical elements of the overall decision-making process, acknowledging that the details are adapted on a case-by-case basis. A land trust that has little or no experience amending its easements might use the following amendment procedure outline to develop its own written procedure. Those with more experience and a written procedure in place might use this outline to review and adjust their own procedural details.

A land trust is not obliged to amend an easement simply because it considers an amendment request. The amendment procedure can lead a land trust to deny an amendment, as well as to negotiate changes to an amendment proposal so as to mitigate any negative effects or improve the conservation benefit.

Steps in the Process

1. Initiating the proposed amendment

The request. Usually the landowner initiates an amendment request, but a land trust may as well. Some land trusts are proactively amending easements, with landowner cooperation, to revise archaic language in older easements. In such circumstances, the procedural details will vary because the land trust is seeking landowner approval rather than the reverse. Regardless of who initiates the amendment request, the land trust should uphold its amendment policy.

No universal amendment procedure fits every organization; each land trust must tailor its own amendment review process to its particular organizational requirements and applicable laws.

Create a checklist to guide your land trust through the needed due diligence for any conservation easement amendment proposal.

Discussion and negotiation. Usually, amendment requests have a soft start. A landowner may call the land trust or mention the issue during the annual monitoring visit to informally discuss the change that he or she is seeking. This initial conversation can help the organization understand what modifications to the easement the landowner is requesting. Sometimes techniques other than an easement amendment better address the problem, and an amendment can be avoided.

When should a land trust initiate an amendment? When the land trust identifies an error, wants to upgrade the conservation easement template or identifies a problem with the easement terms.

The land trust should always explore ways to address the problem without amending the conservation easement.

Provide the written amendment policy to the landowner. The policy informs the landowner of the criteria under which the land trust evaluates an amendment request. The land trust should explain the practical details established by the policy and amendment procedures, including what should be submitted in an amendment request (for example, a written statement of the change being sought and why, maps and any other documentation needed) how costs will be handled (most land trusts require the landowner to pay all of the land trust's costs when the landowner requests an amendment, some with upfront deposits) and the land trust's process and anticipated timeline.

Amendment requests can be quite costly to review, both in terms of staff or volunteer time and out-of-pocket expenses. Land trusts must commit staff or volunteer time to analyze the request, as well as committee and board time for review and analysis. Land trusts will incur legal (and often appraisal) costs evaluating the potential effects of the amendment. A land trust may need to hire other experts, such as wildlife biologists or range management experts, to provide advice on the effects of the amendment. In addition, if the amendment is approved, there will be costs associated with negotiating and drafting the specifics of the amendment document and any exhibits to the original easement that may be affected by the amendment, as well as recording costs. Finally, an amendment generally means that the baseline documentation must be updated (or supplemented), and there will be costs associated with this task, as well as obtaining a mortgage subordination and any other title clearing documents, if necessary.

The policy or written amendment procedure should establish who will be in charge of evaluating the amendment request and who is authorized to make the decision to approve or deny a request. Volunteer-run land trusts may authorize a board committee to review the request, in consultation with legal counsel. Professionally staffed organizations often have staff review requests and then work with a committee to make a recommendation to the board. Some organizations hire outside consultants, such as natural resource experts, conservation lawyers and real estate appraisers, to conduct certain tasks. Some larger staffed organizations authorize staff to complete amendments that meet defined criteria, or to fully analyze amendment requests and

make a recommendation to the board for approval. In all cases, the land trust board is accountable for the final decision.

Early in the process, advise the landowner, in writing, to obtain his or her own legal counsel. Amendments are often as complex as the original conservation easement and may have tax and other ramifications for landowners. Landowners should have competent counsel throughout the process.

The land trust's board is accountable for the final decision on all amendment requests.

Landowner (or land trust) submits written request. Unless dissuaded by discussions with the land trust and legal counsel, the landowner submits the amendment request in writing to the land trust. Some land trusts will waive the written request from the landowner. In these cases, the land trust should still commit the amendment request to writing and confirm it with the landowner before proceeding with the amendment process. For example, the land trust may write a letter with a point-by-point summary of the amendment request as understood by the organization, review that letter with the landowner and confirm agreement, then move on to the next steps in the process.

Early in the process, advise the landowner, in writing, to obtain his or her own legal counsel.

Site visit. The land trust visits the property (the only exception being the simplest cases with no significant change to the easement or in cases in which a reserved right is extinguished). The site visit allows the land trust to identify the amendment's potential effects on the conservation values and purposes of the easement. Photos taken during the site visit can document the pre-amendment condition of the land, supplementing baseline and monitoring photos that may not be fully up to date or may not focus on the specific part of the easement land in question.

2. Reviewing the request

Land trusts typically use several basic questions or tests to determine whether the proposed amendment meets the thresholds of the amendment principles.

- *Public interest and organizational mission test*. Does the proposed amendment serve the public interest and further organizational mission and goals?
- *Legal test.* Is the amendment legally permissible under federal, state and local law? Could the amendment jeopardize the land trust's tax-exempt, charitable status?
- *Financial test.* Could the proposed amendment result in private

inurement or impermissible private benefit?

- *Conservation purposes test.* Is the proposed amendment consistent with the conservation purposes and intent of the easement?
- *Existing and prospective donor test.* Does the amendment fulfill any obligations to the donor, grantor or funder? Will prospective donors, grantors and funders recognize that fact?
- *Conservation results test.* Will the proposed amendment result in a net beneficial or neutral effect on the conservation attributes of the easement land?
- *Public perception test.* Will land trust members and the public understand the amendment or, at least, not find it objectionable? If not, what steps can be taken to improve public perception? Does the land trust understand the community ramifications of the amendment?

In addition to the legal risks outlined in table 2-1 (see page 176), tables 2-2 and 2-3 illustrate the degree of risk related to public perception and land trust capacity.

As the land trust runs the amendment proposal through the screening tests, it also gathers additional information to resolve related due diligence issues associated with the amendment. The land trust should determine the following:

How does the proposed amendment affect stewardship and administration of the easement? Experienced land trusts advise that amendments may provide opportunities to improve easement language, thereby alleviating potential monitoring and enforcement difficulties. Sometimes, improved easement administration is a major goal in amendment negotiations because the land trust can better protect the conserva-

Table 2-2: Public Perception Risk Spectrum

	Less Risk	**>**	**More Risk**	**>**	**Highest Risk**
Neighbors/Land Trust Members/ Community Approval	Neighbors/members/ community approve this amendment	Neighbors/ members/community approve this kind of amendment	Neighbors/ members/community know and are unconcerned	Neighbors/ members/ community are unaware/not consulted	Neighbors/ members/ community oppose this amendment
Media Attention	Amendment likely to receive positive or no media attention			Adverse media attention is likely	Adverse media attention is certain

Table 2-3: Land Trust Capacity and Capability Risk Spectrum					
	Less Risk	**>**	**More Risk**	**>**	**Highest Risk**
Complexity	Simple amendment easily understood				Multipart complex amendment
Degree of Land Trust Review and Analysis	Amendment is fully reviewed by land trust staff and/or knowledgeable committee, full board and qualified attorney			Amendment is minimally reviewed by land trust staff and/or committee or board without qualified attorney	Amendment is minimally reviewed by land trust staff and/or committee without qualified attorney or full board review
Degree of Expert Consultation	Relevant expert scientific or other advice is obtained, or it is clearly not needed and documented				No expert scientific or other advice is obtained but clearly needed
Degree of Land Trust Effort and Expense in Amendment	Land trust staff time and expenses will be fully paid by requesting party or will be minimal				Amendment will impose heavy financial and time burdens on land trust with little or no hope of payment
Effect on Land Trust Stewardship Capacity	Amendment imposes no new or unendowed stewardship obligations; or amendment improves easement's enforceability		Amendment does not improve enforceability of easement		Amendment adds new, unendowed stewardship obligations
Tradeoffs Four Corners Rule	Straightforward amendment that simply adds acreage, adds restrictions, extinguishes reserved rights and the like (no tradeoffs)	Amendment involves no tradeoff or simple tradeoffs of conservation values on only one easement parcel	Amendment involves simple tradeoffs of conservation values; more than one easement property	Amendment with complex financial result or tradeoffs of conservation values or among multiple easement properties or new land added to original easement	Highly complex and/or controversial amendment; likely to require review by public entities, to be outside amendment principles and to fail some screening tests

tion attributes of easement land. Conversely, if an amendment would increase the stewardship burden, the land trust should also weigh this negative factor in the evaluation, and perhaps seek to mitigate this increased burden by requiring a financial contribution from the landowner to the land trust's stewardship fund. However the land trust handles this issue, it must be clear that the landowner did not "purchase" the amendment.

Are there other parties (in addition to the landowner and land trust that hold a legal interest in the easement) that must be engaged in the process? If the land trust purchased the original easement, the funding sources may have a legal or programmatic interest in the easement. Some public funding programs have rules that effectively prohibit amendments. Furthermore, the land trust may wish to consult with the funding source as a matter of courtesy and good public relations depending upon the situation.

If the easement property is part of a larger easement property that was subdivided after the original easement was granted, the owners of the other easement properties may have legal standing to challenge an amendment. Even if the landowners do not have legal standing to sue, the land trust should evaluate whether to obtain these landowners' approval to avoid conflicts.

Amending an easement exacted in a land use or environmental permitting situation may require approval of the permitting agency or municipality. Therefore, such an easement must be carefully scrutinized for the land trust's ability to amend, and steps taken to engage other appropriate parties who must, or should, be consulted about an easement amendment. If some entity other than the land trust must approve the amendment, landowners and land trusts should understand that these approvals may take time and may require public hearings or notice with respect to the easement amendment.

Standing: The right of a person to participate in a judicial proceeding and be recognized as a party to the proceeding by the court and the other parties.

If the easement was donated and an income tax deduction taken, an IRS ruling may be worth considering because neither the IRS nor the courts have yet addressed this point. Some attorneys believe the landowner's tax concerns as to a deduction end when the three-year statute of limitations runs out, thereby making IRS consent unnecessary. The IRS retains power to sanction the land trust, however, and some amendments may have additional tax consequences.

These are subjects that require legal counsel with significant tax expertise. In some states, review or approval of a court, state agency or the attorney general may be required by statute or under charitable trust law if applicable to conservation easements. Even if such review is not required, it may be desirable to protect the public interest.

Are there any stakeholders whom it would be wise to engage? Some experts advise that, in most states, the original grantor of a conservation easement does not retain any legal interest in the easement after the property is conveyed to a new landowner. In these states, the land trust is legally not obliged to consult with the grantor on amendments but may do so for other reasons. Other legal experts advise that an original easement grantor (and his or her heirs) do retain certain rights, particularly if the easement is considered a charitable trust under state law. Other states have not determined the answer yet. This is an unsettled area of law where a land trust must consult qualified legal advisors.

When considering an amendment, a land trust may wish to consult with the original grantor as a matter of courtesy and good public relations.

In any case, a land trust may wish to consult with the original grantor as a matter of courtesy and good public relations; this issue should be evaluated on a case-by-case basis. One angry donor, grantor or funder who feels betrayed can generate damaging publicity that might have been avoided by early involvement. Whatever the status of state law, representations made to a grantor may create rights that may be triggered by an amendment. For example, there may be contract rights enjoyed by a grantor or funder or other rights or concerns that require or justify their involvement.

Other parties to the original transaction, such as direct financial supporters, may need to be consulted as well. In addition, neighbors, community groups or other individuals may be interested in the proposed amendment. The land trust should consider whether and how to seek information and reaction from these stakeholders.

Land trusts should always remember that they are ultimately responsible for their amendment decisions and must, therefore, reserve the right to act in the land trust's and public's best interests, not the interests expressed by third parties, and thereby fulfill their fiduciary and other obligations.

Are there any conflicts of interest to be resolved? If board members, staff or other decision-makers have actual or potential conflicts of interest with respect to the proposed amendment, these must be addressed,

consistent with the organization's written conflict of interest policy. Presence of conflicts of interest may indicate possible private inurement issues, or heighten the need for consideration of public relations issues presented by the proposed amendment.

Are there any title issues to resolve? Check the title of the easement property. If any mortgages or other third-party interests (liens, leases and so forth) were recorded after the grantor conveyed the original easement, they must be subordinated to the easement amendment. Failure to do so risks the loss of the amendment in the event the lien or mortgage is foreclosed.

Any mortgages or other third-party interests (liens, leases and so forth) after the grantor conveyed the original easement must be subordinated to the amendment.

Are there any property tax concerns? The land trust may check, or advise the landowner to check, with the local taxing authority to ensure the amendment will not disqualify the easement from any special taxation program, if such considerations are important to the affected parties. The land trust must check to make sure that real estate taxes have been paid in full prior to finalizing an amendment, or risk losing the amendment to a tax foreclosure.

Is additional expert advice needed? In addition to experienced legal counsel, the land trust may need the services of professional real estate appraisers, natural resource experts, fish and wildlife experts or other professional advisors. Having the opinions of acknowledged experts is especially important when weighing complex tradeoffs and effects on conservation attributes in a proposed amendment.

When should the baseline documentation be updated (or supplemented) and who should pay the cost to do so? Gathering baseline information relating to an amendment early on may assist the land trust in identifying and evaluating any resulting benefits or problems. Absent that information, efforts to evaluate the effect of the proposed amendment on the conservation values may be flawed. Any easement amendment should trigger an update (or supplement) to the existing baseline documentation and should be signed (with signatures notarized according to your state laws) and stored in accordance with the land trust's recordkeeping policy and procedures.

IRS Form 990 now requires disclosure of all amendments, modifications and terminations of any conservation easement.

What information needs to be gathered to prepare Form 990 if the amendment is consummated? IRS Form 990 now requires disclosure of all amendments, modifications and terminations of any conservation easement.

3. Negotiating with the landowner.
Amendments often involve back-and-forth negotiation to address issues that the land trust identifies during its review. For example, the land trust may suggest additional restrictions to offset potential financial gain to the landowner or to compensate for negative effects on the conservation attributes, or the land trust might suggest alternatives that reduce the scope of the amendment. The land trust also may negotiate for a less extensive amendment than the landowner initially requested that still accomplishes similar results. Or, the land trust may request an overall easement "upgrade" to current standard easement language to improve easement stewardship and enforceability. There may be many iterations of the amendment document before both the landowner and land trust agree that the amendment is acceptable. Sometimes this discussion results in an impasse between the land trust and landowner and no amendment is executed.

4. Making the decision
The land trust staff, volunteer or committee that reviewed the amendment request generally makes a recommendation to the board for a full board vote. Some larger land trusts authorize staff to complete amendments under certain conditions without a full board vote if consistent with a well-defined organizational policy and delegation criteria. Regardless of the method for approving easements chosen by a particular organization, the full board is always accountable for all easement amendment decisions.

Whether the land trust grants or denies an amendment request, it must thoroughly document the specific reasons for its action, couched in the context of the easement amendment review criteria set forth in the land trust's amendment policies and procedures. The land trust must then clearly communicate to the landowner, in writing, the basis of the decision to grant or deny the amendment request. Landowners need to know that the land trust's decision is based on applicable laws and its amendment policy and that the policy is applied fairly to all proposed amendments.

5. Updating the baseline documentation
An amendment that changes reserved rights or any other easement terms may potentially affect the land's conservation values as documented in the original easement baseline. If so, the baseline documentation should be supplemented or updated to reflect the condition of the property at the time of the amendment. For example, if an amendment

increases restrictions along a riparian corridor to prevent disturbance to vegetation, the condition of the corridor at the time of the amendment should be documented and the original baseline supplemented (always retaining the original intact baseline documentation report). An amendment that protects a new suite of conservation values should trigger an update to the original baseline documentation. Any added land needs new baseline documentation.

6. Legal review and drafting the amendment

Usually the land trust prepares the amendment document. As with all real estate conveyance documents, professional legal review of the final amendment is always needed, but legal review and participation in amendment decisions is critical throughout the amendment process. The degree of complexity of the amendment drives the extent of attorney review and legal involvement. Land trusts and their attorneys can evolve a set of standard documents to address routine amendments, such as correction of typographical errors, boundary adjustments, reconfiguration of designated building envelopes and additions of conserved land, that allow the land trust to minimize attorney involvement. However, an attorney must review every amendment prior to execution to be certain that the amendment is correct, drafted clearly, does not create unanticipated adverse consequences and complies with all laws.

An attorney must review every amendment prior to execution to be certain that the amendment is correct, drafted clearly, does not create unanticipated adverse consequences and complies with all laws.

If necessary under state law or as required by the land trust's policy, the land trust should then submit the amendment to the state attorney general, IRS or court after the final amendment is drafted.

7. Signature and recording.

The landowner and land trust must both sign the amendment and record it in the appropriate public land records. Execution and recording occurs after the land trust completes the final title exam and other necessary due diligence.

IRS Form 990 provides public notice about any easement amendments and may be considered sufficient notice to any outside parties.

8. Notifying outside parties.

Notifying public entities or other parties about the completion of an amendment is at the discretion of the land trust. Some organizations routinely notify the municipality, county or other local government in which the protected property is located. Others believe that there is no reason to notify any outside parties and that there may be disadvantages to calling unnecessary attention to an easement amendment. IRS Form 990 effectively provides public notice about any easement

Consulting with State Officials

The Nature Conservancy's amendment policy requires consultation with the applicable state attorney general, as follows:

> As a condition of any amendments that alter, eliminate or reduce covenants on all or a portion of the property, TNC's amendment procedure requires that TNC and the landowner will seek approval of the relevant state authority that has oversight of charitable organizations within the state of the easement [often the Attorney General]. The amendment procedure does not apply to amendments that add covenants, provide clarification of ambiguous terms or are deemed de minimus.

Michael Dennis of TNC reports that, given the uncertainties in the law and the fact that TNC operates in all 50 states, this approach helps prevent future challenges to an amendment by the state.

Paul Doscher of the Society for the Protection of New Hampshire Forests advises that land trusts should anticipate the delays that these realities may create and plan accordingly. He adds that it may be advisable for the land conservation community in a state to initiate a dialog with the Office of the Attorney General regarding the prospect of increased amendment review requests. In some cases, the attorney general may work with the land trust community to develop guidance on which types of amendments it wants to review and which it does not. Further, this consultation may help develop protocols for communication with the attorney general so that questions about amendments can be more easily categorized and evaluated.

amendments and may be considered sufficient notice to any outside parties.

9. Signing IRS Form 8283 in cases of donation.
If the amendment qualifies for a tax deduction, the land trust should request a copy of the appraisal and complete Form 8283 following normal land trust procedures. Be careful though: if the land trust exchanged value with the landowner by swapping the release of some reserved rights for the creation of new ones, then both the appraisal and the 8283 must document and value both sides of the exchange and only the remaining excess value, if any, donated by the landowner would be eligible for a federal income tax deduction.

The process outlined above covers typical easement amendment scenarios and offers a basic structure for written amendment procedures.

However, it is impossible to prepare a step-by-step procedure that covers all the variations that land trusts may eventually encounter. Ultimately, land trusts should rely not only on their amendment procedures but also on their experience and legal advice to ensure the best process for making amendment decisions.

Conservation Easement Amendments

This exercise is suitable for a training, self-study program or for an in-house staff or board training.

Read the scenarios below and then answer the discussion questions that follow. Guidance on the questions follows on page 204. Be sure to study those points and compare them to the conclusions you reach.

Scenario 1: Extinguishing Reserved Rights

When George and Martha placed an easement on their property 15 years ago, they reserved the rights to create two additional house lots. They thought their children might wish to exercise these rights. Now the children have made lives for themselves in other places, and George and Martha wish to remove these reserved rights permanently, so that no more houses can ever be built on their land. They proposed this idea to the land trust that holds the easement.

Resolution: The land trust evaluated this proposal using the land trust's written amendment policy. Staff determined that the proposed amendment clearly would have a positive conservation result. In the financial analysis, the landowners were giving up substantial economic value, so impermissible private benefit was not a concern. Neither George nor Martha was a land trust insider, nor was there a mortgage to consider that would require subordination to the amendment. The land trust worked with its real estate attorneys to draft, complete and record the amendment consistent with its amendment procedure. The baseline was supplemented to remove the two house sites.

Discussion Questions

1. Is this amendment proposal more or less risky according to the risk spectrum set forth earlier in this chapter?
2. What do you think this land trust found as a result of applying the amendment screening tests?

Four corners of the document: In ascertaining the legal significance and consequences of the document, the parties and the court can only examine its language and all matters encompassed within it. Extraneous information concerning the document that does not appear in it — within its four corners — cannot be evaluated.

3. What needs to happen if the landowners wish to claim a charitable deduction?
4. Should the land trust consider any other alternatives prior to approving an easement amendment in this situation?

Scenario 2: Excessive Stewardship Obligation

An easement conveyed to a land trust in the year 2000 protects a 1,000-acre ranch. The primary easement purposes are to protect ranchland, agricultural production and wildlife habitat. All structures on the ranch are contained in a single building envelope within the easement, which allows for one primary residence and one bunkhouse. According to the easement, the use of the bunkhouse is limited to the ranch's full-time employees, a hallway in the bunkhouse must be located and designed in a certain manner, and overgrazing is prohibited, with overgrazing defined as grazing that results in a below two-inch grass cover length.

The land trust believes that some of these easement provisions provide little or no conservation benefit and/or impose an unrealistic monitoring burden. The easement was negotiated and signed in the last days of December, when the land trust's regular attorney was unavailable and the organization's usual internal checks and balances were deficient. The land trust would like to amend this easement to improve its enforceability, while ensuring that its purposes and intent are upheld.

Considerations: These easement terms raise more questions than they answer, and the land trust should begin with a careful review of the project file, discussions with present and former land trust personnel who participated in the creation of this easement, and discussions with the grantor and any grantor representatives. The provisions that seem strange and unnecessary now may have had an underlying logic that is not immediately apparent to current land trust staff. If so, that logic must be taken into account when making any amendment decision.

For example, the bunkhouse limit to full-time employees may have been designed to ensure that those who lived in the bunkhouse had a relationship to the land and could be relied upon to be good land stewards as part of their employment. Or perhaps the restriction was intended to prevent the use of the bunkhouse by paying guests while providing housing essential to the ranch operations. This restriction, however, presents monitoring problems, because it would be difficult for the land trust to confirm compliance during a regular annual monitoring visit. Similarly, the very specific bunkhouse hallway requirements are hard to monitor and do not appear directly relevant to the purposes or conservation attributes of the easement. However, one hopes that there was a reason this provision was included in the easement, and land trusts would be wise to research the situation thoroughly before deciding to change these terms. The project file and discussions with those who

originally worked on the easement negotiation and drafting may reveal what the land trust hoped to achieve by these bunkhouse provisions.

The two-inch overgrazing standard is also problematic because it is difficult to measure accurately over the ranch as a whole, which makes monitoring this restriction extremely difficult. If the land trust faces questions as to the intent of the two-inch standard, it may find support in the easement, project file and local cattle community standards to amend the easement to require an average two-inch grass length based on measurements at multiple locations on the ranch. Alternatively, an amendment might eliminate the two-inch grass standard and replace it with a requirement for compliance with an agricultural management plan or compliance with accepted, more easily monitored standards. The goal of amendment should be a net positive conservation result, including improved easement stewardship as a positive factor in the balance sheet.

Discussion Questions

1. What risks and concerns does the risk spectrum reveal about this proposed amendment?
2. What factors should the land trust consider?
3. Does the land trust have any alternatives to amendment?
4. What else should the land trust consider?

Scenario 3: Weighing Impacts to Conservation Purposes and Attributes

The owner of a 400-acre easement-protected dairy farm approaches the land trust with an amendment proposal that would allow him to expand his herd size greatly, diversify the operation, reduce water pollution and cut energy consumption on the farm. The proposal includes expanding his herd from 400 to 2,200 cows; processing the manure in a methane digester that would produce electricity, bedding material for the cows and marketable fertilizer; and running the wastewater through a series of greenhouses that would produce vegetables and bedding plants for local markets. The amendment request is to expand the size of the farmstead building envelope from 20 acres to 50 acres, or from 5 percent to 12.5 percent of the entire 400 acres.

Resolution: The focus of this land trust's conservation program is to conserve working farms because of the importance of agriculture to the state's economy, its scenic beauty and its cultural heritage. Within this context, the land trust focused on the conservation purposes of the easement when analyzing the landowner's request. The amendment would have enhanced a principal purpose of the easement, the continuation of an economically viable farm. But the proposed operation was out of scale with agriculture in the region, prime agricultural soils would be taken out of production, and the complex of new buildings would have had significant scenic impacts. Looking at the easement purposes in the context of the community and the land trust's goals, the land trust found that the negative effects on the other conservation attributes protected by the easement far outweighed the positive effect on the agricultural purposes. Therefore, the land trust denied the amendment request.

Discussion Questions

1. How does a land trust evaluate the effect of an amendment on multiple conservation purposes?
2. Does the land trust need to consider obtaining third-party review of an amendment?
3. How does a land trust proceed when it determines it must say no to an amendment request?

Guidance

Scenario 1: Extinguishing Reserved Rights

1. This straightforward amendment proposal has a clear conservation gain and no discernable downsides. By running the proposed amendment through its amendment policy and procedures, the land trust documented its reasoning that the amendment was allowable. This is a good example of a low-risk amendment. The land trust could make the decision to proceed on its own, with the advice and drafting services of legal counsel, but without seeking analysis from outside experts or other constituents. The land trust did not need an external analysis because the landowners gave up something of value to the land trust and sought nothing in return. The amendment had a positive effect on the conservation easement by reducing previously allowed development.
2. The land trust applied the amendment screening tests at a scale appropriate to the proposal; it used staff analysis rather than hiring expert naturalists or a professional appraiser. If a land trust without staff faced this proposal, its volunteer board would ultimately make the decision, involving qualified legal counsel early in the process. The land trust had no discernable conflict or motivation outside its traditional, land-saving motive, so its decision is uncontroversial. This amendment might offer an opportunity to approach the landowners' neighbors to explain about conservation easements with George and Martha as allies. New easements on adjacent land would enhance the protection provided by this easement.
3. If George and Martha intend to claim a charitable deduction for canceling the two reserved house sites, they need personal tax counsel, must obtain a "qualified appraisal" substantiating the value of their contribution, and satisfy the Form 8283 requirements, including execution of the form by the land trust confirming the gift.
4. This amendment result could have been achieved by placing a second conservation easement over the same land, affirming the first easement and eliminating the reserved rights, thus avoiding an actual easement amendment (although the results would be identical). The best format will vary based on state law on recordation and transfer and various other considerations, such as the desirability of upgrading the original easement language to the land trust's newer model easement and stewardship issues concerning the management of two conservation easements on the same property.

Scenario 2: Excessive Stewardship Obligation

1. Some legal experts believe that if restrictions in an easement are not necessary to achieve the purposes of the easement, and if the restrictions are not required to protect the relevant conservation attributes of the property, the land trust may consider amending those particular terms. It may be appropriate to replace difficult-to-monitor restrictions with more easily monitored provisions that better address the issues or, in some cases, it may be appropriate to remove them altogether. These attorneys believe that improved stewardship of the easement's purposes is a good reason to amend the easement, provided that the amendment strengthens the overall protection of the land or the enforceability of the easement. These attorneys argue that such restrictions may not be enforceable as written under different legal principles, so their amendment or removal from the easement may improve the easement's overall enforceability.

   Other attorneys believe amendments in these situations pose a serious risk on many grounds, including the potential for creating impermissible private benefit and breach of promises made to the original donor, grantor or funder. These seemingly obscure restrictions may have had special importance to the grantor that prompted the land trust to agree to place them in the easement. Amendment of provisions that were key to the original landowner's decision to grant the easement may leave the land trust open to charges of fraudulent solicitation, raises issues concerning the charitable trust doctrine and may damage donor relations.

   This case illustrates a moderate to significant risk in the amendment spectrum. Modifying easement restrictions to improve enforceability requires appropriate analysis using all the tests of the amendment policy.
2. In removing restrictions from an easement, the land trust must consider carefully whether releasing restrictions may result in an impermissible private benefit or private inurement or harm to the protected conservation values. When there is uncertainty with respect to private benefit issues, a qualified appraiser should review the situation and prepare an appraisal, if warranted. Removal of restrictions resulting in harm to conservation values may violate the perpetuity requirements in federal tax law if the grantor took a deduction for the easement donation.
3. Alternatives that the land trust could consider in this case include choosing not to enforce the easement with respect to technical violations — a "discretionary waiver" — or granting discretionary approval for the use or activity in question. For example, the land trust might not monitor the

employment status of people living in the bunkhouse or might choose to grant discretionary approval for part-time employees who live there. Land trusts must be very cautious when choosing these types of alternatives. These approaches should be considered only for true technical violations that have no effect on the easement purposes, no significant effect on the conservation values of the property and no potential for conferring impermissible private benefit or private inurement.

4. Any changes to the easement may require supplements to the baseline documentation. More thoughtful easement drafting could have avoided this problem!

Scenario 3: Weighing Impacts to Conservation Purposes and Attributes

1. When easements have multiple purposes — as most do — a proposed amendment can positively affect one purpose and negatively affect others. Deciding how much is too much is a matter of scale — are the negative impacts to the purposes significant? Written opinions from experts might be useful in weighing effects on multiple conservation values. The land trust's mission and the community context become important guides for making the decision. For example, in this situation, the land trust determined that the proposed use was not consistent with existing agricultural practices in the community. This scenario is an example where the land trust was not convinced that the public benefits clearly outweighed the negative impacts and so chose to leave the status quo in place.
2. Because the amendment would have had negative effects on some of the conservation purposes, the land trust may have needed attorney general or court approval to proceed.
3. The land trust is rarely, if ever, obligated to say "yes" to an amendment request. Following the land trust's amendment policy and documenting the reasoning behind decisions will help a land trust defend its choices.

Drafting Easements with Amendments in Mind

Given the reality of human error and lack of omniscience, land trusts will never be able to completely prevent the need for amendments; however, your land trust can greatly minimize the need for amendments by doing two things when you draft your land trust's original conservation easements: draft for perpetuity and draft for flexibility.

Drafting for Perpetuity

Conservation easement drafting for perpetuity means that your land trust's conservation easements do not include language that is likely to become outdated, such as shorthand terms that are the current jargon (for example, "sustainable agriculture"). Drafting for perpetuity also means avoiding ambiguous terms and conditions, and inserting only those provisions that you believe are clearly understandable today and will be 100 years from now. For example, if you must use design restrictions (such as in a historic preservation easement or a scenic easement with publicly visible improvements), a requirement that buildings may only be painted with "natural colors" is ambiguous, because the term "natural colors" means different things to different people. Sunset orange and robin's egg blue may reasonably be considered natural colors, but most land trusts that use the phrase "natural colors" intend shades of green and brown that blend into the surrounding environment. The land trust should use tangible concrete criteria, such as a named and dated color card, included in the baseline documentation report, from which the landowner may select colors.

Land trusts should also refuse items that will cause the land trust unacceptable administrative burdens or will be impossible or expensive to monitor annually. For example, a restriction on the numbers or types of domestic pets a landowner may keep on his or her property ("no more than two dogs are allowed on the land") is impossible to monitor. Your land trust will not be on the land every day to check if the landowner adheres to this restriction. Furthermore, you will find such a restriction impossible to enforce in most courts, because judges and juries are not likely to uphold it. In addition, these types of restrictions may trigger amendment requests over time, as landowners' needs change or the land changes hands.

Conservation easements that include affirmative obligations or affirmative rights may also trigger easement amendment requests, and they can represent serious administrative burdens for land trusts. It is important to be extremely careful when placing affirmative obligations on landowners, because future landowners may not have the capacity or the desire to implement them. A future landowner may request the easement be amended to reduce or eliminate such obligations.

Drafting for Flexibility

A land trust that anticipates likely areas of change will draft a conservation easement so that it is appropriately flexible. Experienced practitioners say that the most pressure for change comes with houses, house rights and other structures appurtenant to houses; subdivision rights; and agricultural, recreational and forestry uses. Your land trust can build flexibility into its conservation easements to relocate structures, subdivision lines, building envelopes and the like, to the extent appropriate for the resource base, by using an approval function rather than requiring an amendment.

Example

Avoiding Amendments through Better Easement Planning

The Society for the Protection of New Hampshire Forests has found that the most common amendment requests are those associated with its early easements that have houses within conservation easement areas, because landowners today seek to do things with their homes that could not have been anticipated when the easement was drafted. Today, the Society usually excludes existing residential use areas from new easements. However, for proposed easements in which the landowner wishes to retain the right to build a future home, the Society provides two choices: (1) excluding a future house site from the easement area before conveying the easement; or (2) reserving a right in the easement to withdraw a site in the future. Because of ever-changing local land use regulations, the first approach could result in a legally substandard site at some point in the future, which in turn could generate an amendment request. In the second approach, the easement terms provide that the site either be a specified number of acres or the minimum needed for local regulatory approval, provide guidelines for where the withdrawn site can be located and that the site must be approved by the Society. This approach ensures that the future withdrawal does not compromise the conservation purposes and attributes. 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.

Easement Amendment Provisions

Part of drafting for flexibility means that easements sometimes must be changed. An amendment provision in a conservation easement affirmatively declares the land trust's powers to modify the easement and the restrictions or requirements that apply to such amendments. Land trusts should include an amendment clause in their easements to allow amendments consistent with the easement's overall purposes, subject to applicable laws and any land trust requirements (such as compliance with the land trust's amendment policy). Transparency of intent is an ethical obligation; if land trusts wish to modify conservation easements in certain circumstances, they should put their donors, grantors, landowners, members, funding sources and the general public on notice by specifically describing amendment rights in the easement document.

In states where an easement may be considered a charitable trust, an amendment provision grants and defines power that the land trust might otherwise lack without court approval and simplifies compliance with charitable trust requirements. In some states, an amendment clause may be necessary to make any changes to an easement. An easement that lacks an amendment provision may be amended if permitted under state and federal law, but in these states, amendments may otherwise be subject to invalidation unless approved by the court or attorney general. Because state laws are uncertain and may change, an amendment clause may in time be helpful even if not obviously essential today.

Placing an amendment clause in a conservation easement may prevent the grantor from contending later that amendments are forbidden or that the land trust concealed the possibility of amending the easement. As noted in the *Conservation Easement Handbook*, "[m]any easement drafters . . . consider it prudent to set the broad outlines of the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses." Amendment clauses can notify interested parties that there are certain amendments the land trust will not consider (such those involving increased development or subdivision rights) and can also provide notice that certain procedures will be applicable to an amendment request, including the recovery of the costs of processing those requests.

Some practitioners believe that including an amendment provision in an easement may generate amendment requests, because a landowner

may infer that amendment is an option if the landowner is unhappy with the easement. This concern can be addressed both by the plain language of the clause stating that amendments are rare, and by a separate handout explaining in detail the land trust amendment policy and procedures.

Others believe that absence of an amendment provision in a conservation easement could be interpreted to mean amendments are forbidden, leading to possible disputes if an easement is later amended contrary to the grantor's understanding. To minimize risks, the land trust's amendment policy and supporting materials should underscore that easements are perpetual, amended only in exceptional circumstances, and that all amendments must clearly serve the public interest — not solely the interests of the landowner.

Every conservation easement should contain an amendment clause.

Approval Clauses

In addition to an amendment clause, your easements should also include a discretionary approval clause that allows your land trust to approve uses or activities that were not anticipated at the time of the conservation easement, so long as such uses or activities are consistent with the identified conservation values and the purposes of the easement. Such a clause may help your land trust prevent amendments that would otherwise be necessary (for example, to adapt to changing technology). Land trusts that insert discretionary approval clauses in their easements caution that the same procedures used to analyze an easement amendment request should also be applied to a discretionary approval decision to avoid the pitfalls discussed above for amendments. See page 243 for an example of a discretionary approval clause and the Land Trust Alliance course "Conservation Easement Drafting and Documentation" for further discussion of this issue. You may also refer to the *Conservation Easement Handbook* sample easement provisions for another version of this clause. A discretionary approval may not always be appropriate and should be carefully analyzed.

Drafting Amendments

The format of an easement amendment will vary based on state laws on transfer of property interests and recordation of documents, as well as such issues as the desirability of upgrading the easement language to the land trust's current model easement format and language. Generally, an easement amendment will look very similar to a conservation easement and must be recorded in the county or town in which

the protected property is located. If the amendment affects any of the exhibits to the original easement, such as the legal description of the property or the easement map, these amended exhibits will be attached to the document. If a lien or mortgage was placed on the property after the original easement was recorded, a subordination agreement will be placed in the amendment or recorded immediately after the amendment, depending upon your land trust's policies and procedures.

If the change your land trust approved to the conservation easement affects only one clause or a small portion of the original conservation easement, then you can draft an amendment that only alters that portion without restating the entire document. This method also works when changing just a few paragraphs of the conservation easement. The more clauses in the original easement that your land trust intends to change, the more you should lean toward restating the entire conservation easement.

The short form type of amendment usually starts with background information that sets the context of the amendment, followed by granting and conveying language, and then a statement that the parties are deleting a referenced clause and substituting another. An amendment should always conclude with a ratification of the entirety of the remaining original conservation easement to clarify that nothing else changes and that the original easement was not superseded in its entirety by the amendment. Many land trusts insert a provision that references the original easement terms and confirms that they remain in full force and effect, except as specifically amended. The title of the document must clearly identify the amendment to ensure that it is not lost or misunderstood in later title searches. All parties to the original conservation easement, or their successors in interest (the property's current owners and the current easement holder), must sign the amendment.

One drawback to the short type of amendment is that it makes record-keeping and conservation easement interpretation more challenging. Land trusts must retain two or more documents and reference each for easement stewardship. Also, title examiners often prefer the restatement version because there is less chance of inadvertently missing the full easement in a title search.

For more complex amendments that affect many parts of the original easement document, usually the entire easement is restated and ratified

in its modified form. Some legal experts recommend always restating the entire document so that the public record clearly reflects the land trust's and the landowners' commitment to the specific and general conservation purposes served by the easement. Future landowners and easement monitors will also find it easier to deal with a single, complete easement document without having to reference multiple amendments. If the landowner takes a deduction, IRC Section 170(h) requirements will most clearly be met by restating the easement in a single document with additional recitals to establish the conservation values furthered by the amendment.

Regardless of the drafting method chosen, the document should make clear how the amendment serves the public interest. Most attorneys recommend that the amendment include:

- Extensive recitals at the beginning of the document to explain the land trust's reasoning for the amendment and the background of the property
- Other relevant approvals or amendments in the past
- Additional information to provide context to the current amendment

Transparency in any conservation easement amendment is critical. If the amendment is challenged in the future, these recitals may help the land trust defend its decision.

Your land trust's amendment procedures should also create a system to identify any other issues relating to the land or conservation easement in question that could be fixed in the same amendment. Amendments provide an opportunity for the land trust to bring older conservation easements up to current standards. Land trusts should consider this point when evaluating what form the amendment should take. "Upgrading" the conservation easement to current standards generally means an entire rewrite of the original conservation easement.

Alternatives to Amendments

Before agreeing to an easement amendment, always consider the alternatives. These approaches can be used in situations that do not affect the purposes or conservation values of the easement, do not involve impermissible private benefit or private inurement, and otherwise comply with the law. For problems or uses that are likely to be tempo-

rary, these less permanent approaches can be more appropriate than amending the easement. One concern with these approaches, however, is that some of these methods are very similar to amendments, but shortcut the amendment process in ways that can potentially undermine easement programs. Therefore, it is important to consult with experienced legal counsel regarding the risks associated with using alternatives to amendments.

Before agreeing to an easement amendment, land trusts should always evaluate alternatives.

Corrective Deeds

Modifications that merely correct mutual mistakes in the original easement can be recorded as "corrective deeds" or "corrective conservation easements" rather than "amendments." These types of mutual mistakes include corrections of minor errors and oversights mutually acknowledged by the grantor and easement holder. These deeds are used to correct errors such as scrivener's mistakes, erroneously stated acreage or parcel descriptions or missing pages, sections or information. These are truly errors and do not create substantive changes to provisions or intentions reflected in the original easement. All corrections should be consistent with the amendment principles and the land trust's amendment policy and procedures. An advantage to using the term "corrective deed" or "corrective conservation easement" as opposed to "amendment" is that the document's title clearly indicates a correction of an error even if that correction creates a substantive change to the provisions. The corrective deed does not alter the intentions of the original parties to the easement.

Corrective deeds are likely to present problems only if the affected parties have relied on the existing easement deed. For example, if an appraiser relied on the original deed to arrive at an easement value for tax deduction purposes that is now inconsistent with the value under the corrected deed, then the appraisal must be corrected and amended tax returns may need to be filed.

Release Deeds

Release deeds or quitclaim deeds (the title depends on your state real estate laws) act in a similar manner to corrective deeds. If the landowner wishes to eliminate a reserved right, then he or she can sign a quitclaim or release deed to the land trust. These types of deeds work only if the land trust is not exchanging a new reserved right for the one released. The released right must be described carefully and explicitly

so as not to confuse title examiners and others that the fee interest in the land is being conveyed — only a reserved right in the conservation easement. This method is attractive because it involves only one party's signature — the landowner. It is also faster and easier than an amendment and does not have the word "amendment" in the title of the document. These types of deeds can be viewed as additional gifts to the land trust, provided that the land trust has not exchanged any value for the conveyance. If the landowner wishes to claim a federal income tax deduction for the release of the reserved right, then the land trust and landowner need to follow all the usual procedures in preparing, documenting and signing the IRS Form 8283.

Example

The Vermont Land Trust accepts a release or quitclaim deed when a landowner wishes to extinguish reserved rights. In a typical year, VLT might receive two or three such release deeds, usually for a house right. Because VLT is an older land trust and has a large portfolio, most of its conservation easements prior to 1990 had multiple reserved rights. Before VLT had a large source of purchase money for farm easements, it had to fund farmland protection through limited development conservation easements. Today the organization has a policy of talking with those landowners who still retain these reserved rights about extinguishing them. Many take advantage of the potential federal tax benefits, particularly when the real estate market was at its height and the rights had significant value.

Discretionary Approval

To reduce frivolous or unacceptable requests, the discretionary approval clause should clearly state that the land trust will review all these requests using the same set of criteria as the organization would use to consider amendment requests.

As discussed above, some easements contain a "discretionary approval" provision that allows the land trust to approve, under certain conditions, activities that are restricted or not specifically addressed by the easement, so long as those activities are consistent with the conservation purposes of the easement. These provisions allow the land trust to address unanticipated change and minor, short-term problems or questions without using an amendment. The downside of discretionary approvals is that they may encourage a proliferation of approval requests for new uses, many of which may be unacceptable. To reduce frivolous or unacceptable requests, the discretionary approval clause should clearly state that the land trust will review all these requests using the same set of criteria as the organization would use to consider amendment requests.

Discretionary Waiver

A *discretionary waiver* refers to the land trust's ability to choose appropriately proportional, and possibly creative, enforcement for technical easement violations. It is distinct from a discretionary approval in that there may not be a specific discretionary approval clause in the easement deed. Because land trusts are empowered by their enabling acts and enforcement clauses of conservation easements to uphold conservation easements, many attorneys infer broad discretion for land trusts to appropriately and proportionately design responses to violations.

For example, upon finding a child's rustic tree house built on easement land where the easement prohibits all structures, a land trust might allow the tree house to stay, document the extent of use and simply advise the landowner, in writing, not to expand that use. This approach may be used to address only minor, technical, relatively short-term or transitory violations of an easement that do not impair the property's conservation attributes. If the rustic tree house was built in an important ecological area of the easement property where all activities are prohibited, then such a waiver may not be appropriate or proportional because its presence may cause actual, substantial or permanent damage to the protected resources. Or, a waiver may not be appropriate in this example if the easement explicitly states that the area where the tree house was constructed was not to have any structures at all, not even nominal temporary structures.

Land trusts that use discretionary waivers (or any amendment alternatives) may run the risk of creating precedent or inappropriately shortcutting the amendment process. Your land trust should have a written policy (likely as part of the organization's easement enforcement policy) on addressing these minor interpretation or enforcement issues in this manner, and an evaluation procedure to ensure that your land trust upholds the conservation easement purposes.

As with amendments, land trusts should evaluate the options, risks and benefits of all these amendment alternatives with experienced legal counsel. You should also be able to articulate to the public in an easy, simple way why such an approach is in the public interest and consistent with the spirit and intent of the original conservation easement.

License

Some land trusts use the form of a "license" to permit the specific requested activity and define limits. Of course the license should only permit activities that are not inconsistent with the conservation goals of the property, and the land trust must avoid conferring impermissible private benefit and private inurement. The license permits a particular use of the property for a set period of time. Licenses are generally granted specifically to only one landowner (as a personal right that is not intended to run with the title to the land) and thus are not recorded in local real property records.

Licenses can be useful to solve disputes with neighbors claiming conserved land (adverse possession claims) or landowners who want temporary minor structures. For example, a neighbor to easement-protected property claims that she has had her garden shed partly on the conserved property for at least 10 years and, in addition, has been mowing a half acre of the land for at least that long. She threatens a court case to establish her ownership claim to the property. The landowner disputes her claim. A survey shows that the shed extends one foot beyond the boundary line. Rather than engage in a lengthy and expensive court proceeding, the land trust and the landowner offer the neighbor a license to allow the shed in its current location and to continue the mowing of the half acre for the length of her ownership of her land. Both uses must stop when she sells the property or moves. The neighbor agrees, and the parties record the written license in the land records. The land record filing both terminates the adverse possession claim and resolves the legal challenge.

Interpretation Letter

A land trust may issue an "interpretation letter" to a landowner responding to a question about whether particular uses or activities would be allowed under the terms of an easement. For example, suppose a farmer wants to know whether giving hayrides for a fee is allowed as an agricultural use on easement land. The easement does not specifically address this use. Rather than permanently amending the easement to allow (or prohibit) the hayride right for all future owners, the land trust could address the specific question in an interpretation letter, often setting limits on what the landowner can do and stating the land trust rationale. Like a license, interpretation letters are generally not recorded in real property records.

Looking Ahead: The Future of Easement Amendments

Experience shows that as conservation easements age, a portion of the amendment requests that land trusts receive become increasingly complex. Changes on the land, changes in ownership, evolving economic forces and community needs, and outdated easement language all bring new amendment challenges. As they address these challenges, land trusts are carefully refining their techniques. The key areas under debate in the land trust community include:

Refining how land trusts evaluate amendment proposals. Land trusts continually test and refine their methods of evaluating the effects of proposed amendments, especially methods to weigh tradeoffs in conservation attributes and evaluate impacts on conservation purposes. As more land trusts gain experience, decision-making and documentation methods are becoming more widely practiced and consistent. In the long run, solid amendment policies and consistency in the way land trusts apply them will help uphold the value of conservation easements as a long-term land protection tool.

Clarifying the law. As land trusts implement amendments, practical experience from the field will help to clarify local, state and federal laws that pertain to amendments, in turn providing more clear guidance to practitioners. At present, legal experts do not always agree about the legal underpinnings of easements and the constraints on amendments. They do, however, expect that the uncertainties will be resolved over time as laws are tested in the courts and as state legislatures refine easement enabling statutes.

Clarifying the effect of easement origin. Practitioners are considering how amendment policy applies to the different types of conservation easements, whether donated, purchased, reserved or exacted as part of regulatory processes, and whether landowners enjoyed tax benefits. Some practitioners advocate consistent guidelines that apply to all types of easements, regardless of origin. The charitable trust doctrine could also affect the outcome in more complex amendment situations.

Clarifying the role of public entity or judicial oversight. With experience, practitioners expect to develop more clear guidance about when they should seek the approval of a public entity or a court for a proposed amendment, and how to do so.

Improving easement language to prevent the need for amendments. Drafting conservation purposes and restrictions to withstand the test of time is an evolving art. Easements should not include language that is unnecessarily restrictive, does not support the conservation purposes or that is disproportionately difficult to monitor and enforce. Land trusts continually improve easement language, making it flexible enough to accommodate changes in technology and new economic uses of the land. All easement drafters should stay current on new developments in the field and learn from others' successes and mistakes.

Easement Amendments

This exercise may be started in a training or self-study program, but it can only be completed with assistance from other members of your land trust, including board members and legal counsel.

This template includes an outline for an amendment policy with important issues and questions that will help you think through issues your land trust may face when confronted by amendment requests. Each section also refers to the page numbers in this chapter where you can find additional information.

Use your answers to the questions to create or revise your land trust's amendment policy. The template includes sample provisions for guidance. However, you should refrain from wholesale copying of the sample language without due consideration of the issues raised by the questions. Effective amendment policies will reflect the mission and core values of your land trust and will be specific to your organization. When you have completed a draft, review it with legal counsel. Finally, always date your policies and procedures to assist your land trust in keeping track of the most current version. Include the date of the policy's first adoption and the most current revision date.

I. Philosophy Statement *[page 178]*

Your land trust's amendment policy should begin with a statement of intent or the principles your land trust will use when considering an amendment proposal. In developing this statement, consider the following:

Why is it necessary to amend conservation easements?

How does amendment fit with the perpetuity of easements?

How does amendment relate to the land trust's mission and goals?

What is the land trust's philosophy on upholding the grantor's intent?

What is the land trust's philosophy on upholding the purposes of the easement?

How will your land trust address change?

Always date your policies and procedures to assist your land trust in keeping track of the most current version. Include the date of the policy's first adoption and the most current revision date.

All amendment policies should be reviewed by legal counsel before adoption and implementation.

Sample Language 1

The [*land trust*] acknowledges and accepts its responsibility to forever uphold the integrity of the conservation easements it holds and supports the principle that conservation easements are forever. The [*land trust*] recognizes that conservation easement amendments are not routine but can serve to strengthen an easement or improve its enforceability, so long as an amendment results in either a positive, or not less than neutral, conservation outcome, and the amendment is consistent with the [*land trust's*] mission.

Sample Language 2

In furtherance of its mission, the [*land trust*] accepts and administers conservation easements protecting _____ resources. On rare occasions, circumstances may arise that make it desirable to change the terms of existing easements. By way of example, an amendment may be necessary if there are unforeseen changes in laws or land use practices that cause the easement to have unintended consequences. Or, for example, the [*land trust*] may desire an amendment to improve the effectiveness of an existing easement, to prevent costly legal proceedings or to provide additional conservation benefits. This amendment policy sets forth criteria for the land trust's requesting an amendment, or for entertaining an amendment request from a landowner, and the procedures for amending a conservation easement. This policy outlines the basic principles that will guide the land trust and its staff in exercising its sole and absolute discretion as to whether a proposed amendment of an existing easement is acceptable to the land trust.

II. Evaluating the Request: Amendment Principles *[page 179]*

The amendment policy should include the standards or thresholds that a proposed amendment must meet to be deemed acceptable. All amendment policies should, at a minimum, contain the principles listed below.

Sample Language

Amendment principles form the core of the amendment policy. By applying these principles, the [*land trust*] ensures compliance with the law and sets limits on how substantially an amendment may modify a conservation easement. To be acceptable, an amendment must satisfy all of the amendment principles:

- Clearly serve the public interest and be consistent with the [*land trust's*] mission
- Comply with all applicable federal, state and local laws
- Not jeopardize the [*land trust's*] tax-exempt status or standing as a charitable organization under federal or state law

- Not result in private inurement or confer impermissible private benefit
- Be consistent with the conservation purpose(s) and intent of the easement
- Be consistent with the documented intent of the donor or grantor and any direct funding source
- Have a net beneficial or neutral effect on the relevant conservation values protected by the easement

Are there additional principles your conservation easement amendments must meet? If so, list them here.

III. Reviewing the Request *[page 189]*

Land trusts typically use several basic questions or tests to determine whether the proposed amendment meets the thresholds of the amendment principles. Often, the screening tests will require more information gathering. All amendment policies should, at a minimum, address the screening tests listed below.

Sample Language

Amendment screening tests:

- Public interest and organizational mission test: Does the proposed amendment serve the public interest and further organizational mission and goals?
- Legal tests: Is the amendment legally permissible under federal, state and local law? Could the amendment jeopardize the land trust's tax exempt charitable status?
- Financial test: Could the proposed amendment result in private inurement or impermissible private benefit?
- Conservation purposes test: Is the proposed amendment consistent with the conservation purposes and intent of the easement?
- Existing and prospective donor test: Does the amendment fulfill any obligations to the donor, grantor or funder? Will prospective donors, grantors and funders recognize that fact?
- Conservation results test: Will the proposed amendment result in a net beneficial or neutral effect on the conservation attributes of the easement land?
- Public perception test: Will land trust members and the public understand the amendment or, at least, not find it objectionable? If not, what steps can be taken to improve public perception? Does the land trust understand the community ramifications of the amendment?

Are there additional screening tests your conservation easement amendments must pass? If so, list them here. Consider the following:

- How will the amendment affect stewardship and administration of the easement?
- Are there other parties that must or should be engaged in the process or that hold a legal interest in the easement?
- Are there any stakeholders that it would be wise to engage?

IV. Allowable Purposes of Amendments *[pages 179, 183–85]*

Many amendment policies list circumstances under which an amendment request may be considered. Will you allow amendments that:

- Address mutual errors?
- Add acreage?
- Add restrictions?
- Remove reserved rights?
- Involve tradeoffs within the easement?
- Involve land beyond the "four corners" of the easement?

Sample Language

Circumstances of the Requested Amendment. The [*land trust*] staff/committee/volunteer will recommend an amendment to a conservation easement in the following circumstances:

Insert language that addresses the appropriate circumstances for your land trust. Sample language can be found in the documents on page 243. Circumstances may include:

- Prior agreement
- Correction of an error or ambiguity
- Settlement of condemnation proceedings
- Amendments consistent with conservation purpose and enhancing conservation value
- Upgrade standard language and format
- Leverage additional conservation
- Reconfiguration of conservation easement area

V. Amendment Procedures *[page 186]*

Most amendment policies contain a general process for amending conservation easements, including the basic steps and key questions a land trust should use in evaluating amendment proposals and completing amendments. While certain steps are common to most land trusts, much variation exists in the details and the order of steps. The particulars of the amendment review process depend on the land trust's staffing level, board governance style and individual organizational experience with amendments. The details of the process are influenced by the legal context within which a land trust evaluates amendment requests as well. For these reasons, no universal amendment procedure fits every organization; each land trust must tailor its own amendment review process to its particular organizational requirements.

The following is a list of some sample sections and questions for you to consider in developing your own policy.

1. Initiating the proposed amendment
   - How will the proposed amendment be initiated?
   - Must the landowner submit a request in writing?
   - What are the procedures if the land trust initiates the amendment?
   - Will there be a meeting with the landowner? A phone conversation?
   - When and how will the amendment policy be provided to the landowner?
2. Costs
   - Who will pay for the amendment? (Be sure to calculate staff time as well as fees paid to outside experts such as appraisers and attorneys.)
   - Will the landowner pay a fee upfront to ensure payment in cases when you refuse an amendment proposal?
3. Decision-making
   - Who is in charge of evaluating the amendment request?
   - Who is authorized to make decisions?
   - When will legal counsel be involved?
   - How will the landowner be informed?
4. Reviewing the request
   - Does it comply with the land trust's policy?
   - If not, can it be modified to comply?
   - If yes, how?
   - What expert opinions are needed for documentation?

Sample Language

All easement amendments must meet the amendment principles and pass the [*land trust's*] screening tests. Any potential conflicts of interest must be addressed in accordance with the [*land trust's*] conflict of interest policy.

In addition, consider the following:

- When will a site visit be required?
- When will outside experts be consulted?
- Under what circumstances will the land trust seek review or approval from a public agency, attorney general or court?
- Due diligence
  This section can summarize the due diligence steps that are necessary to complete the amendment once it has been approved and describe any procedures unique to your land trust. Consider:
  - Title issues that may need to be resolved, including subordination of mortgages and liens
  - Whether the baseline documentation needs to be updated
  - Final legal review of the easement amendment
- Finalizing the amendment
  This section should summarize the final steps in completing the easement amendment, such as:
  - Signing and recording
  - Notifying outside parties
  - Completing the internal recordkeeping

VI. Periodic Review *[page 217]*

What is the process by which the policy will be reviewed and updated?

Sample Language

The [*land trust*] will evaluate the adequacy of its amendment policy on a periodic basis and make adjustments as needed to ensure that the goals/philosophy outlined in this policy are met. To this end, this policy shall be reviewed every _____ years by the board of directors or a designated committee, in partnership with staff and/or volunteers involved in the easement stewardship program and legal counsel. Changes in law, best easement stewardship practices and other practices of the [*land trust*] may require adjustments to this Easement Amendment Policy.

Insert the date of the policy and the date of its last revision.

Notes

CASE STUDY

A Principled, Systematic Response to Problematic Landowner Demands

A well-established, staffed land trust with an active board of directors located in the Rocky Mountain region had a generous conservation easement donor who gave the land trust its first easements, including an easement on a 50-acre parcel of land with extensive river frontage. The landowner was also generous to the land trust with financial gifts and promised to donate additional conservation easements on other property to the land trust. The 50-acre easement limits development of the conserved parcel to a maximum of one single family home with no subdivision permitted. The land has high scenic and natural resource values; it is located along a designated state scenic byway and provides access to the river for a number of wildlife species. Since the donation of the easement, property values in the area around the conserved land have greatly increased.

A few years after making the gift, the landowner sent a representative to the land trust's regular board meeting. The representative told the land trust that the landowner wished to amend the 50-acre easement to double the permitted development density on the river parcel from one single family home to two, and to allow subdivision of the property into two parcels. In exchange, he offered to donate an easement on a 200-acre parcel of upland property, located about 15 miles from the river property. His representative told the land trust that if the organization did not agree to amend the easement to provide for more development, the landowner would "sue the land trust and put it out of business." The landowner was a very wealthy individual who clearly had the financial ability to pursue a lawsuit. This amendment request represented the first time the land trust was asked to amend an easement it held.

After a collective deep breath by the land trust board and legal counsel, and some initial legal consultations, the land trust wrote the landowner suggesting a 90-day period to research the law and professional best practices associated with conservation easement amendments, to adopt a conservation easement amendment policy, and to then consider the landowner's request in accordance with the policy.

The land trust's calm and prompt response was a brilliant move. It communicated to the landowner that the land trust was taking his request seriously; however, the organization wanted to thoroughly investigate the matter and, without saying so, the land trust refused to be intimidated into a rash response. Slowing down and

communicating a clear process in similar circumstances is usually a good initial response.

The land trust then proceeded to use its pro bono legal counsel (who was well versed in conservation easement issues and real estate law) to investigate all the federal and state laws as well as organizational issues, including the land trust's mission and *Land Trust Standards and Practices*, that affect amendment decisions. The land trust then proceeded to create and adopt a conservation easement amendment policy. After due research and deliberation, including a site visit to the easement property and the proposed exchange land and appraisals of both properties, the land trust and legal counsel determined that the exchange land did not have anything close to the scenic or natural resource values of the already conserved land. Also, the appraisals clearly showed that the amendment would increase the value of the river property far in excess of the value the landowner would give up by donating an easement on the upland property. In light of IRS requirements, including Section 170(h) and impermissible private benefit as well as private inurement rules (the landowner was considered an insider under the land trust's conflict of interest policy), and in light of the land trust's mission, values and new amendment policy, the land trust decided that it could not move forward with the amendment.

Legal counsel prepared a carefully worded and thorough letter to the landowner explaining all the laws as well as the results of the site visit and appraisals. The land trust delivered the letter and explained the reasoning in person to the landowner's representative (the landowner refused to meet with the land trust). The landowner was not happy with the result, but he accepted the land trust's decision. While the land trust does not know if the donor retained legal counsel to assess the likelihood of success in pursuing litigation against the land trust, it may be that counsel advised the landowner that he would not be likely to prevail in a suit to require exchange of the conserved land. The landowner did not press the case nor did the landowner initiate a whispering campaign to discredit the land trust in the community. The landowner, however, never donated additional easements or money to the land trust again, but he also did not undertake any nuisance violations on his conserved land in retribution for the decision, nor did he follow through on his threat to sue the land trust.

The land trust believes that by adopting an easement amendment policy that addressed all relevant laws with respect to easement amendments and that reflected the best current easement amendment professional standards (including the

caution that easement amendments should enhance or at least have only a neutral impact on the original conservation values) and by considering the request under the policy, the organization demonstrated to the landowner that it was taking the only position it ethically and legally could take. The land trust also demonstrated that it would apply such a policy to all landowners in a consistent fashion, regardless of how important the landowner was to the organization or how potentially harmful he could be.

Questions

1. What did the land trust do that allowed it to ultimately prevail in this situation?

   _____

   _____

2. What benefit did the land trust gain from having and following an amendment policy? What could it have done better?

   _____

   _____

3. What might have happened if the land trust approved this amendment request?

   _____

   _____

Guidance:

1. The land trust did everything right in a difficult and painful situation. The land trust:
   - Remained calm and polite
   - Responded promptly and reasonably to the landowner request
   - Called legal counsel immediately so that counsel could assist from the very first response

- Applied its existing conflict of interest policy
- Researched the law thoroughly and developed an amendment policy
- Conducted a site visit to determine resource values and obtained expert advice on the effect of an exchange on conservation easement purposes and land trust mission
- Obtained value appraisals to determine private inurement or impermissible private benefit
- Communicated its decision clearly in person and in writing, and in detail

2. If the land trust had an amendment policy in place before this request, then the organization would have avoided struggling with policy development while it was making a difficult decision with a major donor. Nonetheless, they managed. Your land trust can avoid this dilemma by developing an amendment policy before facing your first amendment request. With an amendment policy in hand, your land trust will be more impartial and experience less anxiety. As you learn from implementing the policy, your land trust can adapt and improve it.

   When the time came to make a decision, however, the land trust had a policy and used it. Policies have a number of benefits for land trusts. Policies make decisions fair and impartial; you are following a set procedure and standards instead of making decisions based on hunches or pressure from important members, donors or board members. Policies also depersonalize the decision-making. You are not refusing a donor; instead you are following your land trust's stated policies. If consistent with all legal requirements and routinely followed, policies will help your land trust remain in good standing with the state and federal governments, including the IRS. In this example, the policy may have prevented a disgruntled landowner from starting a whispering campaign or violating the easement in retaliation. While the land trust appears to have lost a major donor, it saved its reputation and upheld one of its easements.
3. If the land trust had approved this amendment request, it would have conferred a benefit to an insider and in so doing risked its 501(c)(3) status or intermediate sanctions by the IRS. Even if the land trust avoided legal penalties, it may have faced negative publicity if word of the amendment reached the newspapers. Such publicity could harm fundraising and future land protection projects.

Evaluate Your Knowledge

Now that you have grappled with the major issues involved in amending easements, check that you:

1. Can articulate three reasons that make having a written amendment policy worth the investment of time to develop:

   _____

   _____

   _____

2. Can define private inurement and impermissible private benefit and how to identify them.
   Private inurement is:

   _____

   Impermissible private benefit is:

   _____

3. Know three questions to ask to determine the existence of either:

   _____

   _____

   _____

4. Can describe a situation when a land trust should say no to an amendment request or negotiate to modify the request:

   _____

   _____

   _____

5. Can describe two ways that your land trust can make sound amendment decisions and maintain good traction on the slippery slope:

   _____

   _____

   _____

Answers

1. An amendment policy ensures compliance with the law; sets limits on how substantially an amendment may modify a conservation easement; articulates the principles and considerations in reviewing an amendment request; allows the public and landowners to see that your land trust operates fairly and consistently; holds your land trust steady in the face of difficult requests; and preserves the integrity of your land trust, of your conservation easement donor intentions and of the resource values protected by the conservation easement.
2. Private inurement: a land trust cannot confer a financial benefit on anyone who is an insider to the land trust without receiving something of equal value in return. Impermissible private benefit: a land trust also cannot financially benefit any other third party by its decisions, although incidental benefit to outsiders is permissible if the benefit is minor and naturally occurs from the land trust's activities.
3. Who is requesting the amendment? (If the individual is a major donor, board member, staff member or related person — spouse, child, grandchild or sibling — then that person is an insider.)
   - What will that person gain and why is he or she asking for an amendment?
   - If we amend the easement, will the public benefit?
   - If we amend the easement, what will other people gain?
   - If so, is that gain significant?
   - Can the petitioner achieve his or her goals without land trust involvement?
   - If we will benefit from this transaction, are the benefits that the petitioner gains relatively insignificant?

- If I cannot answer these questions, who can? An appraiser?

4. Land trusts should refuse or modify amendment requests that:
   - Have a negative impact on the conservation resources and purposes of the conservation easement
   - Adversely affect the intentions of the original donor and any direct funding source as articulated in the conservation easement or other written documentation
   - Result in private inurement or impermissible private benefit
   - Threaten the land trust's charitable status
   - Might violate any law
   - Contravene the public interest or the land trust's mission
5. You should have an organizational discussion and consensus around the values of the land trust and its mission as those affect amendment decisions. Your land trust can then develop an amendment philosophy. Next, develop and adopt a detailed amendment policy and procedures with guiding principles and screening tests to provide board, staff and volunteers traction to prevent sliding down the slippery slope.

Conclusion

Although conservation easements have been in use for several decades, the land trust community's experience with amendments is still relatively new. The process of making amendment decisions is sure to evolve further. This chapter attempts to provide land trusts with the most current and best available practical advice of legal experts and amendment practitioners.

Key points to remember:

- Consider amendments only with great caution — amendments should never be routine
- Focus on good initial easement drafting to prevent amendments to the greatest extent possible
- Develop and follow a written amendment policy and procedures that include the amendment principles
- Obtain expert legal advice to develop an amendment policy and to review and draft proposed amendments
- Use organizational mission and goals to inform amendment decisions so that conservation easements will continue to benefit the public in the face of change
- Keep up with the latest developments in the amendment field
- Never amend a conservation easement to negatively affect the easement's conservation purposes

The issue of whether and how to modify conservation easements is critical, because it speaks to the heart of the land trust community's obligation to protect land forever and serve public interests. A land trust must uphold this obligation, even when confronted with the inevitable changes that time may bring to easement properties. This chapter provides some tools that land trusts can use to address many of the challenges that change brings to conservation easements. These tools can help land trusts reach amendment decisions that are sound, comply with the law and uphold the documented intent of the original grantor. The Land Trust Alliance will continue to work with easement practitioners and legal experts to keep land trusts informed as amendment knowledge and experience continue to unfold.

Sample Documents

The following sample documents can help you develop an amendment policy and procedures, but you should seek legal advice before adopting any policy or procedures. Also, you should be thoughtful about this process and do not take what is offered below without adapting it to your particular circumstances. The template on pages 219–25 is designed to help you develop an amendment policy; the samples below are provided so you can see how other land trusts handle amendment requests. Some of these samples predate *Amending Conservation Easements: Evolving Practices and Legal Principles* and will not reflect all of the recommendations contained in the report. Other sample policies and procedures are available on The Learning Center (http://learningcenter.lta.org).

Conservation Easement Amendment Policy, Gallatin Valley Land Trust, Montana (*page 237*)
This is an example of a simple amendment policy adopted by a regional accredited land trust that addresses philosophy, circumstances and procedures in brief. The policy does not include the requirement, seen in many policies, that any amendment represent the minimum change necessary to accomplish the purpose of the amendment. It does, however, state as a test that no amendment will jeopardize the land trust's charitable status and addresses the issues of private inurement and impermissible private benefit. Incorporating procedures into the policy makes it convenient for landowners. Here, they are incorporated in a general way so as to leave adequate room for flexible adaptation to meet circumstances. GVLT could add a section on the due diligence steps necessary for any amendment as discussed in this chapter.

Conservation Stewardship Program Amendment Principles, Vermont Land Trust (*page 240*)
This policy contains an amendment philosophy, principles and a brief description of procedures. It does not include all the suggested amendment principles discussed in this chapter, and it contains three unusual principles unique to VLT and its mission that may not be appropriate for other land trusts: no feasible alternatives available to achieve a similar purpose, consideration of whether an amendment will increase the land's economic sustainability, and whether denial will cause undue hardship over which the landowner has no control. The policy addresses other important issues, such as conflict of interest, costs of

considering an amendment and the possibility of additional stewardship endowment requests if the amendment increases VLT's stewardship responsibilities. As written, it does not meet all the elements of Practice 11I because it does not require compliance with any funding requirements, nor does it address the role of the board.

Conservation Easement Amendment Policy, Society for the Protection of New Hampshire Forests (*page 242*)
The Society revised its amendment policy after publication of *Amending Conservation Easements: Evolving Practices and Legal Principles*, and the new policy contains all the critical language recommended. The policy is brief and does not address many practical details or elaborate on any of the more complex issues, such as the four corners question. The policy also does not reference any separate procedures. Consistent with the attorney general advisory in New Hampshire, the policy does state that any amendment must be satisfactory to the attorney general's office. The Society also has an internal set of procedures that it follows for each amendment request. These procedures are not made public; potential amendment requesters do not know all the steps in the process where there may be an opportunity to exercise undue influence.

Sample Conservation Easement Language Permitting Amendment and Discretionary Approval, Discretionary Approval Letter as Alternative to Amendment, Informal Discretionary Approval Letter (*page 243*)
The first document, prepared by Karin Marchetti Ponte for the Maine Coast Heritage Trust, offers sample easement language that may allow a land trust to issue a discretionary approval for landowner activities in certain circumstances, rather than an amendment. The second document (also prepared by Karin Marchetti Ponte) and third document (prepared by VLT) are discretionary approval letters, permitting certain activities not addressed in an easement and limiting those activities to ensure they do not adversely affect the conservation values or purposes of the easement. Discretionary approval letters can be used as an alternative to an easement amendment in appropriate circumstances.

Sample Waiver Letter, Vermont Land Trust (*page 247*)
This sample letter identifies a minor violation, indicates the violation has been thoroughly documented and permits the landowner to continue a small portion of the activity in question while remediating

the remainder of the violation. Waivers can be used in limited circumstances in lieu of an amendment to resolve minor or technical easement violations.

Sample Interpretation Letter, Vermont Land Trust (*page 248*)
This sample letter is an example of how a land trust might interpret a conservation easement provision to give a landowner guidance in understanding his or her easement, or to resolve a technical or very minor violation of the provision without using a full easement amendment.

Gallatin Valley Land Trust
Conservation Easement Amendment Policy

I. General Policy Statement

A The Gallatin Valley Land Trust (GVLT) acquires and holds conservation easements on property in order to protect, in perpetuity, the conservation values on the land, including scenic, agricultural, and/or wildlife resources of the property and surrounding areas, for the benefit of present and future generations. GVLT is committed to ensuring the perpetuity of the conservation easements it holds, and shall not seek termination of any conservation easement in response to a request for an amendment.

B Because GVLT's acquisitions are primarily achieved through voluntary agreements with landowners, the success of the conservation easement program depends upon the confidence of these landowners that GVLT will meet its obligation to monitor and enforce the agreements. This confidence would be seriously eroded if GVLT were to allow indiscriminate and unwarranted modification of its conservation easements.

C Furthermore, amendments to conservation easements can raise serious problems with the Internal Revenue Service. GVLT's tax-exempt status as an organization may be jeopardized if easements are amended gratuitously. An easement donor who has claimed a charitable deduction for a gift of an easement may lose that deduction if the easement is amended. Any amendment which results in a benefit to a landowner or any other private party may create "private inurement" or "private benefit," if the benefits conferred by the amendment are more than incidental. The U.S. Tax Code prohibits GVLT from engaging in any actions that create private inurement or private benefit.

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

E GVLT's policy is that the requester of the amendment shall pay all costs, including staff time and consulting fees for reviewing the request, whether or not the amendment is granted, and of implementing the amendment if approved. GVLT may require that the party requesting the amendment cover the cost of a qualified appraisal of the value of the requested amendment, in order to assess whether the amendment will result in any private inurnment or will confer any private benefit, if the amendment request is approved. At GVLT's sole discretion, GVLT may waive the foregoing requirement that the requester of the amendment pay all or some of the costs of amendment review, approval, appraisal, or implementation.

II. Conditions Under Which Amendment Requests May Be Considered
GVLT will consider amendments to its conservation easements only under the following circumstances:

A **Prior Agreement**. In a few cases, a conservation easement may have a specific provision allowing modification of the easement at a future date under specified circumstances. Such agreements must be set forth in the conservation easement document or in a separate written document signed by GVLT and the conservation easement grantor at the time the document was executed. The amendment must be consistent with the terms and conservation intent of the original agreement.

B **Correction of an Error or Ambiguity.** GVLT may authorize an amendment to correct an error or oversight made at the time the conservation easement was executed. Such errors or oversights may include, but shall not be limited to, correction of a legal descriptions, inclusion of standard language that was unintentionally omitted, or clarification of ambiguities. Any amendment authorized to clarify conservation easement ambiguities shall be supported by written statements, affidavits, agreements between GVLT and the conservation easement grantor, or other tangible evidence that the intention of the amendment is to clarify and implement the parties' original intentions when GVLT first acquired the conservation easement from the grantor.

C **Settlement of Condemnation Proceedings.** Conservation easements GVLT holds in land are subject to condemnation for public purposes, such as highways and schools. Where it appears that the government's condemnation power will be properly exercised to terminate a GVLT conservation easement, GVLT may enter into a settlement agreement with the condemning authority and landowner in order to avoid the expense of litigation. In reaching such an agreement, GVLT shall attempt to preserve the intent of the original conservation agreement to the greatest extent possible.

D **Amendments Consistent with Conservation Purpose and Enhancing Conservation Values.** GVLT may authorize amendments to a conservation easement provided that the amendment is determined to be consistent with the original intent of GVLT and the donor, consistent with the statement of purpose in the easement, and provided that the amendment enhances, or has no adverse effect on the Conservation Values protected by the easement. No amendment will be granted under any circumstances if GVLT determines, in its sole discretion, that the amendment would affect the conservation easement's perpetual duration, would afford less protection to the Conservation Values protected by the original conservation easement, or would result in private inurnment or private benefit to any party. Nothing in this policy statement shall be interpreted to require GVLT to grant a conservation easement amendment request, even if all of the foregoing criteria are met. GVLT shall have unlimited discretion to grant or to deny each amendment request and shall evaluate each request on a case-by-case basis.

III. Amendment Procedures

A Any landowner or other party seeking an amendment to an existing conservation easement must present to GVLT a request in writing, stating what change is being sought and the specific reasons why it may be needed or warranted. The request shall be accompanied by appropriate maps and other documentation.

B Upon receipt of a request, GVLT will hold an initial consultation meeting with the landowner or other person who requests the amendment. During this initial consultation meeting, costs to review and process the request and payment arrangements will be discussed and agreed upon. A

cost agreement will be developed and signed before proceeding. GVLT staff shall review all requests and, where appropriate, a representative of GVLT may conduct a site visit(s).

C Evaluation of requests shall include consultation with the third parties, when applicable and appropriate, including:

- Reasonable efforts to discuss the proposed amendment with the principal parties to the original transaction, including the landowner who granted the restrictions or his/her heirs or successors.
- Funders, if any, of the original easement. GVLT shall comply with all applicable funding requirements.
- Additional third parties, public or private, whose opinions or expertise GVLT determines may be helpful to its evaluation of the amendment request.

However, in all cases except funding requirements, GVLT shall have no obligation to confer with third parties, and, if it does, any third party opinions about the propriety of granting or denying an amendment request shall be advisory only. GVLT retains exclusive authority to grant or deny amendment requests, within the constraints of funding requirements.

D GVLT staff will compile information and review the request for amendment, and make a recommendation to the Lands Committee. If the Committee finds that the amendment is legally permissible, consistent with the terms of this policy, and clearly warranted by the circumstances, the Committee will forward the request and the Committee's recommendation to the Board at its next regularly scheduled meeting. A decision by the Committee to disapprove the amendment will be final, unless the landowner presents a written request for review by the Board, with his/her reasons for requesting Board review.

E The Board may approve, reject, or approve with modifications the request; approval shall require a 2/3 majority vote of the full Board.

F All easement amendments that are approved by the Board must be made in writing, signed by both parties, and must be recorded in the land title records of the local jurisdiction in which the affected property is located. The appropriate planning board will be notified of any conservation easement amendments within that planning board's jurisdiction.

Approved by GVLT Board of Directors November 9th 1999, revised, updated and approved June 23, 2008

Vermont Land Trust Conservation Stewardship Program Amendment Principles

Philosophy. Amendment requests that satisfy an expressed landowner need, have a better or at least neutral effect on the resources conserved, and improve ease of implementation and administration for stewardship staff and the landowner may be recommended for VLT Board approval. To be recommended for approval, stewardship staff must reconcile any conflicting values or multiple goals of the conservation easement. To do this stewardship staff considers all the facts and circumstances and examines the following principles and considerations. There may be other considerations relevant in individual circumstances and those will be examined too. The following principles and considerations, and any additional ones, will be weighed as appropriate to each individual circumstance. No conservation easement has only one goal. With multiple goals there will be tensions. Amendments can redefine the balance among multiple goals over time or to reflect changes in policy.

Principles and considerations.

(a) it is consistent with the overall purposes of the conservation easement;
(b) it will enhance the resource values conserved or have a neutral effect;
(c) there are no feasible alternatives available to achieve a similar purpose;
(d) denial will cause undue hardship over which the landowner had no control;
(e) there are no issues regarding private benefit or any issues can be adequately addressed;
(f) it is consistent with any other written expressions of the original Grantor's intent;
(g) conservation easement co-holders approve of the amendment;
(h) the likelihood of land ownership by those working the land is increased or the economic sustainability of the agricultural or forestry operation on the land is increased;
(i) it is consistent with one of the below circumstances.

Circumstances of the Requested Amendment. VLT's Conservation Stewardship Program will recommend an amendment to a conservation easement in the following circumstances:

I. Prior Agreement. In a few cases, a conservation easement has included a specific provision or an unrecorded agreement or letter allowing modification of the restrictions at a future date under specified circumstances. Such agreements must be set forth in the conservation restriction document or in a separate document signed by all parties including VLT at the time or prior to when the conservation easement was executed. The amendment must be consistent with the terms and conservation intent of the original agreement.

II. Upgrade Standard Language and Format. The standard language and format of conservation easements are periodically revised to reflect new standard clauses, statutory changes, changes in policy, or to improve enforcement and administration, or enhance the protection of the conservation values of the protected property, or consolidate the legal documents in order to simplify the protection regime. Amendments for any of these purposes will be recommended so long as the changes are consistent with the intent and objectives of the original conservation easement.

III. Correct an Error or Ambiguity. An amendment may be recommended to correct an obvious error or oversight that was made at the time the conservation easement was entered into. This may include correction of a legal description, inclusion of language that was unintentionally omitted, or clarification of an ambiguity in the easement in order to avoid litigation over the interpretation of the document in the future, or to cooperate in a boundary adjustment based on a survey or in an exchange of land if the resource values of the land to be received are at least equivalent to the land exchanged.

IV. Settle Condemnation Proceedings. VLT may recommend a settlement agreement with the condemning authority where it appears that the land to be taken has little or no resource value, is not central to the purpose of the conservation easement and where condemnation power would be properly exercised for a recognized public purpose. If the condemnation proposed is significant, affects valuable resources and is central to the conservation easement, and there is no other better alternative site for the proposed facility,

VLT may still recommend a settlement agreement with the condemning authority if the public health, welfare and safety significantly outweighs the conservation resource values, but will do so only with great caution. In reaching such an agreement, the intent of the original conservation easement must be preserved to the greatest possible extent.

V. Amendments to Leverage Additional Conservation. VLT welcomes amendments to add additional land to a conservation easement. VLT also welcomes the return of reserved rights by landowners.

VI. Amendments to Reconfigure Conservation Easements: Modifications or additions of reserved rights in exchange for additional land conservation may be recommended provided that the above principles and other considerations are substantially met. We will not accept agricultural options or cash as the primary value equivalent exchange for adding reserved rights. Adding farm labor housing may be an exception where we would possibly accept an agricultural option on the farm land or the whole farm. In those circumstances, we would also seek to limit the size and value of the additional housing unit by imposing size limits and value per square foot limits to the agricultural option. We might also accept them to close a value gap between the additional land conserved and the right released.

VII. Amendments Consistent with Conservation Purpose. Other amendments of a conservation easement may be recommended where the modification is consistent with the goals of the original conservation project, there is no or only incidental private benefit, the amendment is substantially equivalent to or enhances the resource values protected by the conservation easement and any additional burden on the Stewardship staff is outweighed by the increased conservation value. Requests made under this section will be reviewed carefully.

Private Benefit Test. Conferring benefit (from a legal perspective) upon private parties without those private parties reciprocating with an equivalently valued public benefit to the VLT could threaten the tax-exempt status as an organization that is federally recognized as "operated exclusively" for charitable purposes. Treasury regulations set forth the "private benefit test" and reflects the legal requirement that VLT be "primarily engaged in activities which accomplish one or more of the exempt purposes specified in section 501(c)(3)" – that it be operated exclusively for charitable purposes and not confer benefit on private parties. Private benefit issues must be resolved before an amendment can be approved.

Conflict of Interest: Any conflicts of interest or potential conflicts must be resolved before an amendment can be approved. The conflicts of interest procedures must be followed.

Requesting an Amendment. Any landowner seeking an amendment shall write or call staff at VLT's Conservation Stewardship Program stating the change being sought and the specific reasons for it.

Staff Costs. VLT may request the landowner to pay all staff costs pertaining to reviewing the change, visiting the site, and preparing the paperwork but only if the amendment is approved. The Stewardship Director may waive some or all costs for the following reasons: hardship, contributing errors by VLT, costs covered through a separate project or other grant especially if additional land is conserved. The amendment BDR will state our rationale and principles served by allowing the amendment.
All current project BDRs will recite the reasons for all exclusions due to future audit sensitivities and to provide documentation for future amendments.

Stewardship Endowment. VLT may request the landowner to pay an additional stewardship endowment sufficient to generate income to cover staff costs likely to be incurred under the new provisions. The usual endowment formula will be consulted to determine this amount. The Stewardship Director may elect to apply for grant funds to cover the endowment if the amendment is to conserve additional land.

Last revised September 2005

Society for the Protection of New Hampshire Forests

Conservation Easement Amendment Policy*

Approved by Land Protection Committee 3/19/08, Board of Trustees 4/02/08

The Forest Society's conservation easements are achieved though voluntary agreements with landowners. Conservation easements are perpetual and are presented as such to land owners. Once an easement is executed, the Forest Society is bound to uphold the terms of the easement as executed. The Forest Society's record in upholding the terms and purposes of the original easement will determine whether future donors will put their trust in the Forest Society.

It is the Forest Society's policy to hold and enforce conservation easements as written. Amendments to conservation easements will be authorized only under exceptional circumstances and then only under all of the conditions below.

- In no case will an amendment be allowed that will adversely affect the qualification of the easement (under IRS regulations) or the Forest Society's qualification as a charitable organization under any applicable federal, state, and local laws or regulations.
- Issues of private benefit or inurement will be taken into account when considering amendments to easements, as required by IRS regulations.
- The amendment serves the public interest.
- The amendment has a net beneficial or neutral effect on the relevant conservation attributes protected by the easement
- The amendment is consistent with the Forest Society's mission.
- The modifications are consistent with the documented intent and/or restrictions of the donor, grantor and any direct funding source.
- Other parties that hold a legal interest in the easement agree to the amendment.
- The amendment complies with all applicable federal, state and local laws
- The amendment complies with the Forest Society's conflict of interest policy.
- The modifications are consistent with the purposes and intent of the original easement.
- Any party requesting a conservation easement amendment shall pay all Forest Society costs including staff time and direct costs for reviewing the request, regardless of whether the amendment is granted, and for developing the amendment, if approved.
- The Amendment is acceptable to the State of New Hampshire, acting through the Office of the Attorney General, Charitable Trusts Division and/or the Probate Court, if applicable.
- The Amendment will be acceptable to Forest Society's Board of Trustees in its absolute discretion.

****This policy applies to deed restricted lands, where such restrictions are analogous to the terms and conditions of a conservation easement.***

SAMPLE CONSERVATION EASEMENT LANGUAGE PERMITTING AMENDMENT & DISCRETIONARY APPROVAL

AMENDMENT AND DISCRETIONARY CONSENT.

Grantor and Holder recognize that circumstances could arise which might justify modification of certain of the terms, covenants or restrictions contained in this Conservation Easement. To this end, Grantor and Holder have the right to agree to amendments to this Easement, provided that in the (reasonable) OR (sole and exclusive) judgement of Holder such amendment furthers or is not inconsistent with the purposes of this Conservation Easement. Holder and Grantor have no right or power to agree to any amendment that would limit the term or result in termination of this Conservation Easement, [[OPTION: that would increase or permit residential development]] or that would impair the qualification of this Conservation Easement or the status of the Grantee under any applicable laws, including Title 33 M.R.S.A. Section 476 et seq., or Section 170(h) of the Internal Revenue Code. Any such amendment shall be recorded in the County, Maine, Registry of Deeds.

Any discretionary consent by Holder, permitted by this Conservation Easement for uses that are conditional or not expressly reserved by Grantor(s), may be granted only if the Holder has determined in its reasonable discretion, that the proposed use substantially conforms to the intent of this grant, meets any applicable conditions expressly stated herein, is not inconsistent with the conservation purposes of this grant, does not materially increase the adverse impact of expressly permitted actions under this Conservation Easement.

THE FOLLOWING EASEMENT CLAUSES ALLOW OR CALL FOR HOLDER TO EXERCISE DISCRETIONARY RIGHTS IN THE STEWARDSHIP OF THE EASEMENT:

Surface Alterations. ...As of the date of this grant, there are no surface alterations except an unpaved trail and an unpaved parking area near the public roadway, which may be maintained and, with 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, except that additional trails designed to discourage use by motor vehicles may be established, and small select portions of the Protected Property for the study of natural resources or archeology, subject to the prior written approval of Holder which may be granted if such activities will be conducted according to generally accepted professional practices and standards and in a manner consistent with the conservation purposes of this grant.

Public Access. ...Grantor and Holder may jointly agree in writing to restrict access to the Protected Property or parts thereof, but only to the extent and for the duration necessary to assure safety, or to preserve important ecological, habitat and conservation values of the Protected Property.

Notices. ...Any notices to Holder or requests for Holder consent, required or contemplated hereunder, must include, at a minimum, sufficient information to enable Holder to determine whether proposed plans are consistent with the terms of this Conservation Easement and the conservation purposes hereof.

Affirmative Rights. ...Holder has the right to require that Grantor's reserved rights be exercised in a manner that avoids unnecessary harm to the conservation values to be protected by this Easement.

Screening Requirements. ...The adequacy of vegetative screening and other measures taken to control visibility is to be determined in the sole discretion of the Holder.

DISCRETIONARY APPROVAL LETTER AS ALTERNATIVE TO AMENDMENT

Sample provided by Karin Marchetti Ponte, Esq.

(- Letterhead Of Holder -)

Date

OWNER:
Town Official
Town of
Municipal Building
City, State, Zip

Re: Conservation Easement Approval for Town Lot Changes

Dear Sirs:

We are writing this letter to grant our discretionary approval of changes made at the Town Lot, (the "Protected Property") which is subject to a conservation easement granted to us by PREVIOUS OWNERS on_____ and recorded in Book _____, Page _____, at the _____ County Registry of Deeds (the "Easement").

We recognize that a strict adherence to certain of the terms of the Easement would have been in conflict with the purpose of the easement, in that it had become impossible to control the public uses that is encouraged by the Easement, and the absence of such controls had placed in jeopardy the property's high value as a scenic resource. To assure the accomplishment of both purposes, we hereby give our consent, retroactively to the time of completion, to the following changes on the Protected Property, which were approved by the Town by a meeting of its Selectmen on _____, and by HOLDER at a meeting of its Board of Directors dated_____;

A. The installation and maintenance of a wooden post and rail fence along the northern boundary along the Road, and low wooden barriers around the newly delineated gravel parking area of not more than four thousand (4,000) square feet, as indicated in the "Sketch Plan of Proposed Park for Town, Road", dated , by Surveyor, RLS # , and in accordance with the photographs contained in Holder's Baseline Documentation Report dated , attached hereto and made a part of this approval, are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.

B. The installation and maintenance of the two existing wooden picnic tables east of the parking area, and the installation of additional picnic tables, benches, and small unlighted signs to enhance and control public use, after prior written notice to Holder, and an opportunity to cooperate in the text and design of signs so that they will inform the public about the conservation protection provided by Holder and Third Party; are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.

C. The leveling, grading and the addition of loam and seed to the formerly gravel area east of the parking area, as indicated in the aforementioned "Sketch Plan", is

hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations.

D. The establishment of a drainage ditch and culvert in the location indicated in the aforementioned "Sketch Plan", is hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations.

In all other respects, Holder and Third Party hereby ratify and confirm the Easement, and any forbearance or delay in providing this approval shall not be construed to be a waiver of the right to enforce other terms of the Easement or any future violation of the Easement.

Sincerely,

_____

HOLDER

_____

By: , President

THIRD PARTY

_____

By: , President
ADDRESS

Enclosure: Baseline Documentation Report dated , 200
cc: EVERYONE

VLT: Informal Discretionary Approval Letter

DATE
name
address
town

Re: Approval of Monuments and Scattering of Ashes

Dear _____:

You asked whether you could place a **(insert type and size)** monument and have your and your spouse's ashes only scattered on your land in _____, on which you are granting a conservation easement today. Even though your conservation easement does not expressly provide for this use, we can approve such uses provided that the uses don't overwhelm the agricultural or forestry productivity of your land or interfere with the other stated purposes of the conservation easement.

If the location of the monument is within (the _____ complex or the excluded acreage around your house), then you can erect any monument you choose without any need to obtain our approval. If the monument is located on Protected Property, then our concerns are that it not be a billboard, some other means of advertising or some "visually offensive" sign as prohibited in Section II(3), nor that it be an excessively large monument and that it not consume more than _____ insert size not to exceed 15 x 15 square feet of land area.

The _____ monument you propose seems to be a memorial of some type which is included as "permitted" in Section II(3) in the phrase "memorial plaque". The location you propose is _____ and as it does not interfere with agricultural or forestry use of the property (note: if the CE is a scenic CE or has public recreation you need to address those issue too), is for the use only of you and your spouse and as the are you propose to use does not exceed 15' x15', then we are agreeable to this memorial. Please accept this letter as our approval of the same.

In addition to our written approval under the conservation easement, you may also need the approval of the Town of _____ under its zoning ordinance, and other state and federal regulators. The best place to start is with your Town zoning administrator. Your attorney can best advise you about any other government permits or licenses that may be required.

If you have any questions, please call our Conservation Stewardship staff. Thank you.

Sincerely,

Project Counsel

C: Conservation Stewardship Office
Landowner attorney

May 23, 2006

name
address
town

re: Dump Site

Dear

I understand from our Conservation Field Assistant, _____, that there is a wide variety of _____ and other discarded items on your property. As you know, Section II(__) of the conservation easement prohibits "placement, collection or storage of trash…" on the Protected Property. For this reason, you understand that you cannot add materials to the old dump site, and while we do not require that you remove the existing materials, if you are able to remove the metal drums especially, that would be greatly appreciated.

We do monitor all conserved property annually. The photographs of the dump and this letter will be in the stewardship file for this property and will be checked during our annual monitoring visit to ensure that new materials are not added, which would be a violation of the easement.

As you know, metal, glass, and many plastics are recyclable without cost to you. Please note that it is a violation of the conservation easement and of state law to burn any material except untreated wood. Thank you for your compliance in this matter.

Kindly sign below to indicate your receipt and understanding of this letter.

Sincerely,

Project Counsel

RECEIVED AND UNDERSTOOD THIS ___ DAY OF _____, 200__

_____ _____
name name

May 23, 2006

name
address
town

Re: Temporary Use of Motor Vehicles on Conserved Land

Dear _____:

As you requested, this letter is to confirm the _____- Land Trust interpretation of the conservation easement on your land in _____ (the "Protected Property") with respect to temporary use of motor vehicles.

As you know, we interpret the Grant to include motor vehicle use for agriculture and forestry activities. In addition, we interpret the Grant to permit motor vehicle use in your discretion in response to emergencies and for handicapped access. Naturally, this does not mean that you can construct roads or pave or widen existing roads for these vehicles, only that such vehicles can be operated on existing roads or off-road as necessary in an emergency or to transport handicapped persons to participate in permitted uses on the Protected Property.

In addition, we assume that you will need to use temporary motor vehicles when you exercise the reserved rights in the Grant for construction of the minor structures and appurtenant temporary structures and any non-commercial recreational structures you might build in the two areas to be excluded in the future. We also assume that you might need to temporarily use motor vehicles to move temporary structures such as picnic tables or outhouses at the beginning and end of each season as well as repairs to any of the permitted structures. This is all fine with us. Again, we expect that that you will not construct new roads or pave or widen existing (or new woods roads or trails constructed for forestry activities pursuant to the approved forest management plan) roads for these vehicles.

You may also need the approval of the Town of _____ under its zoning ordinance, and other state and federal regulators. The best place to start is with your Town zoning administrator. Your attorney can best advise you about any other government permits or licenses that may be required.

If you have any questions, please call our Conservation Stewardship staff.
Thank you.

Sincerely,

.
Project Counsel

C: Conservation Stewardship Office
Landowner attorney

Additional Resources

Amending Conservation Easements: Evolving Practices and Legal Principles (Washington, DC: Land Trust Alliance, 2007). Available at http://learningcenter.lta.org/.

"Amending Conservation Easements: Legal and Policy Considerations," by William P. O'Connor, *Exchange*, Spring 1999.

"Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," by Nancy A. McLaughlin, *University of Richmond Law Review*, Vol. 40 (2006) pp. 1031–97. Available at http://learningcenter.lta.org.

Amending Perpetual Conservation Easements: Confronting the Dilemmas of Change: A Practitioner's View, by Darby Bradley (Cambridge, MA: Lincoln Institute, 2008).

"Amendments to Conservation Easements: How & Why to Develop a Policy," by Amy Humphreys-Chandler. *The Back Forty: The Newsletter of Land Conservation Law* (Washington, DC: Land Conservation Law Institute) Vol. 8, No. 2 March/April 1999. Available by contacting scholarp@uchastings.edu.

"An Analytic Approach to Complex Conservation Easement Amendment Questions," by Andrew C. Dana (2007). Available by contacting andy@conservationlawassociates.com.

"Conservation Easement Amendments: A View from the Field," by Andrew C. Dana. *The Back Forty: The Newsletter of Land Conservation Law* (Washington, DC: Land Conservation Law Institute) 2006. Available at http://learningcenter.lta.org/attached-files/0/57/5754/CE_Amendments-View_from_Field_(ADana_5-5-06).pdf.

The Conservation Easement Handbook, by Elizabeth Byers and Karin Marchetti Ponte, 2nd edition (Washington, DC: Trust for Public Land and the Land Trust Alliance, 2005). Sample amendment policies are on the CD enclosed with the book.

"Designing a Conservation Easement Amendment Policy," by Karin Marchetti Ponte, Rally 2002 Session. Available at http://learningcenter.lta.org/attached-files/0/27/2778/Rally_2002_6G.doc.html.

"Hicks v. Dowd: The End of Perpetuity?" by C. Timothy Lindstrom, *Wyoming Law Review*, Vol. 8, No. 25 (2008). Available at http://uwadmnweb.uwyo.edu/law/Student_life/lawreview.asp.

Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations, Joint Committee on Taxation, 48, 52-56 (JCX-29-05) April 19, 2005. Available at http://www.house.gov/jct.

"In Defense of Conservation Easements: A Response to The End of Perpetuity," by Nancy A. McLaughlin and W. William Weeks, *Wyoming Law Review*, Vol. 9, No. 1 (2009). Available at http://www.law.utah.edu/_personfiles/80/SCHOLARSHIP/McLaughlinWeeks.pdf.

The Law of Tax-Exempt Organizations, by Bruce R. Hopkins, 9th edition (Hoboken, NJ: Wiley, 2008).

"Legal Considerations Regarding Amendment to Conservation Easements," by the Conservation Law Clinic at the Indiana University School of Law. Available at http://learningcenter.lta.org/attached-files/0/65/6536/CLC_Legal_Considerations_Amending_Conservation_Easement_final.pdf.

Massachusetts Conservation Restriction Stewardship Manual: A Handbook for Land Trusts and Conservation Commissions (Lincoln, MA: Massachusetts Audubon Society, 2006). Available by contacting land@massaudubon.org or online at http://www.massaudubon.org/Nature_Connection/landprotection/news.php?id=298&event=no&sanc_news=yes.

The Power of a Positive No: How to Say No & Still Get to Yes, by William Ury (New York: Bantam Books, 2007).

Protecting the Land: Conservation Easements Past, Present and Future, edited by Julie Ann Gustanski and Roderick H. Squires (Washington, DC: Island Press, 2000).

"Reinventing Conservation Easements: A Critical Examination and Ideas for Reform" (Policy Focus Report), by Jeff Pidot (Cambridge, MA: The Lincoln Institute of Land Policy, 2005). Available at http://learningcenter.lta.org/attached-files/0/53/5367/Rally_2005_C19_1.pdf.

"Rethinking the Perpetual Nature of Conservation Easements," by Nancy A. McLaughlin. *Harvard Environmental Law Review*, Vol. 29 No. 2 (2005) pp. 421–521.

"Who Has Legal Standing to Enforce or Amend a Conservation Easement: A Guide for Land Trusts," by R. Steven Carroll, Vermont Law School Environmental Law Clinic Research Paper, 2008 (http://learningcenter.lta.org/objects/view.acs?object_id=27174).

Check Your Progress

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

- ☐ Explain the value of having a written policy or procedure for when and how your land trust will amend conservation easements
- ☐ Describe the role of various parties (board members, staff, attorneys and others) in amending conservation easements
- ☐ Determine what costs are involved in amending a conservation easement
- ☐ Know how to draft an original conservation easement to allow for the potential to amend
- ☐ Explain the limitations on conservation easement amendments imposed or implied by federal and state law
- ☐ Understand how the concept of private inurement can come into play in a conservation easement amendment
- ☐ Understand the amendment principles that form the core of any amendment policy
- ☐ Help your land trust find the resources to draft a conservation easement amendment policy or procedure that:
  - ☐ Includes the conditions under which the organization would consider an easement amendment
  - ☐ Includes a prohibition against private inurement and impermissible private benefit
  - ☐ Requires compliance with your organization's conflict of interest policy (see Practice 4A)
  - ☐ Requires compliance with any funding requirements
  - ☐ Addresses the role of the board
  - ☐ Is consistent with the organization's mission
  - ☐ Is legally permissible
  - ☐ Ensures the amendment is consistent with the conservation purposes of the easement
  - ☐ Contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome
- ☐ Understand the different kinds of amendments and where they fall in the amendment "risk spectrum"
- ☐ Explain when a discretionary approval letter is preferable to an amendment

Chapter Three • Violation Resolution and Easement Defense

"We can't just say we're going to be friends. We gotta have an agreement or something."

— Theodore "Beaver" Cleaver in *Leave It to Beaver,* 1957

Practice 11E. Enforcement of Easements.
The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense. (See 6G and 11A.)

When a land trust accepts an easement, it also accepts the responsibility to enforce that easement in the event it is violated, and to defend it from challenges. Land trusts facing their first enforcement action often wish they had a formal policy or written procedure to follow governing contact with landowners, board and staff roles, attorney involvement, and steps to take in the event a potential violation is discovered. This practice calls for all easement-holding land trusts to develop such a policy or procedure. In addition, land trusts must be prepared for enforcement actions and should have access to appropriate legal counsel and the financial resources to pursue the enforcement. Every land trust should promptly address every easement violation.

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

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Learning Objectives

After studying this chapter, you should be able to:

- Distinguish between conservation easement *defense* and *enforcement*
- Explain why easement enforcement is important
- Describe, in a general way, the link between easement drafting, easement monitoring and easement enforcement
- Explain the value of having a written policy or procedure for how your organization will respond to a potential violation of a conservation easement

- Describe the role of various parties (board members, volunteer, staff, partners and others) in the event of a potential conservation easement violation
- Describe the range of solutions and approaches available to land trusts to resolve conservation easement violations
- Determine when a land trust should seek legal counsel in the event of a potential violation of a conservation easement
- Explain the types of costs a land trust might incur when enforcing a conservation easement
- Determine the range of legal defense funding that would be appropriate for your organization
- Help your land trust find the resources to draft an enforcement policy or procedure that addresses the following:
  - The role of all parties
  - Documentation of the potential violation
  - Communications with the landowner
  - Options for resolution
  - Involvement of legal counsel

Summary

Successful land conservation starts with closing important conservation projects and continues with, and is dependent upon, solid, sustainable conservation easement stewardship systems, including enforcement and defense. Upholding and defending your land trust's easements are two of your land trust's most important obligations. Conservation easements are only paper and ink if your land trust does not uphold their terms. Three important components of conservation easement defense and enforcement are covered in this course: recordkeeping, addressing easement amendments and conservation easement enforcement (other closely related easement stewardship components, including sound conservation easement drafting and due diligence, annual monitoring visits and good landowner relationships, are covered in other Land Trust Alliance courses).

The IRS requires that to be eligible to hold easements that may qualify for federal tax benefits, land trusts must monitor and enforce all their conservation easements. They must also have the commitment, capacity and capability to uphold their conservation easements forever. Most attorneys interpret this requirement to mean that all violations, even technical ones, must be addressed in a manner proportional to the severity of damage to the conserved resources. Failure by a land

trust to resolve even a single conservation easement violation can cause many unpleasant consequences. The land trust may be:

- Disqualified from accepting further tax-deductible conservation easements
- Fined, or have its charitable status revoked, by the IRS

Even if the land trust avoids these penalties, at the very least it will endanger the organization's credibility in its community and with its landowners.

Conservation easement "enforcement" is often referred to by land trusts as "violation resolution," because it involves discovering and resolving a violation of the easement. If the land trust and landowner cannot resolve the dispute, then the land trust may take the landowner to court to remedy the problem. Land trusts can use a variety of techniques to resolve an easement violation before seeking remedies in court, and many are described in this chapter. Conservation easement "defense" means that the land trust responds to a legal action or challenge relating to a conservation easement brought against the land trust by another person or entity, including a landowner, neighbor or another third party.

Easement enforcement: The discovery and resolution of an easement violation.

While the vast majority of easements have not been violated, your land trust should prepare for violations of varying degrees. The key is to minimize the magnitude of violations, prevent expensive, unnecessary legal actions and address the violations your land trust encounters promptly and appropriately. Land trusts must understand that violations usually appear suddenly and without warning. A landowner is unlikely to alert the land trust that a violation is imminent; therefore, your land trust must be prepared for the unexpected and be able to respond rapidly and appropriately. Your land trust also must identify potential sources of violations and head them off through proactive assistance to conservation easement landowners.

Easement defense: The land trust's response to a legal action or challenge relating to a conservation easement.

Landowners are endlessly creative in interpreting conservation easements. Your land trust, therefore, needs to have:

- A solid understanding of the conservation easements it holds
- Sound legal advice when dealing with new easement interpretation issues
- Excellent communication and negotiation skills to resolve violations

Adoption and implementation of a conservation easement violation policy (preferably before your land trust experiences its first major violation) will go a long way toward ensuring that your land trust upholds its promise to enforce and defend its easements in perpetuity. Moreover, adoption and implementation of a violation policy will reduce the anxiety every land trust experiences when it discovers a violation. A policy provides a clear road map of the actions to take, the parties to contact and the documentation necessary to resolve the violation. In this chapter, you will receive the tools you need to draft a violations policy that is tailored to your land trust's unique situation.

For more information on drafting conservation easements and establishing strong landowner relationships, see the Land Trust Alliance courses "Conservation Easement Drafting and Documentation" and "Conservation Easement Stewardship."

Evaluate Your Practices

Conduct a quick evaluation of your land trust's current approach to enforcement. Give your land trust one point for every "yes" answer. Scores are explained at the end.

Does your land trust:

1. Speak with at least one owner of every parcel of conserved land every year?
2. Visit every parcel of conserved land every year to identify any easement issues?
3. Track and personally meet with all new owners of conserved land?
4. Provide resource information and other assistance to owners of conserved land?
5. Have a written statement of your land trust's stewardship philosophy?
6. Have a written violation resolution policy and procedure?
7. Follow your land trust's written violation resolution policy and procedure?
8. Have sufficient funds set aside to pay for outside experts, legal advice and necessary judicial remedies?
9. Address every violation that occurs on conserved land in proportion to its severity?
10. Have a litigator and/or a qualified real estate attorney readily

available to call upon, without advance notice, for assistance with conservation easement interpretation, enforcement and defense questions?
11. Have a system to track violations, their severity and their resolution?
12. Understand and use available alternatives to judicial enforcement?
13. Have a system to evaluate and learn from violations?

Scores

If your land trust scores:

13: Congratulations! Your land trust has put much time, effort and thought into its systems, policies and procedures. Share your policies and procedures with your colleagues by sending them to the Land Trust Alliance for posting in the digital library (e-mail learn@lta.org).

9–12: Good job! Identify the few places where your organization could improve and implement some of the suggestions in this course.

5–8: You are on the right track and have tackled some of the basics. You are ready to take the next steps so that your easement enforcement and defense program complies with the *Land Trust Standards and Practices*.

0–4: We are glad you are taking this course. You have taken the first step toward learning about easement enforcement and how to develop a policy for your land trust. Keep at it. You will be pleased with the results.

Guidance

1. The most important part of conservation easement enforcement and defense is preventing violations from occurring in the first place. Do everything you can to prevent violations or at least reduce their severity. One of the best prevention methods is a substantial and meaningful visit with the landowner on the land every year.
2. By visiting every parcel of land every year and meeting with

the landowner on the land, you can have a dialogue that will help your land trust anticipate a landowner's needs, answer questions, review easement terms and discuss the future of the conserved land to prevent violations and build good relationships.

3. Successor owners of easement land do not have the long history and relationship with your land trust that the original grantors had; therefore, to prevent violations and build a good relationship with these owners, you should personally meet every successor owner and help him or her understand your land trust and the conservation easement. You also must understand the new landowner's needs. Successor owners may not have land ownership experience and some may not have as strong a conservation ethic as the original landowners, so it is important to dedicate the time and resources to help these landowners understand their easement and your land trust's responsibility.
4. By assisting landowners to be the best possible stewards of their land, you promote a community land ethic and also build good relationships that will help your land trust prevent violations and more easily address those violations that do occur.
5. Your land trust should articulate how it views landowners and how it wants landowners to view the land trust. You also need to determine how your organization balances landowners' needs for their land with your land trust's obligation to uphold the easement's purposes and the public interest. Your stewardship philosophy is one good way to articulate these issues to landowners.
6. Your land trust's written violation policy and procedures will guide you through the difficulties of violation resolution. Your land trust should adopt and implement a violation policy and procedure before its first violation, so that you do not struggle with violation resolution and the creation of a policy at the same time. As you learn more over time, your land trust can refine its policy.
7. You need to follow your land trust's written violation policy. Doing so will ensure your land trust treats all landowners fairly and consistently. You can follow the policy and still act with flexibility and adapt to different circumstances — policies do not need to be rigid. In fact, they work better if they include appropriate flexibility to deal with unforeseen events and differ-

ent circumstances. When you follow your land trust's policy with appropriate adaptations to circumstances, you demonstrate to the public, landowners and the court that your land trust consistently addresses and resolves easement violations.

8. Conservation easement enforcement and defense requires time, patience and adequate human and financial capacity to be effective. Your land trust will experience violations, and you will need to have sufficient funds available to support violation resolution. Fundraising to pay for the costs of resolving a current violation is not a practical solution because you are not likely to have the capacity to both fundraise and manage the violation effectively.
9. The Internal Revenue Code and Treasury Regulations require that every land trust that accepts conservation easements intended to qualify for federal tax benefits have the commitment and resources to enforce its conservation easements. Most practitioners interpret this rule to mean that you must address every violation, even the most trivial or technical. How you address it should be proportional to the severity of the violation. For example, a landowner who forgets to promptly notify the land trust of a change in mailing address deserves a different response from a landowner who builds a cabin in an area of the property where no structures are allowed. Your land trust's violations policy should articulate the methods appropriate to address various categories of violations, such as technical, minor, moderate and major violations.
10. When your land trust needs legal help, you likely will not have time to thoughtfully select a litigator to represent your land trust. You should recruit and interview possible attorneys in advance, well before you need to call a litigator for assistance.
11. Documenting violations is critical so that you have a record of the problem and how it was resolved, and can report your actions easily to your land trust board, members and funders, as appropriate.
12. Your land trust may have to go to court in emergencies when an injunction may be necessary to stop an ongoing violation, when you exhaust all other alternatives or if you need to respond to a landowner's suit. But unnecessary or precipitous litigation is expensive and alienates landowners who would otherwise be inclined to resolve their violation

Injunction: An equitable remedy granted by a court in a lawsuit that prohibits another party to a lawsuit from acting in a manner detrimental to the other party's interests until the matter can be resolved before the judge. Usually the action must be of a nature that is immediate, substantial and irreparable or if not stopped would result in extensive losses to the other party if compelled to return to the condition preceding the adverse action.

voluntarily. Litigation may also alienate the public and does not always yield a favorable or predictable result for land trusts. Therefore, knowing all your alternatives to litigation and how to use them appropriately is as critical as knowing when you should litigate.

13. Land trusts should take the time to periodically review the violations they have experienced to assess the effectiveness of their easement drafting and stewardship program. For example, if you see repeated misunderstanding of a restriction contained in all your easements, you may want to revise the language or develop more detailed landowner information. The goal is for your land trust to help landowners avoid violations.

Importance of a Violation Policy and Procedures

Maintaining the Public Trust and Landowner Relationships

Your land trust must maintain public trust to be successful. Without this trust, you will not be able to raise operating money or encourage landowners to partner with you to protect important lands. Enforcing and defending conservation easements is an essential aspect of building that trust. By adopting and implementing a violation policy, your land trust demonstrates its intent to uphold its obligations to the original grantor and provide perpetual support for the purposes of each conservation easement.

Adopting and implementing an easement violation policy will demonstrate your land trust's commitment to the perpetuity of its conservation easements and will help avoid appearances of conflicts of interest and possible sanctions by regulatory agencies.

A violation policy guides your land trust through violation resolution and helps your land trust address, manage and resolve every easement violation in a fair, conscientious and effective manner. A policy helps your land trust assess the extent of violations and respond proportionately to the circumstances, consistently with the law and respectfully of landowners.

A well-written violation resolution policy and procedures will help your land trust become a partner with the landowner instead of a police officer waiting to jump on an infraction. For example, compare these two responses to a minor violation that caused little or no damage to the land's resources:

- Personal education and outreach to the landowner
- A formal, certified letter to the landowner, written by your organization's attorney

Potential responses to categories of violations are two of the elements a land trust should have in its violation response policy and procedures. Violation resolution policies typically address three areas:

- The overall policy guidelines and criteria for identifying violations and categorizing their severity
- An analysis or spectrum of appropriate responses to each violation category
- The specific procedures that you use to address violations

All responses to violations should be proportional to the severity of the resource damage.

Some land trusts meld these items into one document; others keep them separate. The policy should also require a timely response to all violations proportional to the resource damage and equitable application of the policy to all landowners. All land trust personnel, both staff and volunteers, should implement the policy and procedures to assure transparency of process.

In the above example of the responses to a minor violation, the first approach addresses the current violation (and hopefully stops it) while at the same time fosters the relationship with the landowner. The information may also help prevent similar future violations. The second response may antagonize the landowner, putting him or her on the defensive and less likely to call the land trust with questions about appropriate land use in the future. It may also stop the current violation. The approach that your land trust selects should be reflected in your policy and applied equitably to all landowners based on reasonable criteria.

Example

More than 1,300 abandoned tires at the Point Creek Natural Area (PCNA) in the coastal zone of Lake Michigan became playground surfaces and horse arena padding thanks to the efforts of the conservation easement holder and a local businessman. Instead of suing the owner of the natural area to remove the tires, Glacial Lakes Conservancy worked diligently to find a creative solution to a common and frustrating conservation easement dilemma encountered by many land trusts. It helped tremendously that a local business owner offered to cover the tire disposal costs. The Point Creek site, located in the town of Centerville, is a research and educational area with public passive

recreation that has been undergoing work to restore the property to a mixed native species habitat. A neighbor to the preserve had gradually deposited the tires on the property over the years. Manitowoc County, which owns the property, and the Conservancy, the easement holder, were both unsure about the boundary line. The neighbor responsible for the violation had died, leaving no legal recourse against him. Using a blend of perseverance and diplomacy, the Conservancy pushed the county to find a way to determine the boundary line; eventually a survey of the area in question was conducted. Unfortunately, once the county was established as the responsible landowner, it indicated that it did not have any financial resources to remove and dispose of the tires, except to provide in-kind volunteers for the project.

The long search by the Conservancy to dispose of the tires ended when Richard Larson, owner of Whitewall Tire Company and GreenSky Energetics in Wisconsin, paid the tire disposal costs. He donated his and his staff's time to work with the county's volunteers to load, haul and then pay for the proper disposal of the tires that lay abandoned for years.

A Guide to Navigating Difficult Situations

A violation resolution policy holds your land trust steady during the turmoil of evaluating and documenting violations and provides guidance on determining whether a violation has occurred and how it should be addressed.

A violation resolution policy holds your land trust steady during the turmoil of evaluating and documenting violations and provides guidance on determining whether a violation has occurred and how it should be addressed. It is also valuable in defining upfront who has the authority to act, so that your land trust avoids confusion, miscommunication, delays and missteps. With a defined process and roles, you can focus on the violation rather than on determining who has to be involved and how. Adopting and implementing a violation policy that encompasses all the issues discussed in this chapter will ensure that your land trust does not skip any important steps in resolving an easement violation. A policy also ensures that your land trust response is disinterested and equitable by creating a consistent standard that is followed in every violation situation. Such a standard helps prevent conflicts of interest and preferential treatment of insiders, favorite landowners and major donors. Preventing conflicts of interest and adhering to a violation policy that meets *Land Trust Standards and Practices* will help you avoid IRS sanctions against your land trust for conferring private inurement or for failing to enforce easements that qualified for federal tax benefits.

Legal Reasons

Internal Revenue Service Treasury Regulations Section 1.170A-14 requires that qualified conservation easements (easements that qualify for federal tax benefits) must be granted exclusively for conservation purposes. To be eligible for a federal income tax deduction, the conservation organization must protect the purposes of the conservation easement forever. This requirement means that your land trust must address every violation; however, how to address those violations is left to the land trust's best judgment and discretion. Your land trust's conservation easement violation policy and procedures will articulate that best judgment and provide uniform steps to apply it on a case-by-case basis for each individual conservation easement and owner of conserved land.

The IRS is now scrutinizing land trusts to ensure adherence to these regulations. In December 2008, the IRS finalized a new Form 990 and instructions (see http://www.irs.gov/charities/article/0,,id=185561,00.html). These forms and instructions are required to be used for filing in 2009 for reporting on tax year 2008. These documents ask land trusts to demonstrate that they are committed to, capable of and do, in fact, uphold their conservation easements. To maintain your land trust's tax exempt status, your land trust needs to demonstrate that it keeps adequate records, amends conservation easements only in an appropriate manner and appropriately enforces all conservation easements.

In addition to helping the land trust meet federal law, a good violations policy helps in the event of legal action. Having a policy that addresses every violation appropriately ensures that your land trust maintains its right to enforce its conservation easements because you have created a pattern of consistent responses to every violation situation. Being able to demonstrate such consistency is essential if your land trust ever winds up in court defending or enforcing an easement. Courts may determine that your land trust "waived" its enforcement rights by being casual or capricious in addressing previous violations.

Also, note that your land trust may forfeit its right to pursue a judicial remedy if you wait too long after discovering a violation. Having a policy and following it in every case will help your land trust act effectively in the case of a violation.

IRS Form 990 and Easement Violations

Form 990 includes several questions that directly relate to conservation easement enforcement. Those questions are listed below (listed by IRS number), followed by the IRS instructions for each.

4. Number of states where property subject to conservation easement is located.

Line 4. A qualified organization must have a commitment to protect the conservation purposes of the easement, and have the resources to enforce the restrictions. Enter the total number of states where property is located and subject to a conservation easement held by the organization during the tax year.

5. Does the organization have a written policy regarding the periodic monitoring, inspection, violations, and enforcement of the conservation easements it holds?

Line 5. Report whether the organization has a written policy or policies regarding how the organization will monitor, inspect, respond to violations, and enforce conservation easements. If "Yes," briefly summarize such policy or policies in Part XIV. Also, indicate whether such policy or policies are reflected in the organization's easement documents. *Monitoring* means the organization investigates the use or condition of the real property restricted by the easement to determine if the property owner is adhering to the restrictions imposed by the terms of the easement to ensure the conservation purpose of the easement is being achieved. *Inspection* means an onsite visit to observe the property to carry out a monitoring purpose. *Enforcement* of an easement means action taken by the organization after it discovers a violation to compel a property owner to adhere to the terms of the conservation easement. Such activities may include communications with the property owner explaining his or her obligations with respect to the easement, arbitration, or litigation.

6. Staff or volunteer hours devoted to monitoring, inspecting, and enforcing easements during the year.

Line 6. Enter the total number of hours devoted during the tax year to monitoring, inspecting, and enforcing easements, as those terms are defined in the instruction for line 5, above. Include the hours devoted to this purpose by any of the organization's paid or unpaid staff and by any of the organization's agents or contractors.

7. Amount of expenses incurred in monitoring, inspecting, and enforcing easements during the year.

Line 7. Enter the total amount of expenses incurred by the organization during the tax year to monitor, inspect, and enforce the easements it held during the year as those terms are defined in the instruction for line 5, above.

Excerpt from the 2008 Form 990 instructions for Schedule D

http://www.irs.gov/pub/irs-tege/schdinstructions.pdf

The Whidbey-Camano Land Trust in Washington learned some important legal lessons when it pursued an easement violation without a clear violations policy in place that staff followed consistently. WCLT discovered that a successor landowner had cleared a septic drain field and put down a foundation for a house outside the allowed building envelope on an easement property. The land trust contacted the landowner to discuss the situation, but in the midst of trying to negotiate a settlement, the landowner sued the land trust for relief. In court, the landowner convinced the judge that he had not understood the easement terms because they were inadequately explained during the closing on the purchase of the property. The landowner prevailed. The judge said that WCLT seemed to enforce its easements casually and that it did not adequately explain the conservation easement to the landowner. Following the ruling, the land trust adopted a clear policy on violation resolution and follows it closely.

WCLT summarized the lessons they learned in an article by Brenda Biondo in the Winter 1997 issue of *Exchange*:

- Have a policy and procedures that allows the land trust to deal quickly with enforcement problems
- While in an enforcement situation, put every conversation with the landowner in writing, either in a letter reiterating the conversation or at least in notes for the file
- Be consistent in enforcing violations
- Have the land trust's policies and actions audited periodically, preferably by peers in a regional land conservation organization
- Remain visible to the landowner and community through regular contact and other means
- Have a clear policy for disclosing and resolving any potential conflicts of interest among land trust board, staff, volunteers or other insiders

There are additional important lessons that land trusts should take away from this incident. First, land trusts should realize that others, including judges, may not understand conservation easements nor accept their general validity; therefore, having systems, policies and procedures will support the credibility of your land trust and your conservation easements. Take time to educate the judge and jury. *Land trusts must demonstrate competence in everything they do*. Second, remember that judges may be susceptible to local pressures and publicity, so provide them with cogent reasons to rule in your favor to decrease adverse publicity.

WCLT learned that having a thoughtful violation resolution policy and following it routinely and consistently eliminates delays in response to violations and establishes credibility. Developing a policy before a violation occurs allows the land trust time to think through the policy calmly without the pressure of a violation to resolve. As your land trust learns by experiencing and successfully resolving violations, you can later refine the policy.

Conventions of Deed and Contract Interpretation

In most states, conservation easements are real property deeds that transfer property rights to the land trust. Conservation easements also memorialize contracts between the landowner and the land trust that are forever. Courts apply laws of both deeds and contracts to interpret conservation easements. Courts have some general rules that apply in most states.

Share this list with your attorney to determine how your state's courts interpret deeds and contracts. This summary is not comprehensive, but it does cover some basic principles relevant to conservation easement enforcement. As these principles vary by state and by the circumstances of each case, your land trust should be sure to consult its attorney for guidance on how to apply them.

- Deeds and contracts are construed according to the intention of the parties if the court can tell what that is from the conservation easement. Courts will read the conservation easement first to determine the parties' intentions.
- If the conservation easement is ambiguous or if reasonable people could interpret it in various ways, then the court looks beyond the conservation easement to determine intent.
- Words are given their ordinary and usual meaning that a reasonable person in that community would give them. If the written words are clear, then those words will govern the actions of the parties and the court has little discretion to stray from that meaning. If the words are not clear or are ambiguous or if reasonable people would disagree about what the words ordinarily mean, then the court must determine the parties' intent. The courts then look beyond the four corners of the conservation easement to consider other evidence. Baseline documentation reports would, in this case, be very important to clarify the parties' intentions.

Developing a Violations Resolution Policy

Violation resolution policies typically address three areas:

- The overall policy guidelines and criteria for identifying violations and categorizing their severity
- An analysis or spectrum of appropriate response to each violation category
- The specific procedures that a land trust uses to address violations

- As time passes, the court finds it more difficult to determine the circumstances surrounding the creation of a conservation easement and what the original parties intended; therefore, the court has more discretion to impose its interpretation of ambiguous words.
- If neither the conservation easement as written or additional evidence clarifies the parties' intentions, then the courts use rules of construction to interpret the conservation easement.
- Deeds must be interpreted as a whole and all the words given an integrated interpretation, leaving nothing out.
- Specific explicit and detailed statements are given more weight than general statements.
- The parties' conduct may be relevant evidence about intentions, but conduct may never override clear explicit words in deeds.
- Specially negotiated clauses are given more weight than boilerplate or template standardized language.
- Whenever possible, ambiguously worded land use restrictions will be resolved in favor of the free unrestricted use of the land, creating a judicial bias against enforcement of conservation easements.
- Courts will construe ambiguities and other gaps in information or intention against the drafter of the document.
- Courts prefer specificity, but remember that too much specificity can also be too narrowly interpreted.

(Adapted and edited from Andrew Dana, Esq., Bozeman, Montana)

Some land trusts meld these three items into one document; others keep the policy and the procedures in separate documents.

The overall policy is usually in a form that you can share with landowners, potential easement donors and the public. Some land trusts choose to keep procedures in a separate document to be used internally only. Some land trusts make all of their policies publicly available, believing that the more transparency a land trust has, the more public confidence it will generate. Some attorneys, however, caution against publicizing detailed violation resolution procedures, because if a land trust fails to follow every single procedure to the letter every time a violation occurs, the failure to follow the procedures may be used against the land trust in court. Consult your attorney about the appropriate balance for your organization. One way a land trust can address this issue is to state directly in the violation resolution procedures that the land trust has the ability to adapt the procedures to each event. Because all circumstances cannot be anticipated, such language may make it clear that land trust personnel, whether staff or volunteer, have the discretion to reasonably and appropriately adapt the procedures as they deem proportional to the circumstances. Another way to address the concern about sharing procedures is to separate your land trust's violation resolution philosophy from the actual violation procedures, and simply make the philosophy component of the violation policy available to the public.

If you make public detailed violation resolution procedures and your land trust fails to follow every single procedure to the letter every time a violation occurs, that failure may be used against the land trust in court.

Resolution Principles

The four most important and overarching guiding principles in violation resolution are

1. Take immediate, thoughtful and appropriate action (waiting never helps)
2. Always use a personal and compassionate approach with the landowner, while at the same time upholding the purposes of the conservation easement
3. Address all violations, no matter how minor, but tailor your approach in proportion to the circumstances of the violation
4. Comply with all laws

Keep these four guiding principles in mind when drafting your violation resolution policy and procedures.

Basic Elements

The following section presents the basic elements that land trusts should include in a violation resolution policy. It also discusses how a policy may be adjusted to reflect organizational mission and comply with state law and lays out a process for violation evaluation and resolution. For additional background information and further examples of current policies, see the Land Trust Alliance website, *Land Trust Standards and Practices* and *The Conservation Easement Handbook* and its accompanying CD, as well as the sample policies included on pages 350–68.

Violation resolution policies typically include:

A statement about the land trust's philosophy on easement violation resolution. The underlying philosophy of most land trust enforcement policies has two main points: first, maintaining landowner relationships by adopting a cooperative, rather than an adversarial, approach when seeking to enforce or defend conservation easements; and second, responding quickly to all violations, to uphold public confidence, maintain the right to enforce and comply with laws.

Land trusts should also consider their mission and goals when developing their violation resolution philosophy. Land trusts with a mission to conserve lands used intensively by humans, often referred to as "working lands," may find that they have more easement violations and thus need different responses to violations than a land trust focused on natural area protection, whose easements generally do not allow human activity or allow only limited pedestrian use of the conserved land. You might evaluate the spectrum of human involvement allowed by your conservation easements, as well as the spectrum of likely third-party violations, when considering your violation resolution policy.

The land trust's philosophy statement might also include language that reflects the land trust's intent to:

- Address every violation proportionately to its scope, scale, severity of resource impact and duration
- Preserve the purposes and intent of the conservation easement in perpetuity
- Preserve the documented intent of the original grantor
- Comply with federal, state and local law

- Maintain public and landowner confidence in the land trust
- Respond quickly and follow its violation policy and procedures
- Support the organization's mission
- Preserve its tax-exempt status as a charitable organization
- Prevent private inurement and impermissible private benefit
- Maintain landowner goodwill to the fullest extent possible
- Require maintenance of records and funds to provide sufficient stewardship services
- Conduct annual monitoring visits to the conserved land and, if possible, with the landowner

Assessment of violation severity. Not all violations are the same in scope, scale, severity or duration. Your land trust's violations resolution policy should acknowledge this reality and identify a method to rate the violation on a scale of severity. Identifying the severity of the violation is important so that your land trust response is proportionate to the impact of the violation. This type of information will help your land trust in a number of different ways:

- It will assist your land trust in determining the resources, both human and financial, that it will need for enforcement
- You will have a useful record of violations for education and reporting purposes because it can be analyzed by severity category
- If your land trust chooses to publicize its violations rate and severity, the way you choose to categorize your violations may affect public confidence in the organization's operations

Collecting and sharing violation information helps the entire land trust community.

Finally, collecting and sharing this information with the Land Trust Alliance will help the entire land trust community understand the scope of threats to land conservation nationally.

Most land trusts adopt at least three categories of violations: minor, moderate and major. Some land trusts separate technical deficiencies (for example, paperwork lapses) from minor violations that cause actual negative resource damage and thus have four categories of violations: technical, minor, moderate and major. Other land trusts simply adopt two categories of violations: minor and major. Your land trust should determine which approach best serves your mission, will work for your land trust procedurally and is most acceptable to your landowners and your community. Your land trust's violation policy should describe what criteria demarcate each violation category.

Risk Analysis

Your land trust must evaluate its own risk, its capacity to deal with litigation, financial and human resources, the likelihood of the risk, the consequences if the risk occurs and its implications for the land trust. Attorneys too frequently see that land trusts gloss over the gloomy possibilities and do not pay sufficient attention to risk analysis.

Questions for your land trust and your attorney in assessing risk include:

- Generally how litigious is the area in which your land trust works?
- Have you seen a rapid increase in development or much higher than the national average increase in land values?
- Do you think your area is becoming more litigious?
- Do you engage in high-risk transactions?
- Do you routinely amend your conservation easements?
- Does your state allow unrelated third parties — private citizens — to sue to enforce any conservation easement?
- Does your state apply the charitable trust doctrine to conservation easements? (This topic is discussed in more detail in chapter 2.)
- Do other public entities (a public agency funder or co-holder, for example, or a reviewing public agency) have accurate copies of your documents that are safe, secure and easily accessible?
- Are your conservation easements complex?
- Do you use subjective or vague measures for issuing approvals?
- Does your state have a transferable tax credit or other similar program?
- Do you require affirmative actions by the landowner regarding land management practices?

Risk analysis does not mean planning for the worst-case scenario. Risk analysis does mean thinking carefully about the possibilities and determining what risks the land trust is willing to assume even if the worst consequences do occur and then planning accordingly.

When structuring and defining the severity rankings, you may also want to consider public perception of reporting violations. Reporting a major violation is a significant event; therefore, you should be certain that the resource damage truly is major in scope, scale, severity and duration before ranking the violation as major. Because some violations are worse than minor but not major in terms of their severity, many land trusts adopt an intermediate category of violations. Without a third category, accurate classification of a violation can be difficult and misleading to an outside person.

Easement violations that are classified as moderate and major should be limited to those serious violations that go to the heart of the property's conservation attributes and the easement's purposes. If you define these types of violations differently, you may be in a weak position to insist that a landowner correct the violation.

Land trusts that adopt a fourth category (technical lapses), generally only label (and track) as violations those incidents that result in resource damage. Land trusts should be careful about appearing overly bureaucratic in labeling paperwork lapses as violations when no resource damage occurs on the property because of the incident.

Moderate and major violations go to the heart of the property's conservation attributes and the easement's purposes.

The box on page 275 contains a brief description of how many land trusts define categories of easement violations (your land trust's definition may be different, depending upon your own unique circumstances):

Description of possible responses in proportion to violation severity. Everyone wants to be treated fairly. We accept bad news better if someone delivers it kindly and if the consequences are proportional to the action. Your land trust policy should address the array of possible responses to violations and generally assign acceptable responses based on the severity categories you develop. The list of acceptable responses should be considered only as a guideline, not a rigid and inflexible list, because, in analyzing an easement violation, you may find that with more information or landowner interaction either the category shifts or that a different response might be more effective. If your land trust has an inventory of the responses at hand and knows the consequences associated with each, you can respond more quickly and effectively to violations. See page 298 for a detailed discussion of the spectrum of possible responses that land trusts can use to address violations.

Land trusts should be careful about appearing overly bureaucratic in labeling paperwork lapses as violations when no resource damage occurs on the property because of the incident.

Effect of mitigating circumstances. Life is messy. It will serve your land trust well to never assume that landowners intend to violate their conservation easements. For example, a landowner may have simply forgotten that the conservation easement restricts the activity in question. Perhaps the landowner even thought he or she was following the easement in good faith but interpreted a clause incorrectly. Often, third parties cause the violation. Sometimes the land trust may have contributed to the violation through poor conservation easement drafting, poor communication, failure to adequately monitor the property, poor recordkeeping, inadequate follow-up to questions from landowners or other circumstances. Landowners should not pay for the land

Types of Violations

Technical Lapses or Deficiencies. Such deficiencies are technical in nature and do not adversely affect the conservation attributes of the conserved land or conflict with the conservation purposes of the easement. Technical lapses may include failure to give notice before transferring an interest in the conserved property (generally acknowledged as the most frequent form of easement violation) or failure to seek approval prior to exercising a reserved right (such as constructing a permitted structure) when the activity is conducted consistently with the easement. Other land trusts consider these types of actions minor violations.

Minor Violations. Land trusts typically define minor violations as actions that have a measurable, negative effect on the conservation attributes protected by the easement and/or violate the conservation purposes and/or certain terms of the easement. These violations may be remediated through restoration, an amendment or other solution. Examples of minor violations may include construction of a building in such a way that a small portion extends outside the building envelop, or third-party trespass with negligible or transitory damage (such as prohibited ATV use, trash dumping or sometimes timber trespass).

Moderate Violations. Moderate violations are actions that cause significant negative damage to the conservation attributes protected by the easement and violate one or more of the explicit conservation purposes and easement terms. Moderate violations can be transitory and severe, or permanent and less damaging to the resource, or affect a smaller area of the conserved land. As with minor violations, many moderate violations can be remediated, and often the solution includes a large component of landowner education. Examples of moderate violations may include construction of prohibited improvements, such as roads, ponds or utilities; the extension of utilities to structures allowed by the easement but for which no utility service is allowed, such as for hunting cabins or gazebos; timber harvests that were not conducted according to required best practices but do not rise to the level of a major violation; third-party construction of structures, such as wells and cabins; and boundary encroachments from clearing or other activity.

Major Violations. Major violations are actions that have a serious and often permanent negative impact on the conservation attributes protected by the easement; they also violate one or more of the express conservation purposes and terms of the easement. Major violations can negatively affect a large area of the protected property and can be difficult or impossible to mitigate or remediate. A major violation can also drastically affect a small area of the conserved land. Sometimes an action is defined as a major violation only because the landowner refuses to cooperate in halting and resolving a lesser violation. Examples of major violations include construction of houses not permitted by the easement; construction of commercial or industrial structures; subdivision of the land when subdivision is not permitted by the easement; surface mining; forest harvests in violation of the management plan that affect a large area or a clear cut on a smaller area; clearing vegetation from large portions of riparian buffers or other sensitive, designated ecological or scenic areas; or activities that lead to a significant or continued degradation of protected resources.

Your land trust may want to assign different rankings to these examples depending upon your mission, philosophy, values and the explicit restrictions stated in your conservation easements. Be sure to obtain the advice of legal counsel to ensure that the ranking you assign is supported by and consistent with the explicit language of the conservation easement.

trust's mistakes. Identifying appropriate mitigating circumstances is an important part of your land trust's violation resolution policy. In developing or refining your land trust's policy, you should also discuss how much weight to give to mitigating circumstances or how this will be determined.

Additional requirements. The violation policy should include additional requirements, such as compliance with the organization's conflict of interest policy, funder requirements and mission, as described by the land trust's philosophy statement on easement violation resolution. Other items the land trust may wish to address in its policy (or in the procedures) include:

- Whether the land trust will require landowners to reimburse the organization for the costs of enforcement or defense
- Precedents (is each violation handled on a case-by-case basis or do they create precedents?)
- The role of the board and chain of decision-making
- A system to learn from violations and collect data
- Violation prevention strategies, tools and techniques
- Who, how, whether and when to address media, neighbor or other public inquiries about violations and violation response
- When the land trust's attorney should be contacted and the attorney's role in violation resolution

Whatever form your policy takes, the land trust must ensure that all resolutions are legally permissible and consistent with the conservation purposes and documented original grantor intent. Your policy should also contain a prohibition against allowing private inurement and impermissible private benefit to arise from a violation resolution.

Violation policies should contain a prohibition against allowing private inurement and impermissible private benefit to arise from a violation resolution.

Resolving Violations

Procedures for enforcement of easements vary among land trusts, and examples can be found in the Sample Documents section on page 348. Land trusts typically follow seven steps when addressing a potential violation. The order of the steps may vary slightly depending on the circumstances, but most land trusts:

1. Identify a potential violation
2. Document the potential violation
3. Review the documentation

4. Determine if it is a violation, and if yes, its severity
5. Identify potential mitigating factors and choose the appropriate enforcement response
6. Work with the landowner to address the violation
7. Record the final resolution and lessons learned

You can write violation resolution procedures as shown below in a narrative format, or you can depict them visually in a flowchart. For example, the Vermont Land Trust chooses to depict its enforcement procedures in a flowchart with "yes" or "no" decision points to direct the course of action (see page 364). For other land trusts, the visual method may not provide enough explanation of the steps. When developing your violation resolution procedures, each land trust should evaluate how much detail and explanation is appropriate given the organization's unique situation.

1. Identify a potential violation

Land trusts discover most easement violations through a regular and frequent program of easement monitoring. When conducting an annual monitoring visit, be sure to inspect the intensely used areas of the conserved land every year. Your land trust's monitoring protocols must ensure that the monitor visits every portion of each parcel of conserved land on a regular cycle, so you can observe whether there are any boundary issues, remote trash dumps and cabins, timber violations or other issues that might be a violation which are located outside of the intensely used areas. Highly sensitive ecological areas may need to be visited every year regardless of how difficult they are to reach. It is also a good idea to visit landowners who have a history of misunderstandings or violations more often than the standard annual monitoring visit. For more information about monitoring conservation easements, see the Land Trust Alliance course "Conservation Easement Stewardship."

Sometimes easement violations are uncovered in other ways, some of which are discussed here. Violations may be reported by third parties (such as neighbors or land trust members) who observe an activity on the easement land. It is important to educate all your volunteers and staff to be alert for potential violations when they are not "on duty." All reports of violations should be checked immediately by either calling the landowner to inquire about recent activities (while taking care to not accuse anyone of violating the conservation easement) or by visiting the property within the week, depending on the nature of the report.

To learn of potential violations such as prohibited subdivisions of land or separate conveyance of parcels, or to track changes in land ownership, you should check land records regularly (many of which are electronically accessible from office or home computers). If checking the land records is not feasible for your land trust, try to find a reporting database. For example, some states have real estate transfer taxes and require regular electronic reporting of transfers of land subject to the transfer tax. If your land trust operates in such an area, it can periodically peruse the database for information about easement landowners' land transactions.

Another way to detect violations is to develop relationships with other professionals, such as real estate agents, attorneys and zoning and building officials, so that they will call you if they have questions about conserved land. Some land trusts who have taken the time to develop these relationships report that their local building department will not issue a building permit until it first contacts the land trust to report the permit application. Land trust personnel, whether staff or volunteer, should read local trade journals and newspapers for notices of sales, foreclosures and auctions that may alert them to easement violations or the presence of a new owner of conserved land.

Robert Keller, executive director of the Mountain Conservation Trust of Georgia, says that what coaxed him into the land trust business was the thousand cups of coffee he had with landowners. He stresses that the ability to listen goes beyond stewardship or enforcement. His land trust wants to be seen as outstanding in that regard — accessible and open.

The key to discovering easement violations is to be continually vigilant and use multiple sources of information.

By understanding the resources your land trust is protecting and the lives of the landowners you work with, you can analyze how best to allocate your land trust's resources to identify problems early and before they become major concerns. The key to discovering easement violations is to be continually vigilant and use multiple sources of information, rather than simply relying upon your land trust's annual monitoring visit.

2. Document the potential violation

When you discover a potential violation, you should document it immediately as appropriate to the circumstances. You may need to schedule another site visit to further document and better understand the situation, as well as the landowner's intentions. You should docu-

ment everything necessary to accurately describe the possible violation. Depending upon the circumstances, such documentation may include photographs, measurements and mapping of the particular location in question, and field notes, as well as other information relevant to the potential violation. If the violation you identified is a mere paperwork lapse, then documentation may be minimal and field work will be much less extensive or may not be necessary at all.

Be sure to talk with the landowner to discuss what you found. It is easy to ask about the physical facts without stating that what you identified might be a possible violation. It is important to choose your words carefully when asking the landowner about an activity or use you identified as a potential easement violation. Therefore, you should use language that invites the landowner to talk to you about his or her actions, rather than using words that might be interpreted as accusatory or critical. For example, you might call the landowner and (after making small talk) casually mention that you noted some trees had been cut down. Then wait for the landowner to reply, basing your next response on what he or she says.

If a land trust delays investigation, documentation and communication about a potential easement violation, it can complicate resolution of the violation.

At this point, it is too early for the land trust to send a formal letter to the landowner or even for verbal communication of a possible problem. Before taking either of these steps, the land trust should evaluate the situation internally and with legal counsel.

Once these essential first steps are complete, your land trust should immediately alert the designated land trust personnel, whether staff or volunteer, of the potential violation in accordance with the land trust's policy or procedure. This individual should coordinate the completion of the remaining steps. Time delays at this point can be harmful and can further complicate resolution of the violation.

3. Review the documentation

Immediately after receiving information about a potential violation, it is critical that you analyze the information and secure legal advice about the potential violation. Other expert advice may also be necessary to determine if, in fact, a violation of the conservation easement has occurred. Review the conservation easement yourself and with your land trust's attorney. Does the easement clearly prohibit the activity? Sometimes we think an activity is or should be prohibited by the easement, but it is not. Or, a land trust may not realize a restriction is ambiguously worded until it reviews the clause with an attorney who

Recordkeeping is essential to effective and fair conservation easement enforcement.

can dispassionately analyze the issue. Review the baseline documentation report and map. Do you see any contradictory information or land trust errors, or is the use or activity you discovered clearly a violation? Check the annual monitoring reports for indications of this violation in prior years. Check your database for the history of this property and landowner. Check your approval and amendment records. Was the activity approved by your land trust years ago, or was an amendment created to allow it? Nothing is more embarrassing than informing a landowner of a violation and discovering later that your land trust previously approved the activity.

4. Determine if it is a violation, and if a violation, its severity

Recordkeeping is essential to effective and fair conservation easement enforcement. If all your records show that the activity or use you identified is a violation, then you need to determine the violation's effect on the property's conservation resources. What harm did the activity do to the resource? How easily can it be fixed? What is involved in fixing it? Now is the time to analyze scope, scale, severity and duration of the violation and apply your violation categories (for example, technical, minor, moderate or major).

Once you have determined that a violation has occurred, an attorney should be consulted early in the process. The attorney can help assess the severity of the violation and the land trust's course of action. He or she should thoroughly brief staff or volunteers on proper procedures, conduct, correspondence and other communication to protect the land trust's legal interests. Your attorney can also give you helpful tips on the best approach to resolve the violation without litigation and how to preserve the land trust's rights in case you do wind up in court.

Evaluating the severity of the violation

Determining whether a violation is technical, minor, moderate or major involves an intensive land trust conversation to arrive at an agreed-upon set of criteria for measuring conservation easement violation severity. Usually it helps to have an array of examples to dissect so that you can examine the attributes of each category. Once you assign attributes to each category, then applying the attributes together with any mitigating circumstances to each situation becomes much easier.

When to Consult Outside Legal Counsel

Consulting legal counsel early in the violation evaluation process is essential when facing a potentially significant violation. Some questions to ask an attorney include:

- Do we really understand the conservation easement provisions involved in this possible violation? Have we interpreted the entire conservation easement document correctly as it relates to this possible violation?
- What are the weaknesses of our position?
- What alternatives do we have in approaching resolution with the landowner?
- What would a court think of each alternative and of our interpretation?
- Is our response measured, proportionate and appropriate?
- How likely is the possible violation to erupt into judicial action?
- Is this a violation of an express restriction in the conservation easement or does it require piecing together various restrictions to make a case?
- Are we effectively documenting our attempts to achieve compliance?
- Do we know all the facts of the violation?

One way to ensure effective and economical use of legal time would be for your land trust to answer these questions internally first, then test your answers with legal counsel. You could prepare a short comprehensive memo when you meet with the attorney to review the issues and determine next steps.

5. Identify potential mitigating factors and choose an appropriate enforcement response

At this point, many land trusts require that staff or volunteers inform the organization's board chair immediately and legal counsel (if not already informed) about the nature of the violation and the evidence supporting the determination. Doing so may slow the process of resolving the violation, so you should take steps to ensure the fastest possible review commensurate with the severity of the violation. Naturally, major violations will need more time to resolve.

Other land trusts (usually only the very large, well-staffed land trusts with in-house legal counsel) handle all violations at the staff level and inform the board only of major violations and the steps staff is taking to pursue resolution. How your land trust arranges these responsibili-

Violations involving board members, volunteers, staff, major donors or other insiders

If your land trust discovers a violation on a property owned or managed by an insider (as defined by law and in your organization's conflict of interest policy), your land trust should take extra care to follow the procedures outlined in your organization's violation resolution policy and document your actions. The affected individual should not be present during any violation resolution discussions, nor receive any materials distributed to the board or committees regarding the violation. No land trust personnel, whether staff or volunteer, should discuss the violation with the insider, except as specifically authorized and directed by the board and preferably in the presence of the land trust's legal counsel or other third-party, neutral observer. In addition, for all violations involving the property of a board member, the land trust should consider asking him or her to take a leave of absence from the board until the violation is resolved. If the violation involves a land trust staff member or volunteer, it may be advisable to temporarily modify that person's tasks and responsibilities, location of work and even apply other appropriate options, such as paid leave, until the violation is resolved. Extra precautions need to be taken for violations committed by or affecting insiders to the organization to ensure that there is no favoritism or self-dealing (or the perception of the same). Take care, however, not to unduly escalate an adversarial stance in such a case. When resolving such a violation, the land trust must ensure that the resolution itself does not result in any private inurement.

Extra precautions need to be taken for violations committed by or affecting insiders to the organization to ensure that there is no favoritism or self-dealing (or the perception of the same).

A land trust must ensure that the resolution to the violation does not result in any private inurement.

ties will be determined by the size of your land trust, your land trust personnel's experience, the capacity of your organization to handle the violations, your land trust's total number of violations and conservation easements, and your land trust's written policies regarding violation resolution, amendments and stewardship philosophy. At a minimum, the land trust board should receive a regular report on all easement violations and how they were resolved, so that the board can fulfill its legal and fiduciary responsibilities to the organization.

No matter what your response procedure includes, remember: A timely response to any easement violation is critical to resolving the violation. Having a few appropriate responses available to discuss with the landowner allows the land trust to work more flexibly with the landowner to uphold the conservation easement.

Identify any mitigating factors

Most land trusts consider certain mitigating circumstances when

determining their response to a violation. While some land trusts consider mitigating factors when determining the severity ranking, most land trusts use only a resource analysis for this determination and then consider mitigating factors in determining the most appropriate response to the violation.

You should consider the same mitigating factors for every violation, treating all landowners equitably.

Mitigating factors can help guide your land trust's response to the violation or influence your severity ranking. Whatever mitigating factors your land trust decides to consider, document them in writing so that you consider the same factors in every case, treating all landowners equally and fairly.

"Positive" Mitigating Factors

- The landowner demonstrates a legitimate misunderstanding of the easement.
- The land trust did not follow its own procedures, such as failing to give a landowner a timely response to his or her inquiry about a proposed activity. Or the land trust's actions contributed to the violation (for example, poor communications with landowner).
- A third party committed the violation without the landowner's consent or knowledge.
- The landowner willingly and promptly stopped the prohibited activity and resolved the violation.
- The landowner's intent was consistent with the conservation purposes of the easement.
- The violation was an innocent mistake by the landowner.
- The easement was poorly drafted or confusing.
- The landowner has special circumstances that cause the land trust to feel compassion.
- The original easement grantor expressed a particular special intent (recorded in a written document in the land trust's possession) regarding the particular resource in question.
- Funders or partners of the land trust have strong opinions about the violation.
- The violation and the land trust response will have a persuasive effect on public confidence in conservation.

"Negative" Mitigating Factors

- You can *demonstrate* (not just suspect) that it was an intentional violation.
- The landowner has a *documented* history of violating his or her conservation easement.
- The landowner violated local, state or federal laws.
- The landowner is uncooperative.

Third-party violator: A person or entity that is not the owner of the easement-protected property who enters the land without the knowledge or permission of the landowner and violates the conservation easement.

The Uniform Conservation Easement Act does not explicitly give standing to land trusts to sue a third party for an easement violation on an easement property, but it does not prohibit it either.

Third-Party Violations

Land trusts may find that many of the conservation easement violations (possibly as much as 40 percent, the average rate of third-party violations experienced by the Vermont Land Trust) they must address are caused by third parties. Addressing third-party violations requires even more persistence, diplomacy and education than dealing with landowner violations.

Most experienced land trust professionals recommend that conservation easements be written to obligate landowners to prevent trespass or other actions that may lead to violations on the protected land. They do so because only the actual owner of the land has the ability to control access to it and, in most states, the landowner has the best legal ability to sue a trespasser or file a criminal complaint against someone who caused an easement violation. Although the rationale underlying this recommendation is sound, in practice, land trusts find it difficult to enforce an easement violation against a landowner who did not personally cause the violation. Generally, such violations will require land trusts to work closely with the landowner to locate the trespasser and pursue a resolution or jointly correct the damage to the property.

If the land trust and landowner can identify the person who caused the violation, the first step is to hold a meeting with all parties to discuss corrective measures. If the third-party violator cannot be found, or can be found but is unwilling to cooperate, and if the violation also represents criminal trespass or otherwise is a violation of the law, it may be desirable to involve law enforcement officials to discuss resolution options. Even if the language of the easement places the legal responsibility for the violation on the landowner, it is important to try every possible method to hold the third-party violator responsible for remediation of the violation.

The Uniform Conservation Easement Act does not explicitly give standing to land trusts to sue a third party for an easement violation on an easement property, but it does not prohibit it either. A land trust may have standing to sue, depending on state laws. If your state enabling act

6. Meet with the landowner

Once the land trust has concluded that there is a violation of the easement and considered mitigating factors, the land trust should arrange a meeting with the landowner. A cooperative, face-to-face meeting to view the land, review the relevant easement restrictions and discuss resolution of the problem is usually effective.

Before making that phone call, your land trust needs to identify: (1) who has the authority to determine the appropriate course of action with respect to all violations, and (2) who implements the viola-

treats conservation easements as a property interest, then under your state's real estate laws and case law you may have standing. A land trust may prevail by arguing that it holds a property right against which the violator trespassed, and so the land trust is a directly aggrieved person and has standing to sue. If your land trust is considering pursuing a case against a third party for violating the conservation easement without including the landowner in the case, you may have to convince the court that this action is appropriate. If your state does not create a real property right in a conservation easement, then your land trust may have to argue that legislative intent of the enabling legislation allows your land trust to proceed against a third party without the landowner to overcome objections based on the failure to include an indispensable person (the landowner) and the land trust's possible lack of standing to sue the third person.

A land trust would only consider pursuing judicial remedies against a third party when the landowner is without fault in causing the violation *and* the landowner wants to avoid being a party to the suit. If the owner is a violator or contributes in any way to the easement violation, then the land trust can sue the landowner, if other violation resolution techniques are not successful.

If a third-party violation winds up in court, the judge may look to the conservation easement to determine the intent of the parties and whether the original landowner intended the land trust to have the ability to enforce third-party violations. Land trusts may want to consider drafting easements to include explicit rights of entry to enforce easement restrictions against third parties without joining the owner. Land trusts may also want to consult with their attorney to determine the law in their state regarding the standing of a land trust to enforce its property rights conferred by the conservation easement if that state considers a conservation easement a property right. The nature of your state's laws will affect what you need to include in the conservation easement regarding enforcement of trespass. Your state's conservation enabling act, if silent on this point, does not necessarily mean that standing is precluded.

Indispensable party: A person or entity that is essential to be included in a lawsuit so that all the issues may be fully resolved and an adequate judgment rendered.

Always involve legal counsel in discussions related to moderate and major violations, regardless of your experience with violations.

tion resolution with the landowner. The land trust staff or volunteer entrusted with approaching the landowner needs to know the degree of flexibility he or she has in negotiating with the landowner about implementing the proposed resolution. Until the land trust has sufficient experience to determine and implement a response, legal counsel should be involved in this discussion for all minor violations or technical lapses. Always involve legal counsel in discussions concerning major violations, regardless of the land trust's experience with violations. Depending on the severity of moderate violations, the land trust may want to more deeply involve legal counsel. That involvement need

The person designated to talk with the landowner and propose a resolution should be a skilled negotiator who has the authority to adjust the proposal appropriately to fit the circumstances.

not include direct landowner contact. Avoid disproportionately severe and accusatory conversations. Coach your attorney to maintain a tone of helpfulness, rather than one of an adversary, when dealing with landowners at this stage of violation resolution.

The person designated to talk with the landowner and propose a resolution should be a skilled negotiator who has the authority to adjust the proposal appropriately to fit the circumstances. Your land trust will need to decide if the person responsible for annual monitoring visits and landowner relationships is the appropriate person to respond to a violation. That person may know the landowner best, but the resolution of the violation may not be congenial. It may be better to shield the person conducting the annual monitoring visits from any unpleasantness in resolving the violation. Your landowner communication will need to be increasingly skillful as the violation severity increases. Be sure to communicate clearly and often with the landowner as you work through the process. Landowner anxiety may lead to precipitous preemptive litigation that some extra care and attention on your part can prevent.

Voluntary resolution by the landowner

A voluntary, negotiated resolution to a violation is the most common and highly preferred solution. Most easement violations are caused unintentionally by landowners, abutters or other parties who were unaware of the easement, did not understand it or did not take it seriously. Landowners are often willing to voluntarily correct the situation.

If you can involve the landowner in crafting the resolution to the violation, you will have much more success in implementing the solution. At minimum, it is best to have some alternatives to offer the landowner. To the extent possible, be appropriately flexible with any proposed violation resolution while, at the same time, upholding your land trust's obligation to enforce its easements. For moderate and major violations, regardless of the degree of mitigating circumstances, your land trust may want to choose landowner education and relationship building by using creative problem solving or even paying the costs of remediation. These types of violations usually require one or more site visits to assess the situation, develop a solution and then ensure that the agreed upon follow-up occurs. The solution to a violation can involve a discretionary approval, amendment or other adjustment to the conservation easement and/or remediation by the landowner. Moderate to major violations also often involve other forms of reme-

diation, including restoration, where feasible, or payment of damages as appropriate to the level of mitigating circumstances. No matter what resolution you choose, try to make it as swift and easy as possible for the landowner. Doing so will keep you out of court and will preserve landowner goodwill while still fulfilling your obligations to uphold the conservation easement. Remember: violation resolution is not about assigning blame; it is about upholding the conservation easement and preserving trust.

Violation resolution is not about assigning blame; it is about upholding the conservation easement and preserving trust.

If you are on track to resolve the violation voluntarily with the landowner, then the next step is formal communication with the landowner.

> A few land trusts have adopted the policy of referring every violation immediately to an attorney so that their staff or volunteers visit the landowner and conserved land only to determine if any possible violation exists. If any activity raises a question about a potential violation, the matter is immediately referred to counsel who handles it from there. This approach places less emphasis on landowner relationships and more on legal processes than most land trusts prefer. How your land trust handles the balance on these issues is an important matter for your board to discuss and address in your violation resolution policy.

Formally communicate a proposed resolution and some options to the landowner

Most land trusts will call or visit the landowner before sending a certified letter even when the easement requires written notification by certified or other secure mail. If you send a certified letter before personally communicating your land trust's position to the landowner, the landowner may become defensive and uncooperative. Or, the landowner may immediately hire his or her own legal counsel, transforming the matter into an adversarial situation. By meeting with the landowner and discussing the land trust's recommendation (and any appropriate alternatives) for resolving the matter, you may avoid descending into an adversarial relationship. However, if the landowner refuses to meet or talk with you, then a letter is the appropriate course of action. This procedural point is very important and should be discussed with your legal counsel, board and staff or volunteers and stated explicitly in your enforcement procedures.

In any conversation with the landowner, you should:

Knowing When You Have to Go to the Mat: Identifying When to Seek Judicial Remedy

The following criteria will help you determine whether the violation is significant enough to warrant going to court. It is not intended to be a definitive guide to taking legal action; however, you may need to file a lawsuit if the landowner is uncooperative and:

- It is an emergency. The bulldozers are rolling and the landowner will not stop the work or cannot be reached. You need a restraining order or an injunction.
- The damage does significant harm to the stated conservation purposes of the easement and the conservation easement expressly prohibits the use or activity.
- The integrity of the *land trust* is at stake, the violation significantly harms the stated conservation purposes of the easement, and the conservation easement expressly prohibits the use or activity.
- The integrity of the *conservation easement* is at stake, the damage does significant harm to the stated conservation purposes of the easement, and the conservation easement expressly prohibits the use or activity.
- Legal analysis concludes that your land trust is likely to prevail; that the judge sitting in the court in which the lawsuit will be heard is at least not disinclined to conservation; your land trust has sufficient, or can readily obtain sufficient, funds to carry the matter through appeals; and your land trust records are sufficient to prove your case.
- Your land trust is ready, willing and able to manage the media reaction and public and donor reaction.
- Your land trust's donors and board willingly support the litigation, both through the initial proceedings and through all possible appeals.
- The statute of limitations is about to expire.

Always consult with your land trust's legal counsel before threatening judicial action with a landowner.

Never threaten any action that your land trust board has not authorized.

If the landowner calls your bluff and your organization does not have board and legal support to carry out its threats, you will weaken your land trust's negotiating position with the landowner.

- Acknowledge the landowner's goodwill and care for the land
- State that you value the relationship and want to work on this problem together
- Ask for his or her help
- Describe the land trust's concerns
- Explain where the conservation easement addresses the activity
- List the possible next steps and results the land trust would like to see
- Ask for his or her thoughts

You should also alert the landowner to expect a follow-up letter that summarizes your conversation and any resolution you both agreed upon. For technical lapses or minor violations, usually one conversation and one follow-up letter — often an approval letter — is sufficient. All final resolutions of violations should be documented in writing and archived, with a copy kept in the working files for reference during your land trust's next annual monitoring visit. Documentation of a violation, even a file memo, is essential so that future stewards know what has occurred, how the problem was resolved and what waivers or approvals the land trust gave (if any).

If the personal approach does not work, you may wish to send the landowner a friendly, informal letter describing the land trust's concerns and its documentation of the violation. In the letter, ask the landowner to work with the land trust to solve your mutual problem. The tone of this letter should not be critical or judgmental. Remember: punishment is not your goal. Your goal is to uphold the conservation easement, resolve the violation, educate the landowner and maintain landowner goodwill to the greatest extent possible. Once you have established formal communication with the landowner about the violation, use your negotiating and listening skills to bring the matter to a satisfactory resolution. Every violation, landowner and parcel of land is different, so every resolution will be different.

Example

Talk Before You Write

One West Coast land trust learned a hard lesson about sending a certified letter accusing the landowner of a violation before talking with that landowner first. The land trust discovered a conservation easement violation caused by a contractor hired by the landowner and followed the process outlined in the conservation easement for notice to the landowner by certified letter, rather than having a personal phone conversation or meeting

first. This letter caused the landowner to hand the entire matter to his attorney, who then proceeded to turn a minor to moderate violation into a first-class nightmare. Because the landowner had business relationships with every significant law firm in the state, the landowner proceeded to disqualify every lawyer that the land trust wanted to represent it by refusing to waive the conflict of interest. The land trust had to conduct all the discussions on paper with the landowner's attorney, who responded from a position of legal obstruction rather than one of problem-solving. This tactic increased the time and money spent by the land trust and decreased progress toward resolution. Months went by without any movement on the matter and left the land trust wondering if it would have to go to another state to find legal counsel. Fortunately, the landowner, upon seeing the damage caused by his contractor, finally corrected the situation on his own. When the land trust next visited the land, the correction, undertaken without notice or consultation with the land trust, was acceptable enough in the circumstances to conclude the matter. The land trust no longer sends certified letters first but always tries a personal approach to violation resolution.

You may find a few landowners who are aggressive, unfriendly, uncooperative and adversarial from the beginning; do what you can to cool their rancor. Listen carefully to what the landowner says, and do not accuse him or her of wrongdoing. At the same time, gently but persistently talk about the need to address the issue. A few landowners may not be willing to talk with you. If that is the case, send the landowner a letter asking that the landowner designate a representative to discuss the matter with you. In some rare situations, landowners will refuse to talk through their violations with land trusts; these landowners are most likely those who intentionally violated their conservation easements. It is best to be persistent and patient even with the most difficult landowners. Carefully document all of your attempts to seek resolution. If voluntary resolution does not work, you can consider litigation, if the severity of the violation and the clarity of the conservation easement permit it. If the situation does not rise to that level, you will need to find another means to reach the landowner. Some alternative approaches are listed on page 292. Sometimes, however, a landowner leaves the land trust with no choice but to seek a judicial remedy.

To ensure that you have time to work with a landowner to voluntarily resolve an easement violation, you must be aware of when the statute of limitation runs on this type of issue. In some states, the statute of limitations may only be one year. In these states, a land trust only has one

year from the date they discover (or should have discovered) a violation until the time expires on the land trust's right to sue to enforce the violation. In all states, ensuring that your land trust does not allow the statute of limitation to run on an easement violation before the violation is resolved is critically important to its professional operation and reputation. Your attorney can help you determine whether the nature of the violation is such that you need to take immediate judicial action to stop further resource damage, or if you have time to negotiate a voluntary solution.

Knowing the statute of limitations is also important in cases when the landowner is not cooperative. In such situations, your procedures should address what steps to take next, such as advising your board chair or executive director and consulting legal counsel about the landowner's refusal to remedy the violation. Determining what next steps are necessary and acting promptly is critical to preserving your land trust's right to sue.

Example

Violation Resolution Conversation: Marin Agricultural Land Trust

The Marin Agricultural Land Trust successfully pursued a violation resolution conversation with a landowner who persistently violated his conservation easement. This landowner regularly boasted that he made trouble for the land trust. On one annual monitoring visit the land trust found four significant easement violations. Despite the apparent violations and animosity, the land trust staff person was cordial to the landowner during the visit. Stewardship staff documented the violations, consulted a lawyer and then sent the landowner a friendly but firm letter requesting a meeting with the landowner to discuss their findings. At the meeting, staff presented the landowner with pictures and maps demonstrating their concerns. Despite the subject matter, the meeting went well. The landowner corrected the violations promptly and stopped disparaging the land trust in public. The relationship between MALT and the landowner turned from a divisive, adversarial one into one that is polite.

If, despite your best efforts, a landowner will not cooperate with you, then a formal notice of violation as specified in the relevant conservation easement provision, and a request to halt the activity and return the site to its prior condition is your next response. Your land trust could consider litigation or enforcement by a government agency if the landowner will not cooperate and other alternatives have not worked.

Temporary, emergency court orders may be necessary in some circumstances to prevent irreparable harm to the land's conservation resources if the landowner will not halt the activity after verbal or written requests. If the violation is severe or significant enough, court action or litigation could be the first response to the discovery of a violation, or if there is major, irreparable damage occurring to a resource that is central to the conservation purpose of the easement. For example, a landowner has heavy equipment on the land and is digging what appears to be a foundation for a permanent structure in a spot that is not approved for such a structure in the conservation easement. You discover the activity as the backhoe reaches three feet below ground level. You immediately call the landowner and ask him to stop while you discuss his plans and the conservation easement. He refuses to meet you at the site and hangs up. You have no choice at this point. The landowner is uncooperative; the damage is potentially severe and ongoing. You call your attorney to be certain that this is a violation, and you document the violation. If your attorney determines that an injunction or a temporary restraining order is appropriate and obtainable, then the attorney acts immediately to file the necessary court action that will make the landowner stop so you have time to address the situation. This tactic also prevents the landowner from continuing to invest time and money in an activity that he is likely to have to unravel. You want to prevent this waste because sometimes courts will find that requiring the landowner to undo an investment is not equitable and will find against the land trust for not stopping the activity sooner.

Mediation: The act of an impartial third person negotiating between two or more contenders with a view to persuade them to settle their dispute or to discover by an interactive process of conversation and negotiation a mutually acceptable solution to their dispute. This procedure is different than the formal and binding process of arbitration.

If your formal notice of violation and request to halt the violation and restore the land is ignored, your land trust must then follow its violation procedures and pursue its other options to resolve the violation. These options may include:

- Sending a second certified letter demanding a halt to the violation and the immediate restoration of the affected conservation attributes
- Seeking formal mediation of the issue with the landowner
- Searching for a person sympathetic to the land trust and who knows the landowner well to intervene with the landowner to prevent litigation
- Seeking a court order or initiating litigation against the landowner
- Notifying the government agency responsible for enforcement if the landowner also violated the law

Your land trust should never seek a court action or initiate litigation without formal board approval. The only exception to this rule may be for circumstances that require an injunction to halt an activity that may create extreme or irreparable damage to a protected conservation resource. Your land trust should have a specific procedure that allows one authorized person, upon advice from legal counsel and with approval of the board chair or executive committee, to seek an injunction.

Never seek a court action or initiate litigation without formal board approval.

Before you file litigation, you need to be sure of your case

If the conservation easement is poorly drafted, if your land trust's records are deficient or if your land trust made serious mistakes that contributed to the violation, then you may not have a sufficient case even if the resource damage caused by the violation is serious. In this event, you will have to find other alternatives, such as mediation, to resolve the violation. If the landowner resists mediation and your land

The Land Trust Alliance's 2007 *Conservation Capacity and Enforcement Capability* research report estimates a land trust can expect one *litigated* easement violation over a 10-year period for every 300 easements it holds, and one easement *enforcement action* (not necessarily litigated) costing more than $2,500 to resolve over a 10-year period for every 100 easements it holds.

The research report did not address the estimated rate of occurrence of technical and minor violations, but earlier census data shows a national average of 5 percent of all easements experience such violations annually. The anecdotal experience of larger and older land trusts suggests you should expect at least four minor and three technical violations *annually* for every 100 conservation easements your land trust holds.

Therefore, if your land trust holds 20 conservation easements, you should expect at least one violation of some degree *every* year. Over a 10-year period, this ratio represents a total of 50 violations for every 100 conservation easements held by your land trust. Variables that are likely to *increase* your easement violation rate include:

- Successor landowners — the more time and generations in ownership past the original grantor, the greater the chance a violation will occur
- The quality of your conservation easements — poor drafting, as well as older easements and complex easements
- The quality of your easement stewardship program — poor recordkeeping, poor or nonexistent baseline documentation reports, failure to complete annual monitoring visits or poor landowner relations

trust determines this course to be the best option for resolution, you may need to file a complaint to compel the landowner to mediate.

Having a legal defense fund (or combined easement stewardship and legal defense fund) to support enforcement actions and pay legal counsel is essential. Experienced land trusts estimate that litigation costs run from $25,000 to more than $250,000 per case and potentially higher, depending on jurisdiction, appeals and complexity. See the discussion of legal defense funds on page 313 for more information.

Payment of costs

Your land trust's violation policy and procedures should address whether landowners will pay the costs associated with resolving violations, including attorney fees, staff time and associated out-of-pocket expenses. Violations can be time consuming and extremely expensive, putting a severe strain on a land trust's resources. Some land trusts waive these costs for all voluntarily resolved violations to support continued good landowner relationships. Others insist that landowners pay at least the land trust's out-of-pocket expenses, while others require landowners to pay all the costs of resolving a violation in hopes of deterring future violations, or because they need to recoup the costs to replenish their legal defense fund.

All conservation easements should include a clause requiring the landowner to pay the land trust's litigation costs if the land trust prevails.

All conservation easements should include a clause requiring the landowner to pay the land trust litigation costs if the land trust prevails in a suit (commonly called an "attorneys' fees" clause; see *The Conservation Easement Handbook* for samples). Land trusts should not agree to pay the opposing party's attorneys' fees because doing so may be a disincentive to appropriate enforcement. Depending upon the facts of the case and other factors, litigation, mediation or arbitration can result in an order for restoration of the land, payment of monetary damages or both. Land trusts often seek monetary damages when the conservation resources harmed by an easement violation cannot be restored or if the restoration will take a long time (such as planting trees to replace an old-growth forest that was impermissibly harvested). Therefore, if your land trust decides to litigate, mediate or arbitrate a violation, it may be appropriate to ask for damages in addition to resolution of the violation. Most experienced land trusts, however, do not rely on these payments as a means to fund future litigation or replenish the easement defense fund. Monetary damages are often used to conserve lands with similar conservation values as the land harmed by an easement violation that cannot be remediated quickly.

Arbitration: The reference of a dispute to an impartial third person chosen by the parties to a dispute who agree in advance to be bound by the arbitrator's decision issued after a formal hearing. Arbitration is different from the informal and nonbinding process of mediation.

7. Record the resolution and lessons learned

Record the events and learn from the result

Your land trust will want to learn from the violations it experiences. You may find you can avoid, or at least mitigate, the severity of violations in the future by adjusting your practices. In 2004 when the Land Trust Alliance surveyed 105 land trusts about changes they made after experiencing violations, 40 percent reported that they changed their easement drafting, monitoring or violations policies and some reported changes to all of those policies. The most common change was clarification of easement documents. Land trusts also reported increasing their efforts to notify new landowners of conservation easements, to maintain good relationship with all landowners and to conduct more frequent and thorough monitoring visits. Staff at one land trust reported that two litigated violations could have been prevented by better landowner relationships alone.

Collect what you learn from experiencing violations and from landowner feedback. Analyze and discuss this information internally to help improve project development, conservation easement drafting and stewardship procedures. This information will also help you identify trends and issues, and track the effectiveness of your organization's responses to easement violations.

Manage public relations

Addressing easement violations may require a land trust to deal with media inquiries and public relations issues associated with the violation, particularly if the violation winds up in court, or an aggressive or disgruntled landowner publicly verbalizes his or her poor opinion of the land trust's enforcement measures. Every land trust's violation policy and procedures should determine in advance who will speak to the press or public.

It is wise to always take the high road even in the case of an egregious violation. Using an understated tone, a sympathetic manner and presenting a forthright message will serve your land trust well. The media and the public may not focus on details and nuances, so any attempt to explain or defend your actions that turns on subtle details may be lost. In addition, attempts by the land trust to pursue a conservation easement violation in public can result in as much adverse publicity for the land trust as for the violator. People in the community may perceive your actions as an attack by a bureaucratic organization on a hapless individual, or as an attempt by the state to usurp property

ownership, failing to distinguish your organization from the government. At the same time, your land trust must be vigilant to ensure that any serious errors in media reports about the violation are corrected.

In addition to inquiries from the media, your land trust may also receive calls and letters from public officials and members of the general public when dealing with a serious violation that becomes public. In all of these cases, your land trust needs to decide when to respond, what to say, who says it, to whom and in what manner.

A final principle is respecting landowner privacy, especially with a landowner who may have made a mistake that caused a violation. You will be more successful if people trust you to treat everyone compassionately and fairly. Remember that your role is to deal effectively with the violation, not to punish or embarrass the landowner.

Notify co-holders and third-party enforcers

If your land trust co-holds a conservation easement with another entity, or another entity holds third-party enforcement rights in one of your easements, you must notify that entity promptly of all violations, in accordance with the entity's rights and responsibilities under the conservation easement. You should consult with that group regarding violation resolution if appropriate under the conservation easement or other written arrangement. The conservation easement (or a separate agreement between your land trust and this entity) should specify who has what rights regarding violation resolution. For example, in Maryland, many land trusts co-hold easements with the Maryland Environmental Trust, a government-funded and state-chartered land trust governed by an independent board of trustees. The arrangement has many advantages, including providing landowners with additional financial incentives for donating easements and providing land trusts with the backing of the Maryland attorney general in enforcement situations. MET also provides technical support and training to local land trusts. The co-holding agreements with local land trusts spell out in detail how MET and the organization work together on joint easements, detailing responsibilities for landowner outreach, easement drafting, processing and reviewing paperwork, monitoring and enforcement.

Third-party enforcer: A person or entity that is not named as a holder of a conservation easement but who nonetheless has the legal right to independently enforce a conservation easement. In some states, the attorney general may be a third-party enforcer.

Co-holding and Easement Violations: The Maryland Environmental Trust and the Eastern Shore Land Conservancy

Example

For many years the Maryland Environmental Trust and the Eastern Shore Land Conservancy (ESLC) have worked together to protect farmland and natural resources on the Delmarva Peninsula. The Eastern Shore Land Conservancy, founded in 1990, has a staff of 13 that works to sustain the region's rich landscapes through strategic land conservation and sound land use planning. Together, the two organizations co-hold more than 175 easements that protect about 40,000 acres of farmland, woodland and wetlands, as well as Chesapeake Bay and tributary shoreline.

The co-holding agreement specifically spells out each organization's roles and responsibilities regarding monitoring and enforcement. Such planning has proven invaluable during enforcement situations. In one such situation, a relatively minor violation was handled swiftly and efficiently by all parties before it could escalate into a major problem.

In March 2008, the local planning office alerted ESLC to a request from a homeowner for an occupancy permit for a new residence on conserved land. Unaware of the new construction on the easement property, the ESLC stewardship manager immediately phoned the easement donor to find out what happened. The land had been transferred to a family member in December 2007 who began construction of the house, which was one of two residential rights reserved under the easement.

Because the easement was co-held with the Maryland Environmental Trust, the ESLC stewardship manager contacted his stewardship counterpart at MET to fill him in on the background and to coordinate a response. They decided that the ESLC representative would proceed with contacting the landowner to arrange for an onsite inspection, keeping MET apprised of the situation.

The ESLC staff member visited the landowner, educating him on the easement restrictions and procedures for having a home site approved. At the same time, he assessed whether the home site was acceptable. His goal was to minimize the negative effects on the easement's protected conservation values, particularly fragmentation of the productive agricultural land and the scenic view from the adjacent roadway.

The ESLC stewardship manager then shared the results of the meeting and inspection with MET. The two land trusts determined the site was acceptable

with respect to the conservation values of the property. They then forwarded the landowner's letter of request for after-the-fact approval of the home site and the accompanying map of the property and requested/existing home site to their respective boards for approval at their next regularly scheduled meetings. Both land trust representatives also prepared accompanying memos that summarized the request and the acceptability of the site. After considering the effects on the conservation values, both boards granted after-the-fact approval, but they underscored the need to educate the new homeowner about contacting the land trusts before beginning construction.

The land trusts then wrote a joint letter to the landowner giving the approval and reminding the new landowner about the need for an approval. The new landowner explained that he assumed because the building permit was granted that all necessary approvals had been obtained. The situation also prompted ESLC to include a reminder in its biannual newsletter to easement landowners about obtaining approvals for exercising reserved rights and to maintain open communication with the land trust to avoid problems or misunderstandings.

The close coordination between the land trusts in response to violations—investigating circumstances, formulating responses and following up with landowners — ensured that the interests of both organizations were represented, that the landowner-land trust relationships were enhanced and that the conservation values were protected.

Violation Resolution Tools

Land trusts have many tools available to resolve violations. These tools represent a continuum of response, ranging from the most collaborative to the most adversarial. Most land trusts prefer the collaborative end of the continuum, if that will result in upholding the purposes of the conservation easement. Almost every land trust with a written violation resolution policy expressly states a preference for resolving violations without resort to unnecessary judicial remedies.

Education

Education may be your land trust's most effective tool in resolving a violation. A violation is an opportunity for a positive conversation with a landowner about the easement and land stewardship. Engage the landowner in creative problem-solving and inquire about his or her

goals and needs. You can often accommodate the landowner's wishes by using different approaches that are consistent with the conservation easement. For example, suppose landowners are worried about continuing to live on the land as they age. They want someone they can train to take over the land and its management, so they ask the land trust to allow them to put a secondhand trailer on the easement property for which there is no reserved right. Instead of considering an easement amendment to allow the trailer or granting a license for this use, you could discuss with them the possibility of constructing a minor addition to the main house that includes a small caretaker apartment. Walk the landowner through the conservation easement again. Explain in plain English, using examples, what each clause means, the common misunderstandings, implications for the landowner and so forth.

Your land trust will need to fully train the person who interacts with landowners regarding conservation easement interpretation. Consider involving legal counsel in training this person. He or she should also be a skilled negotiator and have a friendly, open disposition that inspires landowner trust and confidence.

Negotiation

Land trust personnel, whether staff or volunteer, must negotiate with landowners to resolve most violations. Like most people, landowners do not respond well to orders. A good way to open a negotiation is to first set the landowner at ease and assure him or her that you are sure you can find a solution that works for everyone. For example, a landowner subdivides his land in violation of the conservation easement. You read the easement and confirm that no reserved right exists to allow the subdivision. You arrange a meeting with the landowner. Open the conversation by saying that you want to be helpful and that you know the landowner has good reasons for selling part of his easement property. Ask the landowner to explain his reasons. Then signal your understanding of his reasons by making comments such as "The economy is really tough now, and I can see how some extra cash to make ends meet is critical to you." Then explain the conservation easement's restrictions. At this point, you then need to explore what options are available to address the violation.

Understanding the landowner and his or her goals for the land is the first step toward successful negotiation. If you start with a friendly, mutual, problem-solving approach, rather than assuming a policeman-

like posture, you will be more successful. Landowners are less likely to dig into a contrary position if you are conciliatory and much less likely to initiate litigation if you present the land trust as willing to talk about how to resolve the matter. Being a good listener is critical to effective negotiation. Once you have listened to the landowner explain his or her position and goals, you can explain the land trust's goals and concerns and ask the landowner to help you find a solution. If possible, try to offer ideas and options that address both parties' concerns. If the land trust has certain limits to its ability to negotiate a solution, be clear about these limits early in your discussions with the landowner. Also, be aware of any statutes of limitation. If you sense that the matter may not be resolved voluntarily, you must know when your time to file suit expires.

Discretionary Consent or Approvals

Some land trusts' conservation easements contain discretionary consent or approval clauses that allow the organization, at its sole discretion, to issue approvals for certain activities consistent with the easement's purposes. For example: "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." Other land trusts address discretionary consent as part of an amendment provision or in a separate paragraph of the easement.

In the context of resolving an easement violation, a land trust could use its discretionary consent to approve an activity or use that is technically a violation of the easement, but that only nominally affects the land. For example, a discretionary approval may be an appropriate response to a landowner who builds a small child's playhouse (no foundation or utilities) that extends beyond the building envelope identified by the conservation easement. The easement prohibits structures outside of the envelope. However, the playhouse has no negative affect on the easement's conservation purposes or resource values, nor does it increase the value of the landowner's property and is not contrary to the documented intent of the original grantor. After discussing the violation with the landowner, you discover he had good reasons for locating the playhouse where he did or perhaps the extension of the playhouse outside the building envelope was an oversight. In either case, your land trust's analysis of these issues indicates that granting the landowner a temporary or discretionary approval for the playhouse is an appropriate violation resolution response, proportionate to the severity of the violation.

This type of violation creates an opportunity for landowner education. You could encourage the landowner to talk with the land trust before building anything on the conserved land to avoid future complications. In granting the approval for the playhouse, you might limit its use to a nonresidential children's play toy and restrict it to its current size. You could also require that the landowner remove the playhouse or relocate it to the building envelope within a certain number of years or prior to transfer of the property. To document the approval, photograph the structure and identify its location on a map, and store the approval letter in the land trust's permanent records.

Minor violations that cause no more than nominal resource damage can often be resolved with the use of discretionary approvals, licenses, waivers or easement interpretation letters.

Even without an explicit discretionary approval clause in its easements, a land trust may still be able to address these types of minor violations by granting a license, a temporary waiver of a restriction or an interpretation of an easement that acknowledges and allows a certain activity or use, so long as it does not harm the conservation resources and is not contrary to the purposes of the easement.

Remediation

If the violation causes adverse resource damage or negatively affects the conservation purposes, the violation must be remedied and the damaged property restored. Remediation does not always mean having to restore the conserved property precisely to its prior condition. Depending on the result of the land trust's resource and legal analysis, other alternatives may be available.

For example, suppose a neighbor mistakes the boundary line between her property and an adjoining easement property. She cuts trees on the easement property for a view of the lake that is surrounded by the easement land. The neighbor immediately stops the activity when notified of the true boundaries and apologizes for her actions. The easement landowner agrees to have a surveyor clearly mark the boundaries to avoid any future confusion about their location. The neighbor agrees to plant some native trees in the cut area to provide a scenic screen for the public view from the lake, which was one of the purposes for which the easement was granted. This resolution is not full remediation, but it is sufficient for the circumstances because it restores the land adequately enough to uphold the conservation purposes for which the property was conserved. Another example of when full remediation may not be necessary is when a landowner inadvertently clears a portion of a riparian buffer that, under the easement, was to remain in its natural

state. If the best course of action is to allow the buffer to regrow naturally, the land trust may ask the landowner to widen the buffer and flag it to prevent further damage, rather than require the landowner to replant what was cut.

Amendments

Amendments should be used very sparingly to resolve a violation and must only be used in compliance with your land trust's amendment policy. Sometimes, however, amendments best address violations where approvals and remediation will not be effective and where education alone is insufficient. Any amendment used to resolve a violation must result in a better, or at least neutral, overall conservation result. As discussed in chapter two, you must ensure that the amendment does not confer impermissible private benefit and that it complies with all laws, your land trust's conflict of interest policy and your land trust's mission.

Example

Amendment as Violation Resolution

A real-life land trust holds a conservation easement on part of a large farm. The purpose of the easement is to conserve both valuable agricultural land and a stream corridor and associated riparian area. When the original grantors' children inherited the land, the land trust met with the new owners to discuss and review the easement and its restrictions. During an annual monitoring visit some years later, the land trust discovered that the new owners placed two large, but necessary and customary, agricultural structures outside of the building envelope. The easement requires all such structures to be located within the building envelope. After meeting with the farmers, the land trust realized that they honestly forgot to consider the building envelope boundaries when building the new structures. The landowners wanted to keep the agricultural buildings, which the land trust determined do not damage the property's conservation values. The landowners offered to protect some of the unprotected land they inherited adjacent to the farm that includes the same agricultural and ecological values as the already protected area. After applying its full amendment policy and procedures, the land trust determined that amending the existing easement to expand the building envelope and thus permit the new agricultural buildings to remain while adding additional land of high conservation value would be an acceptable resolution of this serious violation and not confer impermissible private benefit.

This solution, available in only limited circumstances, required painstakingly careful evaluation of all financial, legal and resource issues. When the land trust completed all these evaluations, it could have determined that the new structures were a major detriment to the central conservation purposes of the easement and needed to be moved. In such a situation, a land trust must carefully evaluate its options with the assistance of a competent and pragmatic litigator. Whatever the decision, you must address the violation in a manner consistent with all laws and the highest ethical principles, your land trust's internal policies and mission, the express language of the conservation easement and the original grantor's documented intent. Ignoring a violation is never an option.

Mediation and Arbitration

If the violation dispute cannot be easily resolved between the landowner and the land trust, one option is for the parties to try to reach an agreement with the assistance of a third person who acts as a mediator. Frequently, mediation is a worthwhile alternative to the courtroom. In a real-life example, a landowner cleared four acres of highly sensitive desert habitat and created a pond in violation of the conservation easement. When approached by the land trust, the landowner claimed he did nothing wrong because with the pond he was creating good habitat, one of the easement's general purposes. The land trust disagreed but offered that he could keep the pond if he gave up two of his four reserved house rights, each of which would disrupt about four acres of land. The landowner rejected this solution and all attempts to negotiate. The land trust filed suit and suggested mediation as an alternative to a lengthy and expensive trial. The landowner agreed, and together they selected an impartial mediator with a pragmatic reputation. After 13 hours locked in the mediator's office, the parties emerged with a solution agreeable to both sides.

In mediation, the parties retain a neutral, third-person mediator to assist them in negotiating a mutually agreeable resolution. Mediation preserves the land trust's decision-making powers, because the process is not binding on either party. Because mediation is not binding and may not result in a negotiated settlement, the land trust must preserve as a secondary option the filing of a civil action in a court of law. Also, only through court order may the land trust obtain a temporary restraining order or preliminary injunction, which can halt landowner activities posing immediate harm to an easement's purposes or conservation values.

A land trust should consider carefully the merits of its case when deciding whether to participate in mediation and/or proceed with litigation. In its settlement negotiations, the land trust must pay attention to any proffered resolutions that encroach on the easement's purposes or compromise its conservation values. Unless a landowner's activities are causing immediate harm to the property in violation of the easement, or pose an immediate threat of such damage, there is often nothing for the land trust to lose in sitting down at the table with the landowner and a neutral, third-person mediator to try to negotiate a resolution. Mediation can result in a win-win settlement for both the landowner and land trust and can help preserve the parties' future relationship.

If the mediation does not result in a resolution, litigation is still an option.

Most easement practitioners do not recommend binding arbitration as an alternative to mediation or litigation. In arbitration, the parties pay an arbitrator who hears both sides and makes a decision. A land trust may not wish to entrust important decisions involving large sums of money, easement interpretation or legal principles to an arbitrator who may or may not have experience with conservation easements or even general real estate law. Additionally, arbitration is typically as expensive as litigation, particularly when a case involves conflicting expert opinions. Unless the parties agree otherwise, generally arbitration is subject to a particular set of rules and provides for discovery, which means time-consuming and costly depositions of both expert and lay witnesses, and intensive preparation by legal counsel. Although an arbitrator's determination does not set legal precedent, his or her decision is binding. There is no opportunity for appeal of an arbitrator's decision, no matter how unfavorable the result.

Avoid placing mandatory arbitration and mediation requirements in conservation easements.

Most experts advise against placing mandatory arbitration and mediation requirements in conservation easements. These tools are usually available to the parties at any time, so they do not need to be stated in the conservation easement unless you are in a jurisdiction where they are not commonly used. But if the jurisdiction in which your land trust operates does not regularly use mediation, or if the general judicial attitude to conservation is negative, then you may want to provide for mediation. Take care to also provide for an exception to mediation for the land trust in the event of an emergency or expiration of a statute of limitation. A local litigator should be able to advise your land trust about this issue.

Judicial Remedies

Almost all land trusts and attorneys agree that judicial remedies are the tools of last resort or used only for true emergencies. Going to court costs time and money, and it may irreversibly damage the landowner–land trust relationship. However, when determining whether to go to court, the land trust must also consider the risk of not following through on its commitment to enforcement.

Sometimes there is no alternative to a judicial proceeding. If a landowner persists in a restricted activity that damages a protected resource, a land trust must seek a temporary restraining order and/or preliminary injunction, and then a permanent injunction from the courts. Suppose a landowner is digging a hole with a backhoe for a foundation in an area not approved for structures. Upon inquiry, you find the landowner is building a house not permitted by the conservation easement and refuses your request to stop construction. In such a situation, you have no alternative but to seek a judicial remedy and an injunction to stop the action until the parties can meet. If you allow the landowner to proceed with construction while you are filing a court case, you may lose the entire case because you failed to take steps to limit the landowner's financial investment in the construction. Even though the conservation easement clearly prohibits the structure, a judge may rule against you. Judges will consider the equities of the situation and may find the land trust could have prevented economic damage to the landowner if it had acted quickly by seeking an injunction.

In addition to halting resource damage, litigation may be the only course available to respond to a landowner who refuses to repair damage voluntarily. Enforcement of the easement and protection of the property's conservation values must be top priority when deciding the course of action.

Enforcement by a Government Agency

Requesting a government agency to enforce a violation of a conservation easement that is also a violation of a state, local or federal law is an extreme step. If you believe that a landowner also violated a law when he or she violated the easement, and if the landowner refuses to cooperate with your land trust to resolve the violation, then your land trust could file a complaint with the government agency charged with enforcement. For example, suppose a logger under contract with

a landowner is harvesting timber on easement-protected land. The conservation easement permits timber harvesting with an approved management plan, which the landowner has, but the logger is removing much more timber than approved in the plan and operating in areas not scheduled for harvest for another 10 years. The logger has also violated state law by clear-cutting several acres immediately adjacent to a public water body. Your land trust could decide that this action is serious enough to warrant state agency enforcement and report the violation to the forest management department.

Such action might also be appropriate when a landowner builds a structure or subdivides protected land in violation of both the conservation easement and local land use laws, or when a landowner drains or alters a federally protected wetland in violation of both the easement and federal laws. Government agencies may be hard to motivate in these instances, so relying upon this form of violation resolution may not result in consistent enforcement of your land trust's conservation easements. Take care when you chose to involve the government, because this action may have adverse consequences not only with the subject landowner but also with owners of other conserved land and those considering conservation who might feel that the land trust is betraying the landowner.

In some states, the attorney general may help enforce conservation easements, such as in Massachusetts, where the state reviews and approves every easement. Though there have been few instances of attorneys general becoming involved in easement litigation, in most states they have legal standing to intervene. Co-holding arrangements with state entities also make the state attorney general's office available for assistance in enforcing, and perhaps defending, conservation easements.

While exploring attorney general assistance is often a good idea, land trusts would be prudent to refrain from exclusively relying on the attorney general to enforce their easements. They should have other means at hand should the attorney general decline to assist or not be prepared to assist in the manner the land trust feels is appropriate. There are a host of considerations prior to involving the government in easement enforcement:

- Decisions about which cases to pursue and when to settle are often influenced by political considerations

- In lean economic times state offices may be forced to pursue only the most egregious and "public" cases
- Landowners may become fearful if they see government intrusion in a private transaction between a landowner and a nonprofit entity
- An attorney general may use aggressive litigation or public relations tactics during a trial that a land trust might not condone
- An attorney general may agree to settlement terms that the land trust would not support

Innovative Use of State Attorney General

In December 1999, Connecticut Attorney General Richard Blumenthal announced that the policy of his office is "to assist land trusts and other holders of conservation easements in enforcing easement restrictions in appropriate circumstances. . . . This policy should be particularly helpful to many small land trusts in Connecticut with limited financial resources to pursue restriction violations on their own."

David Sutherland, director of government relations at the Connecticut Land Trust Service Bureau, added: "While we advise land trusts to continue to set aside funds for easement stewardship and defense, Connecticut land trusts benefit tremendously from a strong partnership with the attorney general's office in their ongoing work to ensure that conservation easements stand the test of time."

Connecticut land trusts brought the issue of easement enforcement to the attention of the attorney general's office when they perceived that a lack of financial resources to defend their easements might hamper the protection of sensitive property in the state. Linda Bowers, former program coordinator for the Connecticut Land Trust Service Bureau, noted: "The attorney general's statement grew out of a grassroots effort that involved both land trust people and lawyers who were concerned about possible violations of land trust easements. We persuaded the attorney general's office that protecting easements was in the state's interest."

As of early 2008, assistance from the attorney general's office is still available, but no land trust in Connecticut has yet used the system. In 2006, the attorney general reaffirmed the availability of assistance from his office to land trusts, and this position has been ratified legislatively. Most recently, the attorney general's office assisted the State Department of Agriculture to protect land conserved under an agricultural conservation easement from conversion to a golf course.

Combined Approach

Often you will find that you need two or more of the available tools discussed above to resolve a violation. Nonjudicial violation resolution tools, when used in combination by skilled people, should successfully resolve almost all violations without having to go to court. No matter what resolution tool or combination of tools your land trust chooses, it is important to try to maintain good landowner relations despite the presence of a violation. Even land trusts that have experienced major violations that required a landowner to expend large sums of money to remediate damage have successfully kept positive landowner relations both during the resolution and afterward. It is possible to accomplish this difficult task if your land trust is committed to dedicating the time and resources to doing so.

During a major violation, landowners will often realize how badly their land was damaged and how their practices need to be changed. This realization can be especially true if they hired a contractor to do some work, such as a timber harvest, and did not adequately supervise him or her. If the land trust can help the landowner resolve the situation and stop the damage, even if the landowner has to pay to clean up the mess, he or she may still be grateful for the assistance and respectful attitude of land trust personnel.

One landowner in this situation sent the land trust a thank-you letter saying, "Thank you so much for getting me out of this mess. I can honestly say that the land trust is still the greatest organization I've ever been involved with. I don't know what would have happened to my acres if you hadn't existed. Thanks again!" The landowner is an even bigger supporter of and donor to the land trust than prior to the violation.

Third-Party Enforcement

As individual land trusts and the land trust community strive to identify, establish and grow their enforcement resources, a question inevitably arises as to whether third parties should enforce, or be able to enforce, conservation easements. Ordinarily, third parties with no legal interest in a conservation easement do not have standing to enforce it. A "third party" is a person or entity who was never directly involved in the conservation easement in question. To have standing, usually the third party must have some legal connection to the source of the

dispute (the conservation easement or the protected land). Simply owning land next to an easement property is not usually enough to give a person standing to sue to enforce the easement. Limitations on standing by courts usually include:

- A general prohibition on a person addressing another person's legal rights
- A rule against judicial remedies for grievances without a direct connection to the complainant
- The requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked
- A requirement that concrete injury has occurred

The Uniform Conservation Easement Act (UCEA) provides the framework for many state conservation easement statutes and enabling legislation for conservation easement transactions. The UCEA recognizes three categories of conservation easement enforcers:

- The owner of an interest in conserved land
- The holder of the conservation easement
- A person possessing a third-party enforcement right

These three categories are derived from the language and terms of a particular conservation easement. In addition, the UCEA acknowledges that state laws may give other third parties enforcement rights. An example of a state law conferring standing through statute or common law is the right of an attorney general to enforce a conservation easement in his or her capacity as supervisor of charitable trusts for the state (in a state in which a conservation easement is construed as a charitable trust). Another example is the state of Illinois, where the statute grants neighbors within 500 feet of any conserved land the right to enforce conservation easements.

If a land trust is unable or unwilling to enforce the conservation easement against a landowner or third-party violator, or is perceived by a third-party enforcer to be unwilling or unable to enforce its easements, then the third-party enforcement right may be available. States that have adopted the UCEA are the most likely to identify rights for third-party enforcement of conservation easements. Among those states that have not adopted the UCEA, most either are silent or expressly prohibit a third-party right of enforcement. A few of these have either passed new legislation or revised their existing conservation easement

enabling legislation to include a third-party right of enforcement in response to passage of the UCEA.

How your land trust drafts its conservation easements may be critical to whether third-party enforcement rights exist under the easement. If an easement specifically refers to a party as a beneficiary of the easement, that party may acquire the right to enforce the easement. Thus if your land trust drafts an easement that protects a lakefront property and states that it benefits the neighbors who also own land on the lake, you may have created third-party rights of enforcement in those neighbors. There are many legal issues associated with standing questions, so your land trust should consult its attorney for guidance on how its easement drafting practices may affect third-party enforcement rights. For more information on this topic, see the Land Trust Alliance fact sheet "Co-holding Conservation Easements."

Preventing and Mitigating Violations

Your land trust's easement stewardship program should include methods to prevent violations and to reduce their severity. The program should also be designed to prevent landowner or neighbor lawsuits against the land trust to the extent possible. Almost all these techniques involve effective, timely and sympathetic communication with landowners, neighbors and other people who may be concerned about an easement violation or affected by its manner of resolution. While these techniques require an investment of time and patience by land trust personnel early on, they can save considerable time and money later by avoiding problems or at least reducing their severity. The key point to remember in your interactions with all people is that your land trust's legal rights may intimidate them into taking defensive action. As you speak with people, they may be worried about your land trust's plans. Therefore, do everything you can to lower their defensiveness, including using a gentle tone of voice and choosing words that are at least neutral, if not sympathetic.

Your land trust's legal rights may intimidate people into taking defensive action, so do everything you can to lower defensiveness when upholding your conservation easements.

You can still be firm in your land trust's need to uphold its conservation easements without being aggressive in your manner or words. For more information on working with easement landowners to prevent violations, see the Land Trust Alliance course "Conservation Easement Stewardship."

In the end, practice for the best situations, but do not forget to be prepared for the worst! The worst can happen in spite of all of your land trust's best efforts. Assess the risks of easement violations and operate in a levelheaded manner, balancing costs and benefits while reasonably addressing those risks. Ken Stern, stewardship director for the Society for the Protection of New Hampshire Forests, sums up conservation easement violation resolution by saying, "It takes considerable patience, leverage, a good attorney and creativity to find a solution within the realm of possibilities, because sometimes just undoing things is not an option."

Estoppel: A legal term meaning that a person is precluded from complaining against a circumstance that he or she caused or contributed to, either by his or her silence, acquiescence or affirmative approval.

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."

Compliance/Estoppel Certificates

People considering the purchase of land protected by a conservation easement sometimes request written assurance from the land trust that the land is free of violations. Although the request is reasonable, a land trust must exercise great caution in issuing any such statement. These so-called "compliance letters" or "estoppel certificates" legally bind the land trust to the conclusions it makes in the document. For example, if you write such a letter, then the land trust cannot act on a newly discovered violation that occurred *before* it issued the letter unless the land trust worded the letter to avoid that situation.

Producing well-crafted certificates takes a great deal of time and investigation by the land trust, because it must be absolutely certain of all of the statements. The wording of these certificates is critical. Saying you *found* nothing that violates the conservation easement is different than saying *no* violation exists. Estoppel certificates should say as little as possible, leaving room for later discoveries of problems the land trust may have missed.

See *The Conservation Easement Handbook* for a further discussion of the issue and sample estoppel certificate language.

Example

Statement of Compliance

When its easement-restricted properties change hands, the Brandywine Conservancy requires that the original landowner request a statement of compliance before transfer of the property. The statement is limited to the condition of the property as of the Conservancy's most recent inspection. The landowner may request a more current inspection, which is then conducted at the landowner's expense. The inspection is designed to ensure that the seller will not be drawn into a lawsuit if the new owner violates the easement, and protects the buyer from unsuspected violations by the seller.

Funding Easement Defense

As land trusts mature and assume the responsibility for monitoring and enforcing larger numbers of conservation easements, they realize that they need to budget for the number of long-term relationships created by their easements, not the number of initial easements. In other words, land trusts should plan for the perpetual stewardship of each parcel permitted to be created under each easement they hold, because all permitted subdivisions will add successor owners who must be contacted and educated, and who will want to exercise reserved rights to build houses, conduct timber harvests or engage in agriculture activities — all of which must be monitored and all of which may lead to easement amendment requests and/or easement violations. In addition, each relationship carries with it the need for landowner support to interpret the conservation easement, answer inquiries, visit the land and follow up with recordkeeping. With more relationships come more opportunities for misunderstandings and mistakes that lead to violations.

Many land trusts create one dedicated fund for easement stewardship and a second dedicated fund for easement defense.

Stewardship fund calculations, therefore, should be based upon the number of easement relationships an easement will create for the land trust. Dedicated stewardship funds are intended to cover all the costs of managing an easement in perpetuity, including annual monitoring, easement interpretation, landowner outreach and education, responding to amendment requests and pursuing easement enforcement or defense actions.

Many land trusts plan for major easement defense funding to come from the principal of their dedicated stewardship fund. However, land trusts should plan for and take action to replenish the fund if it is drawn down to support easement defense. If an organization finds itself in the unenviable position of defending two or more violations simultaneously, it might jeopardize the entire easement stewardship program by depleting the overall fund. Many land trusts address this challenge by creating a separate fund for legal defense.

Land trusts that have a dedicated legal defense fund in addition to a dedicated stewardship fund will usually fund both for each easement they accept. A legal defense fund may not be used for many years, so the fund's earning is reinvested, allowing the fund to grow until it is needed. To make this plan successful, a land trust should adopt investment and fund management policies in accordance with Practice 6F to ensure

the legal defense fund cannot be raided to pay for general operations. Building an adequate legal defense fund helps a land trust plan for the future and proves that it is managing its easements in a fiscally prudent manner. Some land trusts believe that a healthy legal defense fund may also prove a deterrent to aggressive landowners because it demonstrates a land trust has the ability to defend an easement in court, if necessary. For more information on stewardship and legal defense fund calculations and management, see the Land Trust Alliance course "Determining Stewardship Costs and Raising and Managing Dedicated Funds."

Costs of Easement Enforcement

Typical Costs

Enforcement costs are difficult to predict but typically may include:

- Equipment (camera, GPS, GIS, paper supplies, computer, postage, copies, maps)
- Experts to assist with problem-solving and, if necessary, litigation
- Attorney time, including litigation fees if judicial remedies are necessary
- Staff or volunteer time to document, investigate, negotiate and resolve the violation
- Out-of-pocket expenses, such as title work, recording fees, filing fees, permit fees and perhaps litigation fees if judicial remedies are necessary
- Costs associated with removal of the use or structure that constitutes the violation
- Legal research
- Community or neighborhood meetings and other outreach expenses

Extraordinary Costs

According to the 2007 *Conservation Capacity and Enforcement Capability* report, which analyzed the range of approaches land trusts use to implement Practice 11A, Funding Easement Stewardship, the following holds true:

> As a guide, in order to fully fund *one* enforcement action or other litigation, a land trust needs a *minimum* of $50,000 in its legal defense fund. If the land trust holds more than 15 easements, it needs an additional $1,500 to $3,000 per

easement in this fund. Land trusts should not initiate litigation without having in hand the minimum amount of money recommended to fully fund litigation or a credible plan to raise the necessary funds immediately.

If a land trust lacks sufficient funds to fully fund an enforcement action, it needs a fundraising strategy and a board policy committing funds to this purpose.

The Land Trust Alliance also found fairly consistent data regarding the rate of litigated easement violations, and that the rate of litigated easement violations will likely increase over time as more easements change hands. In making its calculations, the Alliance defined a major violation as one that will cost the land trust more than $2,500 to resolve. For more information, see the research report, available on The Learning Center (http://learningcenter.lta.org/library).

The results of the Alliance's summer 2008 conservation defense insurance survey and the 2004 *Conservation Easement Violation and Amendment Study* both support these findings. Collectively, land trusts experienced a steady increase in expenditures to enforce their easements. The overwhelming majority, 87 percent, reported that in the past five years they had experienced an increase in their expenses, while only 12 percent said that enforcement expenses remained unchanged. A single land trust reported enforcement costs decreasing in the same period and no land trust characterized their expenses as decreasing rapidly.

Land trusts may need to rethink current funding mechanisms to ensure the long-term viability of their legal duty as stewards "forever."

Of those land trusts reporting an increase in expenses, 44 percent indicated financial resources expended to enforce conservation easements have *rapidly* increased. Thus, land trusts may need to rethink current funding mechanisms to ensure the long-term viability of their legal duty as stewards "forever."

Although these expenses are extremely difficult to predict, the Land Trust Alliance has attempted to evaluate the rate of litigated violations and their projected costs so that land trusts can better prepare for these events. Many land trust practitioners agree that the violation rate will most likely increase, especially as easement lands change hands and as land trusts begin to visit conserved land more regularly and become more experienced in identifying violations.

The Future of Easement Defense

Land trusts must assume they will be solely responsible for resolving all violations and defending their easements if challenged. In some cases, assistance in enforcing or defending easements may be available through the actions of a state attorney general's office or other third parties. In 2008, the Land Trust Alliance increased its efforts to assist with easement defense by creating a national conservation defense network of attorneys and senior land conservation professionals. The Alliance has created an online clearinghouse (http://clearinghouse.lta.org) to assist in defending easements and is studying an insurance program for conservation defense and enforcement. For innovative ideas for collective easement defense see "Exploring Options for Collective Easement Defense" in the Fall 2002 issue of *Exchange*. However, land trusts must be clear that they are responsible for protecting the land on which they hold easements.

Collective conservation defense: A collective entity created for the purpose of guiding and funding conservation defense and enforcement with the capacity to oversee the potential cases arising from enforcement and defense of conservation easements and fee-owned land for many land trusts at once.

Managing Easement Violations

This exercise is best completed in a classroom training or board or staff training. It will help you practice the skills you need to exercise when confronting a violation.

Divide the participants into five groups and assign each group a scenario. Discuss the possible solutions to the scenario and steps needed to resolve the situation. Then answer the questions that follow and compare your answers to those provided on page 322–29. These scenarios are drawn from real land trust experience; review the actual results, which are also included.

If using this exercise in a self-study situation, read through the examples and list the important issues and actions to take in resolving the violation. Compare your answers to the guidance, which begins on page 322.

Scenario 1: Separate Conveyance Violation

A conservation easement property consists of three separate parcels. The easement prohibits subdivision or separate conveyance of these individual tracts. Notwithstanding these restrictions, the landowner (the original easement donor) sold one of the three tracts, along with some of his adjacent unrestricted land, and neither he, nor his attorney, nor the buyer's attorney noted the prohibition against the separate conveyance. The land trust was notified of the sale and subsequently notified the buyer and seller that the sale was a violation of the conservation easement. All parties, upon further research, acknowledged the error.

Discussion Questions

1. What alternatives are available to this land trust to resolve this violation?

   _____

   _____

   _____

   _____

2. What additional problems do some of the solutions create?

   _____

   _____

   _____

   _____

3. What other considerations must the land trust examine?

   _____

   _____

   _____

   _____

Scenario 2: Weighing Tradeoffs across Easement Boundaries

A 140-acre easement property surrounds a bed-and-breakfast inn that was excluded from the conservation easement. The easement's primary purposes are protection of scenic and agricultural resources. The landowner, who owns both the easement land and the excluded parcel containing the B&B, constructed a one-acre parking area on the edge of the protected property to serve the inn's guests. The parking area was in clear violation of the easement. At the same time, it was unpaved and located in a manner that had no negative effect on the conservation purposes. The land trust also observed that the parking area was well constructed and important for the inn's long-term success. Courts in the area proved unsympathetic to the land trust in a previous violation action.

Discussion Questions

1. What considerations must the land trust examine?

   _____

   _____

   _____

   _____

   _____

2. What other parties should or could the land trust contact about resolving this violation?

   _____

   _____

   _____

   _____

   _____

Scenario 3: Third-Party Boundary Dispute

The land trust conserved 28 acres of river bottom land for public access and to reestablish a natural river community. A few acres of the easement land are upland along a residential street. A small lot (90 feet x 40 feet) under different ownership juts into the conserved land and contains a residence. Unfortunately, the land trust completed the conservation easement prior to receiving the final survey. The final survey shows two small encroachments from the neighboring lot: one of about five feet from a garden shed and one of about three feet by 20 feet from the porch and residence foundation. The elderly neighbor rejects an offer of a boundary line adjustment and claims adverse possession of not only the encroachment area but also an additional two acres of land that she mows and uses regularly. The owner of the conserved land disputes the claim. The area in question has nominal resource value and there are no resource impacts from the neighbor's encroachment.

Discussion Questions

1. What alternatives are available to resolve this violation?

   _____

   _____

   _____

   _____

   _____

2. What other considerations must the land trust examine?

   _____

   _____

   _____

   _____

   _____

Scenario 4: Successful Enforcement Case

Waiver: The intentional or voluntary relinquishment of a known right or dispensing with the performance of something to which one is entitled from another. Waiver is different than estoppel. Estoppel can be unintentional.

Laches: The failure to do a thing at the proper time, especially such delay as will bar a person from bringing a legal proceeding.

A landowner built a barn in an area in which the conservation easement prohibited such development. To preserve the natural condition of the conservation land, the Weston Forest and Trail Association (WFTA), the easement holder, sued to compel the landowner to remove the building and relocate it to a permissible location. The land trust prevailed on summary judgment in the land court.

This case turned on the fact that the WFTA treasurer (who was also the town conservation commission chair) visited the property in his role with the conservation commission while construction was underway. During this visit, he did not notice that the barn was outside of the building envelope. The landowner claimed that WFTA lost all its rights to enforce the restriction prohibiting the barn because the commissioner did not raise the issue immediately. The WFTA discovered the violation about a year after the barn was completed and notified the landowner of the violation. If WFTA had discovered the violation sooner, the land trust might have been able to stop construction and save much expense — both the landowner's expense of building the barn and then removing it, and both parties' legal expenses.

The court held that the conservation easement was clear and unambiguous in prohibiting the barn and that WFTA did not in any way waive its right to enforce by virtue of the commissioner failing to notice the violation. On appeal, the appeals court upheld the judgment and established the important rule that a nonprofit entity that brings suit to enforce or defend rights in accordance with the public interest is immune from an estoppel or a laches defense (an equitable defense that claims failure to enforce a right within a reasonable time should defeat the ability to enforce the right). While this argument may sound similar to the rationale behind compliance and estoppel certificates discussed on page 311, these situations are very different. In issuing an estoppel certificate or compliance letter, the land trust makes an affirmative act. The letter or certificate states the land trust has found no violations and may list a number of exceptions to the statement. Thereafter, the land trust is barred from raising an issue as

noncompliance unless the land trust listed it as an exception. In the WFTA case, the land trust was accused of failing to act and failing to discover a violation until a year after the landowner built the very expensive structure. The landowner argued that the land trust's failure to act barred it from insisting on compliance with the conservation easement. In legal terminology, this result is known as "waiver" or "laches," while a compliance letter is known as "estoppel." They are related concepts but have different meanings and application.

Interestingly, the court refused to award attorney fees and costs to WFTA, even given the clear violation, the landowner's unwillingness to cooperate and the strong opinion of the court in favor of WFTA.

Discussion Questions

1. What could the land trust have done to prevent this violation and subsequent court battle?

   _____

   _____

   _____

   _____

   _____

2. What lesson does this scenario teach about legal fees associated with a violation resolution?

   _____

   _____

   _____

   _____

   _____

Guidance

Scenario 1: Separate Conveyance Violation

1. The land trust has four options in this situation:
   - *Rescission*. The land trust could demand that the sale be rescinded and could sue to achieve that result. The owner and unsuccessful buyer could look to their attorneys and, depending on policy terms, to the title insurer for damages. Absent unusual circumstances or serious delay, a court would likely enforce the easement and compel rescission of the sale; however, it is always possible that one of the parties could successfully argue that the equities of the situation make rescission unfair.
   - *Amendment or approval*. Depending on the configuration of the land and the factual circumstances, the land trust could consider whether the separate sale of the single tract from the other two negatively affects the purposes or conservation values of the easement. This determination may require outside scientific expertise. If the purposes and conservation values are not affected, and the owner and buyer do not wish to rescind, the land trust could consider amendment of the easement or approval of the subdivision if the conservation easement provides for those types of approvals. The land trust must also address any impermissible private benefit issues that may have occurred from this separate sale.
   - *Create additional restrictions.* The easement contains a reserved right for one additional home site on one of the two parcels that the landowner retained. As one option, the land trust could negotiate with the landowner to eliminate this reserved right. Extinguishment of that house site could offset the enhanced value resulting from sale of the parcel to the buyer. Further, removal of the house site would create an overall conservation gain for the easement property. All three tracts would remain under easement and the landowner (seller) would pay the land trust additional stewardship funds for the additional easement relationship created by the now-separated parcel.
   - *Exchange*. An alternative solution would be for the landowner (seller) to conserve his adjacent, unconserved land in exchange for the approval of the separate conveyance and require that those two parcels be merged forever. The land trust can further require the seller or buyer to pay an additional stewardship amount to cover the second easement relationship created by the prohibited conveyance.

If negotiations fail, the land trust would be left with a lawsuit for rescission of the transaction as a possible remedy. A lawsuit could proceed to judgment or could be settled. Instead of a private settlement, the parties could request that the court approve the settlement terms and make appropriate orders to protect the land trust with respect to any diminution of conservation values and, should it occur, any settlement funds the land trust may receive.

2. There are two major issues that can result from the land trust's response:
   - *Impermissible private benefit*. Both electing to do nothing (thus permitting the conveyance of the parcel of protected land in violation of the easement) and amending to release the restriction would create an apparent impermissible private benefit, because the separate sale of the single tract increased the value of the easement property as a whole. An appraiser determined that the single tract was worth more as a separate parcel than as a portion of a larger ownership that was not dividable. Therefore, in considering violation resolution options in this scenario, the land trust must determine how the value obtained by the impermissible sale could be offset by the landowner who sold the parcel in violation of the easement. To do so, the land trust should weigh the private benefit accruing to the landowner from the separate sale against the financial loss to the landowner resulting from the elimination of the retained house site as suggested in the answer to question 1.
   - *Attorney's fees.* If the easement includes an attorneys' fees clause, a lawsuit to rescind the sale of the parcel would be unlikely to pose a significant economic burden on the land trust, but lawsuits have no guarantees. Courts are not predictable in awarding attorney's fees, so the land trust should assume that even if it prevails in court it may not be able to recover its costs. Moreover, even successful lawsuits can produce adverse publicity. The land trust should consider all risks and benefits before commencing litigation.
3. The land trust should determine whether or not the separate sale of the single tract will negatively affect the purposes or conservation attributes of the easement. If the land trust determines that the separate conveyance has no negative effect on the conservation purposes and decides to forego rescission, the land trust should examine the easement to design potential solutions. If the land trust chooses to eliminate the reserved house right, it must weigh the neutral effects of the separate conveyance on the conserved resources against the positive conservation results of eliminat-

ing the reserved house site on the parcels retained by the landowner. The solution can be an overall positive conservation result that does not permit impermissible private benefit while upholding the conservation purposes of the easement.

Resolution

The land trust deemed it both impractical and unnecessarily restrictive to try to attempt to force the landowners to rescind the sale. The land trust reviewed the easement and its amendment policy. It noted that the easement contained a reserved right for one additional home site to be withdrawn and sold from one of the two parcels that the landowner had retained after the impermissible sale of the third parcel. The land trust negotiated with the landowner to eliminate this reserved right. The extinguishment of that house site was deemed by all parties to more than offset the enhanced value resulting from the sale of the parcel to the buyer, after the land trust obtained an appraisal to substantiate this valuation. Further, the removal of the house site created an overall conservation gain for the easement property. All three tracts remained under easement, and the amendment was completed.

The land trust used its amendment policy to create a positive solution to a violation. The policy provided a framework for the land trust to envision and evaluate how additional restrictions could offset the problems associated with the violation. The land trust believed that it was a better use of time and resources to address the violation through this framework, rather than to attempt to re-create conditions prior to the violation.

Scenario 2: Weighing Tradeoffs across Easement Boundaries

1. The land trust must consider the following:
   - *Effect on conservation resources*. The land trust must assess whether the parking area has a negative impact on the conservation purposes of the easement. If the parking lot has a negative effect on the conservation easement purposes, then the land trust may have to obtain court approval for any violation resolution (such as an amendment) involving the exchange of the parking lot for additional conserved land. Negative impacts to conservation attributes within an original easement may in some circumstances be acceptable, provided that there is an overall net positive conservation result on the easement property and any exchange property and all conditions of the amendment policy are met. A land trust should never amend a conservation easement to address a

violation if the net result diminishes the conservation purposes.

- *Impermissible private benefit*. The land trust must assess whether or not the parking lot significantly enhanced the excluded area's property value. The land trust could not allow this impermissible private benefit by allowing the parking lot to remain without the landowner equalizing the gain he would reap from the approval.

2. The land trust may want to consult with the following:
   - *Community*. If the land trust is concerned about the public reaction to any of its options to resolve the violation, it should informally consult with the community and neighbors about the issue. If the land trust finds that no parties object to the parking area and that, in fact, there is local support for this type of business, the land trust could reasonably conclude that it would best serve the public interest and uphold the land trust's mission by addressing the violation through an amendment, rather than by attempting to re-create prior conditions and causing harm to other, as yet undisturbed, land to relocate the parking lot. Without doubt, amending an easement to accommodate a violation can be a slippery slope, and a land trust must be very thoughtful about the message it sends to its community. Strict compliance with the amendment policy and procedures can help land trusts keep their footing on the slope.
   - *Attorney general review*. If considering an amendment, the land trust may want to seek the review of the state attorney general in this case because it involves evaluating tradeoffs outside the original easement area. An amendment of this kind will have more than a de minimus effect on the original easement's conservation attributes despite the protection of any additional land.

Resolution

The land trust believed it would be difficult to force removal of the parking lot by obtaining a court order requiring the landowner to restore the one acre to its previous condition. The local court had recently proved unsympathetic to land trust efforts to enforce another easement, and the land excluded from the easement could not be configured for a parking lot without significant alteration of several acres of previously undisturbed land.

The land trust considered whether and how to amend the easement to accommodate the parking lot use. The land trust's conservation analysis concluded that,

overall, the parking area had no significant negative impact on the purposes and important conservation attributes of the easement area.

The landowner offered to donate a conservation easement on an abutting 25-acre property. The financial value of the additional easement more than offset the impermissible private benefit created by allowing the parking lot to remain. From a conservation standpoint, the 25-acre easement offered significant public benefit on its own and offered "spillover benefits" that enhanced the original easement's conservation values. With this additional easement in the mix, the impermissible private benefit and conservation tests of the land trust's amendment policy were both met. After documenting the facts, including obtaining a professional appraisal, the land trust concluded that the overall conservation gain more than justified amending the easement to allow the continued use of the parking lot and add the abutting 25 acres to the easement.

Scenario 3: Third-Party Boundary Dispute

1. The land trust has the following options available in resolving this violation:
   - *Boundary adjustment*. Because the land trust erred in not completing its due diligence prior to closing (which would have revealed this problem) and because the organization's analysis shows no resource damage due to the encroachment, the land trust may join the landowner in a small (less than one-tenth of an acre) boundary line adjustment. The land trust would have resolved the issue in this manner had it been discovered before closing.
   - *File a title notice*. Because the neighbor rejected the boundary adjustment, the land trust and landowner must evaluate other options. One is to file a notice in the land records of the encroachment and that the landowner has title to the land despite the neighbor's claim. Then the landowner and land trust might wait for the property to change hands and resolve the matter upon sale of the residence.
   - *File litigation or seek alternative dispute resolution*. Rather than waiting for the neighbor to sell or otherwise divest herself of the property (which could be as long as 20 or 30 years), the landowner and land trust can file a quiet title action or seek mediation or arbitration of the dispute. This potential solution costs more than other options but resolves the matter promptly. Further, simply filing an action might force the neighbor into settlement.

Quiet title action: A lawsuit brought in a court having jurisdiction over land disputes to establish a party's title to real property against anyone and everyone, and thus "quiet" any challenges or claims to the title.

- *Amendment*. The land trust could amend the conservation easement to exclude the tenth of an acre in dispute and let the landowner sort it out with the neighbor. Unfortunately, because of the larger adverse possession claim to an additional two acres, this potential solution does not remove the land trust from the dispute, and the landowner may feel abandoned by the land trust.
- *Temporary license*. If the landowner concurs, the land trust could agree to the neighbor's temporary use of the area, provided that there was no negative impact on resource values or conservation easement purposes. By signing a temporary license, the land trust would prevent further litigation and possible negative publicity regarding the organization's treatment of an elderly person lacking in financial resources.
- *Waiver*. The land trust might consider permitting the encroachments but would then be faced with burdensome stewardship challenges associated with a second unfunded easement relationship (with the owner of the adjoining, encroaching lot) and potential repeated third-party violations associated with future owners of the lot. The land trust might require an additional stewardship contribution from the adjoining landowner in exchange for the waiver.

  This resolution is somewhat similar to the use of mitigation payments to address conservation easement violations. Taking cash in exchange for a waiver of a violation is a practice your land trust should avoid because of the public perception that your land trust is for sale to those wealthy enough to buy their way out of trouble. Occasionally, however, for very minor third-party encroachments that cannot be resolved in any other satisfactory manner and that do not involve an insider to the organization, a discretionary waiver and a contribution to your land trust stewardship endowment might be appropriate. Be sure to involve legal counsel in any decision to accept a mitigation payment.

2. The land trust must assess the following:
   - *Resource impact*. Fortunately, neither encroachment creates any significant adverse resource impacts on the conservation

values or easement's purposes. The land trust may consider the nominal nature of the affected land (less than a tenth of an acre) and the lack of any negative impact on conservation values or purposes when arriving at its decision.

- *Impermissible private benefit.* The land trust analysis must determine if a boundary adjustment or other solution would bestow an impermissible private benefit on the neighbor.
- *Public interest.* After considering all factors, including possible public perceptions, potential for media coverage, the nominal nature of the disputed land and the lack of a significant impact to the property's conservation value, the land trust must determine which solution would best serve the public interest and uphold its mission.
- *Land trust error.* The land trust erred in not having the final survey prior to closing and addressing the encroachment prior to completing the easement. The fact that the land trust's mistake helped create the problem should factor into the land trust's ultimate decision on how to resolve the issue.
- *IRS requirements.* In accordance with the Treasury Regulations relating to tax deductible easements, the land trust must receive compensation if a boundary adjustment extinguished the easement on the less than one-tenth of an acre.

Resolution

The parties filed suit and proceeded to mediation after some discovery revealed weaknesses in the neighbor's adverse possession claim. After 11 hours of discussions in which the land trust articulated the legal restraints on its ability to give away conserved land and the overall value of the conserved land to the public, the parties agreed to a boundary adjustment of one-tenth of an acre total to remove the encroachments from the conserved land (the size and situation of the lot and house did not allow for any other alternative). They further agreed to give the neighbor a lifetime mowing right on an additional two-tenths of an acre of the conserved land. The neighbor paid the landowner $7,000 for the land and paid all costs of mediation and document preparation. The land trust obtained a percentage of the payment attributable to the land released from the conservation easement.

Scenario 4: Successful Enforcement Case

1. This landowner invested $300,000 in the barn, so he was going to protect that investment by pursuing litigation. The sooner you find and address

violations the more likely you will be able to avoid litigation by a landowner invested in his or her actions.

Annual monitoring visits are critical to retaining the right to enforce an easement's restrictions. The court might have been ruled against the land trust if WFTA had not found the violation for four, five or more years.

Asking board members, volunteers and staff to contact the land trust if they notice any type of construction on easement-protected land would have been helpful. If the WFTA treasurer had notified the land trust about the construction he witnessed on the protected property, then a knowledgeable person at the land trust could have followed up immediately. Anything a land trust can do, especially with its own volunteers and staff, to identify potential violations early and head them off is a gain for everyone.

2. Although the land trust won the case, WFTA was not reimbursed for its legal expenses. WFTA spent in excess of $50,000 to enforce the easement. This figure does not include an additional $150,000 worth of pro bono legal time. Land trusts need to be prepared to pay all their legal bills and have adequate stewardship or legal defense funds for this purpose.

Easement Violation Resolution Policy Template

This template can be started in a training or in a self-study setting but requires the input and consideration of your land trust's board and legal counsel to complete.

This template includes an outline of a violation resolution policy with important questions for your land trust to consider and answer. These questions will help you think through issues you may face when confronted by a conservation easement violation. Effective violation policies will reflect the mission and core values of your land trust and will be unique to your organization.

You may find that some questions do not apply to your land trust's particular circumstances. Consider those questions as appropriate to your land trust's situation. You may not need to answer all the questions to develop a policy for your land trust, but read and think about them all.

Use your answers to the questions to create or refine your land trust's own violation resolution policy. Some sample language is provided for guidance. Also refer to the policies in the Sample Documents beginning on page 348. You should refrain from wholesale copying of the sample language without due consideration of the issues raised by the questions. Legal counsel should review the policy before your land trust adopts it.

You should refrain from wholesale copying of the sample language without due consideration of the issues raised by the questions.

Legal counsel should review the violations policy before your land trust adopts it.

Always date your policies and procedures; include the date of first adoption and the most current revision date.

I. Philosophy or Statement *[page 271]*

Your land trust's violation resolution policy should begin with a statement about the land trust's philosophy on easement violation resolution. You will rely on these principles when enforcing your land trust's conservation easements. In developing this statement, consider the following:

1. Why is it necessary to enforce conservation easements?
2. How does your land trust's approach to enforcing conservation easements support its mission?
3. What is your land trust's philosophy on upholding the grantor's intent?
4. What is your land trust's philosophy on upholding the purposes of the easement?
5. How will public perception influence your decision-making?

Sample Language

The [*land trust*] must, as a holder of conservation easements, enforce the legal agreements for which it is responsible.

Sample 1

In addition to protecting the conservation value of the subject property, enforcement is needed to generate public confidence in [*land trust's*] mission to conserve open space, to uphold [*land trust's*] legal authority to enforce its conservation easements, and to maintain [*land trust's*] ability to accept future donations of conservation easements and its tax-exempt status. [*Land trust's*] failure to enforce its conservation easements could jeopardize its 501(c)(3) status if it were shown that [*land trust*] relinquished its enforcement rights to benefit private individuals. [*Land trust's*] response to a violation should match the severity of the violation. Minor or technical infractions (i.e., failure to provide notice, litter, minor cutting of vegetation) may warrant a written acknowledgment of the violation from [*land trust's*] designated staff or volunteer to the landowner. More egregious transgressions (i.e., construction, excavation outside permitted building areas) require a swift and formal response.

Sample 2

[*Land trust*] recognizes that landowner education and relationship building, not litigation, are the best immediate and long-term methods to guarantee that conservation easements are upheld. [*Land trust*] works with owners of conserved land to help them understand their conservation easement and continue to be good stewards of their land. [*Land trust*] uses this philosophy to determine what is a violation of a conservation easement and what is the appropriate response to that violation, and we apply the following principles and considerations. [*Land trust*] also promptly and diligently pursues violations to ensure integrity of the conservation easements that we hold.

II. Discovering and Assessing the Nature and Extent of the Violation *[pages 272–75]*

When confronted by a possible violation of a conservation easement, you must confirm that the activity is indeed a violation and you must assess its severity. Consider the following:

1. What system has the land trust implemented to ensure timely discovery of and response to violations?
2. How will you verify the violation?
3. How will you determine who violated the easement?

The sample language contains four levels of violations, so that you can consider each and select those that you feel are most appropriate for your land trust. How you define each level is up to your organization.

In determining the severity of all violations, consider the following:

1. Are the damaged resources central to the conservation purposes of the easement?
2. What is the physical effect of the violation? How much of an area is affected?
3. How severe is the damage? How difficult will it be to fix the problem?
4. Are there legal implications of the violation?
5. What public perception issues exist?

Consider the following questions for each type of violation:

Technical Violation

1. Is the violation a "technical" or "paper" violation with no effect on the conservation purposes or values?
2. Would the activity be permitted under your current easement model?

Minor Violation

1. Is the violation a "minor" violation with nominal impact to the conservation purposes or values, but slightly more than no impact?
2. Is the damage transitory?

Moderate Violation

1. Does the violation cause moderate physical damage to those resources protected by the conservation easement?

Major Violation

1. Does the violation have a significant impact on those resources protected by the conservation easement?

Sample Language

The [land trust] shall determine whether, where and when a violation occurred [within __ days upon learning of the violation].

The *[land trust*] shall determine the extent of the violation to assist decision-making with respect to how to resolve the violation, gauge the level of effort and resources required of the land trust to address the violation, and determine expectations for remediation

and compensation. [*Land trust*] will determine the extent of the violation and potential response through an analysis of the violation's severity, as follows:

A "technical" violation is defined as _____ and shall create the following potential responses: _____.

A "minor" violation is defined as _____ and shall create the following potential responses: _____.

A "moderate" violation is defined as _____ and shall create the following potential responses: _____.

A "major" violation is defined as _____ and shall create the following potential responses: _____.

Add additional language here concerning the severity of the violation.

III. Determining Responses to Violations *[page 281]*

Once you have identified the extent, magnitude and severity of the violation, you must then determine the appropriate response. The response plan may also set timeframes for action by your land trust, the landowner and/or the third-party violator, depending on the severity of the violation. Consider the following questions:

1. Is the violation a clear breach of an express provision of the conservation easement? Or is the easement language ambiguous? Is it silent on the issue?
2. Will the violation set a precedent?
3. Is the violation intentional or accidental? Is it a repeat of a prior, resolved violation?
4. Was the violation caused by the original landowner? Successor landowner? Third party?
5. When will you enter into litigation?
6. When will other alternatives, such as negotiation, collaboration or mediation, be used?
7. Are there any third-party interest holders (backup holders or co-holders) that must be engaged? What will be their role?
8. How much weight will you give to mitigating circumstances?

Sample Language

The [*land trust*] will evaluate the extent and nature of the violation and explore potential corrective actions with _____ or other designated staff or volunteer [*and legal counsel*], develop [*recommendations/requirements for restoration, remediation and/or damages or compensation*] by the landowner and formulate recommendations [*for corrective action*] [*and a timeline for compliance*].

Add additional detail here.

If the violation is minor or technical in nature, the [*land trust*] should evaluate the potential for a discretionary approval and education to resolve this violation and prevent future violations. In doing so, the [*land trust*] will adhere to its discretionary approval policies or procedures.

Add additional detail here.

IV. Internal Land Trust Notice *[page 279–81]*

The land trust must engage in certain internal discussions, notification and evaluation of the facts and circumstances surrounding the violation. Consider the following:

1. When will the land trust review its enforcement policy, conservation easement, baseline documentation report and related materials?
2. Who will report and describe the potential violation to whom and by when?
3. When should the land trust alert legal counsel?

Sample Language

The [*land trust*] [*staff, volunteers, committee*] shall evaluate the violation and formulate an appropriate response [*to propose to the Board*] after determination of the extent of the violation and whether it is ongoing or not. The [*staff, executive director, committee*] shall educate/inform the [*Board of Directors/President of the Board/Executive Director*] of the violation and upon [*a full vote of the Board/consideration by the Stewardship Committee/determination of the Executive Director*], the [*land trust*] shall decide how to proceed to correct the violation.

Add additional detail here.

V. Documenting the Violation *[page 278]*

A thorough and accurate record of the violation is essential. This section addresses the procedures for documenting a suspected violation and should be developed in consultation with legal counsel. Consider the following:

1. What level of documentation is appropriate for each level of severity?
2. When will a site visit be required?
3. What kind of documentation will be collected and how will it be maintained?

Sample Language

The [*land trust*] shall document the violation using appropriate available technologies. Documentation shall continue throughout the violation process until the violation is resolved voluntarily or through judicial enforcement and after the violation until the agreed upon or judicially imposed resolution is fully and satisfactorily completed, a positive relationship with the landowner exists and any community outreach is concluded.

Insert a description of your documentation procedures here.

VI. Addressing the Violation *[page 284]*

This section includes the details of how your land trust will respond to the violation. Consider the following questions:

1. How will the land trust communicate with the landowner?
2. How will the land trust proceed if the landowner disputes the violation?
3. How will the land trust proceed if the violation was caused by a third-party trespasser or neighbor?
4. When will the land trust seek an injunction?
5. What steps should be taken to ensure that any damage to the easement property has been remediated?
6. Who will be responsible for responding to media inquiries or inquiries from the community about the violation?

Sample Language

As part of the response to the major/moderate/minor/technical violation, the [*land trust*] shall communicate with the landowner in the following manner to pursue the following response, which response includes/does not include inspection of the property to document resource damage if any and to document any agreed upon or imposed site restoration or

other violation resolution at various interim stages if appropriate and at the conclustion of the matter.

Add additional detail here.

VII. Additional Requirements *[page 276]*

Use this section to list any additional requirements that are not explicitly addressed in other sections of the policy. For example:

- Compliance with the land trust's conflict of interest policy
- A prohibition against private inurement and impermissible private benefit
- Whether the land trust will require the landowner to reimburse the organization for its costs

VIII. Post-Enforcement Assessment, Education and Policy Review *[page 295]*

Use the questions on page 273 to get you started on completing this section.

Sample Language

Upon conclusion of the violation resolution, response and remediation, the [*land trust*] shall review its actions and attempt to draw conclusions as to [*landowner education, compliance, legal counsel involvement, model easement language, this policy, amendment policy, public perception*]. The [*land trust*] shall implement any insights gained from this review of its actions in future actions.

Insert the date of the policy and the date of its last revision.

A Success Story
Vermont Land Trust

The Vermont Land Trust holds an easement on approximately 16,000 acres of forestland on both sides of a mile-long stretch of river running through seven contiguous towns. A large hydroelectric company owns the land. Many neighbors border the conserved land, and many are vacation-home owners on small lots. The public has recreational access to both the land and the water and, in fact, public access is one of the primary purposes of the conservation easement.

For years the landowner struggled with boundary disputes and encroachments. The company had a community relations manager who addressed these issues promptly and did his best to prevent trespass, but with hundreds of miles of boundaries, the company experienced at least one fairly serious trespass every year. Many of the boundaries were surveyed and the corners clearly marked by the surveyor.

One vacation-home owner ("Mr. Smith") instructed his landscape contractor to cut a 300-foot by 50-foot wide swath of trees on the neighboring conserved land to provide him with a view of the river and direct access to it. The contractor did so and pulled several of the survey markers in the process. Mr. Smith also had a large custom-built swing and slide combination installed partly on the conserved land, and his landscaper habitually pushed leaves and other debris onto the conserved land in such a way as to jeopardize the health of the remaining trees.

Before the trespass, the vacation home was not visible to the public from the river or from the recreation spots on the easement land. Afterward, the house was highly visible and significantly marred the public vistas, as well as the experience of being in a remote, undeveloped area.

The landowner utility company and VLT collaborated to discuss these problems with Mr. Smith but to no avail. He ignored letters, and when the land trust finally found Mr. Smith's phone number, he hung up on the staff person making the call. Mr. Smith's visits to his vacation home were sporadic, so land trust and utility company personnel had no way to arrive unannounced and speak with him. The trespasses continued after the land trust's attempts to discuss the matter and after the land trust formally notified Mr. Smith about the boundary encroachment. He also installed a boat ramp on the water's edge on the conserved land. Other neighbors were aware of the situation and one day, soon after the second trespass, they

called VLT to report that more activity was occurring on the conserved land in front of Mr. Smith's house.

Without further options, VLT immediately sent a staff member to Mr. Smith's house and asked the utility company to call the police to stop the continuing trespass. Everyone converged on the site at about the same time. The police removed the landscapers that were again pushing debris onto the conserved land and cutting down more saplings. The staff person documented this third trespass.

The utility company and VLT conferred and decided that no options remained but to file suit and to file notices against trespass. The land trust had discovered that Mr. Smith's wife held a professional license that might be jeopardized by a trespass charge and hoped this risk might inspire a willingness to discuss the matter. It did.

After a flurry of court filings and the beginnings of some limited discovery, the land trust suggested mediation. All the parties agreed and located a neutral, experienced mediator who was also a former judge with a no-nonsense reputation. VLT and the landowner utility company collaborated on mediation strategy and roles. The utility company had a prominent legal practitioner in the area who knew litigation management, and he acted as the lead attorney for the litigation but only represented the company, not VLT, to avoid any potential conflict of interest. The attorney kept the discussion focused and on track. He also provided overall strategic direction and credibility. VLT's real estate lawyer acted as the support lawyer and the conservation law expert and also represented the land trust. The land trust's forester served as the subject matter expert. This combination proved pivotal in the ensuing 15-hour mediation marathon.

VLT's lawyer fielded the first challenge from the mediator, who wanted to scrap the entire claim because he believed that a few small trees really did not matter so much. The lawyer had to explain the purpose of a conservation easement and, more important, its public purpose and benefits that were destroyed by the neighbor's unlawful actions. She also made the point that Mr. Smith should not benefit for the remainder of his vacation-home ownership from his deliberate and unlawful act. This argument was persuasive.

VLT also conducted extensive research into the area of damages valuation, because the stump value of the trees taken was only a few thousand dollars, but the damage to the public purpose of the easement was priceless. The land trust attorney found case law support for unjust enrichment theories, as well as theories for replacement value and aesthetic value. VLT used all of these arguments in the mediation discussion. However, it became clear to the mediator that Mr. Smith's trespass was an ongoing problem when, halfway through the mediation, which took place at Mr. Smith's vacation home, the landscapers reappeared on the easement property, removed the snow fence that the land trust had erected to mark the boundary and pushed more debris over the line. VLT's attorney walked all the parties to the mediation over to the window overlooking the current activity and the swath of cut land to demonstrate Mr. Smith's continued disregard for the boundary. This tactic inspired greater cooperation from Mr. Smith, who immediately told the landscapers to leave the premises.

Eventually, Mr. Smith agreed to accept responsibility and repair the damage to the land and the losses to the land trust and the landowner. The forester's expertise about trees, timber values, long-term care of the resource and all other related matters was critical in structuring the settlement agreement, as well as in determining damages and how remediation would be handled.

VLT and the landowner utility company left the mediation with full payment of their legal fees, full payment for all the land trust's legal time and additional costs, a substantial payment to the land trust for its enforcement fund over and above its costs, and a tree-replanting and multiyear care plan for Mr. Smith to implement and pay for that would be supervised by VLT and the utility company. Mr. Smith was so thoroughly chastened by the process that he actually implemented the plan faithfully. The new trees have softened the cut and the boundary is clearly reestablished.

Questions

1. Why do you think the Vermont Land Trust was able to manage the situation successfully?
2. What steps did the organization take to ensure a successful resolution?

Guidance

Vermont Land Trust personnel did everything correctly in a complex situation. They:

- Remained diplomatic, calm and polite
- Responded immediately and reasonably to the situation
- Met with legal counsel immediately so that counsel could assist from the very first response
- Had sufficient staff capacity and funding so that they could focus on the problem rather than worry about the cost
- Documented and researched the situation thoroughly and devised a course of action consistent with their mission, their stewardship philosophy, the conservation easement purposes, original grantor intent and their established violation policy and procedures
- Conducted multiple site visits by appropriate experts to determine resource values and obtained expert advice on the effect of the violations
- Communicated their decision clearly in person and in writing and in detail
- Had a practice of annual visits — and even multiple visits annually — to easement-protected land
- Had a plan and a strategy, backed up by legal research and experts, which it implemented effectively

Evaluate Your Knowledge

Now that you have tackled the major issues in addressing easement violations, check that you:

1. Can articulate three reasons that make having a written violation resolution policy worth the investment of time to develop:

   _____

   _____

   _____

2. Can list six principles to guide your violation resolution procedures:

   _____

   _____

   _____

   _____

   _____

   _____

3. Can list five violation resolution procedures:

   _____

   _____

   _____

   _____

   _____

4. Can list four alternatives to litigation:

5. Can name three interpretation rules that may affect a court case:

6. Can describe three essential violation documentation procedures:

7. Can describe, in a general way, the link between easement drafting and easement monitoring and easement enforcement:

8. Can identify four ways legal counsel can help with a violation:

_____

_____

_____

_____

9. Can name five costs a land trust might incur when enforcing a conservation easement:

_____

_____

_____

_____

_____

Guidance

1. A written violation resolution policy will:
   - Guide your land trust through potential and actual violations
   - Assist your land trust to fairly, conscientiously and effectively address, manage and resolve violations
   - Maintain your land trust's credibility by having a consistent process for enforcing and defending conservation easements
   - Help your land trust assess the extent of potential or existing violations and respond in a manner consistent with the law, respectful of landowners and proportionate to the circumstances

2. Violation resolution principles covered in this chapter include:
   - Address every violation appropriate to its scale, resource damage and severity
   - Preserve the purposes and intent of the conservation easement in perpetuity
   - Comply with federal and state law
   - Maintain public and landowner confidence in the land trust
   - Follow a policy and procedures that allow the land trust to respond quickly
   - Uphold the organization's mission
   - Preserve the land trust's tax-exempt status as a charitable organization
   - Prevent private inurement and impermissible private benefit
   - Maintain landowner goodwill to the fullest extent possible
   - Require maintenance of records and funds to provide sufficient stewardship services
   - Conduct annual monitoring visits to the conserved land and, if possible, with the landowner
3. Violation resolution procedures covered in this chapter include:
   - Identifying a possible conservation easement violation
   - Investigating and documenting a potential violation
   - Determining whether a violation occurred
   - Evaluating the severity of the violation
   - Considering any mitigating factors
   - Distributing internal notices regarding the violation
   - Determining responses to violations
4. Alternatives to litigation include:
   - Education
   - Negotiation
   - Approvals
   - Remediation
   - Amendment
   - Waivers
   - Licenses
   - Mediation

5. Interpretation rules that may affect a court case include:
   - Deeds and contracts are construed in accordance with the intention of the parties if that intention can be discerned from the totality of the written document
   - Courts will read the conservation easement first to determine the parties' intentions
   - If the conservation easement is ambiguous or if reasonable people could interpret it in different ways, then the court looks beyond the four corners of the conservation easement to determine intent (baselines, correspondence and the like)
   - Words are given their ordinary and usual meaning that a reasonable person in that community would give them
   - If the written words are clear, then those words will govern the actions of the parties and the court has little discretion to stray from that meaning
   - The court is not limited by what other evidence it can consider
   - If neither the conservation easement as written nor additional evidence clarifies the parties' intentions, then the courts use rules of construction to interpret the conservation easement
   - Deeds must be interpreted as a whole and all the words given an integrated interpretation, leaving nothing out
   - Specific, explicit and detailed statements are given more weight than general statements
   - The parties' conduct may be relevant evidence about intentions, but conduct may never override clear explicit words in deeds
   - Specially negotiated clauses are given more weight than boilerplate or template standardized language
   - Whenever possible, ambiguously worded land use restrictions will be resolved in favor of the free unrestricted use of the land
   - Courts will construe ambiguities and other gaps in information or intention against the drafter of the document

6. Essential violation documentation procedures include:
   - Locating the possible violation and identifying it on a map
   - Taking photos, measurements and samples as necessary to document the violation
   - Asking the landowner what he or she knows about the activity
   - Considering whether an expert is necessary for additional documentation
7. The conservation easement must be drafted to clearly identify the land's conservation values, the conservation purposes of the easement and any restrictions on use in a manner that permits land trust personnel, whether staff or volunteer, to easily monitor the easement and the landowner to understand its terms. Restrictions must be clearly described and tied to the conservation values and purposes so that a violation can be detected and resolved.
8. Legal counsel can:
   - Help a land trust understand conservation easement terms
   - Help a land trust understand any weaknesses of its position
   - Propose alternatives for resolution of the violation with the landowner
   - Advise what a court might think of each alternative and of the interpretation of the easement
   - Determine measured and appropriate responses
   - Advise the land trust on the likelihood of the possible violation erupting into judicial action
9. Typical costs include:
   - Equipment
   - Time
   - Travel
   - Legal fees
   - Staff or volunteer costs
   - Extraordinary costs (experts, payments to remove violations)
   - Litigation or mediation costs

Conclusion

The remarks of Jean Hocker, former president of the Land Trust Alliance, on easement stewardship in the Winter 2000 issue of *Exchange*, have proven prophetic:

> What we're finding is that easements have by and large stood the test of time, so far. Some violations have occurred, but most have been minor, few have gone to litigation, and those have largely been resolved in favor of conservation. But we're also finding that serious violations are usually the work of second- or third-generation owners, or of third parties. So we can anticipate that there will be more violations in the next decade.
>
> Admittedly, the details can seem tedious and time-consuming. But sound legal drafting, clear baseline documentation and recordkeeping, consistent monitoring, and diligent enforcement are all part of holding conservation easements. A land trust or agency that isn't prepared to do that ought to consider whether it should be holding easements at all.
>
> To negotiate, sign, and record a conservation easement and then to neglect its stewardship is a little like working hard to buy a sleek sports car and then abandoning it to rust in the rain. If the owner is not able to take care of it, it was probably a mistake to acquire it in the first place; soon it won't be worth having. Of course, you have the right to neglect your Porsche if you wish, but an easement is different because there's a public trust involved.
>
> With so much pressure to save green space before the opportunity is forever lost, it's easy to see why things fall between the cracks. And resources are never enough, even for large land trusts and agencies. So all land trusts need to work smart, select protection priorities carefully, put systems in place to manage easements as efficiently as possible, learn from others' experience, and resolve that stewardship will be just as important as the initial agreement with the landowner.

Sample Documents

The following sample documents can help you develop a violation resolution policy, but you should customize any policy and procedures to your own unique situation. Use the template above to help you in selecting the sample that works for your land trust. For other sample policies and procedures, see the Land Trust Alliance's digital library on the Learning Center (http://learningcenter.lta.org).

Conservation Easement Violation Response Procedure, Dutchess Land Conservancy, New York (*page 350*)
This is a good example of detailed violation resolution procedures developed by a midsized land trust. The document also includes a section on preventing violations, addressing some of the issues raised in this chapter. As of 2008, the Dutchess Land Conservancy has a staff of nine, has protected more than 27,000 acres and is accredited.

Easement Violation Policy and Easement Violation Process Checklist, Marin Agricultural Land Trust, California (*page 355*)
This document sets forth a succinct violation policy and violation resolution procedures. The checklist is a great addition to a land trust's procedures and can help ensure that all steps in resolving a violation have been taken in a timely manner and documented. As of 2008, MALT has a staff of 15 and has protected more than 40,000 acres of farmland.

Procedure for Enforcement of Easements, Mountain Conservation Trust of Georgia (*page 358*)
This small, staffed land trust adopted a procedure for determining the severity of a violation while considering mitigating circumstances. Although this procedure is not sufficient to represent an entire easement violation policy, the questions represent a great example of violation assessment. The Mountain Conservation Trust for Georgia has conserved more than 1,000 acres since 1991 and is accredited.

Easement Enforcement Guidelines, Teton Regional Land Trust, Idaho (*page 362*)
This document is an example of a medium-size land trust's policy that briefly addresses the reasons for enforcement and then sets forth procedures for responding to a violation, including third-party violations. As of 2008, the Teton Regional Land Trust has a staff of 11 and has protected more than 23,234 acres.

Easement Enforcement Flow Chart, Conservation Stewardship Program Violations Principles, Quick Answers to Assist You with Your Conservation Easement, Stewardship's Frequently Asked Questions, Vermont Land Trust (*page 364*)

The flow chart is an example of a visual or graphic violation process depiction that may help land trust personnel, whether staff or volunteer, visualize the process (land trusts may wish to supplement the flow chart with more detail). The principles, philosophy, considerations and assessment tools contained in the Violations Principles are detailed and helpful. The Quick Answers and FAQ handouts can be very valuable in assisting landowners in avoiding technical and minor violations and may be helpful in avoiding more serious violations as well. As of 2008, the Vermont Land Trust holds 1,503 easements totaling more than 470,000 acres and has a stewardship staff of 10.

Adopted by the Board of Directors: 12/13/02
Revised 12/28/06 changing Executive Director to President

Dutchess Land Conservancy, Inc.

CONSERVATION EASEMENT VIOLATION RESPONSE PROCEDURE

I. Easement Enforcement

The long-term effectiveness of conservation easements in protecting valuable lands depends on the Conservancy's ability to enforce the terms of the easements. Strong enforcement builds public confidence in easements as a land protection tool. By swiftly responding to violations, whether actual or potential, the Conservancy will preserve the legal right to enforce the easements it holds. In order to accept tax-deductible gifts and qualify for tax-exempt status, IRS regulations require that easement-accepting organizations commit to upholding the terms of an easement and maintaining the financial capability to enforce the restrictions. (See Treas. Reg. 1.170A-14(c)(1).)

The Conservancy realizes that each easement violation represents a unique situation and requires a tailored approach. The following are guidelines to be used to help assure that appropriate steps are taken to document and notify the property owner about the violation, a well as consult with legal experts.

II. Overall Guidelines for Violation Response and Enforcement:

1. Maintain the conservation purpose of the Conservation Easement.
2. Maintain the Conservancy's image both in its ability to achieve its mission overall and in its ability to enforce specific Conservation Easements.
3. Protect the Conservancy's legal rights and economic value in the Conservation Easement.
4. Maintain the most constructive working relationship possible with the landowner.
5. No one person should make decisions on violation response – get counsel first. Never give a landowner an on-the-spot opinion about whether or not a violation exists.
6. Maintain professionalism and integrity.
7. Be flexible as the situation warrants. Balance the harm caused by the violation with the cost/benefit of the selected enforcement response.
8. Use litigation as a last resort and when there is a good chance of success.
9. Maintain consistent responses to similar Conservation Easement violations.

III. Violation Prevention Strategies

1. Maintain good landowner relations. Make a point of getting the landowner involved with the Conservancy.
2. Provide informal services to the landowner – advice on enhancing wildlife habitat, good forestry practices, etc. Send them newsletters, outing information, and event brochures, etc.
3. Provide an easement summary to landowners every three years as a reminder.
4. Staff to conduct annual monitoring. Send the landowner annual notification and monitoring follow-up letters and, if applicable, a written monitoring report.

5. Ensure that we are informed when properties change hands.
    - Make sure local realtors know about Conservation Easement properties.
    - Check real estate transactions town by town on a monthly basis.
    - Remind landowners to check the Conservation Easement before altering the property in any way.
    - Ask landowners to notify the Conservancy if they are planning to sell their land.
6. Provide a "new owner introductory package" to ensure that new owners understand the Conservancy's mission, the Conservation Easement for their property, and the concept and purpose of Conservation Easements in general.
7. Maintain good relations with the local officials. Make sure that local building officials, town planning boards and conservation commissions are aware of properties with Conservation Easements.
8. Work to ensure tighter drafting of Conservation Easements.

IV. Steps to Take in the Event of a Violation:

Violations may be discovered in any number of ways: through annual monitoring inspection, as reported by neighbors, easement donors, new property owners, passersby, or Board or Advisory Committee members.

If an easement violation is suspected, the President and/or stewardship staff should:

1. Review the Easement Terms. Review the easement document, baseline inventory, and monitoring reports to determine the exact nature of the suspected violation and when it took place. The President should carefully review the easement history to determine the original intent of the donor and the Conservancy, and refer to the Board minutes when the easement was approved. The President should also request an interpretation of the easement by legal counsel.

2. Document the Suspected Violation. Visit the site to inspect and document the suspected violation. The violation must be described in detail including material impact, location and extent. Photos keyed to a photo map should be taken, signed and dated by the photographer. Quantitative measurements of the violation should be noted as appropriate, e.g. area of impact, number of trees damaged. Field notes should be signed and dated by the person conducting the inspection.

3. Contact the Landowner. Meet with the landowner in person if possible to discuss the suspected violation. Violations can be caused unintentionally. Listen to the landowner, ask questions, take notes, and ask them to cease any further work until the matter can be reviewed by the Conservancy's Board Chairman and the Executive Committee. Document all meetings and write a follow-up letter (send certified – return receipt requested) to the landowner confirming any on site discussion.

4. **Hold a Meeting with the Board Chairman/Executive Committee.** Review the suspected violation, easement interpretation and discussion with the landowner with the Board Chairman/Executive Committee.

a) The President, Board Chairman and the Executive Committee shall review the easement, the Conservancy's legal counsel's interpretation of the easement, Board minutes when the easement was approved, baseline documentation and all other relevant information to decide whether there is in fact a violation under the terms of the easement. If the decision is no, it is not a violation, the process ends and a letter is sent to the landowner.

b) If a clear violation of the Conservation Easement exists or if the Executive Committee determines under 4a) that a violation does exist, the Executive Committee then determines whether or not it is a minor or major violation. This determination is used to gauge the expectations for remediation and compensation. If it is major, and may require court action, then the Conservancy's full Board of Directors will be consulted about the appropriate action.

5. Work with the Landowner to Correct the Violation. After the Executive Committee's decision, the President calls the landowner concerning the Executive Committee's decision and sends a follow-up letter (sent certified - return receipt requested) which specifies the Conservation Easement violation, references appropriate passages from the Conservation Easement document, and the Executive Committee's decision.

a) Ask the landowner to voluntarily correct the violation. If the Landowner voluntarily agrees to restore the Property, re-inspect the site on the deadline date. Carefully document the restoration work with photographs, narrative description, and quantitative measurements. Send the landowner a follow-up letter (send certified – return receipt requested).

b) If the Landowner does not agree to voluntarily restore the Property, the President then consults with the Chairman of the Board and the Executive Committee to further discuss the violation and come to a final decision regarding its enforcement.

c) If the landowner does not agree that there is a violation or does not agree on the solution to a violation, the President and Board Chairman consult the Conservancy's legal counsel.

i) If it is a major violation and the Conservancy has exhausted all attempts at negotiation, the Board Chairman will seek Board approval to take the violation to court.

ii) If it is a minor violation, and after exhausting attempts at negotiation for removal and full restoration, the Conservancy may consider temporary approval (limited term) or less than full restoration.

d) For either a major or a minor violation, the Conservancy may consider the use of an amendment or a waiver (similar to amendment but not signed by landowner) to resolve the violation. However, there are number of considerations that the Conservancy must weigh before pursuing this route (refer to DLC's *Conservation Easement Amendment Policy*):

i) Consider the precedent set of condoning a violation with an easement amendment. Consider encouraging easement landowners to ask for a review of a proposed change to the easement protected property whether or not it's allowed under the terms of an easement in order to hold off a potential violation.

ii) There has to be increased resource protection in exchange for any adverse impact of the amendment. If the monetary value of the Conservation Easement is increased or decreased by the amendment, an addition of other restrictions should be negotiated so that the easement value remains the same or is increased (requires an appraisal). Amendments should be either conservation neutral or improve the conservation value.

iii) Consider whether or not the amendment would be controversial or incite negative public reaction in the community.

iv) Consider the time and expense for the approval process (Board approval, appraisal, and any secured lender that must subordinate its interests to an easement amendment).

Note: If an amendment is pursued, Board approval is required before informing the landowner. Document and update baseline data immediately. The Conservancy should refer to its amendment policy for guidance.

The Executive Committee may develop alternative suggestions for remediation and/or compensation by the landowner and should present them to the Board. At this time, the Executive Committee may identify specific legal counsel to provide consultant legal services.

6. Going to Court

Taking a violator to court should be considered as a last resort. Going to court is expensive and time consumptive and will likely irreparably damage the relationship between the property owner and the Conservancy. Court decisions can set precedent that will affect easements either favorably or unfavorably. In certain cases the Conservancy will have to go to court in order to defend an easement, stop damaging activities, or obtain reparations. In such cases, the Conservancy should consult with an experienced trial lawyer to assess the merits of the case, the documentation of the alleged violation and the likelihood that the court will interpret the activity as a violation of the easement. The Conservancy must also be sure to maintain adequate enforcement funds to cover legal expenses.

Note: *During this process, if the landowner can not be contacted by telephone, draft and send a certified letter (return receipt requested) that specifies the violation and requests a personal meeting to resolve the situation. A copy of the certified letter should also be sent by first class mail. Specify a time frame for contact in the letter.*

a) If the certified letter is rejected, resend the letter certified, first class, delivery of the certified letter to be arranged with a private process server or the Civil Division of the Dutchess County Sheriff's Department.

b) If a response is not received in the time period identified, re-evaluate the situation. Try to visit the property at times when someone may be found at home and attempt to make contact. If there is no success with repeated attempts at contact and it is a major violation, consider litigation.

Effective Date: December 13, 2002

Marin Agricultural Land Trust
Easement Violation Policy

Well-drafted easement language and good landowner relations are essential in promoting the integrity of conservation easements and laying the foundation for easement defense. During the course of business, MALT takes numerous steps to address these factors. Easement Program and Stewardship staff coordinate during drafting of easement documents to ensure that restrictions are practical and can be monitored. Discussions with landowners during baseline document creation, and routine contact through annual monitoring visits helps build familiarity and a MALT presence. Providing information on current governmental programs and consulting on conservation projects help establish MALT's interest in the property, the landowner's agricultural interests, and the integrity of the easements.

These efforts minimize potential conflicts, but easement violations inevitably occur. MALT's response to a violation will be proportional to the severity of the violation. Minor infractions may simply warrant a written acknowledgement of the violation and agreed upon remediation from the Stewardship Director to the landowner. Serious violations may require a more formal response with initial oversight of legal counsel.

Response to Easement Violations

While MALT's response to violations will vary depending on the situation, each case will adhere as closely as feasible to the policy outlined here. These steps are generally followed in progression until a violation is resolved and legal counsel may be consulted at any time deemed appropriate. The process is terminated at any stage when it is determined that a violation has either *not* occurred or has been resolved. All documents created in this process are retained.

Time is of the essence. Each step in the process will be carefully considered, but will be taken without undue delay. Further, schedules for remediation will be agreed upon and must be timely in order to minimize potential damages resulting from the violation.

1. **Document the practice or condition in question.**
   If observed during a monitoring visit, follow the procedures described in the Baseline Documentation and Monitoring Program Guidelines. If information is received from another source, such as a neighbor or the County Community Development Agency, prepare a memo that includes the pertinent data. Contact the landowner and schedule a site visit to establish the validity and nature of the issue.

2. **Discuss the matter with the landowner.**
   When possible, bring the matter up with the landowner during the monitoring visit when the observation is first made. Generally, the initial conversation is not the time to state unequivocally whether or not a violation has occurred. The most important objective at this time is to acquire information on the extent, purpose, cause, or planned remediation of the situation. However, when the activity or condition poses a relatively minor threat to the protected values on the property or is relatively easy to remedy, discussions with the landowner at this time may resolve the situation. In this case, a letter is sent to the landowner, according to Monitoring Program Guidelines, documenting the problem and the solution(s) agreed upon.

3. **Establish whether a violation has occurred.**
   A. Stewardship Director (SD) reviews the easement, baseline documentation, previous monitoring visits, and correspondence.
   B. SD prepares a memo detailing his/her observations of the activity/condition and findings from the review in A above, and makes preliminary recommendations on whether or not a violation has occurred and on potential resolutions.
   C. Executive Director (ED) reviews the memo in B above and any associated information. The ED must concur that a violation has occurred before proceeding.
   D. If the SD and ED concur that a violation has occurred and that it can be considered *major*, the Stewardship Committee will be informed of the situation as soon as possible and will review findings and approve staff recommendations for remediation and compensation by the landowner prior to proceeding. A violation may be considered *major* if it poses significant ramifications to easement program integrity, significant threat to protected conservation values of the property, significant cost to the landowner, or a high potential for litigation.

4. **Send a letter to the landowner detailing the observed violation.**
   SD and ED draft a letter to the property owner, relating the activity or conditions to specific provisions of the easement that it/they violate and requesting a meeting to resolve the situation. The Chair of the Stewardship Committee receives a copy of the letter when it is sent to the landowner and the Stewardship Committee is informed/updated at their next meeting.
   A. If a plan of remediation has been agreed to by the property owner in Step 2, describe it and include a schedule for implementation.
   B. If a plan of remediation has not been agreed upon, the letter should include a request to meet with the landowner and provide 2-4 specific dates and times to choose from.

5. **MALT staff and landowner meet to discuss the activity/condition of concern.**
   A. If there is disagreement on whether or not a violation has occurred, or on the best ways to remediate the violation, a third party with expertise in the relevant field may be consulted.

6. **Send a letter to the landowner, Cc to the Stewardship Committee Chair, that documents the conversation and discussed alternatives from Step 5.**
   If an agreement was reached, the letter outlines the agreed upon remediation and a schedule of implementation.

7. **If agreement with the property owner has not been reached on violation and remediation, MALT staff and the Stewardship Committee will consider other approaches that may lead to amicable resolution, including mediation, arbitration, or further third party consultation.**

8. **Legal action will be taken as determined necessary and appropriate.**

Easement Violation Process Checklist

1. Practice/condition documented by_____ Date_____

2. Discussed with Landowner on site to gather information by_____ Date_____

3. Determine whether a violation has occurred by_____ Date_____
   Relevant documents reviewed by Stew Coord (SC) by_____ Date_____
   Memo with recommendation by SC by_____ Date_____
   Memo reviewed by Ex Dir (ED) by_____ Date_____

   If SC and ED concur that a "major" violation has occurred, such as those that pose a significant challenge to easement integrity or protected values, that would have a significant cost to remediate, or that have a high potential for litigation, include step #4 before proceeding to step #5.

4. Stew Committee reviewed and approved recommendations by_____ Date_____

5. Letter sent to landowner detailing violation by_____ Date_____

   If remediation agreed on in step #2, describe and include schedule for implementation. If not, request a meeting with several dates and times to choose from.

   Cc'd to Stew Comm Chair by_____ Date_____
   Stew Comm informed at earliest meeting by_____ Date_____

6. Staff meet with landowner by_____ Date_____
   Third party specialist consulted? by_____ Date_____

7. Letter to landowner documenting outcome of #6 by_____ Date_____

   If agreement reached, outline course of action and schedule of implementation.

   Cc'd to Stew Comm Chair by_____ Date_____

   If agreement not reached, proceed to #8.

8. Staff and Stew Comm consider other approaches
   to amicable solution by_____ Date_____

   May include other remediation, arbitration, or additional third party consultation.

9. Legal action initiated by_____ Date_____

   Legal action may be initiated by MALT as determined necessary and appropriate.

February 20, 2007

MOUNTAIN CONSERVATION TRUST

Mountain Conservation Trust of Georgia's Mission

The Mountain Conservation Trust of Georgia is dedicated to the permanent preservation of the natural resources and scenic beauty of the mountains and foothills of North Georgia through land protection, collaborative partnerships and education.

PROCEDURE FOR ENFORCEMENT OF EASEMENTS

These procedures are for Board Members of the Mountain Conservation Trust of Georgia to determine 1) what is a violation of a conservation easement, and 2) what is the appropriate response to that violation.

Levels of Violations

- Improper Communication of Action
  - would result in no tangible impact on conserved resource(s).
    a) exercising reserved rights without notification
    b) transfer of property without notification
- Minor Violations
  - would result in a transitory or minor impact on conserved resource(s).
    a) undiscovered trash dump (no longer used with absence of hazardous wastes)
    b) unauthorized access (hunting, fishing & hiking)
    c) unauthorized placards
    d) firewood harvesting (of downed trees)
- Intermediate Violations
  - would result in a moderate impact on conserved resource(s) affecting 1-5% (in area) of conserved property
    a) extensive tree pruning & cutting
    b) unauthorized construction of communications system

- Major Violations
    - would result in a major impact on conserved resource(s) affecting 6-100% (in area) of conserved property
        a) clearcutting
        b) unauthorized construction of shelters

Response to Violation

1. For both "Improper Communication of Action" and "Minor" violations, regardless of degree of mitigating circumstances, the Trust should endeavor to educate the landowner and to continue to build a strong working relationship. These violations may 1) merit no formal response, 2) be addressed and approved on principle, 3) be waived because of the perceived minimal nature.
2. (Minor) May require a modest request to the landowner to please inform the Trust before future similar endeavors.
3. (Minor-Intermediate) May require one or more site visits to assess the situation and to develop a solution
4. (Intermediate-Major) May require alternative forms of mitigation (restoration, payment of damages) appropriate to level of mitigating circumstances.
5. (Intermediate-Major) Submission of notification to cease and desist all undesirable activities with a request to return site to prior condition.
6. (Intermediate-Major) Pursuit of litigation or enforcement by city/county municipality if landowner is unresponsive to initial attempts of mitigation\
7. (Intermediate-Major) Attainment of formal "Stop Work Order" to prevent irreparable harm to conserved properties
8. (Intermediate-Major) In worst case scenario, pursuit of litigation may be the greater part of valor in cases where >10% (in area) of conserved property is in peril.

Scale to Assist Violation Gradation

Is the infraction central to conservation purposes and core resource values?

1) No
2) Yes

Would the infraction be permissible under current form of easements?

1) Yes
2) No

Are there special circumstances that cause feelings of compassion and flexibility?

1) Yes
2) No

How much of the property (in area) was affected?

1) 0-5% of the conserved property
2) 6-9% of the conserved property
3) ≥10% of the conserved property

Was the infraction intentional?

1) No
2) Yes

Does the landowner have a history of infractions?

1) No
2) Yes

Did the landowner halt activity when asked to do so?

1) Yes
2) No

Is the landowner willing to repair the damage?

1) Yes
2) No

Is effective remediation possible?

1) Yes
2) No

Is the infraction a violation of the law?

1) No
2) Yes

Will this affect public confidence in land conservation?

1) No
2) Yes

Teton Regional Land Trust
Easement Enforcement Guidelines

Purpose: The Land Trust is responsible for enforcing all its conservation easements through identification and rectification of violations. Regular communication and property monitoring result in violations being found and corrected in a timely manner.

Enforcement is needed to:

1). Engender public confidence in TRLT and their easement program. Public confidence in the Trust's commitment to stand by its easements is built with each easement.

2). Maintain the Trust's legal authority to enforce easement held. Delayed enforcement of a violation may jeopardize the Trust's right to enforce particular provisions.

3). Maintain the Trust's ability to accept tax-deductible easement gifts and its tax-exempt status. Federal regulations specify that the eligibility of an organization to accept tax-deductible easement gifts must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions".

Procedures for Enforcement:

1). All easement deeds include provisions that note the grantee's right to recover all costs, including legal costs, from landowners in case of a violation by the landowner.

2). Easements are monitored regularly to ensure accurate representation of the easement restrictions, to address and steer activities away from becoming violations, and to check for easement compliance.

3). Easements are monitored on a regular basis to maintain and nurture open and positive communication between TRLT and easement property landowners.

4). If a violation is expected or TRLT staff are having difficulty communicating with a landowner involve a board member or a unbiased third person in monitoring visits.

5). The first response to a violation is thorough and accurate documentation of the violation. Documentation should be written for an audience that is unfamiliar with the property. The violation should be carefully documented quantitatively and descriptively. The record should include Photos, signed by the photographer and keyed to photo points on a map, or a videotape with verbal commentary. The violation record provides measurements of damage to the affected resources. The violation record includes extensive field notes that are dated. The violation record includes explicit comparison with the baseline assessment and photo-documentation.

6). If responsible for the violation, the landowner (if not present during visit) is contacted (record of violation given in writing) as soon as a violation is identified by the Land Trust. A meeting is set up to discuss the violation and its remediation. A written record of all meetings, correspondence and other forms of communication is essential when working with the violator toward reparation.

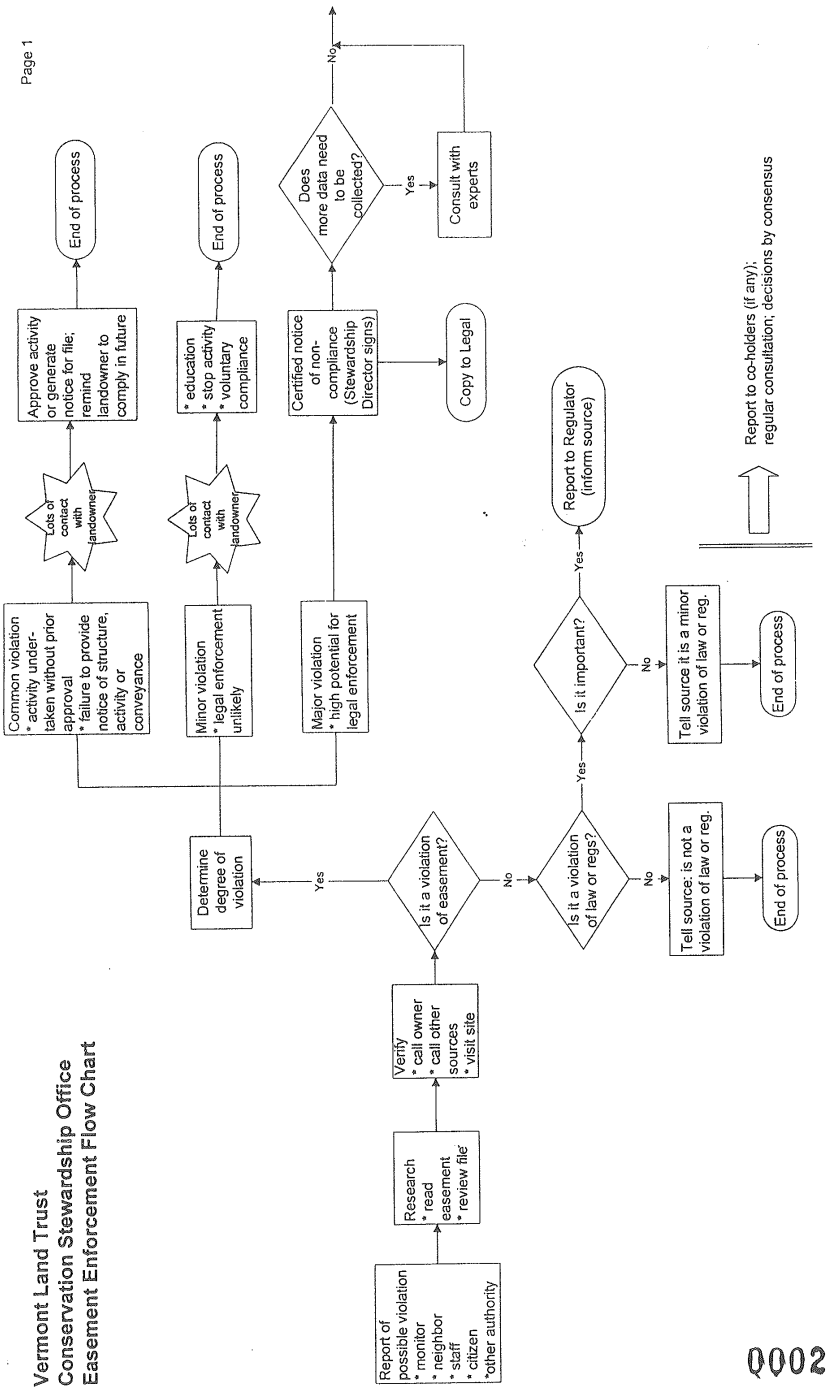
7). If a third party, such as an adjacent landowner is responsible for the violation, they are contacted (record of violation given in writing) immediately by TRLT to schedule a

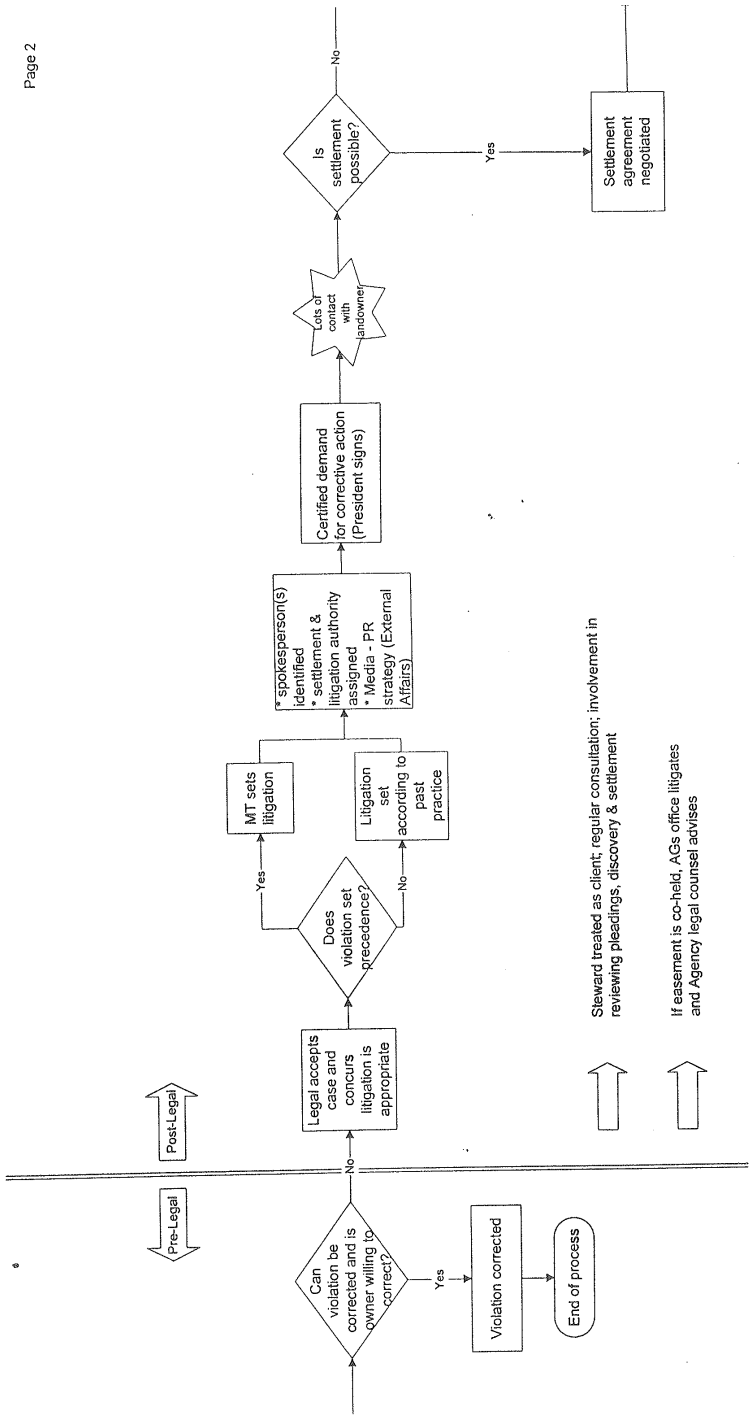
meeting to discuss the violation and its remedy. The landowner must be invited to such meeting since legal responsibility for the violation ultimately falls on him.
7). Easement violations are reported to Board of Directors as soon as they are identified.
8). Legal counsel is brought in early but at the appropriate time. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible.
9). TRLT staff, volunteers and board working on the violation are briefed by an attorney on proper procedures, conduct, correspondence, and other communication to protect the trust's legal interest.
10). Records should be adequate to demonstrate the chain of events to a court, should litigation later become necessary.
11). TRLT with legal counsel decides the best course of action. Possible violation solutions include:

- a). A voluntary, negotiated resolution to a violation. TRLT gives the violator 30 days to cure the violation or restore the portion of the Property to its prior condition in accordance with a plan approved by TRLT. Many violations are caused unintentionally by landowners, abutters, or other parties who are unaware of or did not understand the easement.
- b). Use mediation when the violator and TRLT cannot agree on reparation but are willing to work with a third party.
- c). If the violator fails to cure the violation within thirty (30 days) of receipt of violation notice, or fails to begin curing such violation, or fails to continue diligently to cure such violation until finally cured, TRLT may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of the Conservation Easement, to enjoin the violation, ex parte as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to any such injury.
- d). Litigation is the last choice but may be necessary to resolve the violation. In some cases state law may require the courts be involved when easement violations occur.

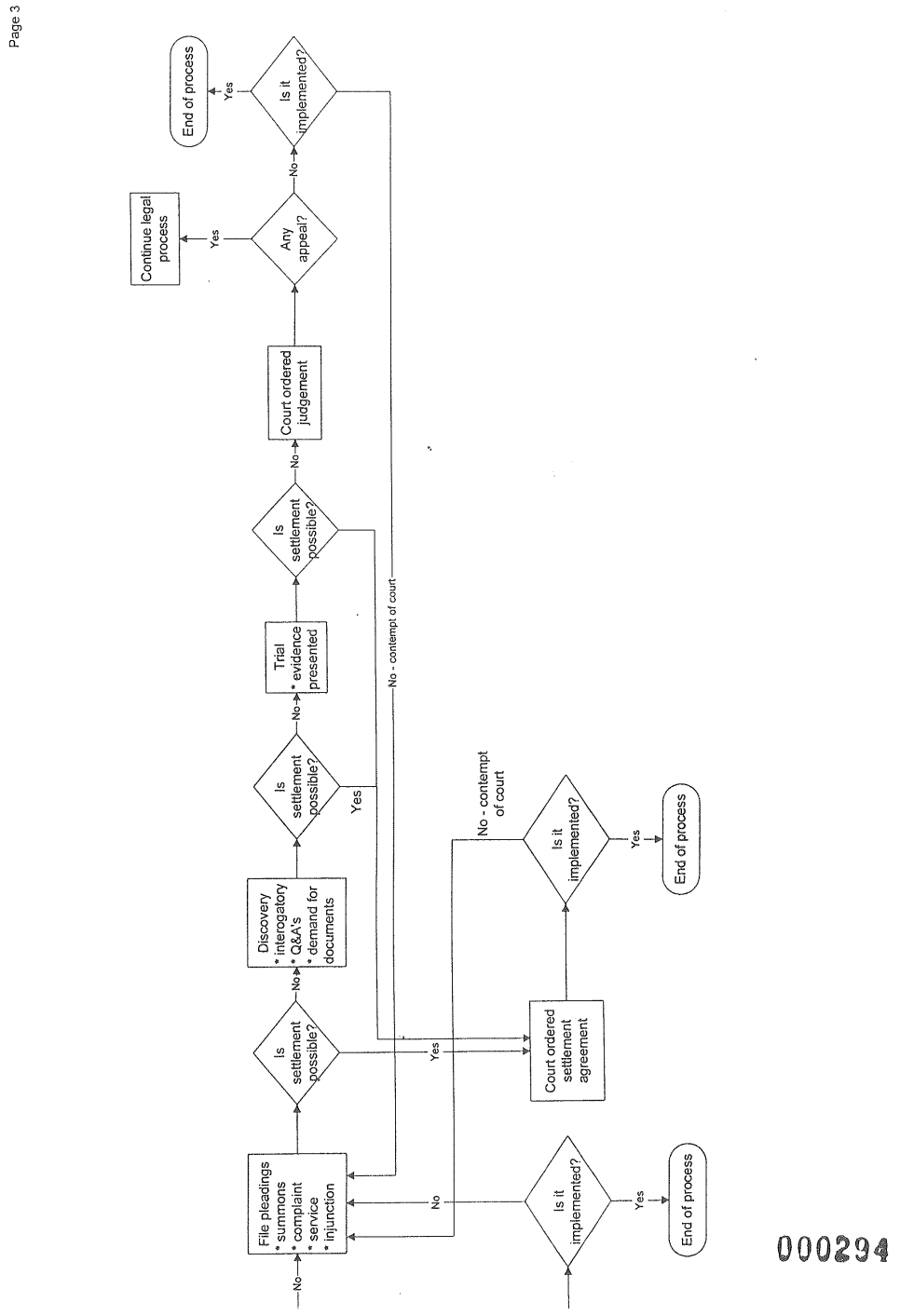
12). TRLT will inform LTA of easement violations. This is especially important if the violation might require litigation and/or set a national precedent.

VLT: Easement Enforcement Flow Chart




Page 2
Pre-Legal
Post-Legal
Can violation be corrected and is owner willing to correct?
Yes
No
Violation corrected
End of process
Legal accepts case and concurs litigation is appropriate
Does violation set precedence?
Yes
No
MT sets litigation
Litigation set according to past practice
* spokesperson(s) identified
* settlement & litigation authority assigned
* Media - PR strategy (External Affairs)
Certified demand for corrective action (President signs)
Lots of contact with landowner
Is settlement possible?
Yes
No
Settlement agreement negotiated
Steward treated as client; regular consultation; involvement in reviewing pleadings, discovery & settlement
If easement is co-held, AGs office litigates and Agency legal counsel advises
000293

VLT: Easement Enforcement Flow Chart



Vermont Land Trust Conservation Stewardship Program Violations Principles

Philosophy. Landowner education and relationship building not litigation are the best immediate and long-term methods to guarantee that conservation easements are upheld. We work with owners of conserved land to help them understand their conservation easement and continue to be good stewards of their land. We use this philosophy to determine what is a violation of a conservation easement and what is the appropriate response to that violation, we apply the following principles and considerations. We also promptly and diligently pursue substantial violations to assure integrity of the conservation easements that we hold.

Application. There is a continuum of responses to violations (discussed below in Section C). We elect the response based on the combination of the resource impact of the violation (see Section A below) and the mitigating circumstances present (see Section B below). This results in a dynamic among all these factors that makes each response unique and individual for each landowner's circumstances.

Principles and considerations.

A. Levels of Violations

1. Technical deficiencies are not counted as violations. Technical deficiencies are "paperwork deficiencies", such as failure to give notice of a sale of the conserved land, that have no tangible physical impact. These issues are not central to the conservation purposes of the conservation easement.
2. Minor violations have only a transitory or minor resource impact such as an old trash dump that is no longer used and has no evidence of hazardous materials. These violations are not central to the conservation purposes of the conservation easement.
3. Moderate violations have a moderate physical impact on those resources protected by the conservation easement and are central to the conservation purposes of the conservation easement, for example extensive tree cutting in a buffer or locating a large mixed use agricultural and commercial structure in an area that has a negative effect on the farm . The factors considered are distance outside the complex, extent of the mixed use, size of the structure, and amount of rated agricultural soils affected, and seriousness of the negative impact, as well as the landowner intent.
4. Major violations have a major resource impact on those resources protected by the conservation easement and are central to the conservation purposes of the conservation easement. For example, a 100-acre clear-cut on a 1000-acre forestland easement property in violation of an approved plan.

B. Matrixes to Assist Decision Making:

1. What Physical Impact and How Central is the Damaged Resource to the Conservation Purposes

CRITERIA	Scaled low to high
How central to conservation purposes of development rights and core resource values?	
How much of the parcel is affected? How large an area?	
How significant in adverse impact? How easy to fix? Does it involve soil loss, water quality, scenic attributes or other resources?	
Would the activity or action be permitted under our current form of easement?	

2. Degree of Mitigation

CRITERIA	Scaled low to high	Weight of Factor low to high
How intentional was the action? Was it a mistake?		
Did the landowner halt the action when first requested?		
Was the landowner willing to fix the violation?		
Have we had to file an action in Court? Seek injunctive relief or otherwise file in Court?		
What limits are there with our remedies: education, legal, financial, other?		

What mistakes did we make and how significant? (delay, miscommunication, drafting lack of clarity and so on)		
Is remediation possible and effective?		
Are there special circumstances that cause us to feel more compassion or flexibility is appropriate?		
Does the landowner have a history of violations?		
What degree of relationship benefits in pursuing education rather than litigation?		
Is it a violation or possible violation of law?		
What was the conserving landowner intent?		
What are our co-holder and other partner opinions?		
Was it a third party violation? How do the circumstances rank on these criteria?		
How will this affect public confidence in conservation?		
What are the community relations costs?		
How much money and time did it take us to fix?		

C. Continuum of Response

1. For all technical and minor violations regardless of degree of mitigating circumstances we pursue landowner education and relationship building. Some technical violations have no response at all, for example the failure to give notice of the sale of the conserved land. Other minor violations can be approved based on principles or waived because of minimal or minor nature and do not require an amendment to resolve.
2. Most minor violations may not even require a site visit and only a modest reminder to the landowner about talking with us first in the future.
3. For all moderate violations regardless of degree of mitigating circumstances we pursue landowner education and relationship building with problem solving and payment of costs as needed. These types of violations usually require one or more site visits to assess the situation and develop a solution. The solution can involve an amendment or other adjustment.
4. Moderate to major violations could also involve other forms of mitigation to correct including restoration where feasible or payment of damages as appropriate to the level of mitigating circumstances.
5. A notice of violation and request to halt the activity and return the site to its prior condition is the next level of response if the landowner has not been responsive to cooperative efforts.
6. Litigation or enforcement by a government agency is considered if the landowner will not cooperate and other alternatives have not worked.
7. Temporary court orders may be necessary in some circumstances to prevent irreparable harm if the landowner will not halt the activity after our verbal or written request to do so.
8. If the violation is severe or significant enough, court action or litigation could be the first response or if there is major irreparable damage to a resource that is central to a conservation purpose– for example a 100 acre clear-cut in violation of an approved plan.

Learning and Data Collection. We collect what we learn from experiencing violations and feedback from landowner, and then we discuss the information with project staff and legal staff to improve how projects development and conservation easement drafting. Stewardship staff reports regularly on these experiences and what we are learning. We also collect this information so we can identify trends and issues, and track the effectiveness of responses.

Last revised February 2004

VLT LANDOWNER INFORMATION SERIES

Vermont Land Trust
CONSERVING LAND FOR THE FUTURE OF VERMONT

QUICK ANSWERS TO ASSIST YOU WITH YOUR CONSERVATION EASEMENT

We at VLT's Conservation Stewardship Program hope to assist you in continuing your stewardship of your land and your commitment to its conservation. Please remember that certain land use activities need to be approved, in writing, ahead of time, so call us as soon as you think you might want to do any of these activities. We evaluate requests for approval based on the consistency of the activity or structure with the stated purposes of the conservation easement.

ACTIVITY	LANDOWNER GIVES NOTICE	NEEDS VLT APPROVAL
Building a house	Yes	Yes
Changing any boundary	Yes	Yes
Siting an approved house	Yes	Yes
Building or siting a driveway or utilities	Yes	Yes
Building or siting septic systems or water supply	Yes	Yes
Giving a right of way (ROW) or any easement	Yes	Yes
Building fences	No	No
Changing types of crops you grow	No	No
Right of First Refusal ("ROFR")	Yes (90 days)	Yes
Giving or selling a Deed of any or all of your land even a little piece	Yes	Yes
Changing who owns the corporation, partnership, trust or other entity that owns your land	Yes	Yes with ROFR
Any changes to public access	Yes	Yes
Relocating a house or a house site	Yes	Yes
Any Deed for an approved lot	Yes	Yes
Any lease exceeding 49 years, including renewals and extensions	Yes	Yes
Constructing or enlarging ponds or reservoirs	Yes	Yes
Maintaining and cleaning an existing or approved pond	No	No
Any business in any home on your land	Yes	Yes
Any business outside any home on your land	Yes	Yes
Converting woodland to agriculture	Yes	Yes
Harvesting timber except for your own firewood	Yes	Yes
Constructing barns, sugarhouses or other agricultural or forestry structures **outside** of a designated building envelope, even if only a part of the structure is outside of the envelope	Yes	Yes
Constructing agricultural or forestry structures **inside** of a designated building envelope	Yes	No
Enlarge or rebuild any residence **inside** a designated building envelope without a historic notice clause	Yes	No
Convert a single family house to a multi-family	Yes	Yes
Any changes to designated historic buildings	Yes (30 days)	No
Create or amend Management plan	Yes	Yes
Any activity in a Special Zone (Ecological Protection or Habitat Clause, Riparian Buffer, Archeological)	Yes	Yes
Building any structure that is not for agriculture or forestry	Yes	Yes

AGRICULTURE — Folks ask us what agricultural activities are permitted under the conservation easement. We follow the State of Vermont definition found in the Accepted Agricultural Practices and in Act 250 that explains that farming and agriculture are the:

1. cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, horticultural crops, or orchard crops. This includes all plants that can be grown in Vermont soils and climate, including flowers, shrubs, sod, orchard crops, fruit vines and bushes, and Christmas trees;
2. raising, feeding, or management of livestock, poultry, equines, fish, or bees. This includes cattle, sheep, goats, bees, swine, poultry, llamas and other camelids, emus and other ratities, fish, game fowl, deer and other cervidae, and the breeding, raising, boarding, and training of horses and other equines;
3. operation of greenhouses, provided that all greenhouses must be located within designated building envelopes;
4. production of maple syrup;
5. on-site storage, preparation, and sale of agricultural products at least 50% of which is produced on the conserved farm provided that all structures for these activities must be located within designated building envelopes; and
6. on-site production of fuel or power from agricultural products or wastes produced 100% on the conserved farm and with the generator located within designated building envelopes.

FORESTRY — The long-term health and sustainable harvesting of every wooded property begins with a thorough and well-prepared *forest management plan*. Most conservation easements allow timber harvesting, but only after we have approved a forest management plan. We accept forest management plans written before conservation but may include conditions when issuing an approval to ensure adequate protection of the resources. The requirements described on these pages are consistent with the standards of Vermont's Use Value Appraisal Forest Land Program. *Items marked with an asterisk (*) are additional VLT requirements.*

Forest Management Plans must include:

- Description of the forest management objectives.
- List the products and/or values that are desired from the forest resource.
- Brief explanation of how these products and/or values relate to the Purposes section of the Conservation Easement*.
- Maps showing the town(s) where the parcel(s) is/are located; the number of acres; boundaries; significant features, forest stands ("treatment units") using Society of American Foresters cover type, or an equivalent.
- topography of each treatment unit and characteristics of the soil(s),
- Date and type of the last treatment or harvest.
- Stocking level and age class distribution before harvest.
- Stocking level after harvest. VLT uses the USDA's Silvicultural Guides for the Northeast as its standard in determining approval or denial for silvicultural reasons.
- Stand Quality; Site Class; Insect and Disease Occurrence; Silvicultural Treatments.
- Special Considerations for Plant and Wildlife, Aesthetic, Recreational, Historic and Cultural Resource *

We at the Conservation Stewardship Program of the Vermont Land Trust are the conservation stewardship coordinators for owners of land with a conservation easement held with the Vermont Housing and Conservation Board, the Vermont Agency of Agriculture, Food and Markets, municipalities, and other conservation organizations. We want to help and we're glad to answer questions. Please call 1-800-639-1709 or visit www.vlt.org for more information.

Vermont Land Trust
Conserving Land for the Future of Vermont

Stewardship's Frequently Asked Questions

Stewardship: What Happens After You Sign a Conservation Easement?

Signing a conservation easement with the Vermont Land Trust is a cause for celebration. It is also the beginning of your relationship with the staff of the Conservation Stewardship office of the Vermont Land Trust. You will receive a yearly visit from a Conservation Field Assistant, the *Stewards of the Land* newsletter and assistance in finding answers to your questions. Our goal is to help you.

What will a visit from a Conservation Field Assistant be like?

At least once each year, your Conservation Field Assistant will call you to set up a day and time to visit. The visit itself usually takes between a half-hour and an hour. The Conservation Field Assistant will walk your land with you (if you choose to join him or her), not examining every square inch, but visiting the key locations. The Conservation Field Assistant will ask questions about how you are using your land now and about your plans for the future. He or she will also answer your questions about your conservation easement, and how the choices you make in using your land can help continue your conservation efforts. If you have made major changes, the Conservation Field Assistant may take photographs, create maps and update records. The starting point for this is the baseline documentation report about your land that was made when it was conserved.

What if I want help or have questions in between visits from the Conservation Field Assistant?

Please call us any time. Our aim is to help owners of conserved land, providing such services as the yearly check-in with a Conservation Field Assistant. The stewardship department is part of VLT but operates separately and has its own endowment to ensure we will be able to fulfill our obligations to owners of conserved land well into the future.

Who is my Conservation Field Assistant? What do they know about farms and forests?

Conservation Field Assistants know quite a bit about farming and forestry, and often have formal training in agriculture, forestry or both and often have worked on or owned farm and forest land. If you have more than 400 acres of woods, our Forester will visit you. The Conservation Field Assistant or Forester's role is to help you continue your good stewardship of your land, including working with your conservation easement, not to tell you how to use your land. A Conservation Field Assistant maintains this role by visiting you every year.

What happens if the Conservation Field Assistant thinks I have not followed my agreement with the Vermont Land Trust?

The Conservation Field Assistant and other staff will work with you to address any problems that are discovered during the yearly check-in or at any other time. We can also tell you where you can get help outside of the Vermont Land Trust to assist you in making the changes or corrections needed in your stewardship of your land. We are very happy to say that in the 28 years of working with more than 1,500 owners of conserved land in 230 towns all over Vermont that all but one problem has been fixed voluntarily and cooperatively.

When should I call the Vermont Land Trust?

Call us anytime, and definitely before you sell, give or lease your land (or any part of it, even a small piece) to anyone, start a business on the property, change any special areas (such as an area with rare plants or animals), change a historic building or archeological site, do any logging (except for firewood for your own use) before you have a plan approved by us, want to build outside the area set aside for building, or create or enlarge a pond. You can always call us if you are not certain. Conservation easements vary and not all have the same rights. Your conservation easement and baseline documentation report are also good sources of information on when and why you need to call or write us.

What about houses?

Your conservation easement might have an area set aside where you can remodel or enlarge your existing house without getting approval from the Vermont Land Trust. Check your conservation easement to see what it describes or give us a call and we will let you know what the conservation easement says. If a house is allowed and you want to build it now, please call us first at (802) 223-5234. We both need to make sure that your conservation easement permits a new house and then we have to agree on the location, so this takes some coordination. Utilities, septic systems, and driveways are also included with new houses. If we agree, existing services to your house can be relocated. Your conservation easement has limits on the number of houses, so please call us before making your plans.

Will my property taxes be reduced?

Some are surprised when taxes are not reduced. Tax assessments are up to town listers so there is no single answer to this question. Also, because valuations on many conserved agricultural and forestlands have already been reduced by their "current use," taxes are already as low as they can be.

VLT notifies the Vermont State Property Valuation Office that your land is conserved and they notify the listers in your town. The listers are required to take into account what the easement does to the value of your land but they may conclude that there is no reason to reduce the assessed value. Some landowners have been able to get the assessment on their property lowered by talking with the listers or by appeal.

What is this: the "current use" or "use value" program?

The use value assessment program is a contractual arrangement with the state that assesses taxes based on how the farmland and forestland are used rather than on their development potential. In general, land in the program must be at least 25 acres in size not including two acres of land with your house. Forestland must have a forest management plan that has been approved by the county forester. Land in the program is given the same tax assessment (the rates in 2005 were $122 per acre for agriculture land or $120 per acre for forest land) for all purposes: local taxes for municipal services, the statewide property tax for education funding, and any local tax for additional school spending beyond the state's per-pupil grant. We also have a more detailed bulletin on property taxes and we can help you enroll your conserved land in the use value program.

Do I need a forest management plan?

Only if you plan to harvest trees for sale, including lumber, chips, firewood or saw logs, or want to enroll your woodland in use value. Your conservation easement probably allows logging but only after Pieter van Loon, our forester, has approved a forest management plan for your land. Depending on what you plan to do, your forest management plan may be short and to the point or very detailed. We recommend that you hire a consulting forester and talk to him or her in some detail about your plans before deciding whether to put together a plan on your own or to hire a forester to do it for you. Please call Pieter at (802) 251-6008 if you have any questions about this or would like the names and numbers of foresters. We also have a more detailed bulletin on forest management.

What if I want a business in my home or barn that is not agricultural or forestry?

Please call us. You can start a business in your home or sometimes in an out-building as long as you tell us ahead of time and we agree. We usually approve business in the home with some limits on numbers of employees. If you want to use your conserved land for fun, learning and to provide the benefits of open space to your community—that is something we can approve too just as long as these activities don't detract from the reasons we helped conserve your land. Some home businesses that we have approved are bed & breakfasts, weaving, knitting, home bakery, accounting services, and tool sales. Some out-of-home businesses that we have permitted on conserved land are the repair of farm equipment, sleigh rides, trail riding, and cross-country skiing for a fee.

What am I supposed to do before l sell my land or give it to my children?

Please call us to tell us the names of the people buying your land, even if they are family, so that we can introduce ourselves. Also, if your conservation easement gives us a right-of-first-refusal, we ask you to complete a simple one-page form telling us about the person offering to buy your land before we can decide if we will give up our right to buy your land. If the buyer is a family member then you do not need to ask us to waive that right.

Isn't the Vermont Land Trust a state agency?

No. VLT is a private non-profit corporation organized as a publicly supported charity to help conserve land for the future of Vermont. Your land may have been conserved as a joint

effort with VLT and the Vermont Agency of Agriculture, Food and Markets (VAAFM), which *is* a state agency. Another VLT conservation partner is Vermont Housing and Conservation Board (VHCB), which is a state-supported funding agency. If your conservation easement names either of these or any other co-holder with VLT, you don't have to worry about also calling those agencies. We do all of that.

What else can the Conservation Stewardship office do for me?

We can help you answer any questions you have about how your conservation easement affects your land. We also can connect you with other resources related to land use issues and government programs for open space, agriculture and forestry. While we don't know everything, we usually know a place where you can get a good answer or find other assistance.

What if I still have questions after reading all this?
We are glad to help and are available by phone, fax, mail and e-mail.

We are always happy to hear from you. Thank you for working together to conserve land for the future of Vermont!

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Additional Resources

Conservation Easement Violation & Amendment Study: Detailed Analysis, by Jason B. van Doren (Washington, DC: Land Trust Alliance, January 2005), available at http://learningcenter.lta.org.

Conservation Capacity and Enforcement Capability: A Research Report, by Sylvia Bates (Washington, DC: Land Trust Alliance, January 2007), available at http://learningcenter.lta.org.

The Conservation Easement Stewardship Guide: Designing, Monitoring, and Enforcing Easements, by Brenda Lind (Washington, DC: Land Trust Alliance and Trust for New Hampshire Lands, 1991).

"Conservation Easement Violations: Results from a Study of Land Trusts," by Melissa Danskin, *Exchange*, Winter 2000.

"Creating Collective Easement Defense Resources: Options and Recommendations," by Darla Guenzler, May 2002, available at http://openspacecouncil.org/projects/easements/baosc_easement_2002.05.06_collective_easement_defense_report.pdf.

"An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date," by Melissa K. Thompson and Jessica E. Jay, *Denver University Law Review* 78:373 (2001).

"Exploring Options for Collective Easement Defense," by Darla Guenzler, *Exchange*, Fall 2002.

"Five Golden Rules of Negotiation," by Marty Latz, *Vermont Bar Journal*, Spring 2005.

Getting Past No, by William Ury (New York: Bantam Books, 1993).

Getting to Yes: Negotiating Agreement without Giving In, 2nd edition, by Roger Fisher, William Ury and Bruce Patton (Boston: Houghton Mifflin Company, 1991).

" 'Great' Easements, Great Expectations: The Challenges and Rewards of Stewarding Large-Scale Conservation Easements," by Preston Bristow, *Exchange,* Fall 1999.

Guidebook for Directors of Nonprofit Corporations, 2nd edition, by Jeannie Carmedelle Frey and George W. Overton (Chicago: American Bar Association, 2002). See especially pages 219–21, warning about problems arising from obtaining legal advice from board members.

"Highlights of the New Restatement (Third) of Property, Servitudes," by Susan F. French, *Real Property, Probate and Trust Journal* 35:225 (Summer 2000).

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Check Your Progress

Before completing this chapter, check that you are able to:

- ☐ Distinguish between conservation easement *defense* and *enforcement*
- ☐ Explain why easement enforcement is important
- ☐ Describe, in a general way, the link between easement drafting and easement monitoring and easement enforcement
- ☐ Explain the value of having a written policy or procedure for how your organization will respond to a potential violation of a conservation easement
- ☐ Describe the role of various parties (board members, volunteer, staff, partners and others) in the event of a potential conservation easement violation
- ☐ Describe the range of solutions/approaches available to land trusts to resolve conservation easement violations
- ☐ Determine when a land trust should seek legal counsel in the event of a potential violation of a conservation easement
- ☐ Explain the types of costs a land trust might incur when enforcing a conservation easement
- ☐ Determine the range of legal defense funding that would be appropriate for your organization
- ☐ Help your land trust find the resources to draft an enforcement policy or procedure that addresses the following:
  - ☐ The role of all parties
  - ☐ Documentation of the potential violation
  - ☐ Communications with the landowner
  - ☐ Options for resolution
  - ☐ Involvement of legal counsel

Action Plan

As a result of studying the material in this course, there are many things that you will want to share with your land trust. The following list of next steps and "To Do Sheet" will help you plan your strategy.

Next Steps

We recommend that you take these steps, if you have not done so already, to apply what you have learned from this course to improve your land trust's operation.

- Consider drafting an overarching stewardship philosophy or guiding principles for your land trust to guide future organizational decisions and to share with landowners. See the Land Trust Alliance course "Conservation Easement Stewardship" for help.
- Choose one or two new ways you can reach out to landowners to build relationships or improve community relations. See the Land Trust Alliance course "Conservation Easement Stewardship" for more information.
- Create a sequential list of the recordkeeping tasks you need to accomplish, assign work teams and realistic completion dates that your team agrees on. Be sure to have intermittent check-in dates to help evaluate progress and support cross-team collaboration.
- If your land trust does not have access to a litigator, find one. Ask your board, donors and funders for names of local litigators whom they respect. Establish a selection committee and draft selection criteria that you all agree upon *before* interviewing the candidates. Be sure to discuss free or reduced-rate services. Discuss your stewardship, recordkeeping, violation and amendment philosophies with the prospective litigators. Then decide whom to retain and create a good working relationship with that person. For information on interviewing and selecting an attorney, see the Land Trust Alliance course "Acquiring Land and Conservation Easements."
- After you have retained a litigator, take your recordkeeping system, amendment and violation resolution policies and procedures and at least two full project files to that person for review and recommendations.

- Develop an amendment policy and procedures and have them reviewed by legal counsel.
- Develop a violation resolution policy and procedures and have them reviewed by legal counsel.
- Be sure that you have a written conflict of interest and insider policy. See the Land Trust Alliance course "Avoiding Conflicts of Interest and Running an Ethical Land Trust" for help in drafting a conflict of interest policy.

To Do Sheet

Use the following sheet to record any "to dos" that occur to you during the course. Be specific with the action item and date by which you hope to accomplish this task.

Chapter One

To Do	Who Is Involved	By When

Chapter Two

To Do	Who Is Involved	By When

Chapter Three

To Do	Who Is Involved	By When

Glossary

Administrative deviation doctrine: Allows a court to authorize a trustee to deviate from an administrative term (as opposed to the charitable purpose) of a trust if it appears that compliance with the term is impossible or illegal, or that owing to circumstances not known to the donor and not anticipated by the donor, compliance with the term would defeat or substantially impair the accomplishment of the purposes of the trust. Modern courts tend to permit a trustee to deviate from an administrative term in situations where the court deems continued compliance with the term to be "undesirable," "inexpedient" or "inappropriate," and regardless of whether the donor had foreseen the circumstances.

Affirmative rights or obligations: (1) An action a landowner is required to take upon his or her land pursuant to the terms of the conservation easement (for example, eradication of invasive species) that may be compelled by the land trust; or (2) the rights a land trust has to enter the easement property and undertake certain land management activities (easement monitoring, habitat restoration, building a trail and the like) or other activities (conducting public tours, scientific research and the like).

Appurtenant: Something that is attached to or travels with or belongs to or is appended to another right or interest.

Arbitration: The referral of a dispute to an impartial third person chosen by the parties to a dispute who agree in advance to be bound by the arbitrator's decision issued after a formal hearing. Arbitration is different from the informal and nonbinding process of mediation.

Business records rule: The business records rule allows a record (in any form) to be included in evidence in a judicial proceeding under the following conditions: (1) the record was created at or near the time of the event (rather than later in anticipation of litigation); (2) the record was created by someone with direct knowledge — or who was given the information by someone knowledgeable; (3) the record was created and kept in the course of the organization's regularly conducted business; and (4) it is the regular practice of the organization to create or maintain such records.

Capacity: The resources an organization has at its disposal to carry out its programs and activities, including human resources, financial resources, systems, equipment and the like.

Changed conditions doctrine: Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified by a court if they no longer substantially achieve their purpose due to the changed conditions.

Charitable trust doctrine: When a gift is made to a charitable organization to be used for a specific charitable purpose, the organization may not deviate from the charitable purposes of the gift without receiving judicial approval unless the instrument conveying the gift specifically permits the deviation. This principle holds true whether the donor is treated as having created a charitable trust or merely as having made a restricted charitable gift under state law.

Collective easement defense: A collective entity created for the purpose of guiding and funding defense and conservation easement enforcement with the capacity to oversee the potential cases arising from enforcement and defense of conservation easements for many land trusts at once.

Conflict of interest: Arises when a person in a position of authority or influence in an organization (director, officer, manager, board member, major donor, employee, other insider and relatives of same) is in a position or perceived to be in a position to be able to benefit personally or to create a benefit for a relative or other organization with which they are associated from a decision he or she could make or influence.

Conservation easement monitoring or annual visit: The land trust's ongoing inspection of land to determine compliance with easement, visit with the landowner and document the organization's findings. Monitoring ensures the protection of the land's conservation values over time.

Conservation purposes: The purposes a conservation easement must serve to be a tax-deductible donation, as defined by Internal Revenue Code (IRC) §170(h) and the associated Treasury Regulations.

Conservation values or attributes: The features or characteristics of a property that provide important benefits to the public and make

the property worthy of permanent conservation, such as presence of threatened or endangered species, important wildlife habitat, scenic views, prime agricultural soils, publicly used trails, strategic location in a corridor of protected land, water resource protection features and so on. Conservation values are inventoried in baseline documentation, which must be updated if the conservation easement is amended to affect those values.

Cy pres doctrine: Under the doctrine of cy pres, if the purpose of a restricted charitable gift becomes "impossible or impracticable" due to changed conditions, and the donor is determined to have had a "general charitable intent," a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is as close as possible to the original purpose specified by the donor.

Discovery: The court-required process used by each party to a lawsuit to obtain from the other party any relevant facts, information, documents, statements, images and other material about the case to assist with each party's trial preparation.

Easement defense: The land trust's response to a legal action or challenge relating to a conservation easement.

Easement enforcement: The discovery and resolution of an easement violation.

Estoppel: A legal term meaning that a person is precluded from complaining against a circumstance that he or she caused or contributed to, either by his or her silence, acquiescence or affirmative approval.

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."

Exaction: The regulatory requirement of an act in order to comply with a permit or obtain a governmental approval usually where the government compels a person or entity to grant a conservation easement in exchange for a permit. See also quid pro quo.

Four corners of the document: In ascertaining the legal significance and consequences of the document, the parties and the court can only examine its language and all matters encompassed within it. Extraneous information concerning the document that does not appear in it — within its four corners — cannot be evaluated.

Hearsay: A statement made (or a document offered) in court that is based on the statement made by another who is not under oath or in court and that is offered to prove the truth of the matter stated. While hearsay evidence is not generally admissible to prove the truth of the statement, there are exceptions that allow the evidence if there is support for its authenticity.

Impermissible private benefit: Occurs when a tax-exempt organization provides more than an "incidental" benefit to a non-insider.

Indispensable party: A person or entity who is essential to be included in a lawsuit so that all the issues may be fully resolved and an adequate judgment rendered.

Injunction: An equitable remedy granted by a court in a lawsuit that prohibits another party to a lawsuit from acting in a manner detrimental to the other party's interests until the matter can be resolved before the judge. Usually the action must be of a nature that is immediate, substantial and irreparable or if not stopped would result in extensive losses to the other party if compelled to return to the condition preceding the adverse action.

Insiders: Board and staff members, substantial contributors, parties related to those individuals, those who have an ability to influence decisions of the organization and those with access to information not available to the general public.

Laches: The failure to do a thing at the proper time, especially such delay as will bar a party from bringing a legal proceeding.

Mediation: The act of an impartial third person negotiating between two or more contenders with a view to persuade them to settle their dispute or to discover by an interactive process of conversation and negotiation a mutually acceptable solution to their dispute. This procedure is different than the formal and binding process of arbitration.

Policy: A specific course of action to guide and determine present and future decisions. In this context, refers to a written, board-adopted policy.

Practice: The land trust's customary action; may or may not be written. Also refers to an element of *Land Trust Standards and Practices*.

Private inurement: Occurs when a person who is an insider to the tax-exempt organization, such as a director or an officer, derives a benefit from the organization without giving something of at least equal value in return. The IRS prohibition on inurement is absolute.

Procedure: A series of steps followed in a regular order. In this context, procedures are written for the board, staff and/or volunteers to follow and may or may not be approved by the board.

Quid pro quo: The exchange of benefit where one valuable thing is given in exchange for another.

Quiet title action: A lawsuit brought in a court having jurisdiction over land disputes to establish a party's title to real property against anyone and everyone, and thus "quiet" any challenges or claims to the title.

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.

Standing: The right of a person to participate in a judicial proceeding and be recognized as a party to the proceeding by the court and the other parties.

Statute of limitations: The maximum period of time after an event that one can initiate legal proceedings.

Stewardship: Those steps necessary to preserve a conservation easement forever, including the creation of baseline documentation, regular monitoring, landowner relations (including successor landowners), addressing amendments and enforcing easements.

Stewardship fund: A separate, dedicated fund established by a land

trust to provide financial resources for easement stewardship costs. If the fund is not a true endowment, the principal as well as the earnings of the fund may be withdrawn.

Successor landowner: An owner who acquired protected property and was not the original grantor of the conservation easement.

Third-party enforcer: A person or entity who is not named as a holder of a conservation easement but who nonetheless has the legal right to independently enforce a conservation easement. In some states, the attorney general may be a third-party enforcer.

Third-party violator: A person or entity that is not the owner of the easement-protected property who enters the land without the knowledge or permission of the landowner and violates the conservation easement.

Transparency: The ease with which the public and others external to the land trust can see how the land trust operates, how it makes decisions and how it applies its policies and procedures to management of its charitable assets.

Waiver: The intentional or voluntary relinquishment of a known right or dispensing with the performance of something to which one is entitled from another. Waiver is different than estoppel. Estoppel can be unintentional.

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