SOLID GROUND
CONSULTING

Easement Revitalization

A Problem Solving Guidebook for Land Trusts

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Gratitude

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Part 1: Introduction

Background

In 1630, the people of the newly established town of Boston voted to impose a levy on each household to finance the purchase of a privately owned parcel of land, to be used by residents for grazing cows, military training and public recreation. The birth of the Boston Common represents perhaps the earliest instance of two traditionally American activities that have shaped our social, political and natural landscape over the ensuing four centuries. The first is the banding together of ordinary citizens to accomplish goals to advance the common good. The second is the protection of land in an open, natural state for the benefit of the community. The land trust community in the United States is the direct heir of both of these strains in our society.

Land conservation takes many different forms now, ranging from tiny community gardens in urban neighborhoods to the grand parks gracing many cities, all the way to the network of national parks that protect some of the signature landscapes of this country. Private conservation has always been part of the mix. Four decades ago, Congress made it possible to claim a tax deduction to offset the donation of a conservation easement to a qualified holder. While private landowners had used donated easements to protect land since the mid-19th century, the tax incentive sparked new interest in the tool. Established organizations that had always relied on fee simple purchase to conserve land were able to dramatically increase their efforts by use of easements. New land trusts formed as people saw the potential to protect critical land from development at a relatively low cost. Nearly all land trusts and public agencies charged with land conservation now include easements among their preferred tools.

Informed insiders quickly saw the potential for ever-rising future costs as land trusts tackled the challenge of stewardship of these perpetual obligations. It took a few very expensive court cases for the rest of the industry to take their warnings seriously. As the people drafting, monitoring and enforcing easements shared their experiences, the land trust community gradually refined its understanding of how to use the tool most effectively. The *Land Trust Standards and Practices* were developed, and later revised, to encode that growing body of knowledge. Most easements being written today are stronger, clearer and easier to steward because of that evolutionary process.

Of course, the nature of a conservation easement means that the mistakes we all learned from live on in the form of perpetual obligations. The landowners are still bound by their restrictions and the holders are still obligated to enforce them. They create a dilemma for stewardship staff, who may spend an inordinate amount of time trying to enforce provisions that are ill-considered or difficult to understand. In some cases, they find that the easement restrictions prevent activities that would improve the conservation values of the land. Poorly drafted terms, easements lacking significant conservation value, and easements with problems in the easement conveyance all represent potential headaches for landowners and easement holders.

Most land trusts continue to ignore the existence of problem easements in their portfolios. If they do think about problem easements, they often conclude that they can deal with the problems when they come up. They resist rocking the boat in advance. But in taking this tack, a land trust runs the risk of having to make critical decisions about easements in a hostile or deadline-driven setting. Rather than tackling problem easements at a time of crisis, land trusts can take a more proactive approach and plan for an orderly revitalization of their overall conservation portfolio when more resources, options, and possible resolutions are available.

This Guidebook offers a process for dealing with the problem easements lurking in a land trust's portfolio. The Guidebook is designed to help land trusts analyze these problem easements and understand the options available to fix or manage the problems. This should not be seen as a one-time project: the continuing evolution of standards and the growing scientific understanding of such issues as biodiversity and climate change suggest that, twenty years hence, some of the easements we are writing today will seem just as flawed as those early easements we struggle with now. Land trusts that establish a program of regular review of their easements and plan how they will manage stewardship challenges will have a far more effective stewardship program. The Guidebook gives land trusts tools they will need to make good choices.

THE DOWNSIDE OF DOING NOTHING

The board of a very successful all volunteer land trust knew there were some older "problem" easements in the portfolio but had decided to "let sleeping dogs lie" and keep limited resources focused on new projects. Three years later, the board members faced a dilemma that would cause them to regret their earlier decision.

Thirty years ago the land trust had accepted an easement over a quarter-acre property surrounded almost entirely by homes. The easement purportedly protected "scenic and wildlife habitat of significant importance to the public" and prohibited the cutting of any trees existing on the property at the time, without exception. The land trust long ago had concluded the property had little conservation value due to its small size and the fact that the public could not really view the "scenic" property. Further, enforcement would be complicated by the fact that there was no baseline document prepared at the time of the donation, and the prohibition on tree cutting was overly restrictive.

continued

How to Use This Guidebook

This Guidebook is intended to provide a structured process for organizations that want to work through upgrading their older easements. It includes "next step suggestions" to start down the path. And it offers some lessons learned from the six case studies and other research conducted by the national conservation team of Solid Ground Consulting (the Easement Revitalization Initiative that resulted in the development of this Guidebook is described in more detail in the appendix). While the Guidebook is geared primarily for land trusts, other organizations that hold conservation easements, such as government agencies with purchased easement programs, will likely find the analysis helpful even though some parts of the analysis related to donated easements will not be applicable.

If a land trust is just starting to think about problem easements, much of the background discussion in the Guidebook will be helpful – at the very least, it will prepare a land trust leader to have a more informed conversation with the land trust's attorney. (The land trust should also consider providing a copy of this Guidebook to its attorney to assist with the initial analysis.) The sections that frame the issue and summarize the legal and policy context provide a broad overview to inform analysis of specific problems.

Some land trusts have already begun the process of evaluating their easements and analyzing the problems. Such groups may find it useful to skip directly to the sections that offer detailed discussions of the options for fixing or managing problem easements. Wherever a land trust may be in the process, the Table of Contents will identify the most appropriate places to begin.

The trees had gotten quite large over the past thirty years and had begun to shade out the two story house on the property. The current landowner, desiring a bit of sun, began cutting down a large oak tree nearest the house. A concerned neighbor called the land trust to warn of the landowner's actions. The land trust consulted its attorney and decided to do nothing due to the lack of a baseline document, the high cost of the litigation, the minimal conservation value associated with the easement, and the potential challenge to the easement language.

Irate that the land trust had failed to act, the neighbor contacted a local investigative reporter who wrote a scathing exposé about the land trust's failure to enforce the clear terms of an easement. The land trust was besieged by phone calls from supporters wanting to understand more about the issue. One board member confirmed the land trust was more or less "side-tracked" by the debacle for over a year, during which it saw donations and new projects decline significantly. Another board member admitted, "We would have been better off working on this issue earlier when we had more options open to us."

What the Guidebook Will Not Do

This Guidebook will not focus on how to resolve organizational problems that may lead to problem easements, nor will it address identifying and providing the financial resources necessary for this process. The Land Trust Alliance has many land trust-specific tools for supporting organizational effectiveness. The Alliance also has resources to help set policies for drafting and documenting good easements and ensuring sound

transactions. The "Assessing Your Organization" (AYO) process determines a land trust's basic level of compliance with *Land Trust Standards and Practices*. The Alliance's Learning Center organizes tools and examples to help land trusts become more effective organizationally and programmatically. And the Land Trust Accreditation Commission provides a comprehensive test of compliance with the most important of these standards and practices through its accreditation process.

The sections in this Guidebook that deal with amendment do not try to capture the breadth of opinion, process or resources available on the subject. A good place to start might be the Land Trust Alliance's 2007 research report, "*Amending Conservation Easements: Evolving Practices and Legal Principles,"* available on the Alliance website.

Much of the analysis in the Guidebook relates to the Treasury regulations regarding donated tax deductible easements. This part of the discussion does not necessarily apply to purchased easements or easements exacted through a public regulatory process. Many easements for which no deduction will be sought still follow the format and wording of a tax deductible easement for various historical and practical reasons. Purchased and exacted easements often require perpetuity as do tax deductible easements, although sometimes for different reasons. Moreover, land trusts are subject to the same requirements as 501(c)(3) charities whatever kinds of easements they may hold. The Guidebook does not attempt to address the specific constraints imposed by regulatory or funding agencies as these are different for every program.

Finally, the Guidebook does not specifically address easements held by public agencies. Public entities that hold conservation easements are subject to the same expectations and obligations as land trusts in terms of stewardship, monitoring, and enforcement. The tools offered here for assessing, managing and fixing problem easements will in many cases be applicable to publicly-held easements. However, there may be additional constraints, and there may be different options for resolving problem easements which differ considerably from those available to land trusts.

Disclaimer

This is a conservation practitioner's Guidebook, not a legal treatise. It contains only a handful of legal citations, and a short list of resources in the appendix, legal and otherwise. Even though this book was prepared with input from and vetted by attorneys, the information, analysis and strategies offered are not and should not be construed as offering legal advice. The Guidebook is intended to give conservation land trust leaders a starting point for tackling their problem easements, but before proceeding on any course of action relating to the options discussed in this Guidebook, land trusts should consult with their attorneys.

Part 2: Initial Reactions and Responses to Problem Easements

What Is the Problem and How Do We Know?

Many land trusts that have operated for a few years have at least one easement that does not meet their current criteria for quality. These problem easements are likely to haunt these groups – and the land trust community as a whole – in the future.

Three Types of Problems

Problem easements can be organized into three basic categories:

- Eased lands that have no, or minimal, conservation value;
- Easement documents with drafting problems; and
- Problems with the supporting documents or the easement conveyance process (collectively, "Transactional Issues").

Here is a quick look at these problems, and a closely related area, referred to as "Complicating Matters." Each of these categories will be discussed in greater detail in Part 4.

No or Minimal Conservation Value

"Conservation value" is a slippery beast in the world of land trusts. Based on differences in organizational mission and purpose, an easement with "minimal conservation value" for one group may be ideal for another – and therefore tricky to distinguish from a more subjective "undesirable" easement.

Many land trusts hold easements that do not meet their current standards for conservation value. In some cases, these easements are the result of looser standards in the past; in other cases, they were acquired from another land trust in a merger or a transfer. The property may have always lacked conservation value so that the easement should never have been accepted.

For other land protected with easements, some original conservation value has been lost. It may be lost due to ecological, biological, or natural changes, such as climate change or invasive species. It may be lost due to easement violations or human causes, such as

development or adjacent land uses, encroachment, or polluting activities. In *very rare* instances, such a major change may have occurred to the land that no conservation value remains, and extinguishment may be appropriate. In all other instances, the land trust has obligations to serve the conservation easements it holds, even those with perceived low conservation value. Staff and board members accustomed to a rigorous review of new easement proposals may question the importance of continuing to defend easements they see as contributing little to their conservation goals, but that does not excuse the land trust from its obligation.

Drafting Problems

Ambiguities, internally conflicting provisions, conflicts between language in the easement document and language in other supporting documents, overly vague or overly restrictive language that makes stewardship administratively burdensome or that invites landowner dispute – these are all examples of the many kinds of drafting problems that may be found in an easement document. The best corrective action will depend on many variables, including, for example, the extent of the problem, the landowner relationship, and relevant court rulings in the jurisdiction.

Transactional Issues

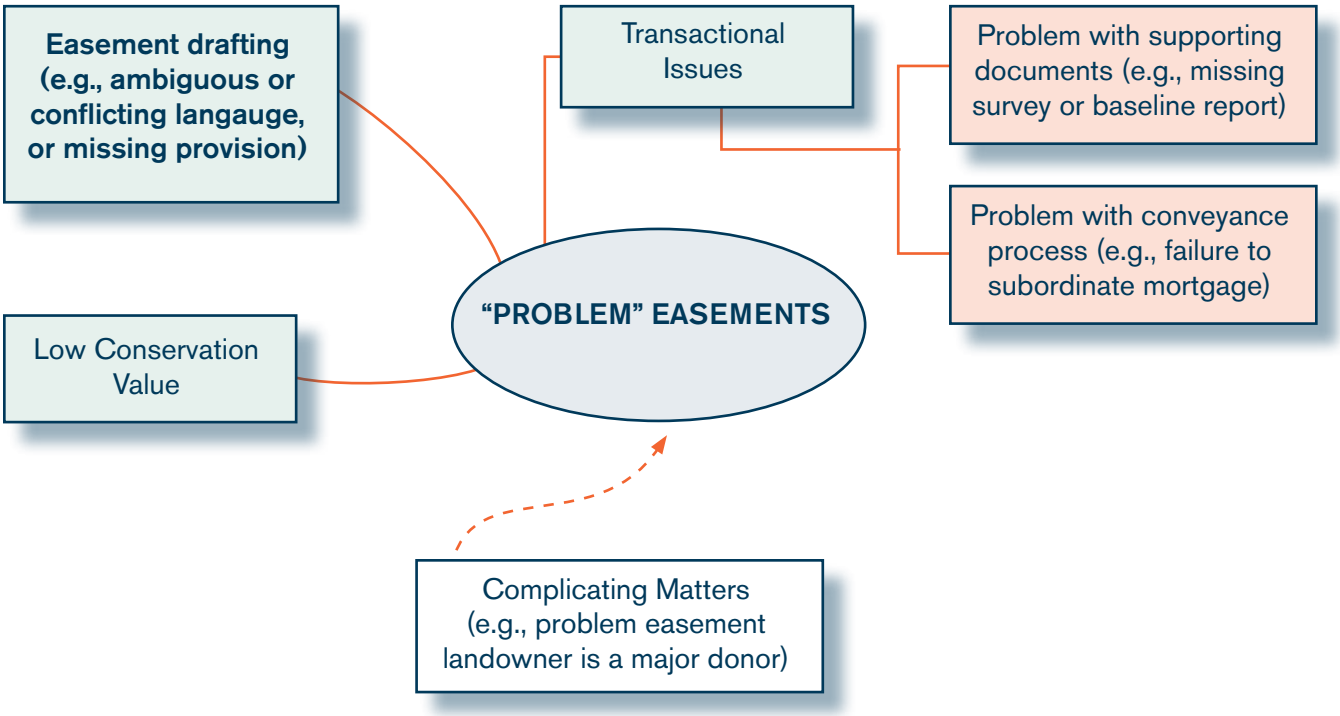
Examples of "Transactional Issues" include land description problems; failure to obtain a mineral remoteness opinion before closing; failure to obtain an accurate survey of the property; failure to obtain subordination of minerals and mortgages before closing; and failure to prepare (and have landowner and land trust execute) a comprehensive baseline document or report. As with drafting problems, how a land trust tries to fix the problem or manage the easement will depend on a great number of factors, discussed in the rest of this Guidebook.

Complicating Matters

"Complicating Matters" do not *create* problem easements but they *complicate* the resolution or management of the easement. For example, a landowner violation of a prohibition or restriction in an easement with drafting problems or transactional issues does not create a problem easement. However, it certainly complicates a problem easement.

The diagram on the following page offers a visual way to think about how these pieces tie together.

A Visual Summary of Problem Easements



Brainstorming for Solutions

Land trusts are blessed with smart people on their staffs and their boards. These individuals come to the land trust world with a broad range of expertise, from the for-profit and nonprofit worlds and from the public sector, and they often bring creative ideas for solving problems. Some of those ideas will turn out to be good solutions. Others will be seen as impractical or impossible when considered in the context of the laws governing nonprofit governance and conservation easements.

Here are a few ideas.

THE IDEA	THE TYPICAL CONVERSATION
No action	*"We've had these easements in our portfolio for over a decade with no problem. Why should we start mucking things up by analyzing them and contacting the landowners when we see problems?"*
Extinguishment	*"This easement doesn't have any real conservation value. The current landowner can't understand what we could possibly be monitoring, and gets ticked off at our yearly visits. Our staff feels like it is wasting its time on stewardship and administration of this easement. And, if we ever have a violation on the property, the last thing we want to do is enforce it. It would be a complete waste of our resources."*
Sell Back to Landowner	*"This easement is a dog. The landowner is eager to pay us the appraised value in order to get rid of it. We could eliminate the stewardship hassles and put that money to better use protecting more important land. Sounds like a win-win."*
Amendment	*"This easement was drafted back in the first year of our organization. It has a sketch of the easement area rather than a metes and bounds survey prepared by a licensed surveyor. Let's just talk to the landowner and see about amending the easement to make it more accurate."*
Seek Judicial Relief	*"We really want to take care of some ambiguous language in the easement. We never meant to restrict the southeast corner so that the landowner is denied the barn she is requesting. We would like to amend the easement but we're concerned there may be later scrutiny of our decision. Our attorney has explained that we could seek a declaratory ruling from our local court."*
Transfer to New Holder	*"This easement doesn't fit our mission anymore and we don't have the right kind of stewardship program to manage it. But there's another land trust in the region that focuses on this kind of property. Let's see if they'd consider holding it."*
Private Letter Ruling	*"Let's ask the IRS to interpret this one for us – they can tell us the tax consequences of what we're thinking of doing by either amending or seeking extinguishment for this easement. Yes, it's an expensive and time-consuming option, but at least we'd have some clarity on whether our proposed changes are consistent with our tax-exempt status."*
Abandonment	*"The Deep Hollow Land Trust is folding. We're willing to take their decent easements, but not the ones with little conservation value, and especially not the ones without any baseline documentation. Just let them go out of business after we take the good ones."*

THE IDEA	THE TYPICAL CONVERSATION
Sequestration	*"In our last review, we just discovered five easements that we think have a high potential of being very expensive to administer and enforce, with low conservation value benefit. Some of them have uses that are likely to lead to violations. Others have ambiguous language in the easement or the exhibits that will be disputed by the landowner. Any lawsuits will be ugly and expensive. Let's convey these to a separate organization with minimal assets. If one of those high risk easements ever 'blows up,' we don't have to worry about it harming our main organization's assets."*
Sequestration & Abandonment	*"Maybe after we set up the new organization and transfer the problem easements to it, we'll just have all the board members resign."*
Management Plan	*"It's probably not cost effective or even possible to fix this easement, but we can anticipate likely problems and develop some strategies for preventing them or for dealing with them if they occur. That way we won't be caught off guard and react in a way that makes the problem worse."*

These ideas fall into three broad categories. (The first two are discussed in greater detail in Parts 5 and 6.)

1. Fix the Problem

There are several legal tools available to eliminate problems in an easement. It may be possible and cost-effective to change an easement and rewrite the badly drafted language or to get a court to rule on its meaning. It may be possible to transfer the easement to an organization with a mission more appropriate to the intended type of conservation. Some transactional problems may be fixable as well. In a very few instances, it may be possible to extinguish the easement. While this last option undeniably gets rid of the problem, it is rarely appropriate and should be considered with great caution.

2. Manage the Problem

In many cases, a land trust that holds a problem easement will decide that the tools available to fix the problems are impractical. But that doesn't mean the land trust should just shut its eyes and hope for the best. A thorough assessment of the risks associated with the easement and a plan to manage those risks will guide the holder in responding to challenges and may help prevent problems from coming to a head in the future.

3. Avoid the Problem

Doing nothing is a simple and common approach for dealing with problem easements. Some members of the land trust community feel that talking about mistakes will draw unwanted scrutiny and may discredit us all. Others point to the potential cost in time and money to address these problems and place them at the bottom of the priority list.

It is tempting, especially when the land trust believes an easement holds little conservation value, to conclude that it will be a waste of resources to give the easement more than cursory attention – just do an annual drive-by, ignore all but the most flagrant violations, and call it good. However, organizations that hold easements have a basic obligation to monitor and defend them. Failure to do so might encourage the landowner to believe the land trust won't ever enforce the easement, leaving the door open for complicated and expensive problems in the future. It may cause other owners of eased land to believe they can also violate their easements. Worse, it also can result in denial of accreditation, loss of public trust, revocation of "qualified holder" status, and even revocation of charitable status. This Guidebook is predicated on the belief that "do nothing" is a shortsighted approach and likely to lead to greater risk in the future.

Abandonment

The notion of simply abandoning problem easements may be seen as a subset of the "avoid the problem" category. But it is worthwhile to address it separately. There is no clear pathway allowing a land trust to abandon some easements while continuing to operate as a qualified holder of conservation easements. Thus, the option of abandonment generally comes up in the context of a merger of land trusts or the failure of a land trust. In both situations, a different land trust may be asked to accept responsibility for easements that do not meet its standards for conservation values, public benefit, or quality of drafting. That land trust might legitimately balk at taking on the burden of another organization's mistakes. There are, however, good reasons not to allow easements to be orphaned, starting with the risk of discrediting the whole concept of conservation easements held by private land trusts. Moreover, the board members of the original holder land trust would be failing in their fiduciary obligations if they allowed this to happen. At some point, the land trust community probably needs to create structures to support land trusts that agree to accept orphaned easements, including funding to cover the costs incurred.

Part 3: Legal and Policy Constraints

The problems and possible solutions presented in the Guidebook must be evaluated against the legal and policy constraints placed on a land trust. Those constraints fall into three basic categories:

- Legal and Institutional. Will the decision comport with federal and state laws governing conservation easements and tax-exempt public charities, as well as be consistent with Land Trust Standards and Practices?
- External. How will landowners, organization supporters, and the general public perceive the land trust's decision?
- Internal. Does the decision support and further the land trust's mission, goals and policies, and what are the financial and administrative ramifications of the decision?

Below we provide a brief summary of the main points. Some of the concepts offered in this Guidebook – including ***Assessment #1 – Conservation Value*** and ***Assessment #4 – Competing Interests*** – dig deeper into these factors.

Legal Constraints

Land trusts are by and large creatures of federal and state law. Any decision dealing with problem easements must be made with a clear understanding of the land trust's limitations. Here is a brief summary of the legal constraints.

Federal Law – Obligations under 170(h) Conservation Easement Statute

To begin with, the conservation easement law, section 170(h) of the Internal Revenue Code ("IRC" or the "Code"), must be evaluated as the land trust decides how it may deal with problem easements. Section 170(h) provides that a "qualified conservation contribution" is the contribution of (a) a "qualified real property interest;" (b) to a "qualified organization;" (c) "exclusively for conservation purposes."

The Treasury Regulations provide that a "perpetual conservation restriction" is a "qualified real property interest." A "perpetual conservation restriction" is a restriction (such as a conservation easement) "granted *in perpetuity* on the use which may be

made of real property ...." Reg. § 1.170A-14(b)(2) (emphasis added). Thus, a decision to extinguish or amend an easement will have implications with respect to this requirement.

A "qualified organization" means (for nongovernmental organizations) the ability to meet, and continue to meet, the requirements of section 501(c)(3) of the Code. The organization must also "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions." Reg. § 1.170A-14(c). So a decision ***not*** to steward or enforce the terms of an easement could have implications with respect to this requirement.

"Exclusively for conservation purposes" means, among other things, the easement must be perpetual and must provide no more than incidental benefit to the donor. Reg. § 1.170A-14(e). Not only must the easement be perpetual, it must be *"enforceable* for perpetuity." Reg. § 1.170A-14(g). Finally, under the Treasury rules, extinguishment is available only if there has been a "subsequent unexpected change" in the conditions surrounding the conserved property that makes it "impossible or impractical" to use the property for conservation purposes. In those cases, the IRS will deem the conservation purpose to be nonetheless treated as protected in perpetuity if the restrictions are (1) extinguished by judicial proceeding, (2) the land trust receives its proportionate share of the value of the property at the time of its sale or exchange, and (3) the land trust uses all the funds in a manner consistent with the conservation purposes of the original contribution. Reg. § 1.170A-14(g). Obviously, a proposal to extinguish the easement will include evaluation of this part of the section 170(h) criteria.

With this in mind, in considering an option to deal with a problem easement, the land trust will need to ask, among other questions: *Will our proposed action jeopardize our ability to meet the "qualified organization" test?* Or, in the context of sequestration *(see Strategy #5: Sequestering the Easement): Will the new organization meet the test?* Another question might be: *Can we survive any legal scrutiny that we (or the donating landowner) might face if we were to extinguish an easement that had been presented to the IRS as being "perpetual?"* On this point, some IRS agents have suggested that a land trust or a government agency could lose its status as a "qualified organization" for failure to show the capacity and willingness to steward and enforce the easements it holds. Several land trusts have, in fact, lost either status as a qualified organization or nonprofit status. Such an intervention would put the land trust out of business and reflect poorly on the land trust community as a whole.

Federal Law – Obligations for 501(c)(3) Tax-exempt Organizations

As noted above, to be a qualified organization, the land trust must meet the requirements of section 501(c)(3). That section requires in relevant part: "Corporations … organized and operated exclusively for ... charitable ... purposes." The phrase "exclusively for charitable purposes" has been refined by the Treasury regulations, as well as by case law, to limit the benefits a tax-exempt organization may confer on a private person. A land trust will need to ask*: If we amend (or extinguish) this easement, will we be conferring an impermissible private benefit on the landowner or otherwise risking our tax exempt status?* Again, loss of tax-exempt status would have a host of impacts on a land trust, including loss of "qualified organization" status.

A land trust could seek a "private letter ruling," in which the IRS will rule on the tax consequence of proposed changes to organizational purposes or activities. If a land trust is unsure about whether proposed changes are consistent with its status as an exempt organization or as a public charity (if applicable), it may request a private letter ruling or determination letter.

Federal Law – Director and Officer Obligations

Directors and officers have the duty to carry out the 501(c)(3) obligations. Under the tax rules, "managers" (which could include directors or officers) of a public charity can be subject to intermediate sanctions (excise tax penalties) for participating in a transaction known to them to be improper (such as one that bestows private benefit). This is one reason that it's also really important to beware of private benefit pitfalls! Nonprofits often carry Directors and Officers Insurance, which may or may not provide a defense but which cannot pay the excise tax penalties if assessed.

State Conservation Easement Statute

State conservation easement "enabling" statutes have been enacted in almost every state. These statutes determine the enforceability of all kinds of conservation easements: donated, purchased, exacted (for example, by zoning regulations), temporary (for example, term easements), and perpetual. They also define what will qualify for treatment as a "conservation easement," including what type of organization may hold a qualifying easement. In many cases, the enabling statutes will define easements and qualifying purposes broadly, given the application of the statutes to a broad range of types of easements. Holders are most frequently limited to government entities and nonprofit organizations with conservation purposes. Some states impose defined

procedures on acquisition and termination of easements. Therefore, a land trust considering a certain strategy should, in addition to considering federal requirements, evaluate the limitations set by applicable state enabling statute. The Land Trust Alliance website includes a summary of all of the state conservation easement enabling statutes.

State Nonprofit Laws

Land trusts that are incorporated as nonprofits are subject to the limitations of their state nonprofit statute. Many nonprofit statutes restrict a nonprofit's ability to convey away what are considered to be assets held in trust for the benefit of the public. A land trust may need to ask: *Can we sequester (or abandon, or extinguish, etc.) the problem easements and still meet the state nonprofit statute requirements?* The same nonprofit statutes typically place trustee-type or fiduciary-type obligations on nonprofit directors and officers. As a result, another question a land trust may need to ask is this: *Will our decision with respect to a problem easement expose our board of directors to liability because of a breach of a statutory obligation?* Usually the state attorney general is charged with overseeing state nonprofits. If an investigation were initiated, it would not only be embarrassing, but it could also lead to the loss of viability of the organization, either by loss of nonprofit status, or as the result of other direct or indirect repercussions.

Other Legal Principles

Contract law. Conservation easements are contractual in nature, with specific terms that certainly bind the landowner and holder *vis à vis* each other but which may be enforceable by third parties in certain situations, such as an adjacent landowner or the state attorney general in some states. A land trust may need to ask: *Could someone argue that our decision with respect to this problem easement breaches the contract?* A strong position by someone with standing to bring a contract challenge could embroil the land trust in contentious and expensive litigation, possibly not only with legal repercussions but also public relations consequences, including possibly loss of trust in the community. So additional questions may be: *Are these the facts on which we are willing to risk a legal challenge and possibly have precedent set?* Contract law may also come into play where the conservation easement resulted from a grant or other agreement with a funder, in most cases a government agency. In that case the land trust must ask: *Is our proposed action consistent with earlier grant agreements that established this easement?*

Real property law. Although conservation easements are contracts, they are a special kind: namely, a conservation easement is a restrictive conservation servitude that runs with the land. A land trust may need to evaluate: *Will our proposed action with respect*

to these problem easements be consistent with real property law interpretations? Possible repercussions similar to those identified under contract law, above, would need to be evaluated.

Trust law. In some or all cases, depending on the state, regional attitudes, and common law precedent, a donated conservation easement may be interpreted as a "thing of value" (in this case, conservation value) held in trust by the land trust and subject to the original donor's intent. Either the donor or the attorney general (or a concerned citizen) might be able to sue in such a situation. Thus, the land trust may need to ask: *Could our actions with respect to problem easements be seen as a breach of trust?* Possible repercussions similar to those identified under contract law, above, would need to be evaluated.

Local Ordinances and Regulations

While a conservation easement precludes or limits development, it does not affect the overlying zoning, if there is any, nor does the easement affect zoning on adjacent parcels. Changes in zoning that create market value by adding density or profitable uses can lead to new pressures on easement-encumbered property as development suddenly looks far more lucrative. While this may not be a legal constraint on the land trust's decision-making, per se, it is a factor that may increase the likelihood of a violation: given the opportunity for a windfall, a landowner may decide to risk being caught violating the easement. A land trust might ask: *Is our easement at risk if the zoning changes, or if property values rise?*

Policy Constraints Arising from External Sources

Alongside the legal and regulatory obligations to which a land trust is subject, other competing interests may constrain the land trust's options and actions in addressing its problem easements. Some constraints arise from perceptions or potential influence of sources outside of the organization – including the original easement donor, the current landowner, neighbors, the general public, and public "watchdogs," including the press and environmental groups. Any easement revitalization efforts should begin by evaluating who will have an interest in (or simply an opinion about) the land trust's activities. This will vary by region or state but will likely include some of these persons, groups or entities.

While different land trusts may give different weight to these groups, all land trusts should go through the exercise of prioritizing and reconciling these interests. This Guidebook walks the reader through such an exercise in Part 4: A Process for Analyzing Your Problem Easements, under "Assessment #4 Competing Interests."

Policy Constraints Arising from Internal Sources

In addition to balancing competing interests from outside sources, there may also be limitations due to the land trust's mission, its capacity for dealing with the problem, and internal policies.

Is the proposed action our best option for achieving our mission? This is a complicated question and the answer includes all the considerations above. Asking the question in this way puts the land trust's conservation mission front and center.

Is the cost of the proposed action manageable within our budget, and if not, are supplementary funds available? The land trust board is responsible for managing its funds wisely. The cost of the solution to a problem should be proportionate to the potential cost of the problem itself. "Cost" in both cases includes cash and intangible elements.

Is the proposed action consistent with our existing policies? If the land trust's existing policies do not provide for the proposed action, the board should consider why not. It may be that the current situation was never envisioned when the policy was enacted. But it may be that the policy was deliberately written to exclude or preclude such an action. The board should consider the reasons for adopting the policy as it stands and decide whether to amend the policy. It should also consider whether the land trust needs new policies to govern situations not covered in any existing written policy.

Are there any conflict of interest issues? If the landowner is covered by the land trust's conflict of interest policy or affiliated with a covered person, or someone who is in a position to exert influence over the decision because of a relationship with the land trust, the decision should be subject to greater scrutiny to avoid the reality or perception of private inurement or impermissible private benefit. The risk of a perception of inappropriate influence may be enough to make the action inadvisable.

RED FLAG! Understanding Private Benefit and Private Inurement

Land trusts must assure their actions are never taken for the purpose of benefiting a private individual or entity. Amendments or extinguishment of easements are especially susceptible to private benefit or inurement issues. Land trusts should always seek experienced nonprofit counsel.

The Basics

Private Benefit

Tax-exempt organizations, including land trusts, are prohibited from allowing "more than an insubstantial" (not defined by the rules) accrual of benefits, including non-monetary benefits, to individuals or organizations, either directly or indirectly. In egregious circumstances, the sanction for impermissible private benefit can be revocation of tax-exempt status. For lesser excess benefit circumstances, fines may be imposed. This rule spawned from the fundamental requirement that a charitable organization operates "exclusively" for exempt purposes.

The IRS focuses on whether an organization's operations further its tax-exempt purposes only and will find private benefit if the organization's operations substantially benefit private individuals or for-profit entities. An individual's or entity's relationship to the nonprofit does not matter and can include disinterested or unrelated persons. Importantly (and counter-intuitively), a violation can be found even when the nonprofit is furthering its charitable purpose during the activities that give rise to the impermissible private benefit, and it can make no difference whether the private benefit was reasonable or excessive.

It is worth noting that "incidental" private benefit is both acknowledged and allowed. Here's an example of what we mean by that: a landowner places a conservation easement over her 300-acre coastal property to protect important land for wildlife. A neighboring landowner enjoys an increase in property value because of the scenic views that are now protected on the adjacent conservation land. The benefit to the neighbor is incidental – that is, not caused by the neighbor's activities – but it is real.

QUICK POINTS IN PRIVATE BENEFIT AND PRIVATE INUREMENT

- Tax exempt organizations ("public charities," including land trusts) must always bestow public benefits through their actions, never private benefits.
- "Private benefit" relates to people outside your organization.
- "Private inurement" relates to people inside your organization, or closely related to it.
- You can compensate private persons for services or products. However, the compensation must be commensurate with what the land trust receives in return.

Private Inurement

No part of a tax exempt organization's net earnings may "inure" to the benefit of a person who has a personal and private interest in the activities of the organization. This rule is very similar to the private benefit rule, and in many cases what will constitute private inurement will also constitute private benefit. The sanction can be revocation of tax exempt status.

The rarely heard term, "inure" (gravitate toward or flow through), adopted by Congress in the Internal Revenue Code, has become an unfortunate part of the nonprofit vocabulary, but one IRS official offered a descriptive, understandable definition of it: *"The inurement prohibition serves to prevent anyone in a position to do so from siphoning off any of a charity's income or assets for personal use."* The private inurement rule does not prohibit transactions between public charities and disqualified persons. But public charities must avoid transactions (salaries, etc.) when what the private person receives has greater value than what the private person gives, referred to by the IRS as "excessive benefit."

Problem Easements and Private Benefit / Private Inurement

When a land trust fixes a problem easement, it must not confer an impermissible private benefit on the landowner. (If the landowner is also an insider, this could also constitute private inurement.)

Amendments

The land trust should scrutinize the proposed amendment and take pains to avoid impermissible private benefit. Any public benefits must significantly outweigh any part of the transaction that might somehow be construed as a private benefit by the IRS. The land trust should also carefully document its reasoning in making its decisions as to why its actions do not constitute private benefit or private inurement – including securing a property appraisal.

Extinguishment

If the land trust simply extinguished the easement, there would be a clear private benefit (the landowner could do as wanted with the property at no cost). This is expressly prohibited by the Internal Revenue Code and Treasury Regulations. The regulations explain that the extinguishment must occur through a judicial proceeding and, further, that the land trust must receive at least the pro rata benefit originally conferred on the donor by way of the value of the conservation easement donation. *See "No Private Benefit" example, further below.*

Enforcement

Another situation in which a private benefit problem could emerge is if a land trust is aware (or should be aware) of a violation of easement terms and fails to enforce the terms. Things are not always that simple. Perhaps the landowner refuses to concede to the violation and

the land trust is concerned the easement restriction or prohibition at issue is ambiguous and that the land trust may not prevail at trial. Or, perhaps the land trust has determined that there is little, if any, diminishment in public benefit (conservation values in this case) from the violation. These risks should be evaluated with the assistance of experienced counsel. Again, the land trust's decisions and reasoning should be carefully documented.

Legal Factors

501(c)(3)

To be entitled to tax-exempt status, the entity must be organized and operated so that "no part of ... [its] net earnings ... inures to the benefit of any private shareholder or individual."

Land Trust Standards and Practices

The material below, excerpted from *Land Trust Standards and Practices,* is used with permission from the Land Trust Alliance.

Practice 02C: Tax Exemption. The land trust has qualified for federal tax-exempt status and complies with requirements for retaining this status, including prohibitions on private inurement and political campaign activity, and limitations and reporting on lobbying and unrelated business income. If the land trust holds, or intends to hold, conservation easements, it also meets the IRC public support test for public charities. Where applicable, state tax-exemption requirements are met.

Practice 04C: Transactions with Insiders. When engaging in land and easement transactions with insiders (see definitions), the land trust: follows its conflict of interest policy; documents that the project meets the land trust's mission; follows all transaction policies and procedures; and ensures that there is no private inurement or impermissible private benefit. For purchases and sales of property to insiders, the land trust obtains a qualified independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real estate experience. When selling property to insiders, the land trust widely markets the property in a manner sufficient to ensure that the property is sold at or above fair market value and to avoid the reality or perception that the sale inappropriately benefited an insider.

Practice 08D: The land trust evaluates and clearly documents the public benefit of every land and easement transaction and how the benefits are consistent with the mission of the organization. All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit.

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.

Practice 11K: Extinguishment. In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

Some Examples

IMPERMISSIBLE PRIVATE BENEFIT

A landowner persuades a land trust to amend a conservation easement covering sensitive wildlife habitat and delete a prohibition on structures.

Even though no money is exchanging hands, this amendment clearly benefits a private person with no offsetting public benefit (assuming an offset could even be contemplated), and therefore constitutes private benefit. The land trust could be sanctioned by the IRS, including losing its tax exempt status and thus its ability to hold conservation easements.

PRIVATE INUREMENT

A land trust board member donated an easement to the land trust 25 years ago. The board member forgot that she was prohibited from filling in the wetlands areas, and spent $100,000 on grade and fill activities. The land trust decided to overlook the violation because it was an innocent mistake.

Again, no money need be exchanged to create private benefit or inurement. These facts present inurement because the private individual sits on the board. The land trust could be sanctioned by the IRS, including – in egregious circumstances – the loss of its tax-exempt status and thus its ability to hold conservation easements.

NO PRIVATE BENEFIT

A very conservation-minded couple made five conservation easement donations over the course of two decades. The land, covering over 1,500 acres, is close to an urban center and abuts a city park used by thousands of city residents. A green space booster committee raised money for a bench within the city park facing the sprawling vista that was protected by the family's conservation easement. An engraving on the bench identifies the family by name and explains that due to their vision and generosity this view is protected forever.

The family may derive some private benefit from the placard; however, it would be considered incidental.

CAUTION

A lava flow wipes out a 50 acre property encumbered by an easement protecting virgin forest. Nothing is left of the forest and it cannot be reestablished. The land trust and landowner petition the court to extinguish the easement. When the donation was made, the value of the unencumbered property value was $1 million, and the encumbered value was $500,000. The proportionate benefit is 50 percent. At the time of extinguishment, the unencumbered value of the property is $2,000,000. The court grants the petition to extinguish and orders the land owner to pay the land trust $1 million at the time of sale or other conveyance of the property.

The facts may support the right to extinguish – or they may not: lava flows are common on the Island of Hawaii, for example. If the easement were to be extinguished, and the document contained the standard language on a federally deductible easement, the land trust would receive its proportionate share of the property's increase in value due to the release of the encumbrance.

CAUTION

A conservation easement established the building envelope in the eastern corner of the property. The landowner desires to amend the easement to move the building envelope to the western side of the easement. The landowner offers $25,000 to cover the land trust's administrative costs of the amendment.

There is insufficient information here to determine if the amendment can be accomplished without private benefit. An appraisal is needed to determine change in value. Cost of amendment is but one issue. The land trust must determine whether there will be any loss to conservation value from the change in location. There would then remain perpetuity issues for the land trust to address.

Preventive Measures

- In all amendment or extinguishment decisions, the land trust should obtain advice from experienced nonprofit legal counsel.
- Depending on the scope of the decision, judicial confirmation of the land trust's decisions may help protect the land trust from a private benefit / private inurement problem.
- The land trust could also consider seeking a private letter ruling from the IRS, if a tax attorney felt this would be promising. A private letter ruling would clarify whether the land trust's proposed changes are consistent with its tax-exempt charitable status. This is not an inexpensive way to go, but it's certainly one option.
- The land trust should always carefully document its decisions and reasoning.

Part 4: A Process for Analyzing Your Problem Easements

Identifying Your Problem Easements

Land trusts take different approaches to problem easements lurking in their portfolios. Some proactively unwrap easements and review them thoroughly, one by one. Others wait for a problem to emerge, and then they address it. One approach – responsive or proactive – is not necessarily better, and both are practical responses. Whichever approach a land trust takes, a little advance thinking about the potential problems will make the process smoother.

Some land trusts have built an initial review process into their easement monitoring routine. Monitors are given a checklist of specific kinds of problems to look for, and they read through the easement before their monitoring visits, flagging any problems they find. Depending on who monitors the easements, a process like this might require some training and oversight, at least in the beginning. A land trust could set a goal of reviewing all its easements in this way over the course of one year. Or it could set up a schedule to spread the process over several years. As problem easements are identified, they can be prioritized for further analysis and action as warranted. For example, easements on land still held by elderly donors might be addressed differently from easements on land that had changed hands.

Even if a land trust decides not to survey all its easements, the checklist of specific problems can help analyze the response when an event such as a violation occurs. A land trust can probably make a good start on that list with ten minutes of brainstorming with its stewardship staff or volunteers. They will know if there are missing or inadequate baselines, sloppy property descriptions, undefined terms, contradictory restrictions and reserved rights, for example. If the easement template has been refined over the years, staff will know what kinds of ambiguities are no longer included in easements but still exist in older documents.

For all-volunteer groups, it will fall to board leaders or key volunteers to shepherd the organization through this process.

Analyzing Easements Identified as Problems

Once an easement is identified as a problem needing attention, the land trust will want to do a more thorough review of the easement document and all supporting documents to analyze the options for addressing the problem. To start, this means assembling a group of capable, dedicated people to analyze the nature and scope of the land trust's easement problems. This "Easement Team" might include land protection staff (acquisition, stewardship or both) and an attorney versed in conservation law – perhaps a staff or board member who is an attorney or perhaps the land trust's legal counsel. In reviewing problem easements, the job of the Easement Team is to conduct the due diligence and to examine the legal, financial, organizational, and political implications of each potential strategy. The Easement Team takes a hard look at the four corners of the easement document, to understand what it was originally designed to do and how well it holds up in so doing. The team evaluates the completeness and accuracy of supporting documentation in the original transaction and assesses the land trust's resources for ongoing stewardship – including funds, personnel, policies and procedures, and monitoring reports in the files. Land trust staff can help the Easement Team understand the broader context for the easement – for example, whether the original donor is still the current landowner, and the nature of that relationship.

Thinking Ahead: Fixing, Fallback, Fallout, and the Future

Dealing with problem easements will generally entail working with landowners and regulatory agencies, and sometimes working with other land trusts. Groups will find that some problem easements can be fixed, whereas others cannot and will have to be managed instead. Either way, land trusts will have to evaluate the repercussions of their choices and manage the public relations implications.

Five assessment steps will help your land trust get started. Begin by assessing ***Conservation Value*** – identifying what the easement was originally intended to protect and the extent to which those conditions and other conservation values still exist. Next, assess the degree to which there are ***Drafting Problems*** in the four corners of the easement document or ***Transactional Issues*** in the process when the easement was accepted into the land trust's portfolio. Analyze the potential ***Competing Interests*** that have some stake in any course of action you might choose to pursue, and determine the degree to which ***Complicating Matters*** gum up the works in resolving the problem easement.

The following pages in the Guidebook outline important issues, considerations, and processes in moving through this analysis.

Assessment #1: Conservation Value

Figuring out the conservation value of an easement may be the trickiest but most fundamental starting point in analyzing easement problems. This Guidebook works from the basic assumption that an existing conservation easement cannot be ignored or extinguished just because it has minimal conservation value and will have minimal public benefit in return for the time and cost of stewarding and enforcing the easement.

The Basics: Defining "Conservation Value"

We have all heard someone say that some property "lacks conservation value." But what does that really mean? Is that accurate? Probably not.

It might mean that the property could not meet the "conservation purposes" test outlined in section 170(h) of the Code, but that does not mean the property has no conservation value. Instead, it means that the land would likely not qualify for a "qualified easement."

It could also mean that the property does not have sufficient conservation qualities of the type related to the land trust's mission. Yet, again, that does not mean there is no conservation value. There could be "value" in conserving five mature trees on a small lot in an urban setting. This does not mean, however, that all land trusts should strive to put conservation easements on a property of this kind. -

QUICK POINTS IN ASSESSING CONSERVATION VALUE

- It is rare to find a property that truly lacks any "conservation value."
- It will be necessary to live with some older conservation easements that we now know are protecting lands with little conservation benefit, even though the time and cost associated with stewarding and enforcing them could be expended on better projects.
- Look for "silver linings" in existing easements with low conservation value. Can the focus on conservation purposes be redirected to revitalize the conservation values? Is there another holder who would see higher conservation due to a different mission (e.g. urban holdings)?

Easements with Minimal Conservation Value

Your land trust may hold some older conservation easements with only minimal conservation value. Or, your land trust, as part of a merger or other land trust consolidation, may be asked to hold easements with limited conservation value. Your initial instinct may be to consider whether to simply get rid of the easements. However, that is rarely the appropriate action.

Constraining your options are legal obligations the land trust assumed when it accepted the conservation easement. These include the obligation to hold and protect assets (conservation easements) deemed to benefit the public. You must also consider that the donor or funder most likely believed the property had important conservation values at the time of the gift or purchase. As a result, the land trust may have fiduciary or trust-like obligations to the donor or funder. If the same conservation values are present today, what has changed? Perhaps only the land trust's selectivity.

In addition to legal obligations, you must also consider how neighbors, supporters of the land trust, and the greater community feel about the perpetual nature of the easements held by the land trust. How would they respond if the newspaper announced that the land trust decided to extinguish an easement, and the accompanying photograph showed some trees on a small lot in an urban or rural setting? Many might see "value" or public benefits. They may not be sympathetic to the land trust's concerns, such as the cost of stewarding versus the resulting conservation benefit.

This is not to say that the land trust does not have legitimate concerns, including the minimal benefit of expending any portion of its limited budget on stewardship and enforcement of a conservation easement that lacks significant conservation value. Nevertheless, as discussed above, the land trust must in most cases find a way to hold and steward the easement notwithstanding its minimal conservation benefits.

Legal and Other Factors

Section 170(h)

On one level, section 170(h) is not applicable or relevant to the "conservation value" discussion because it is focused on whether a conservation easement will qualify for a tax deductible donation whereas, here, the focus is on whether there remains "conservation value." Nevertheless, 26 U.S.C. § 170(h)(4), which enunciates the "conservation purposes" test, is certainly one indicator of what constitutes "conservation value." Here is the test set forth by Congress:

> For purposes of this subsection, the term "conservation purposes" means—
> i. the preservation of land areas for outdoor recreation by, or the education of, the general public,
> ii. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
> iii. the preservation of open space (including farmland and forest land) where such preservation is—
> (A) Pursuant to a clearly delineated Federal, state, or local governmental conservation policy and will yield a significant public benefit, or
> (B) For the scenic enjoyment of the general public and will yield a significant public benefit, or
> iv. the preservation of a historically important land area or a certified historic structure.

Section 170(h)(4) has been further interpreted (and qualified) by Treasury Department regulations that discuss each of these Code sections. However, even those qualifications leave much leeway. For example, recreation and education lands identified in 170(h)(4)(i) will not

meet the test unless "the recreation or education is for the substantial and regular use of the general public" – meaning, public access is a requirement for section (i) above. For section (ii) above, the regulations explain that even habitat altered by human activity may be considered, if it remains relatively natural, and that public access will not be required. As to open space, the Regulations make clear that there is no simple litmus test for establishing what will qualify and that many factors will come into play.

Most will agree that "conservation value" could be defined even more broadly than as set forth in section 170(h)(4). This leads to the point that, once a conservation easement has been accepted by a land trust, it is very difficult to "unring the bell." In most cases, the land trust will need to make room in its budget for maintaining the conservation easement, even though it may not have the most significant conservation value.

Section 501(c)(3)

Land trusts as public charities are subject to 26 U.S.C. § 501(c)(3). While the tax-exempt organization section does not provide guidance on what is or is not conservation value, it provides an important framework for the land trust's choices as it evaluates conservation value. If the land trust wishes to seek extinguishment of a tax deductible easement, and wants to be within the bounds of the law, it must find that the easement has ***no*** conservation value. (*See Tool #4: Extinguishing the Easement.)* As explained, those instances are extremely rare. If the land trust finds there is some conservation value in any kind of easement it holds—tax deductible, purchased or exacted, it is holding an asset that has some benefit to the public and has been acquired typically with public funds, whether through a tax deduction to the owner, a tax deduction for cash gifts to the land trust used to purchase the easement, direct public funds for many mitigation and exacted easements or otherwise. As such, the land trust cannot simply abandon the easement. Among other potential legal problems, abandonment would likely constitute "impermissible private benefit," prohibited by section 501(c)(3), by enhancing the value of the land for the owner.

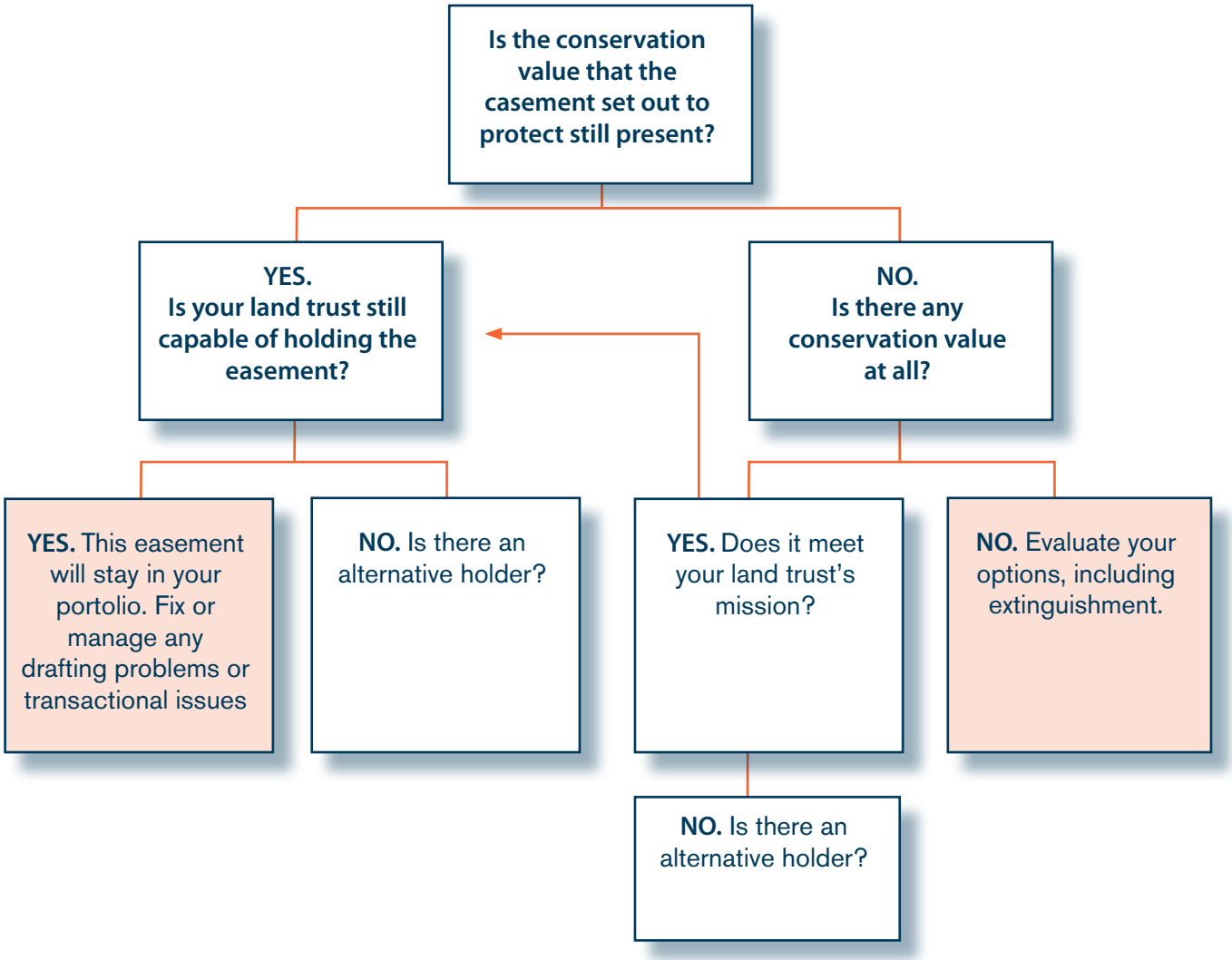
Finding Opportunity in Easements with Low Conservation Value

The old adage, beauty is in the eye of the beholder, can be reworked to this: conservation value is in the eye of the holder. Many "low value" conservation easements are low value because they are close to human populations, they are small in size, and surrounding uses may not be compatible with conservation. These small parcels with no threatened or endangered species could be wonderful urban parks or educational settings, if they permit public access. If your land trust does not include those types of public benefits in its mission, perhaps another nonprofit entity in your community does. This nonprofit could hold the easement if it is a qualified holder or alternatively manage the property. This, of course, requires landowner support. Another option is that the landowner might be willing to convey (by donation or

bargain sale) the fee simple interest to the land trust or another appropriate nonprofit. Simply put, when faced with a problem easement, consider whether with some minimal effort the easement and the land could generate greater public benefits.

On this page and the next are a few examples and a relatively basic "decision tree" for assessing conservation value. The decision tree doesn't yet answer the question of ***how*** to "fix or manage" the problem, but it challenges a land trust to think more broadly about the conservation value that may yet be present in a problem easement.

Assessing Conservation Value



Some Examples

CONSERVATION VALUE	CANNOT EXTINGUISH
One of a land trust's first conservation easements was from an enthusiastic board member. It is more than two acres of land situated in a rural area with lots of other two-acre house lots. The easement includes a half-acre building envelope, leaving 1.5 acres of second- or third-growth deciduous forest. Surrounding the property are manicured lawns, dog runs, elaborate jungle gyms, and bocce ball courts. The conservation values identified in the easement include "natural habitat."	This is not an exciting easement and there is a risk of third party enforcement issues. However, the easement has some conservation value, providing shelter and food sources for nesting birds, squirrels, opossums, deer and other suburban wildlife, as well as a scenic respite for the eye amidst the suburban sameness.

CONSERVATION VALUE	CAN EXTINGUISH
A land trust holds a conservation easement on a 5,000-square-foot, perfectly square, parcel situated in a densely developed city. When the easement was donated, there were (matching) skyscrapers on the north and south side, but no buildings on the west and east sides. On the east side was small park. One could sit on a bench in this park and look west, through the parcel, and see a large and magnificent Italian sculpture located on the other side of the parcel (but not on the parcel), and perfectly framed by the two skyscrapers. The sole purpose of the easement was to protect the parcel as open space to preserve the view of the sculpture, but no public access rights were permitted by the owner (who owned the two skyscrapers). Unfortunately, ten years after donation, the landowner on the west side moved the sculpture and built another skyscraper. The city, hit by the economic recession, sold the park to a developer to pay municipal salaries. Another skyscraper is planned where once there was park.	The views protected by the open space parcel are gone. This easement is a candidate for extinguishment. At the same time, it is a perfect example of a potential pocket park, protected by a different organization such as a community garden or urban park organization.

DIFFERENT CONSERVATION VALUE	CAUTION
The land trust accepted an easement on a 20-acre estuary back in the 1990s. Last year a horrific tsunami slammed into the coastline and no trace of the estuary is left. The property now has no wetland features. However, it is in close proximity to the shoreline. A biologist hired by the land trust says that over time coastal plants will populate the area and it will ultimately support coastal wildlife, albeit not of the wetland type. The land trust is considering extinguishing the easement because none of the conservation values contemplated in the original easement are extant.	It sounds as if some conservation value remains, just of a different type. The land trust may want to continue holding this easement.

Assessment #2: Drafting Problems

One land trust practitioner interviewed for this project suggested that all conservation easements contain language that could have been better drafted and might cause enforcement problems in the future. Another said: "All land trusts have some bad paper." Perpetuity also has a habit of being unpredictable. The evolution of the land trust community reflects a growing understanding of the need for precision and clarity in drafting easements. A cursory scan of the Land Trust Listserv reveals many discussions of the best way to define terms or phrase certain kinds of restrictions. The process of refining standards for drafting easements will never be finished – the willingness to learn from experience and to entertain new ideas is a sign of a healthy professional community.

The result of refining standards is that most land trusts hold easements that do not meet their current drafting standards. Easements may contain undefined terms, conflicts between reserved rights and restrictions, vague or confusing language that obscures the intent, or restrictions that are too loose to protect the resource. This Guidebook cannot list all the possible drafting errors. Each land trust will have its own list of common problems, rooted in its own history, mission and context. But a few broad categories appeared in the case studies, on the Listserv and in the experience of interviewees. The examples below come from all these sources.

Undefined Terms

Striking a balance among the need to define precisely what you mean, the need to keep easements a reasonable length, and the need to preserve some flexibility to respond to events or circumstances you could not predict is one of the most difficult tasks in drafting easements. Some particularly troublesome terms include:

Structures: It was common in early easements to prohibit "structures" without defining what was included in the term and what was not. Easement holders now debate whether a patio must be considered a structure or whether a small shed with wheels mounted to facilitate towing is a prohibited structure or just a vehicle parked temporarily on the land.

Agriculture: Easements on working farms and ranches typically allow the landowner considerable latitude to construct buildings needed for "agricultural uses." If the drafters looked only at the current farming operation, they may have failed to anticipate how the farm might evolve. Did they intend to allow greenhouses, or an indoor riding ring?

Historic: In an attempt to hit as many 170(h) "qualified conservation purposes" as possible, many land trusts included preservation of historic structures or historic landscapes in the conservation purposes of the easement. In many cases though, they had no documentation

of the historic value in the baseline documents nor any restrictions aimed at protecting the historic values. Such easements make it unclear whether the drafters intended to impose an obligation to maintain the historic structures.

Confusing or Conflicting Terms

Careless drafting can lead to a restriction in one section effectively prohibiting exercise of a right reserved in another section. Conflicts can also arise between two conservation purposes. For instance, a prohibition on cutting vegetation, intended to protect the natural character of a property, can conflict with the goal of preserving a scenic view from a public vantage point across the property. A well-drafted easement would acknowledge the conflict and provide for exceptions or prioritize the various purposes.

There are as many ways of drafting confusing easement terms as there are lawyers drafting easements. It would be impossible to enumerate them. With a little experience you should find it easy to spot them. If the easement monitors are not sure what they are supposed to be looking for, that should tip you off that the language is confusing. A landowner who constantly asks for interpretation of the language is another sign of a problem.

Inadequate Restrictions

Many easements define ambitious conservation purposes but allow extensive reserved rights that render the purposes ineffective. The classic example is reserved building rights that do not define the allowed location of the buildings. Restrictions that seemed adequate at the time may look different in the light of improved or changing understanding of the science of biodiversity or climate change.

Inflexible Restrictions

Sometimes the problem is that restrictions are too tight, preventing adaptation to changing circumstances or causing conflicts with landowners that serve no real conservation purpose. Some examples:

Forever Wild Easements: Easements prohibiting any human alteration of the landscape were common in early conservation easements. While it may be appropriate in some places just to let the ecosystem develop naturally, this approach can cause problems if the land is close to human habitation or is used by humans for recreation. Inability to remove dead or diseased vegetation can create a fire hazard. Inability to use machinery to construct and maintain trails can cause unsafe trails or significant erosion.

Scenic Easements: Scenic easements necessarily reflect aesthetic judgments about what is "scenic." Those judgments are often subjective, notwithstanding attempts by some agencies to quantify scenic qualities. The restrictions are often a prolific source of conflict with landowners, who may not understand the reason for certain restrictions or may not share the particular aesthetic judgments that shaped the easement. The problem may be exacerbated by pasting language that made sense for one property into an easement on another property with different characteristics. For example, many scenic easements on rural properties surrounded by undeveloped land impose requirements that buildings be sided in unobtrusive natural colors, with the goal of making them invisible to someone viewing the property. Such requirements may not be appropriate for a property in a more developed area where the neighborhood's character includes highly visible houses in a range of colors and styles.

Restrictions that Cannot be Monitored

These days, land trusts generally include their stewardship staff in the easement development process. That was not always the case. The result was easement restrictions that are difficult or impossible to monitor. Problems include restrictions on use or square footage of buildings without access to the interior of the buildings for monitoring; restrictions that require scientific or technical expertise not readily available to the land trust; or restrictions on activities like hunting that require constant effort to monitor effectively. Such restrictions may be appropriate and defensible, given the mission of a particular land trust, but they must be carefully drafted and the land trust must provide for the resources needed for monitoring. The land trust must consider whether the value of the restriction is worth the extra cost and time it will require.

Here are a few reasonable and practical examples of what a land trust can live with, in terms of restrictions that may seem (or may be) impossible to monitor:

- No All Terrain Vehicles (ATVs) – monitor for tracks and trail use revealing ATV use
- No hunting – monitor for spent shells and/or advertisements for hunting opportunity on the land
- No tree cutting – monitor for stumps

Assessment #3: Transactional Issues

Transactional issues are defined here as problems in the process of developing and finalizing an easement that may not be enshrined in the actual document but can nonetheless leave the easement vulnerable to attack. Some problems may not be "fixable" – after all, you cannot go back and "amend" your process. But understanding the nature of the vulnerability will help the land trust develop its management plan.

Baseline Documents

Failure to develop and certify baseline documents is the most common transactional issue seen in the background research done for this Guidebook, notwithstanding the clear requirement in the Treasury Regulations. Untrained and/or overworked staff and volunteers may not have understood the requirement, or they may have put off the task for a "less busy" time that never arrived. Whatever the reason, there are many conservation easements in place without baseline documents, and enforcing these easements may be difficult. *Land Trust Standards and Practices,* the Land Trust Accreditation Program and the Terrafirma insurance program, all of which require baseline documents for all easements, have already created a scramble to fill the gap.

Perhaps even more common is the problem of inadequate baseline documents. While there have always been requirements in the Treasury regulations, like drafting standards, industry standards for what should be included in a baseline have evolved. Early examples may have been considered complete with a deed and a few photos; current standards may call for an up-to-date boundary survey, a natural resource inventory and GIS maps locating key features and identifying photopoints for a gallery of photographs.

The best cure for a missing or inadequate baseline document is a current conditions report, although a complete file with years of thorough monitoring reports, maps, photos, correspondence and notes might suffice. The standards for compiling and authenticating such a report are the same as for a baseline document. The current conditions report, if properly prepared, should be admissible in a case arising from a violation that occurred after it was compiled but would likely have no value if the violation pre-dated the report. The Land Trust Alliance does not recommend that the easement holder attempt to determine the condition of the property at the time of the easement grant for purposes of the current conditions report, as it would be difficult if not impossible to establish the credibility of the resulting document.

Baseline Document Authentication

From a court's perspective, the baseline documentation is a form of hearsay. In legal terms, hearsay is an out-of-court statement offered in evidence to prove the truth of the matter stated. A "statement" can be written or oral. Hearsay is not admissible unless it meets specific criteria that qualify it for an exception. The baseline would primarily be offered to prove the condition of the property at a specific time—to prove the truth of the facts set out in the baseline, so the baseline is inadmissible unless there is an adequate showing of facts to support an exception from the hearsay rule of inadmissibility.

The principal exception that land trusts will need to use is commonly called the business records exception or, more generally, the exception for records of regularly conducted activity. The technical description of this exception is somewhat long and dense, but each element is important. Under this exception, a court may admit as evidence:

- a memorandum, report, record, or data compilation of events, conditions and opinions
- made at or near the time,
- by, or from information transmitted by, a person with knowledge,
- kept in the course of a regularly conducted business (or nonprofit) activity,
- when it was the regular practice of that business (or nonprofit) activity to make the memorandum, report, record, or data compilation,
- as shown by the testimony of the custodian or other qualified witness, or by certification, and
- the source of information or the method or circumstances of preparation do not indicate lack of trustworthiness.

Each requirement must be satisfied for the evidence to be admissible. In a perfect world, the baseline authentication would address each requirement clearly. But the reality is that few land trusts understand this issue and their authentication templates do not address the requirements. If you conclude this is a potential problem, there are some steps you could take now to strengthen the argument for admissibility of your baselines. These steps include identifying clearly the persons who compiled them and their qualifications and knowledge, and establishing the timing of the baseline compilation (e.g., from records of travel reimbursements, or from dates included in photos). It will only become more difficult to produce such information if you wait. *See Appendix 2 for a more detailed discussion and sample authentication.*

Property Descriptions

An unambiguous description of the property area encumbered by a conservation easement is a must to assure enforceability, especially with respect to activities along easement line boundaries, which might be disputed if ambiguous. What is sufficient will vary from project to project and region to region, and no specific requirement is set by the Land Trust Alliance or the Land Trust Accreditation Commission.

While a metes and bounds description prepared by a licensed surveyor may be the best approach in some situations, it may be considered unnecessary or impracticable (for financial or geographic reasons) in other situations. Other acceptable alternatives, depending on the circumstances, may include, by way of example, a description based on township, range, and section (for example, in the West) or a map or plat to scale with accompanying descriptions and measurements.

Even with great room for alternative describing mechanisms, in the past, land trusts have relied on descriptions which are insufficient. Examples include descriptions from old deeds not based on modern survey standards, hand-drawn sketch maps with insufficient data to locate the boundaries on the ground, or tax maps, which were never intended to verify boundary lines with specificity. Lack of clear descriptions and maps to document the boundaries of the easement can make it very difficult to monitor the easement and can lead to later disputes and misunderstandings.

In many cases, this problem is simple to fix. In the absence of a current dispute over boundaries, a new survey or legal description and property description can be added to the easement through reformation of contract or a correction deed, in states that use that method. If the easement clearly covers all of the owner's land, there should be no issue. If there is a dispute, however, because the easement is unclear or because it covers less than all of the owner's land, the land trust may find it necessary to negotiate a compromise to settle the matter. The vaguer the boundaries are, the harder it will be to insist on the land trust's position.

Title/Priority Issues

Land trusts are learning to conduct a title search on every property they protect, whether by easement or fee acquisition. But until recently, many land trusts did not do so when an easement was being donated. They relied on donors to attest that the title was clear. There are numerous instances of undischarged mortgages, undisclosed rights-of-way and severed mineral or water rights.

In some cases, such as mortgages, these problems may eventually go away assuming the donation was not audited. When a property is sold and the mortgage is paid off (or if the mortgage is satisfied without a property sale), the prior lien ceases to be a problem. The land trust should track this situation. But apart from that example, title problems are likely to be very difficult to fix. There is no incentive for a holder of a prior interest to agree to subordinate that interest to the easement. Buying back that interest may be possible in some cases. But an interest that is likely to be exercised may be very expensive or impossible to buy back. The land trust and owner may be aligned against the holder of the prior interest, and the owner may pay a portion of the cost. Often, however, the interest is revealed on the owner's title insurance so there is no coverage. If there's a real flaw with the title, there may be little a land trust can do if a claim is raised.

Assessment #4: Competing Interests

Any action to revitalize a conservation easement will catalyze responses from a host of players, all bringing their often conflicting interests to the table – even though the activity of easement revitalization should actually serve to ***prevent*** backlash. An easement revitalization project should begin by establishing policies that are informed by having evaluated these competing interests. The land trust need not accept every position, but it does need to be prepared to explain why a particular position should not be part of its policy.

The land trust should anticipate that many people outside the organization will have difficulty understanding the complexity associated with problem easements and their revitalization. So proactive education will be at a premium. Let's take a closer look at each of the potential players and the diverse – and divergent – interests of each.

Original Easement Donor

If the original easement donor no longer owns the land, she may lack legal standing to object to any action the land trust may take. (In some scenarios, depending on the jurisdiction, the original donor might have a claim against the land trust under a breach of trust or fraudulent solicitation theory.) But not having standing doesn't mean she won't have an opinion about it, or attempt to sue anyway. And her reaction can have an impact on the land trust's reputation – either good or bad. The land trust should ask: *Does our proposed action honor the original intent of the donation, or if not, will the original donor understand and support the action?*

Original Intent of the Donation. In most cases, people donate conservation easements because of their deep emotional attachment to the land they want to protect. They also feel a sincere pride in having made a gift to benefit their community. That's almost certainly the case the land trust presented at the time of the gift. A donor who feels that the gift is no longer valued or respected by the land trust is likely to feel betrayed and angry. A generous supporter can be turned into a vocal enemy overnight. Ammunition for the anger can readily be found in the promises of perpetuity that almost certainly appear on the land trust's website.

QUICK POINTS IN ASSESSING COMPETING INTERESTS

- Easement revitalization will bring out strong opinions from interest groups who care most about their issue and less about the land trust's issues.
- Some of the strong opinions on easement revitalization will come from within the land trust.
- Start by acknowledging the competing interests within the land trust and evaluate how to reconcile them.
- Analyze early in the process what you know about the various interests involved. Update your analysis as you get new information.

Potential for Problems with the IRS. The original donor might wonder whether the land trust's actions might prompt the IRS to re-examine his deduction – especially if the land trust is considering extinguishment. The statute of limitations for a routine audit of an income tax return is three years from the time the last deduction was taken. In a situation where a landowner "carries forward" her deduction over the allowed fifteen-year carry-forward period, taking a portion of the deduction each year, that statute of limitations can be as much as eighteen years from the date of the original donation.

If there is concern that the original donor is vulnerable to an allegation of fraud, the situation is more complicated. The land trust is not responsible for the donor's valuation of the easement (the most likely issue for a claim of fraud), even if the land trust signed a Form 8283 acknowledging the gift. But if the IRS were to allege fraud in the original valuation, the land trust would likely (perhaps inevitably) be brought into the case. If this is a concern, both the land trust and the donor should consult experienced tax attorneys.

Landowner Interests

Many of the options for revitalizing easements are only practical if the landowner cooperates. Thus, the land trust will likely need to ask: *Will the landowner be amenable to our proposed resolution of the easement problem? If the landowner is not amenable, do we still need to take action, and if so, how do we minimize the risk of protracted dispute?* This issue obviously goes further than the landowner at issue here. It possibly will affect how other prospective donors consider the land trust.

Protecting the Land. For the original donor, or a family member who has inherited the land, this may be the highest priority interest. Sometimes a second- or third-generation owner will turn out to have been attracted to the property because of the easement. Sometimes people who purchase a protected property become interested in the concept and become vocal advocates. All of these people are likely to be receptive to an approach emphasizing the opportunity to protect the land more effectively.

Retaining the Use of the Land. Even the most committed easement donor will likely have a strong interest in retaining what she sees as legitimate use of the land. If the land trust wants the owner to give up a retained right or agree to a stronger restriction, it might be wise to identify in advance some conservation-neutral concessions the land trust might be willing to offer.

Protecting Income. If a landowner's use of the property is generating income, he is unlikely to agree to restrictions that threaten that income.

Landowner's Legal Counsel. Anticipate that, even if the landowner is amenable to working with the land trust, her lawyer will not necessarily share that feeling. The lawyer's job is to alert her client to the potential negative effects of doing what the land trust proposes. The lawyer is not just being obstructionist in doing that. It's your job to have good answers to those concerns. Consider discussing this with your own lawyer to anticipate concerns and, if possible, have your counsel present at any meetings where the landowner's counsel will be present.

Other Easement Donors and Successor Landowners

Current and potential easement donors might very well be watching how the land trust manages its easements. They may want assurance that their donation will be respected in the future. Or, on the other hand, they may be looking for clues as to how the land trust will view their activities on their own land. The land trust should ask: *What signals are we giving other landowners about how effectively we defend the easements we hold?*

Adjacent Landowner Interests

Adjacent owners will be concerned about ensuring that your land trust's actions don't negatively affect their *ability to use their land.* If adjacent land uses – particularly if they are in violation of local ordinances – have an adverse impact on the conservation values that your easement restrictions sought to protect, you have a tough decision about your recourse. Adjacent landowners may also gain access to their properties via access easements across protected property, throwing another wrinkle into the mix. By the same token, a neighboring landowner that has benefited from the conservation of a swath of land adjoining his property may not want to lose that protection if your land trust is pursuing extinguishment: loss of protection might cost him his view. It is probably wise to discuss with your lawyer the potential concerns of adjacent landowners in the event that your actions could impact them and to be prepared to respond.

Donors and Grant Funders

Land trusts make promises to the people and organizations that provide their funding. Some of those promises are general: *We will use your money responsibly to achieve the mission you support.* Some are more specific: *We will use your money to protect this particular property in the following ways in perpetuity.* It is critical to the organization's ability to raise funds in the future (and maybe to keep the funds it has raised) that it keep those promises. The land trust should ask: *Will our donors understand and support the action we propose?* Moreover, when funds are raised or granted for a specific project, the land trust is bound by the representations made to

donors and funders in the campaign materials or grant proposals. In this case, the land trust must ask: *Is the proposed action consistent with the grant agreement or promises made to donors? Do we need to go back to the donors or funders for permission?*

Public Agency Interests

Internal Revenue Service. The IRS has started collecting information on easement amendments and extinguishments. If such an action is reported, there's a chance it could trigger a review of the land trust, and in that event the IRS might find information that would trigger an audit of landowner as well.

The IRS also has more general jurisdiction over the behavior of nonprofits. If a 501(c)(3) organization violates its responsibility to act in the public interest, it can lose its nonprofit status. The reporting requirement applies to all 501(c)(3) land trusts, including those that accept only mitigation or other non-tax deductible easements.

State Attorney General. In some circumstances, the attorney general will have the authority to step in and prevent an action that runs counter to state statutes. In some states, the easement enabling statute specifies situations in which the attorney general must be made a party to an action. States vary widely in the level of support for conservation efforts to be found in the attorney general's office. It may make sense in one state to call in the attorney general even when not required – in other states that would be foolhardy. The land trust should understand the statutory requirements and the political context in the locality of the easement.

Local Agencies. In a few localities, local planning agencies must approve conservation easements or amendments. These planning agencies may or may not be supportive of the land trust's conservation goals. Even when they are generally supportive, they have a long list of public interests they must serve, including economic development, housing and public safety. The land trust should be aware of the kinds of objections they might raise and be prepared to answer them.

Even when their approval is not required, local planning agencies can be helpful advocates for the land trust's mission. Taking the time to cultivate them now may pay off in unexpected ways in the future.

Public Funding Agencies. If public funds have been used to acquire an easement, there will be restrictions on what can be done to change that easement. The agency that provided the funds will often have to approve any amendment or extinguishment. It's best to bring the agency into the conversation early to define the limitations on what can be done.

Land Trust Supporters

Achieving the Mission. People donate to nonprofits because their donation makes them a part of something they could never accomplish on their own. They expect the organization to be totally focused on the mission. If they see the land trust's actions as contrary to the mission, they are likely to cut off their support and may become vocal enemies. A revitalization program involves concepts that may be new and easily misunderstood by supporters. Consider a public relations program well before you take any action.

Using Resources Wisely. Donors also want to feel that they are giving their money to a financially stable organization. If a land trust's survival is threatened because of spiraling stewardship and enforcement costs, donors may withdraw support without stopping to think about how those costs are related to the mission of protecting land. Communications with donors should consistently make the case that stewardship is an integral part of the land trust's mission and money spent on enforcement is money well spent. This should also include the nuances of the

stewardship and enforcement process that guide the land trust when balancing stewardship expenses with conservation priorities.

Land Trust Community / Accreditation Commission

The larger land trust community has a very real interest in the actions of individual land trusts. Actions that harm the reputation of one organization can also taint other land trusts in the region or even nationwide. Decisions by a court may have a more tangible effect as they are cited or set binding precedents for future cases. So it is important to consider these effects and to consult others that may be affected.

The ongoing need for easement revitalization notwithstanding, accreditation serves to some extent as a backstop or a hedge against future easement problems. Accreditation has its origins in the collective desire of the land trust community to be accountable to nationally adopted standards and sound practices that support perpetual land protection. Organizations that comply with *Land Trust Standards and Practices* – including land trusts that have received the imprimatur of the Land Trust Accreditation Commission – are more likely to avoid certain types of easement problems in the future, such as problems in drafting or in the transaction itself.

The Press

Newspapers, television and radio broadcast companies, news websites – whatever the medium, these are all businesses. They survive by attracting eyes and ears to their products. They look for the kinds of stories their consumers want to read. They are not there to cut and paste your

press releases into their product. If you don't want to attract their attention, don't be a good story. If you do want their attention, try to understand how they define a good story and frame your press release to get them to see you that way. If you don't want their attention but think you'll get it anyway, get out in front of the situation so you define the terms.

A land trust that accepts both donated and mitigation easements should prepare for questions that arise because of the differences in these easements.

The General Public

The reputation of the land trust beyond its circle of donors also has an impact on its ability to be effective. Support from public officials, the media and vocal citizens will depend on their perception of the land trust's trustworthiness and responsibility. The land trust should consider how interested parties will perceive the proposed action and what the land trust can do to affect that perception.

The Watchdog

Many members of the public or the media see their job as protecting the interests of the public by exposing what's going on in the community to public scrutiny. Despite the discomfort of such scrutiny, this watchdog function is a basic reason for a free press. You may feel that the watchdog's coverage is unjustified or slanted. Perhaps the best way to diffuse this problem is to reach out to potential watchdogs and educate them. Alternately, "steal their thunder" by initiating your own proactive PR campaign to educate the public in a balanced way about your easement revitalization plans. However, do not expect this to pacify all watchdogs who may want to speculate, at your expense, about the prospective harm to be caused by your policies or actions. Be prepared to respond.

Assessment #5: Complicating Matters

Let's say that an easement has an ambiguous restriction that states: "No additional structures are permitted in the southeasterly portion of the property." Absent clear a definition of "structure" and a map delineating the "southeasterly portion," that is a Drafting Problem. In addition, no baseline document exists to prove the structure now present was erected after conveyance of the easement. That is a Transactional Issue. Finally, the land trust determines that the structure straddles the middle of the property so that it could be considered at least partly in the "southeasterly portion" (whatever that is determined to be). That is a Complicating Matter. The potential violation complicates how the land trust responds to resolution of the problems with the easement itself.

QUICK POINT IN ASSESSING COMPLICATING MATTERS

- It's better to deal with a problem easement before there are complicating matters.

Several types of issues complicate a land trust's ability to deal with problem easements. These fall under a small handful of categories, each worth a quick examination here.

- Organization problems that lead to orphaned or neglected easements
- Existing or threatened violations
- An antagonistic landowner
- Private benefit or private inurement problems
- Creditor problems

Organizational Problems

Organizational problems can present challenges to resolving easement problems. Lack of sufficient administrative resources, stewardship funds, or enforcement funds, lack of willingness or ability to fundraise, or lack of desire or political will to steward or enforce easements – can cause easements to be *neglected*. If a land trust folds up its tents, leaving no functioning holder or no persons who are accountable for stewardship or enforcement or both, the easements may be considered *"orphaned."*

Violations and Landowner Opposition

Violations present Complicating Matters whether caused by earlier landowners, some unknown third party, or the current landowner. They become even more complex if the current *landowner is antagonistic*, adversarial or threatens to violate, or if a third party demands that the land trust take enforcement action.

Private Benefit or Private Inurement

Potential private inurement or private benefit problems, or the appearance of impropriety, certainly complicate resolution of a problem easement. Examples include a landowner who was (or became) a significant donor, an easement donor who was an "insider" as defined by the conflicts of interest policy, a property's appraised value or tax deduction that was too high, and a conveyance that was a sham. The last two are worse, if the land trust knew, and/or if the landowner received state tax credits! This Guidebook includes a completely separate section *(Red Flag! Understanding Private Benefit and Private Inurement*) on this topic alone.

Creditor Problems

Finally, *creditor conflicts* can gum up the works. If a property is in foreclosure, or subject to a bankruptcy proceeding, that can make resolution of easement problems difficult. So, too, can failure to secure subordination by a mortgage holder or a clouded title.

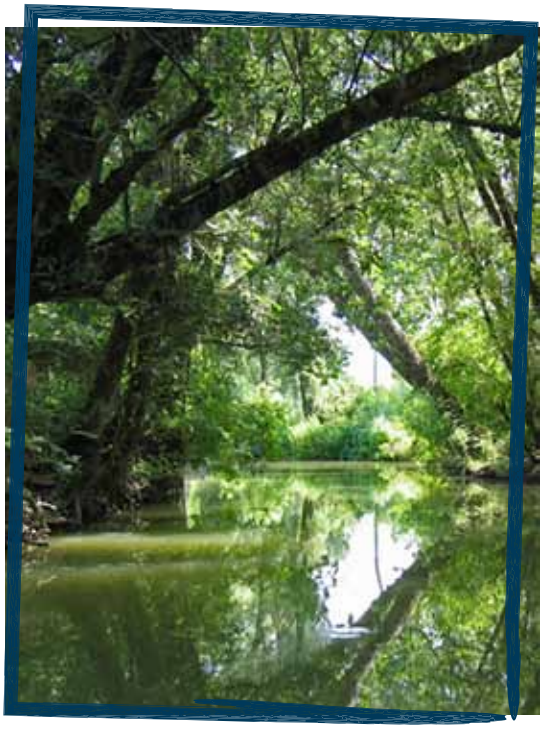
It is clear from these scenarios that, when possible, it would be best to try to deal with a problem easement before there are Complicating Matters. Obviously, unavoidable or unforeseen circumstances are what they are: they present the challenge nobody could predict. All the more reason to address a problem easement before it blows up.

PROBLEM EASEMENTS AND MERGERS

"Mergers between land trusts are the new normal," explained an experienced land trust lawyer. "However, some tough decisions have to be made when it comes to accepting another land trust's problem easements. I've seen some mergers fail because one of the boards was unwilling to take on the complications and potential liabilities associated with some of the easements held by the other organization. Those situations are unfortunate because often one of the land trusts is close to failing, or at minimum, is not stewarding and enforcing as well as they should.

"The successful ones I've seen are where both boards take a deep breath and acknowledge and embrace the problem as something inherent to a growing land trust industry. These boards want to 'do the right thing,' even if it means more work for the new land trust." The lawyer continued, "While certainly more complicated, there are workable ways for land trusts to deal with problem easements during mergers."

Part 5: Managing Problem Easements



Having identified and analyzed a problem easement, the land trust is faced with the question of what to do with it. There are a variety of legal tools available that might be useful to fix the problem: these are discussed in Part 6 of the Guidebook. But in many cases those legal tools will be difficult and expensive to execute. Before resorting to one of those options, the land trust may find it helpful to step back and develop an overall management plan for the easement.

The strategies outlined in this part will not seem novel to most land trusts. The principles here could be applied to management of any easement. But the reality is that stewardship staff and volunteers sometimes wonder why they should spend scarce resources on stewarding a flawed easement, especially when the conservation value seems insignificant. The goal of these strategies is to help the land trust minimize the potential for future problems by taking a thoughtful approach to routine easement management.

The Land Trust Alliance's publication *Conservation Easement Stewardship,* part of the Standards and Practices Curriculum series, provides a comprehensive overview of an effective stewardship program. This Guidebook does not attempt to replicate that discussion. It focuses on how the general principles of easement stewardship can be applied to the special issues presented by problem easements.

Strategy #1: General Stewardship Approach

When a land trust begins to address the management of problem easements it will have to make some general decisions about its approach. Arguably, there is a spectrum of stewardship and enforcement options. The land trust's leaders should be clear about what strategies and tools they are willing to consider.

The land trust probably already has a set of stewardship policies to guide its easement stewardship and enforcement program, as well as a set of operating procedures that may be written or not. Those policies are likely designed to support rigorous enforcement of the terms of every easement, and they should be. This is a core responsibility of any organization or agency that holds conservation easements.

QUICK POINTS ON STEWARDSHIP

- Land trusts holding problem easements must fulfill their core commitment to monitor and enforce them.
- Participation in the Terrafirma Risk Retention Group LLC can support the credibility of a land trust's commitment to defend its easements.

Choose Your Battles

With that said, the reality is that allocating stewardship resources is often a delicate balancing act. No matter how stable and effective an organization is, there is always a limit to how much time and money can be spent on any given issue. While IRS regulations require that a "qualified" holder have the resources and commitment to monitor and defend its easements, nothing about the regulations requires that an easement holder bankrupt itself to defend any single easement. So a land trust must make choices about how to interpret easement language, what remedies to require for violations, and how aggressively to pursue those remedies. It's never appropriate to say: "We're going to ignore this violation because we don't really care about this easement." It may be appropriate to say: "We're going to look for an interpretation or remedy that doesn't unduly burden the landowner by requiring actions that don't contribute to the protection of the conservation values of the property." In other words, land trusts need to consider proportional responses to a violation or problem.

It is easier to make these choices if the land trust has thought about them in advance of the actual occurrence of a problem. That's the function of a "risk" management plan, and the land trust will be well served if it develops a plan for each easement.

The Role of Conservation Defense Insurance

The Land Trust Alliance will launch the Terrafirma Risk Retention Group LLC in 2013. Participation in this program can be an important indicator of the land trust's commitment and ability to defend its easements. While the charitable risk pool will not cover all costs

of defending an easement, nor apply in all circumstances, it will provide resources – both financial and technical – that might not otherwise be affordable to the land trust. It may also provide a strong disincentive to landowners who might seek to challenge an easement.

Review Stewardship Policies

The land trust's stewardship policies may contain provisions that will limit its options in dealing with problem easements, or may provide insufficient guidance. The land trust should review those policies and discuss how they would apply, and whether they should be rewritten. For example:

- Many amendment policies specify that the landowner must reimburse the land trust for all costs incurred in amending an easement. This may not make sense if the land trust initiates the request for an amendment.
- Do the monitoring and enforcement policies clearly delineate who has authority to speak for the land trust in discussions with the landowner? Many problem easements are complicated by unauthorized persons making casual assurances (or threats) during monitoring visits or phone calls.

Strategy #2: Risk Management Plan

A risk management plan for each problem easement will guide the staff or volunteers responsible for stewardship. It should document the assessment process and provide an action plan tailored to the specifics of the easement.

QUICK POINTS ON MANAGEMENT PLANS

- Clarity and consistency in communications with landowners may prevent future challenges that could involve expensive and time-consuming enforcement actions.
- Plan in advance how you will interpret any vague or undefined language in the easement.
- Be on the lookout for changing circumstances that might make it feasible to amend the easement or transfer it to a more appropriate holder.

Assessing Your Problem Easements

Analyzing the Property

Beyond the general description of the property, an easement risk management plan should address the following questions:

- Are boundaries marked, is access easy or hard, are landowners cooperative? Are there any barriers to effective monitoring? Can any such barriers be remedied with reasonable effort?
- Are there existing violations of the easement? What is the statute of limitations, if any, applicable to suing on the violations? What remedies are available? Is there credible evidence that the violation occurred after the grant of the easement? How difficult will the violation be to prove? How difficult would the violation be for the owner to cure?
- What is the history of changes to the property since the easement grant? What reserved rights have been exercised? What discretionary approvals have been sought and granted?

Analyzing the Easement Document

- What are the key conservation values enumerated in the easement?
- What are the basic restrictions that are clearly stated and related to preserving the conservation values? These restrictions are likely to provide little room for interpretation. The land trust must enforce them in a manner that protects the conservation purposes of the easement.
- Are there any restrictions that are vague or contain undefined terms? What are the land trust's reasonable options for interpreting such language? Can a fairly loose interpretation of certain terms be justified as contributing to the overall conservation purposes of the easement? What has been the land trust's interpretation to date, and has the owner come to rely on that interpretation?
- Are there any contradictory provisions? If an activity seems to be allowed in one place and prohibited in another, which provision would the land trust choose to enforce? What would be the rationale for the choice? Have the land trust's actions already effectively made the choice or can the land trust make a fresh decision unencumbered by past events?

Transactional Issues

- Was a baseline document for the easement prepared at the time of the grant?
- If it was, does it provide adequate information to effectively enforce the easement? If not, can the land trust locate or create documentation that will supplement the baseline document for enforcement purposes?
- If no baseline document was prepared, has the land trust prepared a current conditions report?
- Are there any other problems related to the transaction (e.g., title problems or property description problems)?
- Relations with the Landowner
- Is the current landowner the original donor or a subsequent owner?
- Is the current landowner cooperative with efforts to monitor and enforce the easement?
- Does the current landowner appear to understand the terms of the easement?

AN OUNCE OF PREVENTION

"We adopted the 'ounce of prevention' strategy a long time ago," explained the lands committee chair of a four-employee land trust with about 40 easements under management. He continued, "We've long known a few of our easements could have been better; however, we've evaluated ways to possibly fix them, working with current or future landowners. Where that likely won't work, we determine how to manage them best we can. There's no 'silver bullet' -- but doing nothing was not an option for us."

Among other things, the land trust identifies and documents: the potential problems with an easement; its interpretation of any ambiguous language in the easement; and how the easement could be fixed, including what circumstances might "trigger" an opportunity or a call for immediate action. In addition, the land trust establishes a quantitative and qualitative scope for an easement's stewardship and enforcement needs.

"It's unlikely we can make everyone happy with how we approach one of these problem easements," admitted the executive director. "However, because we have done our homework, we know we can confidently explain to our supporters or to regulators that we had fully evaluated our options and had a legitimate basis for our approach to a problem easement. We think that is better than a 'knee jerk' response at a time of crisis."

Action Plan

Prioritize Problem Easements

Which problem easements might have simple fixes, and which ones are hairy, scary and nasty? You might decide to pick the low-hanging fruit and deal with that first, because it's relatively easy. This approach may give you the opportunity to learn helpful lessons for tackling the more troublesome problems. On the other hand, as you weigh potential risks – legal, perceptual and financial – you may decide that your scariest problem easements are the ones you want to tackle early on because they're likely to take time to resolve. Their resolution may also involve a multi-step process, such as sequestering them in a holding company while you consider options.

Determine the Most Appropriate Solution for a Given Problem Easement

Look at your easements through the lens of possible options this Guidebook has described. Is the easement a good candidate for any of the permanent fixes described in Part 6? If so, are there resources to accomplish that? What is the appropriate time frame?

Baseline Documents

If the land trust has no baseline documents for the easement, it should prepare a current conditions report to document the condition of the property at the time the report is prepared, and attempt to get the landowner's signature. This document will not help in correcting existing violations, but will be useful in managing future activities. A landowner might not commit a new violation after seeing the completed current conditions report and realizing the evidence it makes available to the land trust.

Correcting Violations

If there are existing clear violations of the easement, and convincing evidence that the violations do not pre-date the easement grant, the land trust must make and document a credible decision about how it will respond to the violation. In the case of a clear violation, the presumption should be that steps will be taken to address it. Your easement enforcement policy and related procedures should define the line between major and minor violations and outline the steps to take in enforcing them.

Often the situation is not so clear. Especially in older easements, ambiguous language and undefined terms may leave room for an interpretation that defines the condition as a minor violation or no violation at all. This interpretation may be a good option if the land trust determines that the condition in question poses no threat to the conservation values of the property. Without baseline documentation, it may be unclear when the condition first occurred. Circumstances like these may be sufficient justification for taking a less aggressive stance in responding. The ambiguity and uncertainty may make a resolution possible.

The land trust should examine each case and decide how to approach it. It is seldom a good strategy to ignore the possible violation – it will almost certainly not go away on its own. In many cases, a land trust can actually build a stronger and more positive relationship with a landowner by negotiating a solution that honors the intent of the easement without placing an undue burden on the landowner.

LOOKING FOR OPPORTUNITIES

The stewardship director described it as a "pesky one." The easement ranked as one of the best for this Plains state land trust. Unfortunately, when it was drafted twenty years ago the parties had failed to fully clarify reserved building rights, and the landowner thereafter had repeatedly claimed the right to build in close proximity to two of the largest sloughs. The land trust had repeatedly responded that the landowner's interpretation of the easement was wrong, that structures were limited to a less sensitive area.

"We stuck to our guns on this one," explained the executive director. "Although we remained respectful, we also let the landowner know we would exert all of our resources to protect that sensitive part of the property." The land trust's perseverance paid off. The landowner transferred the property to her son as part of some tax planning. The son, an avid birder, had no interest in disrupting this important migratory bird layover, and was amenable to an amendment of the easement to confirm and clarify the prohibition on building in the sensitive area.

Preventing Future Violations

The best way to prevent violation of an easement is to make sure the landowner understands the easement terms and what the land trust will do to enforce it. So it's worth the trouble to build a relationship with the landowner if you can. Decide how you're going to define terms and interpret provisions, and communicate those decisions clearly and consistently. Landowners who know the land trust has a substantial defense fund may be less likely to violate, so the land trust may explain about the defense fund in its newsletter or otherwise let the information out.

Reinterpreting Easement Language

You may be able to take a new look at the easement language and determine a new interpretation of otherwise vague or non-exclusive language to permit a use that you believe does not conflict with the easement's conservation purpose. An example of that appears below. Try having someone new read the easement who is not familiar with the document or the template. That person may see the words in a new light.

Keeping Options Open

You may have decided that the best course of action at the moment is to just hold the easement as is. If so, the land trust should consider in advance what situations might offer new opportunities to make a problem easement a stronger tool or at least less of a problem.

Staff or volunteers in charge of stewarding easements should be alerted to look for these situations. Some examples of situations that may provide opportunities:

- If the landowner wants something – an amendment to redefine or clarify a provision, for example – this can be an opportunity to clean up a badly drafted document and strengthen the terms essential to protecting the conservation values. A previously uncooperative landowner might be more willing to negotiate in this case.

- If the property changes hands, a new landowner might be interested in working with the land trust to clean up problems with the document.
- Another qualified holder may turn up whose mission and goals are more aligned with the conservation values protected by the easement.

Examples of Interpreting Easement Language

WRONG

An easement cites as key conservation purposes the preservation of open space and natural habitat and public access to hiking trails on the protected property. It prohibits surface alterations except to construct and maintain trails and a small parking area. It prohibits "structures" but does not define the term.

The landowner wants to improve the experience of hikers by building a restroom facility at the parking area. The design calls for a foundation that would accommodate a state-of-the-art composting toilet.

Although it is likely that the proposed facility would enhance the public recreation value of the easement, it would clearly violate the prohibition on structures and surface alteration.

If the land trust wants to encourage the construction of such a facility, it will have to amend the easement to change those restrictions. Such an amendment might be defensible as an enhancement of the key conservation value of public recreation. Alternatively, the owner of adjacent land might donate or sell a small section to be used as a trailhead with restrooms.

RIGHT

The monitor of the easement described above visits the property and finds that the landowner has placed several benches along the trails to provide opportunities for rest and enjoyment of scenic vistas.

In a newer easement, the land trust would probably have defined the term "structure" and also probably have included benches on a list of exceptions to the prohibition on structures. The land trust might reasonably define the term as not including the movable benches, especially as they enhance a key conservation value without unduly threatening other values.

This case might also be a good candidate for resolving via discretionary consent (described at the end of Tool #2 – Amendment), or for reformation. (See Tool #1 – Fixing Misstatements, Mistakes and Technical Errors)

CAUTION

An easement cites natural and scenic values as purposes. It prohibits the cutting of vegetation, except for removal of dead or diseased plants. The property is being overrun by an invasive plant, and the landowner wants to begin an aggressive campaign to remove it before it gets completely out of hand. The land trust generally approves of efforts to control invasives and wants to support a landowner willing to invest the time and money required. The stewardship staff proposes that they define the invasive species as "diseased" and allow eradication.

While the goal of controlling invasive species may be laudable, the land trust should be careful of the potential for misuse of this sort of "creative interpretation" of easement language. Defining a term to mean something it doesn't usually mean in general usage could be seen as an abuse of the holder's discretionary authority. An amendment or possibly a reformation of contract would be a safer route.

If the land trust decides to accept this proposal, it should define very clearly the limits on what it is approving and the situations where it will apply this definition.

Strategy #3: Holding Conversations with Landowners

Most strategies available to revitalize an easement that is outdated or has other problems require the participation of the landowner. In many cases, the landowner will have no obligation and may have no intrinsic incentive to cooperate. The land trust should prepare a careful plan for how to approach the landowner.

Here are four types of scenarios under which these sorts of conversations might fall.

The Mission: *Let's work together to make sure this land is better protected.* This is probably the same case that was made when the easement was donated. It's most likely to appeal to a highly supportive original donor.

Practical: *Experience has taught that some things we used to write into easements cause unforeseen and unnecessary enforcement problems.* A practical-minded person may be receptive to this kind of approach.

Quid Pro Quo: *We'll agree to what you want if you'll agree to what we want.* This may be the strongest negotiating position but is only useful if the landowner wants something that the land trust can lawfully grant.

Threat: *If you'll agree to what we ask, we won't take you to court.* If the landowner has violated the easement, the land trust may be in a position to require a concession it wouldn't otherwise get. (Of course, one would normally be a bit more tactful than this.)

Who Owns the Problem?

In any negotiation it's important to analyze how the various parties understand the situation. In the case of an easement revitalization process, that understanding may depend on the events that started the process.

The landowner wants something

The easiest negotiations are likely to happen when the landowner has asked for an amendment or discretionary consent to do something the easement prohibits. This is indeed the most common situation in which we have seen amendments to clarify or strengthen easement terms. The land trust has something of value to trade for the concession it wants, and an external authority that limits what it can concede (i.e., IRS rules regarding private benefit). The landowner has an intrinsic incentive to cooperate.

The landowner has violated the easement

The dynamics in this situation are more complicated. If the landowner is highly motivated to avoid litigation and is generally cooperative with the goals of the easement, it may be possible to negotiate an amendment to clarify or strengthen the terms as part of a settlement. If the landowner is trying to defeat the easement, a settlement is unlikely. Between those two extremes there's a wide area where a careful approach by the land trust can set the tone to encourage a cooperative process.

The easement holder wants to upgrade the easement before problems occur

A proactive approach to upgrade an easement will generally leave the holder in the weakest negotiating position. It's likely that the landowner will not have perceived any problem at all and may not understand why the land trust wants to revisit the easement. It will be important to have some idea of what factors might cause the landowner to agree to negotiate. A landowner who is friendly to the land trust and supports the goals of the easement might be motivated by pride in stewardship of the land. A landowner who thinks in practical terms might be receptive to the case that accumulated experience with easements has taught us better ways to avoid enforcement problems. Whatever approach is used, the land trust should be prepared for the landowner to ask for something in return for cooperation. He is likely to feel that he is granting a favor by agreeing to discuss the issue at all.

QUICK POINTS ON LANDOWNER CONVERSATIONS

- Analyze the situation and the varying interests at play.
- In many cases, the best time to approach the landowner about making changes in the easement is when he/she wants something from the land trust.
- Have as much information as possible in hand before approaching the landowner.
- This negotiation is different from the original negotiation of an easement. Don't be surprised or upset if the conversation turns adversarial.

The bottom line is that the conservation easement is a legally binding document that the land trust is obligated to enforce in perpetuity. The land trust is in a perpetual relationship with the landowner. So it is in their mutual interest to work together to solve the problem.

Planning the Approach to a Landowner

There is no generic formula for how to approach a landowner with a proposal to upgrade an easement. Every situation is different and a number of questions must be asked in planning for the conversation.

ASK AND YE MAY RECEIVE

"I was initially mortified at the idea of telling a landowner that his easement needed a better legal description and was also lacking baseline documentation," confided a stewardship staffer at a mid-sized land trust.

"What turned things around for me was our role-play sessions," she explained. "By the time we had the meeting, we had an arsenal of reasons why fixing the problems was good for the landowner as well as us. Also instrumental was having a supporter of the land trust present with us who had a good relationship with this landowner. Both sides were able to have an open discussion without getting defensive."

She concluded, "Now I'd be mortified if we failed to have that conversation – even if we ultimately got turned down on our request."

Is the current landowner the original easement grantor?

Most land trusts assume that if they are dealing with the original grantor of a donated easement their chances of success are higher. It's a reasonable assumption that the original grantor will want the easement to protect the land as effectively as possible. That assumption may also apply to a purchased easement. It will be helpful in evaluating this factor if the land trust has good records of how the original negotiation went. If the easement was granted to satisfy a permitting requirement, there is likely no advantage in dealing with the original grantor.

What is the land trust's history with the current landowner?

A history of scrupulous adherence to the easement augurs well for a cooperative negotiation. Continued support for the land trust is also a good sign. On the other hand, if the relationship is already contentious or hostile, it might be wise to try to improve it before proposing an upgrade. If there is a history of multiple violations or requests for discretionary approvals, it might be best to just wait for the next one to happen.

Who is the best person to approach the landowner?

The success of a negotiation may hinge on the choice of who is in the room. The land trust should consider everything it knows about the landowner and the history of the relationship in making this critical choice. If the relationship with the landowner has been friendly, the person who has had the most contact (likely the easement monitor) should at least be part of the team and may be the logical person to make the first approach. If the relationship has been contentious, the land trust may be looking for someone with a talent for tact – or

even a peer who knows the landowner and can help with an entrée or in the conversations themselves. Alternatively, the land trust may look for the person with the highest level of authority. In any case, it is important to be clear about what the land trust's representative has the authority to agree to.

Does the landowner have legal counsel?

It's in the landowner's best interests to have a competent attorney who is experienced in conservation law, and it's in everyone's interests that the landowner's attorney is as informed as possible.

What will the process cost and who will pay for it?

Some land trusts have a policy that requires the landowner to pay all the costs of an amendment. These policies assume that amendments will always be initiated by the landowner. In such cases, the policies may make sense – they avoid private benefit, protect the land trust's resources and weed out frivolous requests. With that said, lands trusts may differ on how much to require a landowner to participate in expenses associated with the amendment. If, however, the land trust has initiated the process to ward off potential problems, it will be hard to make the case that the landowner should bear the cost. The land trust should make as detailed an estimate as possible and decide in advance how much it is willing to spend.

What are the deal-breakers for the land trust?

What are the limits on what the land trust is willing to agree to? It is impossible to predict every wrinkle that will appear in the negotiation, but there are likely to be some foreseeable requests that will be unacceptable. The land trust needs to walk into the conversation with what Roger Fischer and William Ury, in *Getting To Yes: Negotiating Agreement Without Giving In,* call its "Best Alternative To A Negotiated Agreement."

Getting Ready for the Meeting

The land trust representatives should be ready to answer all the likely questions they can reasonably predict when they first approach the landowner with a proposal to upgrade the easement. At a minimum they should have:

A clear explanation of the proposal

No jargon, no undefined technical terms – they should be able to explain what the land trust is trying to do and why, in plain English.

A detailed description of the process

What are the steps in the process? Who needs to be involved? How long is it likely to take?

Financial and tax implications

Land trust representatives aren't there to give tax advice, but the landowner has the right to know if there's a potential for tax implications. She should be advised to consult her own counsel about this issue. The representatives should understand thoroughly the prohibition on impermissible private benefit and be able to explain how it precludes amending an easement in a way that shifts substantial value from the easement to the fee.

Strategy #4: Managing Perceptions

One consequence of easement revitalization will be the land trust's interactions with the press and social media. Some of these will be proactive in nature, and some, unfortunately will be reactive. Your response and the information you provide will have significant influence on public perception of your land trust's work.

QUICK POINTS ON MANAGING PERCEPTIONS

- Develop clear goals. What is the outcome you desire?
- The more information the better.
- Develop taking points that are simple and basic and explain them well.
- Prepare a plan of action and follow it. Decide which staff or board member will work with the press or social networks. Assign positions for staff and board.

As a guiding principle, you want your organization to be the first and best source of information. You can – and should – influence the language of the issue. It's important not to let the issue be defined by someone else. Don't be afraid to admit to the best choice out of a number of bad choices.

Be First

Let's say your land trust anticipates an action that may be controversial. If you have a good relationship with the press, and you know a reporter with whom you can discuss this action ahead of time, have a conversation off the record. While there's no news yet, you can provide background information for something that one might expect to happen.

Be Right

Provide a press release outlining a proposed action or describing changes that have occurred. This is your opportunity to provide accurate and credible information from the source.

- Issue a clear and simple press release with as much information as possible (who, what, where, when, why and how).
- Remember reporters will follow the money. What are the financial details?
- Tell the human story connected to the issue.
- Be prepared for the worst and be the first to report it.
- Ideally all external communication needs to happen at the same time.

Be Credible

Even if you get an unexpected call from a reporter asking about an action of the land trust – for example, a conservation easement extinguishment – consider the following:

- Take your time. You have no obligation to respond immediately. Get the information the reporter seeks and promise to call back by a date and time certain.
- Call back by the date and time you pledged.
- Think about strategy.
- Is this a daily reporter asking questions, or a journalist looking for background on a feature story? Act accordingly. A daily reporter's story will be less complex. You need to ensure you provide accurate information. For a feature story, you may need to commit some time to adequately inform the reporter about this issue.
- Ask questions so you understand the reporter's point of view. Think about how this might play out and where you can reasonably end up.

Key Points to Remember

- Always stick to talking points.
- Be clear about facts vs. conflict.
- Ideally, have one person serve as the contact with the press or social media. Refer all contacts to this assigned person.
- Internal communication is critical. Make sure all parties, including the board of directors, are aware of the action plan and who will talk to the press or communicate via social media.
- This may not be a situation where everyone will be happy.
- Prepare the landowner for the possible publicity.
- As a last resort you may have to identify bad actors: you are fixing something not of your making.

An Example

Your land trust decides to amend a conservation easement that you accepted from a now defunct land trust. When you accepted it, your staff and board agreed that it was unacceptable to have orphan easements in your region of focus and this project is adjacent to other easements your land trust has completed over the years.

In exchange for amending the easement to clarify the terms, and provide clear protection to a wildlife corridor protected by your other easements, the landowners can now construct an indoor riding arena near their other existing structures. This is a very high visibility project that the neighbors who hold easements themselves have discussed with you.

You prepare a press release explaining the circumstances of the amendment. The press release includes the details of this amendment, as well as the number of amendments you have done in the past. While you don't know the value, your press release also states the owner took a tax deduction for the original donation, and explains that appraisals were obtained to ensure that there was no impermissible private benefit to the landowner. This was one of the first easements completed in the area, and the land trust has learned a lot since then. Stress the idea that your land trust believes this to be a sensible, reasonable solution. While you did not make this easement, you are the only ones in a position to fix it. It would be irresponsible not to fix the easement, given the surrounding conservation success and the importance of the wildlife corridor. The press release should also mention this is one of the first easements completed in the area when easements were in their infancy.

Before going public with the press release, create a plan of action and communicate it with all staff and board. Discuss it with the owner. Identify the most important person who needs to know this story first and talk to him or her.

QUICK POINTS IN SEQUESTRATION

- There may be some advantages to placing problem easements in a sequestration land trust, but doing so will not eliminate enforcement and stewardship responsibilities or costs.
- A sequestration land trust will need to carefully observe governance requirements.
- Federal tax law and the laws of most states only permit organizations with conservation purposes to hold conservation easements. An organization formed to hold problem easements must have conservation purposes.
- Federal tax regulations for deductible easements require that the terms of a conservation easement prohibit its transfer to organizations that do not have qualifying conservation purposes.

Strategy #5: Sequestering the Easement in a Holding Company

It is common in the corporate world to create separate business entities (e.g., limited liability companies) to hold certain assets in order to protect the other assets of the parent corporation from certain liabilities. In fact, even some nonprofits, including tax exempt organizations, employ such practices, especially when holding real property assets. Therefore, at first glance this might seem like a very attractive option for managing the potential liabilities associated with problem easements. However, closer examination – especially in light of the legal constraints identified in Part 4 – reveals that this option may be less appealing.

The Basics

We use the word "sequestration" to mean placing an easement in an organization that exists or is formed to "sequester" or hold problem easements. Some land trusts have considered using such organizations to isolate but not abandon problem easements and the legal, financial, and public relations issues that may accompany them.

Placing a problem easement in a sequestration land trust can provide some shelter from potential liability for the organization that would otherwise administer the easement, if all the requirements are satisfied. It's important to note, however, creating a sequestration trust is very difficult, and resource-intensive.

Must Be a Separate and Viable Entity

A legitimate and distinct corporate entity, even if controlled by a land trust, could represent a durable liability barrier. If the sequestration entity is fully separate, the liability stops there. However, if the sequestration entity is not fully separate, the liability passes on to the land trust. In legal language, that is called "piercing the corporate veil" and it compromises the goal of limiting liability.

To preserve its shield (especially because a controlling land trust is vulnerable to an argument that the sequestration land trust is really not a distinct organization), the sequestration land trust needs its own board of directors and its own separate office. It will have to carefully maintain corporate records, hold meetings as its articles and bylaws specify, make required filings, and generally build a record that the sequestration trust is in fact a distinct, viable, and operating entity. It needs to have enforcement and stewardship endowment for the easements it holds. In short, it needs resources in order to be its own viable organization – and those resources will come from the parent land trust.

The sequestration land trust will continue to have fiduciary responsibility for promises made regarding administration of the easements. It can be held to account by the attorney general, and – just like any land trust – is subject to contract law and trust law. The founding land trust can restrict the assets it makes available to the sequestration land trust for administration and enforcement of transferred easements, but providing less than reasonable amounts will bring the issues of viability and operating record into question. This requirement and related conclusions regarding the importance of the sequestration land trust being a legitimate and viable entity suggest that it may be as costly to properly sequester problem easements as it would be to deal with them.

Must Be a "Qualified" Holder of Conservation Easements

Both state and federal law will require the sequestration land trust to be a qualified holder, a 501(c)(3) nonprofit. It takes time to set up a qualified holder, and the delay may make this option unsuitable even if it might otherwise work.

Most state laws restrict holding of conservation easements to organizations that have purposes or powers of protecting (among other purposes not relevant to us) natural, open space, and scenic values of real property. Certainly the corporate documents of the sequestration land trust will have to include those purposes, but, if it does not fulfill those purposes by actually

protecting the properties it holds, a state attorney general might argue that it is not a qualified holder under state law. The founding land trust would have to figure out how to handle the ensuing issues in the possible but unlikely event of such attorney general action; the manner in which the sequestration trust came to hold the conservation easements it holds could certainly become public, as could a founding organization's status as the founder or controlling member of the sequestration trust.

Federal tax regulations setting forth requirements for deductible easements limit eligible holders to organizations that have a commitment to protect the conservation purposes and resources to enforce the restrictions. The regulations also require that the easement itself prohibit transfer to any organization that does not meet those requirements. Of course, the regulations are meant to deal with the initial gift and deductibility of conservation easement. If the sequestration trust were involved in a pattern of behavior - for example, systematically determining that it would not enforce certain conservation easements, thereby effectively conveying private benefits to landowners who would otherwise be restricted from obtaining those benefits by the conservation easements – then the sequestration trust could be subject to sanctions in relation to its federal public charity status. Because the founding land trust is likely to be deeply involved in the sequestration trust, it could suffer from bad publicity, and it might not be able to contain IRS enforcement to the sequestration trust.

Managing Public Perception

If the state attorney general or the IRS were to challenge the qualifications of a separate sequestration trust set up to hold certain troublesome easements, there would be a great risk of negative publicity and harm to the reputation of the parent trust. Both organizations need to be prepared to explain to their supporters and to the press the reasons for the structure and how they are ensuring that the obligations in the easements are fulfilled.

Key issues that limit the viability of this option include the following:

- Legal Constraints. In almost all cases, the sequestration entity will need to be able to meet the "qualified holder" requirements established by section 170(h), discussed in Part 4, as well as any similar definition in the relevant state's conservation easement act. Also as discussed in Part 4, section 501(c)(3), state nonprofit laws, and the regulations place implied and express protections on management of public trust assets, and may hold the organization and its directors and officers liable for inappropriate actions. These requirements then lead naturally to internal constraint issues.
- Internal Constraints. The requirement that the sequestration entity is properly capitalized and administered would likely include having directors who meet regularly, maintain records, file required reports and carry out the activities it is designed to accomplish, including stewardship and enforcement. Some minimal threshold amount of adequate financial and other resources must be available to carry out those activities.

The land trust will also need to consider whether there are people willing to serve as a director or officer of a sequestration entity considering its odd mission and potential liabilities. At least some directors must be unrelated to the parent land trust to ensure that the two entities are not collapsed into one, so the parent cannot rely only on insiders.

- External Constraints. If the sequestration entity fails to fulfill the obligation to defend the easements it holds, the resulting negative publicity is likely to include the parent trust as well. In fact, the very knowledge of the sequestration trust structure is likely to raise eyebrows with some in the community. The land trust may be called on to explain why sequestration is a public benefit.

Further Exploring Sequestration

If the land trust believes litigation over the easement initiated by the landowner or other interested party is likely, a sequestration trust – if properly constituted and maintained – would likely succeed in temporarily protecting the assets of the parent trust. In this case, the option might be reasonable – but it is likely to be only a temporary fix, and a costly one: since a sequestration trust holds the easements that are "dogs," it is likely to be under-resourced relative to its stewardship obligations. Any land trust considering sequestration of problem easements will need to conduct substantial legal and other research before acting on this option. Questions to be answered will include: *In sequestering, do we intend to meet federal and state legal requirements? If so, what will be the financial and administrative cost of doing so? How will external influences perceive sequestration?* A further question that must be answered is this: *In light of the purpose for establishing the sequestration entity, will it actually provide the liability and other protection we desired?* "Liability" in this context has multiple parts. *Do we have volunteers willing to serve as a board of directors for the sequestration trust? How will staff responsibilities be handled?*

Sequestration and Abandonment

If the land trust considers sequestration, it might be tempting to take a next step and consider permitting the sequestration entity to quietly fade away, without making further arrangements for the easements it holds, thus effectively abandoning them. This concept is nothing new in the corporate world where shirking of liability is considered by some "part of the game." However, tax-exempt nonprofit organizations with "qualified organization" status are held to much higher standards with respect to the care and protection of their assets. An entity set up with that intent would likely be seen as fraudulent if it came to the notice of the attorney general or court. The goal of providing a corporate shield to limit liability would fail, and the individuals involved could be exposed to personal liability for their actions.

Part 6: Evaluating Options for Fixing Problem Easements

Several approaches are generally available to land trusts for working through the issues. Some are problematic, some more workable. We do not suggest that land trusts fully ignore options that we label "problematic." However, those options must be explored with caution.

Sometimes, it may be possible for the conservation focus to be reconfigured to revitalize the conservation values. When that is not the case, there may still be a "silver lining" in existing easements that have low conservation value for the land trust that holds them. Where the opportunity is available, and it will further the conservation values of the easement, a land trust may convey the easement to a holder whose mission is more aligned to the type of easement. Of course, this new holder will be more inclined to accept transfer of an easement if its complicating matters have been addressed, and if the easement is accompanied by sufficient stewardship and defense funding.

When there is no potential alternative holder for a problem easement, other action must be taken. This section provides four workable options, although the last option may have significant ramifications not only for a land trust that chooses this course of action but for the land trust community as a whole.

While the option of transferring an easement to a new holder, described above, may have limited viability, other options remain for improving or managing problem easements. These include options for ***fixing mistakes*** of various types through reformation or correction deeds, ***amending*** easements, using the courts to provide ***judicial relief***, or – in very rare cases – ***extinguishment***. The Tools that follow address these options.

Tool #1: Fixing Misstatements, Mutual Mistakes and Technical Errors

In some cases the problem with the language of an easement is simply a mistake in preparing the original document. Such mistakes may be mundane, such as a spelling error or an incorrect address. Or they may be more serious, such as an incorrect property description or a misstatement of the original agreement. The land trust should take steps to correct such errors as soon as they are noticed. There are two vehicles for correcting errors in the original document; the choice depends on the nature of the error, whether or not both parties agree that the error exists, and the law of the state in which the property lies. The land trust should consult experienced local counsel to determine which tool to use. The corrections made by both of these tools are retroactive to the date of the original agreement, which means they have the same title priority as that agreement. They are thus distinct from amendments.

Correction deeds may be used (in some states) to correct technical errors, if both parties agree to the error and the correction. These do not require court approval and can be a simple and inexpensive solution. They can be used to correct errors such as typos, missing exhibits or incorrect property descriptions. They may not be appropriate for correcting the description of the restrictions and reserved rights in the easement. The possible repercussions for title and appraisal issues in such cases suggest that it would be safer to seek court approval for the proposed change. There may be specific definitions in the statutes and case law of the state for when a correction deed may or may not be used.

Reformation is a process requiring court approval that changes the deed or other writing to be consistent with the actual agreement originally made by the parties, not to make it more favorable to any party or to address changes occurring over time. As such, it can correct easement process problems such as vague language, in order to conform with the original donor's intent. It may also be used to rectify transaction issues such as baseline problems, land description problems, or title issues. When appropriate, reformation is typically obtained with minimal expense or effort. In cases where the parties do not agree on either the existence of the error or the appropriate correction, either party may seek reformation unilaterally. A contested reformation is likely to require more expense and effort.

QUICK POINTS IN REFORMATION

- The tax code and regulations do not address reformation.
- Reformation will always require court approval.
- Even if the easement was not donated for federal tax benefits, an inappropriate reformation could jeopardize a land trust's tax exempt status, lead to other federal or state penalties or result in negative publicity.
- Known or reported cases of conservation easement reformation are rare because most reformations are neither opposed nor appealed.
- Reformation is not the same thing as amendment.

Land trusts considering reformation or a correction deed should always obtain assistance from legal counsel with a good understanding of conservation easement and tax law. Donors whose past tax returns may need amendment should retain qualified tax counsel. In any reformation or correction, land trusts must ensure there is no impermissible private benefit or private inurement.

The discussion below refers mainly to the reformation process; some of the issues raised apply equally to correction deeds.

The Basics

Reformation is available when the parties actually reached an agreement and the written manifestation of that agreement was not properly expressed, most often by accident. Thus, reformation requires proof that (1) the parties actually reached an agreement; (2) they agreed to reduce that agreement to writing; (3) there is a writing that purports to be their agreement; (4) the writing and the agreement are inconsistent because an agreed-upon term was omitted or a term that was not agreed upon was inserted into the writing (5) either through mutual mistake of the parties or through the mistake by one party taken advantage of by another.

A mutual mistake is one common to all parties that occurs in the writing of the document. Much less often in the conservation easement context, reformation is also available if one party knew the easement deed did not accurately reflect the parties' agreement and concealed the defect from the other at the time of signing the deed. Reformation most often arises from a mistake of fact, and a mistake of law (a mistake as to the legal effect of known facts) may not support reformation in some states or circumstances.

In conservation easements, common circumstances in which reformation may be appropriate include

- omission of an exhibit or attachment to the easement,
- omission of an intended term from the document,
- inclusion of a term that had been discussed and was agreed would not be included,
- error in setting out the property description or otherwise in identifying the property and its boundaries, and
- inaccurate depiction of the building envelope.

All parties to the conservation easement, or their successors, must participate in the reformation, at least to the extent of declaring their lack of opposition. The party seeking reformation typically must plead (1) the identity of all interested parties, (2) the existence and substance of the actual agreement between the parties, (3) the parties' agreement to reduce their agreement to writing, (4) the content of the written agreement, (5) the variance between the parties' actual agreement and the writing, and (6) mutual mistake or other basis for

reformation of the writing. Upon proof of these elements, the court will order the agreement reformed to state the true agreement unless the rights of a third party will be unfairly affected. Absent a third party or a dispute, reformation can often be obtained based on a petition, briefing and declarations or affidavits of the parties. There may be a short hearing, but no trial or extended proceeding is required if there is no dispute about the mistake and need for its correction.

If a federal tax deduction was taken, the IRS (or the taxpayers) may be a third party to be considered. So long as the error is limited to the conservation easement, and the appraisal was based on the actual agreement, there should be no tax consequence. Some errors have no tax consequence in any event, such as the misspelling of a name or omission of an exhibit. If appraisal relied on the easement terms and the reformation would change the easement in a way that would alter the appraisal to the taxpayer's benefit, however, the land trust cannot seek or agree to reformation without ensuring that there is no private benefit. The briefing submitted to the court should address any tax consequences or explain the absence of any consequences.

Reformation can be used for any written instrument. An error or omission in the baseline documentation can be remedied through reformation in the same way as the conservation easement itself. If the baseline was recorded with the easement, and the error is significant, reformation may be appropriate. Often, however, there would be no need for judicial reformation of a baseline as the parties could document and agree to the correction.

Problems in Obtaining Reformation

If the easement property changes hands before the omission or error is discovered, and if the new owner relied on the terms of the original easement as recorded, then reformation may be unavailable. For example, if a donor and land trust agree that the 500-acre property may have only two residences built in envelopes near the northeast corner, but the conservation easement is accidentally drafted to permit ten, not two, residences, reformation is possible while the donor owns the land. There are likely drafts and notes of conversations reflecting the agreement; committee and board minutes showing the true agreement, and appraisal and communications with the appraiser showing the two-residence restriction.

Donor and land trust may seek reformation together. Even if the donor objects, the available evidence is likely to be overwhelming. If the donor sold to an innocent third party who had no knowledge of the two-residence restriction and relied on the recorded easement document in making the purchase, however, reformation is likely to be denied.

The donor in this example enjoyed tax benefits based on the two-residence restriction, so reformation is consistent with the land trust's obligations in signing the form 8283 at the time of the donation and in ensuring there is no private benefit. The innocent third party obtained

no tax benefit and presumably paid for land with a ten-residence restriction. The court will consider the circumstances of each party at the time of a proposed reformation to achieve a fair result. Thus, proof that the third party visited the land trust before the purchase and was told of the two-residence restriction could well change the result.

Reformation is equitable in origin. Undue delay in seeking reformation coupled with prejudice to others may be sufficient to prevent reformation. The equitable defense of "unclean hands," or action in bad faith, may prevent reformation.

Legal and Other Factors Guiding Reformation Decisions

Conservation Easement Provisions

Many easements have a provision declaring that the easement is the final and complete expression of the agreement between the parties and that any and all prior or contemporaneous agreements with respect to this subject matter, written or oral, are merged into and superseded by this written instrument. Reformation is inconsistent with this provision but not prevented by it. In some states, reformation may require proof to a higher degree than a preponderance of the evidence (such as clear and convincing proof) because of the presumption that the writing correctly states the agreement.

Land Trust Standards and Practices

Practice 02A provides: "The land trust complies with all applicable federal, state and local laws." Practice 02C provides that the land trust complies with requirements for retaining its tax-exempt status, including prohibitions on private inurement. Practice 10A provides: "The land trust on its own behalf reviews each transaction for consistency with these requirements." To the extent reformation is seen as analogous to amendment, Practice 11I prohibits private inurement and impermissible private benefit and requires compliance with conflict of interest rules and any funding requirements.

All of these Practices are founded on the assumption that the land trust will seek to correct any errors in a recorded conservation easement and will act to prevent private benefit and private inurement. This assumption is consistent with IRC § 170(h) and 501(c)(3) and the nonprofit laws of the various states.

Uniform Conservation Easement Act (UCEA)

The Act is silent as to reformation. The drafters of the UCEA explain that "the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity" and that "the Act is intended to be placed in the real property law of adopting states …." The real property law of all states includes reformation, so there was no need to address reformation in the UCEA itself.

The Statute of Frauds, Rescission, Amendment

Reformation is not amendment. An amendment changes the content of the conservation easement from the original agreement to a new agreement. A reformation causes the conservation easement to be worded as originally agreed. An easement amendment takes effect at the time it is made, whereas reformation is retroactive to the date of the original easement deed.

Reformation is not rescission. Reformation affirms the existence of the conservation easement and normally corrects an inadvertent error or omission. Rescission terminates the effectiveness of the rescinded document.

Reformation is not barred by the statute of frauds.

Perception by Donors, Landowners, Supporters and the General Public

Since reformation conforms the document to the actual agreement of the parties, reformation is less likely to raise concern among donors, landowners, supporters and the general public and may not come to their attention. As the complaint or petition seeking reformation will be filed with the court, it may be read by local news reporters, especially if the land trust or owner is controversial or newsworthy. The drafter should include appropriate explanation supporting the reformation and explaining its justification. The types of mistakes that give rise to reformation are not unusual in real estate transactions and, although embarrassing, do not reflect negatively on the organization.

Judicial and IRS Review (Relevant Cases)

There are essentially no cases considering reformation in the context of conservation easements. In Glass v. Commissioner, 124 T.C. 258 (2005), the Tax Court noted in passing that the taxpayers had sued the land trust for reformation in state court. That action was dismissed, apparently when the taxpayers realized it would not assist them in the federal proceedings.

Reformation is recognized and approved in private letter rulings involving charitable giving. Depending on the nature of the error and its impact on taxes owed, if any, the easement donor may be required to amend a past tax return and the land trust may need to provide a revised form 8283. If the appraisal is consistent with the actual agreement, however, these activities may not be required.

Private Letter Ruling 9818027 (Jan. 10, 1998)

- Facts: Taxpayer created and funded a charitable remainder unitrust, then discovered a drafting error that made it impossible for her to designate one or more private foundations, organizations described in section 170(c) but not in sections 170(b)(1)(A) or 509(a)(3), as remainder beneficiaries as she originally intended. Evidence of intent was provided.

- Holding: "Because the proposed reformation is the correction of a drafting error, it will not be treated as violating the requirement that the remainder interest to charity must be irrevocable. "
- Comments: The IRS noted that reformation of the unitrust would affect taxpayer's income tax deduction for the charitable contribution made to the unitrust, so its ruling was conditioned on filing a timely amended return reporting a reduced charitable deduction.

Similarly permitting reformation is Private Letter Ruling 201133004 (Aug. 19, 2011) (the attorney used the wrong form and created a NIMCRUT instead of a CRUT; reformation permitted).

Some Examples

INCONSISTENT WITH THE ORIGINAL AGREEMENT	CANNOT REFORM
A land trust has held a scenic, open space conservation easement over a 5,000 acre ranch for some years. The easement prohibits cell towers and commercial uses. The donor contends that he always intended that he could place cell towers inside the tall barn and silo located at the ranch because they will be invisible. Moreover, he argues that cell towers disguised as trees could be placed on the ridge line because they would not be noticed in among the existing trees. The land trust checked its records and found no notes indicating intent to permit cell towers. The express prohibition on cell towers is consistent with the prohibition on commercial uses which would itself prohibit the towers, so internal evidence in the easement confirms the memories of land trust personnel and board minutes. Allowing cell towers would also be inconsistent with the appraisal done at the time of donation, giving the donor a significant financial benefit not contemplated in the appraisal.	The land trust cannot reform or agree to a reformation. The changes are inconsistent with the original agreement, would grant the donor an impermissible private benefit and would violate federal and state tax laws.

LACK OF DISPUTE, NO TAX CONSEQUENCES

One of a land trust's first conservation easements was written in 1978 when the land trust was run by volunteers with little money, so no legal advice was obtained. The easement exhibits were accidentally omitted. No one noticed until the land trust was preparing for accreditation and reviewed its older easements. The donor had died, but her children had inherited and the donor's copy of the easement which had been used by the appraiser had the omitted pages and paragraphs. They agreed it made sense to correct the recorded copy.

REFORMATION OR CORRECTION DEED

The original agreement is clear and without any dispute. No tax consequence would be created. The land trust sought reformation through the court, to attach the relevant documents.

This case might also have been addressed through a correction deed in states where they are allowed.

ERROR IN STATING RESTRICTIONS, RESERVED RIGHTS

Shortly before an easement was signed, the donor agreed to reduce the number of permitted residences from two to one, in exchange for looser restrictions on the size of the permitted building. In the rush of the end-of-year deadline, the land trust printed out an earlier draft of the easement that did not include the changes and that copy was signed and recorded. It was not until two years later that the staff person who negotiated the easement noticed the discrepancy during a pre-monitoring review of the document. A search of the files revealed a clear trail of correspondence regarding the change and both parties' agreement to it.

REFORMATION

The land trust should seek reformation of the easement to reflect the original agreement. It could do so unilaterally even if the donor has had second thoughts about giving up the second residence and resists.

The appraisal should be reviewed to determine which set of restrictions was given to the appraiser. Reformation could have tax consequences for the donor if the appraiser relied on the incorrect document.

DISPUTE, TAX CONSEQUENCES

The land trust accepted an easement over a 20 acre parcel as forever wild habitat. Right at the end of the negotiations, the donor realized he needed access through this parcel to another parcel he owned. The land trust reluctantly agreed and revised the easement to permit construction of a road where it would have the least undesirable impact. Unfortunately, because the knowledgeable land trust staff members were at Rally, the original version of the easement was signed, recorded and used for the appraisal. The mistake was discovered when the donor asked that the Form 8283 be signed. The donor wants the easement deed corrected, but he likes the appraisal number and prefers not to involve the appraiser. The land trust refuses to sign the Form 8283 unless the donor agrees to accept the recorded easement as the final version and to give up the road.

CAUTION

The donor clearly wants more tax deduction than he is entitled to, and the land trust cannot be complicit. The dispute can be resolved with no reformation, no new appraisal and use of the existing Form 8283. Or the deed can be reformed if there is a new appraisal and a new Form 8283.

Inquiries and Action Items for Reformation

For any reformation of a conservation easement, look closely at the existing language and documents and compare them to the proposed reformed documents. If the existing documents reflect the actual agreement that was made, then reformation is inappropriate. If the existing documents fail to reflect that original agreement, then reformation may be appropriate

- If the content of the actual agreement can be convincingly established,
- If there is no dispute or no credible dispute between the land trust and owner/donor,
- If there is no intervening third party whose rights would be adversely affected and who opposes the reformation,
- If there is no impermissible private benefit or private inurement and any potential private benefit can be eliminated by such steps as amending tax returns and Forms 8283 and obtaining new appraisals and paying any taxes that may be owed.

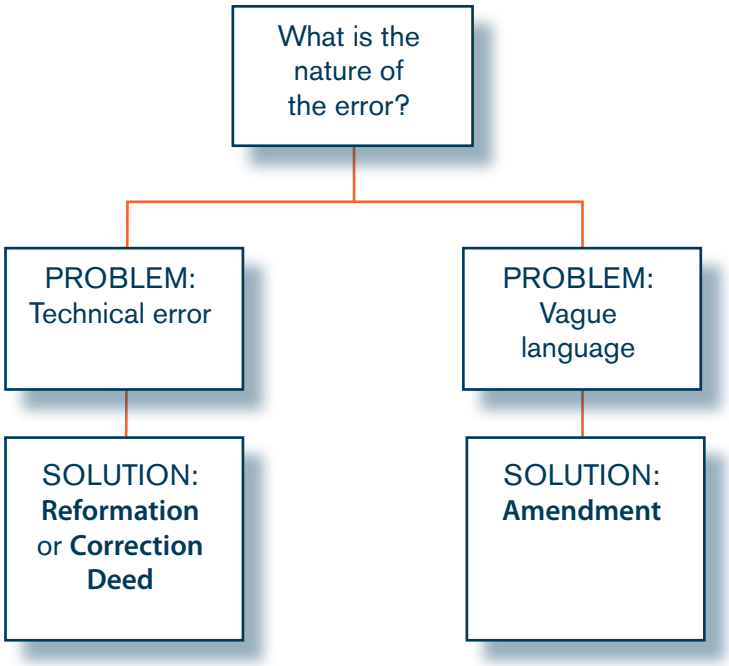
Legal Issues and Inquiries

- Land trusts should be sure to involve attorneys who understand the tax and conservation easement issues at both the state and federal level.
- Look at the proposed reformation from all angles to ensure there is no impermissible private benefit or private inurement.
- Schedule D of the most recent Form 990 (annual nonprofit tax return) requires the reporting of the amendment and extinguishment of a conservation easement. Although reformation is not specifically identified, it is sufficiently similar that it should be disclosed. The land trust, working in cooperation with its accountants and attorneys, should provide a short explanation in the Form 990 and the pleadings and other papers filed with the court should provide a well-documented explanation of the reformation if the IRS questions it.

Public Perception Issues and Inquiries

- To the greatest extent possible, contact the easement's donor or donor's family to make sure that they understand the purpose of the reformation and to address any of their concerns. In most cases, the need for reformation will be discovered relatively quickly, often when the donor remains in ownership.
- If the reformation is likely to be controversial, communicate with key supporters (such as major donors and community leaders). More often, the reformation can be done with little publicity.
- Consider whether the reformation would surprise or affect adjacent and other nearby landowners and whether to communicate with them. When the reformation conforms the document to what everyone believed it to state, there may be nothing to communicate.

Still a little confused about the difference between when to seek amendment and when to pursue reformation? Here's a way to think about it – bearing in mind, of course, the importance of talking with legal counsel to understand how best to move forward:



Tool #2: Amending the Easement

With a cooperative landowner and no private benefit issues, the cleanest solution to sloppy drafting may be to amend the easement. State laws and easement provisions vary concerning the process required to do this, and in some cases it could be expensive and time-consuming. But the benefits to the future stewardship of the easement may be worth the cost.

Land trusts must proceed very cautiously and deliberately when considering an amendment of a donated conservation easement that compromises a conservation purpose or materially alters a prohibition, instruction, or restriction. The law is still unsettled in most states, and there is controversy in the land trust community about basic matters as whether amendments ought to be governed by federal law, the law of contracts, or by other standards. Experienced attorneys can be found on various sides of the issues. This discussion is not intended to propose that one view or the other is correct but, rather, to make readers aware of the diversity of views so that they are prepared to seek the best and most useful advice possible in their jurisdiction and situation.

Special caution: some state attorneys general have taken the position that donated conservation easements are charitable trusts or restricted gifts. In their view, amendments that deprive the public of the charitable benefits of the easement or ignore the donor's stated instructions (and in particular, the donor's conservation-related restrictions) require court approval. No amendment should be entered into without consulting counsel experienced in tax, nonprofit law, and the law of charitable gifts. An amendment that only corrects a mistake, clarifies an unclear provision, or enhances conservation effectiveness can usually be entered into by the easement holder and the landowner. While the land trust community generally believes that amendments should be rare, it is also true that, over time, most conservation easements will probably be more effectively administered if the holders are willing to craft and enter into appropriate amendments.

QUICK POINTS ON AMENDMENTS

- Don't be afraid to negotiate clarifying amendments with landowners; it isn't surprising that clarification may be needed in a perpetual instrument.
- Remember that land trusts cannot confer impermissible private benefit in an amendment process or anywhere else.
- Remember that the conservation purpose is the most important value, that it is a public value, and the land trust has a fiduciary duty to defend it.

The Basics

The amendment of conservation easements has attracted a good deal of attention over recent years in the land trust community. Arguments over proper amendment procedure have made many more cautious about proper amendments than they need to be. Almost all

knowledgeable advisers agree about two points: first, an instrument that defines a perpetual interest is likely to require amendment over time. Second, close attention to consequences is called for if a proposed amendment would eliminate a specific prohibition or restriction or compromise a stated conservation purpose or conservation value.

The Land Trust Alliance, appropriately cautious about amendments, has stated that amendments should be rare. Its 2007 research report, *Amending Conservation Easements: Evolving Practices and Legal Principles,* includes a set of amendment principles on which there is general agreement and provides guidance for land trusts trying to place easements on the risk spectrums as they decide how to proceed. While that policy usefully counsels caution and care, it is also true that over time and over a fair-sized portfolio of easements, amendments can be very appropriate and useful.

Land trusts must be careful to uphold the conservation purposes of the easement, to assure the public interest is paramount for making the amendment, and to otherwise avoid conferring any impermissible private benefit in the amendment process. These issues may not even be raised in some amendments. However, in other amendments, such as those that deal with administrative provisions, any needed approvals will be available under more relaxed standards. Yet others, such as amendments that could be interpreted as relaxing the conservation prohibitions or restrictions, would likely raise different issues. In all cases, the amendments may be scrutinized by the IRS since current federal tax regulations require the disclosure of all amendments in a land trust's annual tax return. The easement terms themselves may require judicial approval of any amendment, and this may be true for all kinds of easements. Therefore, great care by the land trust is warranted.

Applicability of Charitable Trust Laws and Contract Laws

Conservation easements, like some other instruments that convey real property, are contracts. Because, however they also serve as part of a system for publicly documenting real property interests, they are more than contracts. They are also deeds. The IRS, some state attorneys general and some practitioners believe that donated or partially donated conservation easements also represent instruments for conveying restricted gifts or instruments of trust.

If donated easements are restricted gifts or charitable trusts, some attorneys would agree that they are subject not only to the law of contract and deed, but also to the well-developed legal principles that govern administration of charitable gifts. Some other attorneys take the view that conservation easements, governed as they are by the law of the states that make them enforceable, can be amended just as other easements can be – by the agreement of the parties to the easement.

Federal tax law (e.g., 170(h)) incorporates the key principles from the charitable gift view of easement law, by requiring that conservation easements intended to be deductible incorporate terms that prohibit extinguishment unless a court determines that accomplishment of conservation purposes is impossible. So, an amendment that compromises – or partly extinguishes – a conservation easement donated under 170(h) will require judicial approval in almost all circumstances. *(See the appendix for additional resources.)*

State laws vary. About half of the states have adopted a form of the Uniform Conservation Easement Act (UCEA). The published comments that accompany the act make it clear that the authors of the UCEA believe that charitable trust/restricted gift law applies to donated conservation easements. Many UCEA states have included a provision stating that, for interpretation purposes, they intend to have the law correspond as closely as possible to the Uniform Act, meaning that the official comments have significant weight. However, many UCEA states have customized that Act significantly, and many other states have conservation easement laws that differ in very significant respects from the Uniform Act. Moreover, it is dangerous to consider state law in isolation in evaluating actions affecting donated easements for which federal deductions were taken. A state lacks the power to diminish the requirements of IRC sections 170(h) or 501(c)(3) or Treasury Regulations 1.170A-14(c) for purposes of federally deductible donations. Thus, there is no substitute for securing counsel that is familiar with the issues at stake in conservation easement, charitable and nonprofit law when considering an amendment.

Land Trusts should be careful about concluding, absent the support of experienced counsel, that the amendment process is as simple as the language in some states makes it appear. That is, there are likely to be considerations beyond the words of a statute that includes a provision stating that a conservation easement can be amended or terminated in the same manner as other easements – for example, there may be conservation easement amendment language in the deed itself. Many experienced attorneys believe that the language in the UCEA was intended to address only the procedures for amendment—use of a writing, signatures, notarization, recordation and the like. Therefore, for amendments that change a restriction, an instruction, a prohibition or a purpose of a donated or partially donated conservation easement a land trust should consider, with good counsel, whether to seek court approval. The judicial proceeding in which that kind of approval is sought may include the state's attorney general – representing the public interest – as a party.

There is one further consideration here, arising from the current dispute in the land trust community about the extent to which amendments are permitted and the requirements to effect them. A land trust should consider what results may ensue if a course of action is selected and it is later, definitely determined to be wrong. A land trust that seeks judicial approval that turns out to have been unnecessary will have spent some money if would not

have spent had it known the future. A land trust that elects not to seek judicial approval may have placed its donor, its land protection program and its nonprofit status at risk. The risks are far greater for the land trust that assumes judicial approval is not required.

Other Kinds of Amendments

Other amendments merely clarify an ambiguous term, correct an error, add property, or add protection. These typically do not require public participation and can be agreed upon by the property owner and the easement holder, acting alone. Even these must be disclosed to the IRS with an explanation on the land trust's Form 990. In some cases, where the intent is to correct a technical error or misstatement of the original agreement in the document, a correction deed or reformation of the contract may be a more appropriate vehicle than amendment. See *Tool #1: Fixing Misstatements, Mutual Mistakes and Technical Errors* for a detailed discussion, and consult an attorney about whether these are available options.

Other and General Amendment Considerations

There are two other factors to consider in all conservation amendments, even amendments of purchased conservation easements. First, the land trust needs to review any representations made to donors in securing funds used for easement purchase or stewardship, as well as any restrictions imposed by the donor of funds. If the funds were donor-restricted, careful review and observance of the requirements of the restrictions are essential. If solicitations included a representation that the conservation achieved would be permanent, as is common, the land trust may want to consider approval by a court or the attorney general of a proposed amendment that affects that permanence, simply to have an independent affirmation of the good faith purpose that the amendment is designed to accomplish. That will reduce the likelihood of success of any claim of fraudulent solicitation. Second, the amendment needs in all respects to be consistent with the land trust's corporate purposes and its obligation to administer its resources exclusively for charitable purposes.

Public Perception

The land trust should be ready to respond to questions from the press and the public about a decision to amend. Depending on the nature of the amendment, it would certainly be good practice to inform the original donor or seller or the donor's heir of an intention to amend an easement, even if the property has changed hands. Doing so will improve the chance of maintaining good will in that relationship, as well as provide those parties an opportunity to recall history that may be useful.

Discretionary Consent

It's not always necessary to go to the length of amending an easement document, if the document includes language that allows "discretionary consent." This type of language in an easement permits a land trust to make interpretations of the easement provisions at its discretion. The idea is to provide flexibility for the land trust. At its discretion, the land trust may re-think activities that it might once have thought harmful, or consider activities not explicitly permitted or prohibited by the easement document, as long as the proposed uses substantially conform to the intent of the grant, are not inconsistent with the conservation purposes, and don't materially increase the adverse impact of actions expressly permitted under the easement.

Without such discretionary consent language, if there is some doubt about whether a landowner can take a particular action, the land trust could still analyze the potential impact to the conservation value and permit the activity if it found no adverse impact. But having that language provides comfort for the land trust in defending its decision and allows both parties to avoid the expense of legal fees associated with amendment. The permission can be limited to a period of years or to a particular owner, giving the land trust much greater control over the activity than the land trust would enjoy with an amendment.

Some Examples

WRONG

An easement cites protection of natural open space and an unobstructed view of the ocean from a state highway among its conservation purposes. It allows construction of one residence in a defined building envelope in a corner of the property along the road. The landowner wishes to build the permitted residence but would prefer to locate it at the top of a bluff overlooking the ocean. He approaches the land trust to request an amendment.

The desired placement of the residence would be in the middle of the open space and the view from public vantage points. Moving the building envelope there would clearly compromise the conservation purposes of the easement. Moreover, since a house overlooking the ocean would likely be worth considerably more than the same house placed along the road, the requested easement would confer an impermissible private benefit.

RIGHT	
An easement protects sensitive native plants and prohibits the introduction of invasive species. The easement also prohibits use of herbicides. However, an invasive plant that for practical purposes can only be controlled with herbicide now threatens the integrity of the conservation purpose.	Because prohibition of herbicides would in this case defeat the conservation purpose, an amendment appears warranted. As in other such situations, the easement must be reviewed in totality to determine whether the land trust should seek court approval of the amendment (or attorney general approval, depending on the jurisdiction).
An easement permits "residential uses" of the restricted parcel, but a fair reading of the whole easement makes it clear that the phrase does not mean that the property owner can build a house in the restricted area; rather, it means that the restricted property can be used in the way a residential owner would normally use open space adjacent to a residence.	The easement can be amended to eliminate the phrase "residential uses" and replace it with a short, illustrative, non-exclusive list of permissible activities. The amendment can be entered into by the easement holder and the landowner without public proceedings.

CAUTION	
An easement cites natural and scenic values as purposes. The specific terms are weighted to the scenic purpose, citing the view across the property from a public vantage point of a skyline and mountains. However, the easement prohibits the cutting of vegetation, and trees are beginning to block that scenic vista.	A case could be made that the prohibition on vegetation control was a mistake, as the real purpose was scenic. Thus, it could be argued that a clarifying amendment could be entered into by the owner and the holder without court approval. A more conservative view, however, is that there may be natural values other than the view-blocking trees that the easement was meant to protect, and thus that a judicial approval of any suggested remedy is desirable. A limited amendment, permitting the cutting of trees that obstructed the scenic view could be presented to a court for approval, with notice to the attorney general. Questions to consider might include who else benefits from the tree-cutting besides the viewing public, what will happen to the trees when cut and who will benefit.

Tool #3: Asking the Court for Assistance

Where the landowner will not consent to an amendment, and it is vital that the easement be clarified to avoid an imminent dispute, the land trust can ask a court to step in. This is more complicated and usually more expensive. For this reason, seeking court assistance ("judicial relief") is usually, but not always, the option of last resort. Before deciding to seek judicial relief, determine the financial cost and the risk of landowner opposition or supporter or public misunderstanding.

QUICK POINTS IN USING THE COURTS

- In addition to enforcing easement terms, a court could help interpret a provision in an easement or evaluate the propriety of an amendment.
- Judicial relief will be required if a land trust and/or landowner desires to extinguish an easement.
- Even relatively simple court matters may be expensive these days. Unless you have counsel who will work pro bono (without charging a fee), anticipate the cost being $10,000 to $50,000 for even basic matters.
- There is always some risk that the court will not rule the way the land trust would like it to rule.

The Basics

Alternative Dispute Resolution

Some easements may require alternative dispute resolution (ADR) before seeking certain types of judicial relief (as long as there is no imminent threat of harm to conservation values). In some cases, a land trust may simply want to try ADR before going to court. ADR consists of three options:

- Negotiations. The parties can try to work things out between each other through one or more discussions, by phone, in writing, or in person. In-person negotiations are almost always better.
- Mediation. The parties can seek the assistance of a third-party neutral charged with assisting the parties to find resolution. Good mediators usually have training, experience and a good understanding of the court system. The mediator should also have a good understanding of the law relating to the issue at hand.
- Arbitration. Arbitration is not a way to seek compromise; instead it is an alternative to going to court. It may be faster and less expensive than going to court, but not always. Arbitration is usually fully binding on the parties and enforceable by law, including by the courts. It usually is not appealable.

Judicial Relief

A court will usually have the authority to grant a variety of kinds of "relief" (assistance to the parties), including the following relevant ones:

- Injunctive relief. A court orders a party to do something, or to stop doing something.
- Monetary relief (damages). A court orders one party to pay another party.
- Declaratory relief. A court interprets a contract (such as a conservation easement), or a provision therein, or issues a ruling based on facts presented to it (however, the facts

will need to constitute a real case and controversy). Sometimes a request for declaratory relief can be presented in a non-adversarial fashion, such as if both the landowner and land trust agree to a particular course of action. In that case, they may present the issue as co-petitioners.

- Reformation of contract. A court modifies the contract to accomplish the original intentions of the parties. In the conservation easement context, reformation could be requested by a land trust if a provision is absent, but both parties understood that the missing provision was a part of the original agreement. This Guidebook includes a separate Tool that addresses reformation of contracts.

Jurisdiction

A court must have "jurisdiction" to hear the matter. This basically means two things.

- First, the issues presented in the matter must be of the type that the court can hear. For example, a land trust would go to the court that has jurisdiction over civil matters, including contracts and real property matters. This will usually be a state court.
- Second, the court must have jurisdiction over the parties in the case. For example, a Nebraska state court would not have jurisdiction to hear a case involving land in Colorado, when neither of the parties resided or had its principal place of business in Nebraska.

Standing

The person bringing the court case must have a legal right to bring it, called "standing." This can involve complex factors, but in most cases it means: Will the person bringing the case suffer injury? In conservation easement cases, it can be stated even more simply: Does the person bringing the case have the right to enforce the conservation easement? Or is the person bringing the case subject to the easement terms by virtue of having an interest in the land encumbered by the conservation easement? Either would have standing.

Parties

The person who initiates a lawsuit is a plaintiff. The person named as the opposing party is the defendant. A case can have multiple plaintiffs and multiple defendants. In some states, the attorney general may need to be named as a party. Some states may require public notice of the lawsuit and an opportunity for others to intervene. In some instances dealing with non-adversarial declaratory rulings, where both parties are requesting the same relief, the parties may be identified as petitioners. Such a filing may be more in the form of a petition (e.g., "In the Matter of the Blackacres Conservation Easement").

Basic Parts of a Case

- Complaint. To initiate a case, a plaintiff must prepare and serve a complaint on the defendants who will be affected by the court's ruling. In the case of a conservation easement, the parties are usually limited to the holder and the landowner and often the state attorney general. The complaint provides a brief description of the controversy and identifies the relief requested by the plaintiff.
- Answer. The defendant will provide a brief answer to the complaint. Neither the complaint nor the answer is meant to resolve the case in itself. These documents are initial procedural steps that define the scope of the issues the court is to resolve.
- Discovery. Court rules permit the parties to investigate facts by requesting documents, asking for written answers and questioning potential witnesses through depositions.
- Motion. Some matters can be resolved by motion. Each party is provided an opportunity to provide written reasons for a particular result. There is usually a hearing where oral argument is heard. Then the court will rule on the motion and issue an order.
- Evidentiary hearing. In some cases, there will be testimony and documents presented before a trial. This could be for a motion or for other reasons.
- Trial. At a trial, the court hears all the relevant, admissible evidence. Some controversies are entitled to a jury trial. It will depend on the state, the issue, and whether the plaintiff or defendant requests a jury. Otherwise, a judge will hear the trial.
- Judgment. A judgment is a final ruling by a court. A judgment can be issued after a trial and sometimes after a motion.
- Appeal. An appeal to a higher court can sometimes be taken from a judgment.

When to Use the Courts to Resolve Problem Easements

There are situations in which a land trust may want to seek judicial relief. In other instances, the land trust will have no choice but to seek judicial relief. Here are a few of these situations:

- The landowner has violated the conservation easement, the violation is causing significant harm to the conservation values, and the landowner refuses to cure the violation. Here the land trust has no choice but to seek help from a court. The land trust will seek injunctive relief and possibly monetary relief, as well as possibly attorneys' fees and costs for having to bring the case.
- The landowner and land trust believe the easement should be extinguished. In this case, the parties will present the law and facts and ask the court to rule favorable to them. There may be the need for the attorney general to be a party to this type of case.
- The land trust and landowner are in agreement as to an amendment to the conservation easement, but the land trust wants to make sure the action does not constitute impermissible private benefit. (The ruling may have relevance only with respect to state laws, however, as the state court's ruling would not be binding on the IRS. A land trust might be able to get a private letter ruling from the IRS, or the parties may seek declaratory relief in federal court.)

- The land trust and landowner disagree over the interpretation of a provision in the easement and either of them (or both of them) desire to have the issue resolved by the court. Either party can seek judicial relief. More often than not, it will be the land trust that forces the issue, with or without the consent and support of the landowner. Here the land trust would seek a declaratory ruling or possibly reformation of terms in the easement.

Preparing to Use the Court

Land trusts should anticipate that at some point they will need to use the court to assist with one of the issues discussed above. Here are some steps that will help the land trust be prepared.

- Identify local counsel with the background to assist the land trust. This will not always be the same as the attorney who assists on nonprofit issues or conservation law issues. It will be a civil trial attorney (litigator) with experience in real property or tax matters. It should also be someone genuinely interested in the land trust's specific issues, willing to provide early counsel, and, as necessary, prepared to represent the land trust.
- Consider supporting legal help from a national source. Conservation easements are unique, and there are benefits to having the assistance of an attorney who understands litigation as well as the nuances of conservation easement law. This person may not practice in your area but could assist a local attorney behind the scenes or by presenting in court through a process known as pro hac vice. Typically, it is not wise to rely exclusively on an attorney from far away because of lack of knowledge of state law and local judges, rules, and procedure.
- When considering whether the land trust's enforcement funds are sufficient, include the likelihood of court costs associated with amendment, reformation or extinguishment. Conduct sufficient fundraising to meet any shortfalls. Consider seeking help from the Conservation Defense Fund, if the case may be precedential in nature.

Applicable Land Trust Standards and Practices

Here's a quick rundown of relevant practices. More information can be found at the Land Trust Alliance's on-line Learning Center.

Practice 11D: Landowner Relationships

The land trust maintains regular contact with owners of easement properties. When possible, it provides landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures. The land trust establishes and implements systems to track changes in land ownership.

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.)

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.

Practice 11K: Extinguishment

In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

Tool #4: Extinguishing the Easement

Where there is absolutely no conservation value, extinguishment of the easement ***may*** be an available option. This is a last-resort option, appropriate with conservation easements ***only in rare cases***. Extinguishment should be pursued only with extreme caution and excellent legal counsel. And the land trust's entire share of any proceeds from any sale of the extinguished easement property must be used in a manner consistent with the conservation purposes of the easement.

"Extinguishment" has been defined as "[t]he destruction or cancellation of a right, power, contract or estate." When a conservation easement is extinguished by both the landowner and the easement holder, it ceases to exist. The property is returned to its original unencumbered state and can thereafter be used for any legal purpose. In most cases, it will be much more valuable after extinguishment of the conservation easement. For extinguishment to be successful, it will ordinarily require the agreement of both the land trust and the landowner and also the assent of a court.

Extinguishment should not be confused with "merger," a different legal concept. In merger, there is a carrying on of the substance of the thing, except that it is merged into and becomes a part of a separate thing with a new identity. In the case of a merger involving an easement, the substance of the thing is the conservation purpose of the easement. For example, if a landowner were to transfer the fee interest in her land to a land trust that held the conservation easement over that land, the fee interest and the easement are now held by the same entity. In theory, this could cause the two interests to "merge," thereby potentially causing the easement to legally "evaporate" and no longer be enforceable. However, this rarely if ever could happen in the conservation easement context.

Under most state laws and in the eyes of the IRS, the easement and the management and monitoring responsibilities associated with the conservation easement survive even though there is only one owner of both interests. This is a sound legal and practical result because otherwise, merger could be used to circumvent state and federal laws that apply to the extinguishment of a conservation easement. This is a critical distinction that must

QUICK POINTS ON EXTINGUISHMENT

- The tax code and regulations identify only one situation where extinguishment would be permitted of a qualified conservation easement – where an unexpected change in the condition surrounding the property makes it "impossible or impractical" to use the property for conservation purposes.
- Extinguishment of a tax deductible easement will require court approval.
- Even if the easement was not donated for federal tax benefits, an inappropriate extinguishment could jeopardize a land trust's tax-exempt status or lead to other federal or state penalties
- Known or reported cases of the extinguishment of a conservation easement are quite rare, and those that do exist do not provide clear guidance for the land trust community.

be understood by any land trust that is contemplating the extinguishment of one of its conservation easements. In one instance the easement has been terminated and in the other the easement still exists. The distinction has both legal and public relations repercussions.

Problem Easements and Extinguishment

At first blush, extinguishment might appear to be a particularly attractive way to deal with an easement that the land trust determines, in retrospect, has low conservation value. The land trust may be rightly concerned that it will be spending some of its limited stewardship and enforcement resources on land that has questionable public benefit and want to say: "Look, we didn't get it right when we accepted this easement, years ago. We now know it's not benefiting the environment or people. Let's extinguish it and move on to bigger and better projects." This reasoning is even more attractive because many landowners might not complain if the easement were extinguished. And it may be especially tempting if the landowner is offering to "buy back" the easement at its appraised value.

RED FLAG!

It is critical that the land trust avoid allowing the potential recovery of the easement's value to become an incentive for extinguishment. Each easement must be considered on its own. The recovery of funds is simply a part of the final process. It is not a reason for considering extinguishment.

Legally and perception-wise, it's just not that easy, as explained further below. The better option may often be something other than extinguishment of the conservation easement such as amending the easement or transferring the easement to another land trust that is better suited to own and manage the easement. Nevertheless, there may be limited situations where extinguishment is the best option – for example, for an easement where no conservation value can be objectively ascertained. It is rare to have an easement that has no conservation value. But if that situation does exist, the land trust will want to consider whether extinguishment is the best option.

Deciding When to Pursue Extinguishment: Legal and Other Factors

Conservation Easement Provisions

Most easements, and virtually all donated easements, contain language relating to extinguishment. This language must be carefully reviewed to ascertain what the original parties to the agreement intended and what contractual basis there may be to extinguish the easement. In the case of a tax-deductible easement, the language must be consistent with the IRC regulations discussed below. For example, in 2012, a tax court held that a provision in the easement that allows a land trust and donor to extinguish the easement at their mutual discretion will prevent the easement from qualifying for federal deductibility *(Carpenter v. C.I.R. Tax Court Memo 2012-1).* How can the easement be extinguished in these circumstances and also meet the perpetuity requirement of the IRC?

Land Trust Standards and Practices

Practice 11K says:

> **Extinguishment.** In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

This language flags critical issues related to extinguishment discussed below.

IRC § 170(h)

If the original donor claimed a tax deduction for donating the easement to the land trust, Section 170(h) and related sections and regulations of the IRC are applicable. For an easement to be deductible under the IRC, it must comply with the IRC, including the requirement that the easement be "perpetual." Clearly there is an inherent tension between "perpetual" and "extinguishment."

Treasury Regulation Section 1.170A-14(g)(6) addresses the issue of extinguishment. It provides that, if a subsequent unexpected change in the condition surrounding the property can make "impossible or impractical" the continued use of the property for conservation purposes, then, subject to a judicial proceeding and the required sharing of proceeds between landowner and easement holder, the easement may be extinguished.

These regulations anticipate that an easement may be extinguished by seeking court action in accordance with a judicial proceeding that is often based upon the doctrine of "cy pres." "Cy pres" (pronounced "see-pray," which in French means "as near as possible") permits a court to terminate a charitable trust, such as a conservation easement, when the purposes of the trust are impossible or impractical to continue. Recent examples of cy pres outside the easement context arose with respect to donated land and buildings restricted to exclusive use by men, or by members of a particular race. When these restrictions became recognized as unconstitutional, courts were asked to terminate the donation or to eliminate the restriction, based on the best determination possible at the time of the donor's wishes.

After a court has agreed to the extinguishment, upon the subsequent sale of the property and receipt of its required share of the proceeds, the land trust must use its share of the proceeds in a manner consistent with the original conservation purposes of the easement. The land trust's share of the proceeds can be no less than the easement's proportionate value of the property's full value at the time of the donation. For example, if at the time of the donation, the easement was valued at 60% of the property's full fair market value, then after extinguishment

and upon the subsequent sale of the property, the land trust is entitled to no less than 60% of the proceeds of the sale of the property. Until the subsequent sale of the property, for which there is no time limit, the land trust has a vested legal right in the property that will protect its right to its share upon the property's sale.

IRC § 501(c)(3) and State Nonprofit Statutes

If the original donor did not claim a federal tax deduction, IRC § 170(h) may not apply. Nonetheless, the land trust still has significant obligations due to its status as a 501(c)(3) "public charity," or as a "nonprofit corporation" under federal law and under most state statutes. To receive the tax-exempt benefits provided by federal or state law, the land trust agrees to abide by restrictions and prohibitions that protect the public interest. These include the federal rules that a public charity act "exclusively" for charitable purposes and not for private purposes.

In a similar vein, most state nonprofit corporation statutes include provisions quite similar to the federal rules. Inappropriate extinguishment of an easement may violate these requirements. A land trust should not undertake an extinguishment action without the assistance of excellent legal counsel who understands both the federal law and applicable state statutes.

Perception by Donors, Landowners, Supporters and the General Public

In addition to legal restrictions, an easement extinguishment opens a land trust to potential scrutiny. An extinguishment could result in members of the public questioning the land trust's principles. If the land trust decides an extinguishment is necessary, it should develop a plan for how to present the decision to a number of different audiences. The original easement donor, donors of other easements, neighbors of the property, other conservation organizations, the press and public watchdog organizations all have the potential to weigh in with an opinion. The land trust should know how it will answer their questions and, in some cases, may want to include some of these stakeholders in the decision-making process.

Summary of Potential Outcomes of Extinguishment

POTENTIAL POSITIVE OUTCOMES	POTENTIAL NEGATIVE OUTCOMES
The land trust will free up resources to devote to projects with real public benefit, provided that the proceeds are used in a manner consistent with the extinguished easement's purposes.	The land trust is required to report the extinguishment of any conservation easement on its Form 990. It is reasonable to assume that such a report will draw IRS attention to the details of the action, given the rarity of the event. Even if extinguishment is found to be justified, scrutiny will be uncomfortable at best.
The land trust will realize the value of the extinguished easement and must apply those funds to a project that protects the conservation values more effectively. (Note that, while payment of the easement value to the holder may be seen as a positive outcome, it should never be a factor in the board's decision to seek an extinguishment.)	If the extinguishment is found to violate any of the regulatory requirements discussed above, the land trust risks losing its status as a tax-exempt public charity and as a qualified easement holder.
The land trust's supporters may see the decision as a thoughtful approach to how the land trust evaluates conservation value and public benefit.	Even if extinguishment passes the regulatory tests, public reactions may be negative. The original donor might complain publicly. Existing and potential donors of other easements may question the land trust's promises of permanent protection. Watchdog agencies may also object.

POTENTIAL POSITIVE OUTCOMES	POTENTIAL NEGATIVE OUTCOMES
	There is a risk that the original easement donor could claim that the land trust fraudulently encouraged the donation, contending that the extinguishment violates promises and commitments made by the land trust at the time of the donation. In many states, the donor could ask the state's attorney general to investigate the land trust, and fraudulent solicitation can result in fines, penalties and loss of tax-exempt status.
	There is a potential for establishing legal precedents that may be cited in attempts to extinguish other, more valuable easements.

A possible extinguishment example

CAN EXTINGUISH?

A freight train derailment results in toxic contamination of a 20-acre suburban wetland property protected by a conservation easement. The wetland – protected for its value as a nesting area for migrating waterfowl – is polluted with chlorine, benzene, and petrochemicals. Adjacent residences have been evacuated while the area is evaluated for public health hazards.

A case could conceivably be made for extinguishment, given the level of damage to the wetland. This would be more supportable if the land trust conducted an analysis that determined that restoration of the wetland would be "impracticable or impossible" (this is the bar set by 170h).

On the other hand, consider this: While the conservation value of this wetland has ostensibly been damaged by the contamination, there may yet be potential for cleanup: drainage of the wetland, removal of toxic soils, and regrading. A land trust should not assume that this situation – as dire as it seems – is irreparable. With the funds from the settlement with the railroad, the land trust could work with the nearby university to use this land as a research/study demonstration on reclaiming damaged land.

A land trust holds a scenic easement along the bank of a brook facing the south side of a state road between two towns. It had the effect of rendering a four-acre area at the top of the bank undevelopable. Following Hurricane Irene, the brook had completely scoured the bank at this location, and a landslide obliterated the area at the top of the bank. Emergency repairs ordered by FEMA and the Highway Department resulted in a huge rip rap wall from the stream bed to the top of the bank. The land trust unsuccessfully sought damages and mitigation from the Highway Department, which cited its responsibility to protect public health and safety and restore transportation routes following a declared state of emergency.

What do you think?

Is there a case for extinguishment?

Inquiries and Action Items for an Extinguishment Issue

There are at least two considerations in extinguishment of a conservation easement. The first involves a thorough review of the law at both the federal and state level. The second should address the public response to extinguishment. Both are largely uncharted territory. At a minimum, any land trust involved in extinguishment of a conservation easement should consider the following.

Legal Issues and Inquiries

- Seek legal support from lawyers who understand the issues at both the state and federal level.
- Review IRS code and Treasury regulations (1.170A-14(g)(6)) that address extinguishment and ask and answer the question: does the potential extinguishment of the easement meet the "subsequent unexpected change in conditions" test?
- Review the applicable state statutes and consider whether the potential extinguishment is consistent with state law.
- Anticipate IRS inquiries. Schedule D of the most recent Form 990 (annual nonprofit tax return) requires reporting of amendment and extinguishment of conservation easements. In the event of an extinguishment, does the land trust, working in cooperation with its accountants and attorneys have a well-documented explanation of the extinguishment process if the IRS questions this action?

Public Perception Issues and Inquiries

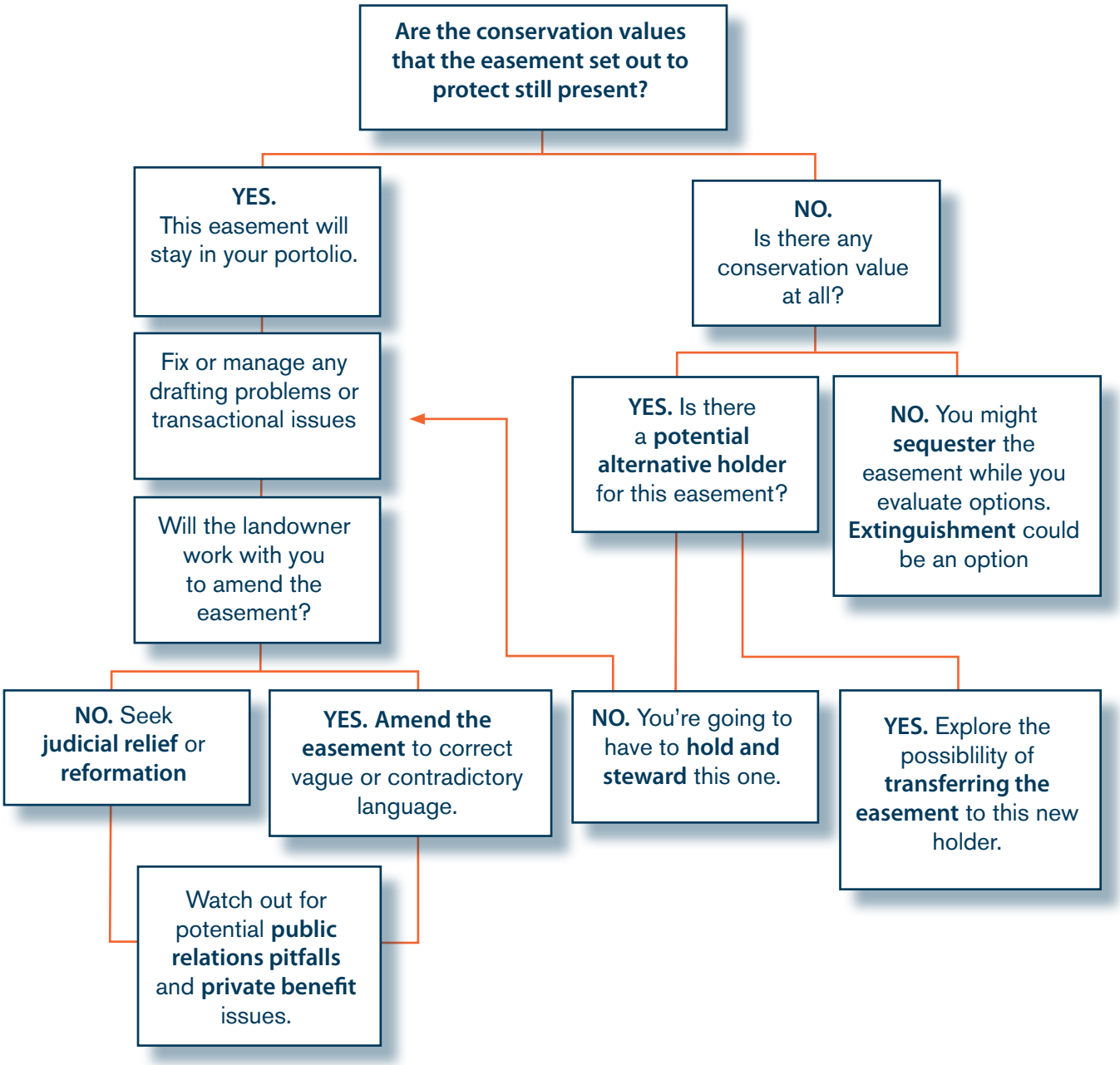
- Make every effort to contact the easement's donor or the donor's family to make sure that they understand the purpose of the extinguishment and to address any of their concerns.
- Communicate with key supporters, including major donors, community leaders, organizational partners, and jurisdictional partners.
- Consider the perspective of adjacent and other nearby landowners and be prepared with a strategy to address their concerns. Although neighbors may not have a legal interest in the extinguishment, they can complain to a local newspaper or to a public agency.

Consider the potential for setting a precedent affecting other land conservation organizations. Although the local impact of an extinguishment may be minimal, it could establish a state, regional or nationwide precedent. Has the land trust, as part of the process, contacted organizations such as the Land Trust Alliance for information and guidance purposes?

Easement Revitalization: Getting Started

Here's a way to think about beginning your analysis. We've deliberately simplified the decision tree on the following page. The versions that appeared earlier were also fairly basic, but they offer a pathway into thinking about problem easements.

A Possible Decision Tree



Parting Thoughts

Six land trusts – strong, effective organizations with deep bench strength, solid land protection programs, and smart leadership – opened their portfolios and selected a handful of problem easements for our team to tease apart and analyze. What we learned from these analyses, and from scores of conversations with land trust leaders all over the country, is that there is a strong desire to resolve the problems – because they are a resource drain and they represent opportunity cost for the land trust, and because it's the right thing to do to uphold conservation permanence.

The result of someone else's poor choices, these easements can be hard to justify. Lacking a road map, people are understandably worried about what the IRS might do, concerned about private benefit issues, and thoughtful about the potential impact of their actions on supporters and their peers in the land trust community.

We hope that this Guidebook makes a few things clear:

- Doing nothing isn't really an option.
- While different organizations have different levels of resources available, there is a path forward. Even if an audit of your entire portfolio is the gold standard, you don't need to do an audit all at once. You could audit a few easements each year. You could review just the easements that show a problem. You could do a light audit one year and a deep review the following year.
- There are things you can do to fix some problems and to manage others.
- Acknowledging that there are problems with how land trusts used to bring easements into their portfolios is the same as saying that we know more and we're better at this now. It should increase donor confidence, and the credibility of the land trust community overall as a responsible actor.

From one of the land trusts that participated in the study, we heard this: "We feel very fortunate to have been a case study partner because we benefited greatly from your analysis of our easements, and the project is also forcing us to face our problem easements, encouraging us to be more deliberate and proactive." We're not fortune-tellers, but we'd hazard a guess that other groups will find similar satisfaction in tackling some of their problem easements – maybe even their really stinky ones – thoughtfully and head-on.

Appendices

Appendix 1: Resources

Conservation Effectiveness

Land Trust Standards and Practices can be found on the Land Trust Alliance website at http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf

Managing Conservation Easements in Perpetuity. Curriculum, Land Trust Alliance; Leslie Ratley-Beach, 2009. Available: http://www.landtrustalliance.org/training/publications/curriculum

The Conservation Easement Handbook can be found on the Land Trust Alliance's Learning Center, at http://learningcenter.lta.org/attached-files/0/57/5752/CEH_preview.pdf

Nonprofit status

IRS Private Letter Ruling 201110020, at http://www.irs.gov/pub/irs-wd/1110020.pdf

IRS Release No. 20110903, at http://www.irs.gov/pub/irs-wd/1109030.pdf

A summary of all of the state conservation easement enabling statutes, prepared by Rob Levine, can be found on the Land Trust Alliance website: http://www.landtrustalliance.org/policy/conservation-easement-enabling-statutes

Amendment

Amending Conservation Easements: Evolving Practices and Legal Principles. Research Report, Land Trust Alliance, August 2007.

Extinguishment

IRS General Information Letter, No. 2012-0017 (Mar. 5, 2012), regarding "swaps" or extinguishment of easements that seek federal deductibility, is available at http://www.irs.gov/pub/irs-wd/12-0017.pdf

IRS 2011 Instructions for Schedule D (Form 990) are available at http://www.irs.gov/pub/irs-pdf/i990sd.pdf at 2

Using the courts

Land Trust Alliance Resources

- Land Trust Standards and Practices
- Land Trust Alliance Practical Pointer Series:
  - Types of Conservation Easement Violations
  - Easement Violation Process Decision Tree
  - Anticipating Costs And Creating Legal Defense Reserves
- Land Trust Alliance Conservation Defense Clearinghouse:
  - Attorneys' Fees (various cases)
  - Conservation Easement Violations and Defense (various sources)
  - Stewardship Reserves, Legal Defense Funds and Deductibility of Donations (various sources)
  - Standing (various cases)

Additional Resources

Conservation Easement Audit Techniques Guide,
http://www.irs.gov/businesses/small/article/0,,id=249135,00.html

ITS Notice 2004-41, available at http://www.irs.gov/pub/irs-drop/n-04-41.pdf

Appendix 2: Baseline and Current Conditions Reports: Authentication and Admissibility

This section was prepared by attorney Ann Taylor Schwing, of counsel at Best Best and Kiger, and is used with her permission.

Baseline documents serve two related purposes of the easement holder. They serve as a guide to determine whether and how the property has changed since the easement grant. And they serve as evidence for a claim that the landowner has violated the terms of the easement. In order to be admissible as evidence in a court case, baseline documents must meet the criteria for one of the exceptions to the general rule against admissibility of hearsay evidence; the most applicable exception is the business records exception.

The Basics

Land Trust Standards and Practices Practice 11B—Baseline Documentation Report—provides in part, with added emphasis:

> For every easement, the land trust has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement.

The federal regulations governing deductions for donated easements, 26 C.F.R. §1.170A-14(g)(5), provide, with added emphasis:

> Protection of conservation purpose where taxpayer reserves certain rights—
>
> (i) Documentation. In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. . . . The documentation, including the maps and photographs, must be accompanied by a

QUICK POINTS IN BASELINE AUTHENTICATION

- The format of the authentication should address all the requirements for the business records exception to the rule against hearsay.
- The land trust's policies regarding compilation of baseline documents should be consistent with the requirements as well.
- A current condition report, compiled after the grant of the easement, should adhere to the same standards.

statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying "This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer."

If these requirements are satisfied, this form of authentication is sufficient for the donor to obtain a tax deduction but not enough to protect the land trust. The land trust needs to ensure that the baseline documentation (and subsequent updates) will be admissible in court if there is an enforcement action. That lawsuit may occur years later, when everyone involved in the original donation and preparation of the baseline is dead or has disappeared.

Baseline Reports Are Inadmissible Hearsay

From a court's perspective, the baseline documentation is a form of hearsay. In legal terms, hearsay is an out-of-court statement offered in evidence to prove the truth of the matter stated. While the Federal Rules of Evidence (which have been adopted by most states) provide that a "statement" can be written or oral, hearsay is not admissible unless there is an exception from the hearsay rule. The baseline would primarily be offered to prove the condition of the property at a specific time—to prove the truth of the facts set out in the baseline, so the baseline is inadmissible unless there is an adequate showing of facts to support an exception from the hearsay rule of inadmissibility. There are three possible exceptions to hearsay that might be available in most states.

Exception for statement made by opposing party. One exception is an admission of a party opponent or an opposing party's statement, which is not hearsay at all because of its probative value and the presence of the party who can refute or explain the statement. If the land trust sues the original donor who signed the baseline as required by the regulations, then the baseline will be an admission by the defendant donor. The Treasury Regulations require the donor to make a written admission that the baseline is accurate in depicting the property.

This exception is not especially valuable because few land trusts have reason to sue the original donor of a conservation easement. In some States, a court might admit a baseline in an action against a subsequent owner, especially if there were proof that the subsequent owner knew about the baseline and conservation easement and saw the baseline before acquiring the land and is reasonably bound by its contents, but no one should count on such generosity. The usual requirement when the statement was not made by the opposing party is that the opposing party must have manifested an adoption of the statement or a belief that it was true. Proof that a person bought land and saw the baseline at the time of purchase does not prove that the person manifested adoption of the baseline or believed its contents were true. The person would have constructive and perhaps actual knowledge of a baseline recorded with the deed of conservation easement, but knowledge of its existence or even of its contents does not constitute an admission of the truth of the contents. Even if an attorney believed this

factual difficulty could be overcome, no case so holds, so a land trust would face the risk and the expense of attempting to make new law. As the one offering the evidence, the land trust would have the burden of proof.

Exception for present sense impression. Another exception is a present sense impression. A statement describing or explaining an event or condition made while the speaker was perceiving the event or condition or immediately thereafter. If the baseline or other evidence revealed that it was prepared while visiting the property and within a very short time after, a court might accept at least part of the baseline under this exception, but the chances are very slim. Most or all courts require some degree of spontaneity. Years after a baseline is prepared, land trusts are not likely to have proof of the timing and other information sufficient to establish admissibility of the baseline on this theory, even if it could be used.

Business records exception. The principal exception that land trusts will need to use is commonly called the business records exception or, more generally, the exception for records of regularly conducted activity. The technical description of this exception is somewhat long and dense, but each element is important. Under this exception, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business (or nonprofit) activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by proper certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

A baseline is certainly a memorandum, report, record, or data compilation of events, conditions and opinions. The other requirements are

- made at or near the time,
- by, or from information transmitted by, a person with knowledge,
- kept in the course of a regularly conducted business (or nonprofit) activity,
- when it was the regular practice of that business (or nonprofit) activity to make the memorandum, report, record, or data compilation,
- as shown by the testimony of the custodian or other qualified witness, or by certification, and
- the source of information or the method or circumstances of preparation do not indicate lack of trustworthiness.

If all of these are satisfied, the baseline is admissible to prove the truth of both the affirmative statements it contains (endangered plant X is located in identified vernal pools on the property) and the absence of facts on which the baseline is silent when it plainly would have

revealed those facts had they been discovered at the property. In other words, the baseline and other land trust documents that satisfy the business records requirement can be admitted to prove the nonoccurrence or nonexistence of the fact, if the fact was the kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. Thus, admission at trial of a well-prepared baseline will provide evidence that there was no second residence on the property, no road or no orchard.

Establishing the Admissibility of the Baseline Documents

Authentication Format. The land trust community is very far from the goal of baseline authentication that will support ready admissibility of baselines against second and third generation owners. Possible reasons are that the language of Practice 11B and the Treasury Regulations do not affirmatively mandate as much of the hearsay authentication as they might and because there has been so little litigation that the issues of admissibility of evidence have not risen to the forefront.

In a perfect world, the baseline authentication itself should address the critical elements of the business records exception and provide factual support as to

- the timing of its creation in relation to the time the information was gathered,
- the identity of the person(s) who created it and/or supplied the information,
- the knowledge and qualifications of the person(s) to collect the information and prepare the report,
- the land trust's regular practice to prepare baselines, and
- the land trust's regularly conducted course of activity to keep and preserve the baselines.

Many land trusts use authentication forms, copied from various sources, that do not satisfy even Practice 11B and the IRS requirements. Virtually none begin to satisfy the requirements for admissibility under the business records exception to the hearsay rule. The example below, from Peninsula Open Space Trust, addresses explicitly each of those requirements. It does not require notarized signatures, but rather specifies that the statements are made "under penalty of perjury." It is not particularly difficult to complete as the several signing individuals can each sign at different times.

SAMPLE BASELINE AUTHENTICATION

Acknowledgements

Baseline Documentation Team:

Sam Smart, Land Stewardship and Acquisition Specialist

Samantha Solid, Land Stewardship Specialist

Zoe Ground, Ph.D, Soil Scientist

Location of the Original Document

The original signed document is stored in a fireproof cabinet located within the Peninsula Open Space Trust office. This original document was placed in this location on _____, 2007 by _____.

Declarations

I. Declarations of Accuracy

This baseline report (consisting of xx pages of text including the table of contents, 4 appendices, 5 maps and 14 pages of photographs) is prepared to document the current status of the Great Ranch Conservation Property to be held by the Peninsula Open Space Trust, a California 501(c)(3), nonprofit organization.

We declare that, in the preparation of this baseline report, we acted under and fulfilled our duty to gather and record the information contained herein accurately and in the regular course of the business of the Peninsula Open Space Trust. Further, we declare that the information contained herein accurately reflects our personal knowledge gained by our field observations on December 2 through 4, 2006. We declare that the information contained herein was recorded at or near the time that the information was obtained and accurately describes the conditions of the physical features and uses of the Great Ranch Conservation Property.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

_____	_____	_____
Sam Smart	Samantha Solid	Zoe Ground

II. Declaration of Reliance and Certification of Record

Acting as the President of the Peninsula Open Space Trust and as its Custodian of Records, I declare that the Peninsula Open Space Trust adopts, has relied upon, and will rely upon the information contained in this report to describe the condition of the Conservation Property. Further, I certify that the preparation of this document complies with our general procedures for creating and maintaining business records and specifically with our procedures for the creation of baseline reports. This document was created in

the regular course of our business for the purpose of managing our conservation easement portfolio.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

_____

Helen Speaker

President, Peninsula Open Space Trust

III. Declaration of Acceptance

I, George F. Donor, as Trustee of the George Y. Donor Trust, am the current owner of the Great Ranch Conservation Property subject to the conservation easement dated December __, 2006, to be conveyed to the Peninsula Open Space Trust and recorded in the official records of _____ County. I have read and independently reviewed this baseline report and declare that this report accurately describes the status of the physical features and uses of the conservation easement area.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

_____

George F. Donor,

Trustee of the George Y. Donor Trust

Verification/Notarization of the Baseline Authentication. The IRS regulations do not require a "swearing" to the truth of the authentication. Nevertheless, the presence of a swearing is likely to enhance the admissibility and credibility of the baseline. The gold standard for swearing out of court is an affidavit—with a notary attesting to the identity of the signer and the fact that the signer swore to the truth of the statements. If the land trust does not have a notary on staff, and the donor is in another location, getting notarized signatures can be such a burden that no signatures at all are obtained. A declaration under penalty of perjury is a near equivalent to an affidavit in many states and does not have the nuisance of a notary. Less weight is given to a simple signature, without the "under penalty of perjury" language that puts the signer at modest risk of criminal charges for perjury.

Beyond the Authentication. The custodian of the baseline document can supply additional evidence supporting its admissibility at the time of trial, and the custodian will be the one to establish that the land trust retained and preserved the baseline from the date of its preparation to the date of trial. For example, if the baseline authentication shows that Tom Jones prepared it and used information he collected as well as information Mary Smith collected, the custodian may be able to fill in the gaps with testimony that Tom had a college degree in botany and six years experience in land stewardship and other qualifications and that Mary was a surveyor's assistant with training in map making. Of course, if Tom and Mary were summer interns or long departed employees, and there are no records of what they knew or what experience and training they had, then admissibility becomes more difficult. Some courts would admit the baseline and discount its credibility while others would exclude it. The same would be true for problems with proof of the other points required for admission of the baseline. The weaker the showing on any point or overall, the less hope of admissibility.

The less detailed the baseline and the more time that has elapsed, the greater the problems the land trust will face in offering the baseline. Proof of the timing may be assisted if photographs have dates or if records can be located showing visits to the property (expense reimbursement records with explanatory notes may help, but these may have been discarded). If employee records have been discarded, it may be impossible to identify the scribbled initials and establish the preparer's qualifications. As staff turns over with time, it may be impossible to prove the land trust's course of activity in earlier years. The issue is not just having a good baseline but also being able to establish that it *is* good, and explain why. Even if the entire baseline is inadmissible, the photographs may be admissible if someone familiar with the land can be located to identify and authenticate the photographs.

Baseline Documentation After the Fact

Both Practice 11B and the Treasury Regulations require that the baseline report be prepared before the closing. There are cases in which that requirement is not met. The land trust may prepare a current condition report in such a case, applicable to the conditions at the time the report is prepared. The standards for compiling and authenticating such a report are the same as those for a baseline document. The current condition report, if properly prepared, might be admissible in a case arising from a violation that occurred after it was compiled, but would likely have no value if the violation pre-dated the report. The Land Trust Alliance does not recommend that the easement holder attempt to determine the condition of the property at the time of the easement grant for the purposes of the current condition report, as it would be difficult if not impossible to establish the credibility of the resulting document.

A current condition report might also be made at the time the property changes hands or at a time when significant changes have occurred that should be documented. If reserved rights have been built out, for example, or a natural disaster has altered the landscape, both land trust and landowner may be benefitted by an updated report. Such a report would not invalidate the earlier one but merely be additive to address the new circumstances.

The following acknowledgement could be signed by a grantor or subsequent owner, creating a baseline as of a date after the creation of the original easement.

ACKNOWLEDGEMENT OF BASELINE DOCUMENTATION

The undersigned, being the grantor/successor under a conservation easement granted to Tardy Valley Land Trust ("TVT") with respect to land located at _____ _____ ("the Property"), hereby certifies to TVT that I have read and independently reviewed this baseline report which includes the "relevant documents" listed below is an accurate representation of the physical features and uses of the Property and its condition on the date hereof. [I agree that the conditions documented in said baseline documentation do not necessarily represent the conditions of the Property allowed or required by the conservation easement and that TVT in no way waives any rights, either at or in equity, to enforce the provisions of the conservation easement.]

I declare under penalty of perjury under the laws of the State of _____ that the foregoing is true and correct and that this declaration was executed on December __, 2006.

_____

Grantor/Successor

Acknowledged by:

Tardy Valley Land Trust

By: _____

Relevant Documents:

- Conservation Restriction History, titled _____
- Baseline Inspection Report, dated _____
- Photos (numbered 1 through ___ , and dated _____)
    - Photo Log, dated _____
    - Photo Key, dated _____
    - Preparer's Affidavit, signed and dated, _____

Appendix 3: About the Solid Ground Study

The aim of the Easement Revitalization Initiative is to develop strategies and tools that groups can use to "revitalize" their easements and make them suitable for prime time. Solid Ground Consulting launched this project in July 2011 with the sponsorship of the Open Space Institute. Preliminary findings were presented at Rally in Salt Lake City in October, 2012. This project had five major components.

Conducting Research

Solid Ground sought an early definition of the problem, as well as an understanding of the scope of the issue. The team conducted:

- In-depth interviews with twenty leaders in the land trust community. Interviewees included land trust staff leaders, service center representatives, and others with specific expertise. We looked for diversity of geography, mission and organization size in selecting the people to interview.
- An online survey collecting data about the experience of land trusts with certain kinds of easement-related problems. We invited a list of 95 land trust leaders to take the survey – again aiming for diversity. We also posted the link to the Land Trust Listserv to give other groups the opportunity to contribute. The data reflect a total of 71 respondents, though not everyone answered all questions. It is important to be cautious about extrapolating the survey responses to the larger land trust community. The respondents are self-selected and a fairly small sample. The survey nonetheless gives us some hints about the nature and scope of the problem.
- A review of published literature regarding certain aspects of the issue of troubled easements. While necessarily incomplete, the review turned up considerable discussion of the problems we are seeing, as well as discussion of some of the potential options for addressing them.
- A review of Land Conservation Case Summaries, compiled by Rob Levin, a Maine attorney working with several land trusts. This review pinpointed some of the key court cases that might inform our discussion.

Testing

A pilot case study tested early findings with one land trust partner in order to refine potential strategies for fixing or managing problem easements.

Seeking Guidance

We sought expert input into the process at the mid-point of the pilot study.

- A convening of conservation attorneys and land trust leaders in Racine, Wisconsin to examine and reflect on very preliminary findings, and provide guidance in reframing the issues and potential solutions to test.

Refining Strategies

- Land trust case studies conducted in 2011 and 2012 with five additional land trust partners, bringing the total of case studies (including the pilot) to six organizations working in seven states (California, Colorado, Maryland, Massachusetts, and New Jersey and Washington/Oregon). The case studies offered an opportunity to obtain a comprehensive understanding of the extent to which "problem easements" exist, and focus on how land trusts can remedy or otherwise manage problem easements. The six case study partners vary by geography, region, jurisdiction, size, and age, offering Solid Ground an opportunity to evaluate diverse problems and solutions.
- For each partner, an Easement Team was established, comprising the land trust's staff and/or board members and its legal counsel, as well as attorneys and consultants from Solid Ground. Easement Teams analyzed four to six problem easements from each case study partner and reported findings to the land trust's board of directors.

Synthesizing Learning

- A second meeting of conservation law experts and land trust leaders in Portland, Oregon to examine and reflect on the case study results and refine overall learning for the land trust community.
- A presentation at Rally to offer preliminary findings from the project and to seek additional input.
- A Guidebook for land trust practitioners, including a process and tools for revitalizing and managing problem easements.

Consultant Team

Project Team Biographies

Dale Bonar, Solid Ground Consulting, Hawaii

For several decades, Dale has helped protect the best places in America. A marine biologist by training and former professor at the University of Maryland, Dale recently retired as Executive Director of the Hawaiian Islands Land Trust and the Maui Coastal Land Trust. In a prior lifetime, he served as the Director of the Land Trust Alliance's Northwest office, where he provided training and support for land trusts in the region and facilitated the merger of several land trusts in Washington State. He was instrumental in the development of LTA's *Assessing Your Organization* workbook and was one of the early voices supporting accreditation for land trusts. Passionate about the ocean, Dale spends as much time as he can under it and on top of it. He can also make some pretty amazing hardwood furniture, when he gives himself permission to spend time in his wood shop.

Mike Dennis, Conservation Strategies, Virginia

With over 35 years experience in conservation real estate, Mike serves as Legal Counsel of Ecosystem Investment Partners. He was The Nature Conservancy's General Counsel for 25 years and its Vice President for Real Estate for six years. He served as a board member of the North American Wetlands Conservation Council and the Land Trust Alliance. Mike is also a member of the boards of the Conservation Law Center and Cuenca los Ojos. Mike holds a B.A. from Northeastern University, J.D. from Suffolk University Law School and LLM, Tax Law, from Boston University Law School.

Allison Handler, Solid Ground Consulting, Oregon

Allison has more than fifteen years of experience in affordable housing, land-use planning and land conservation. She has worked with nonprofit organizations and local governments on strategic planning, organizational assessment, business development and financial feasibility. Formerly the Executive Director of Portland Community Land Trust, Allison also founded the Land Stewardship Program, a housing land trust program of the North- Missoula Community Development Corporation in Missoula, Montana. Allison holds a B.A from Williams College and M.S. in Environmental Studies from the University of Montana.

Karen Harris, Vermont

Karen has more than 20 years of experience serving as a staff person, executive director, board member, and consultant to foundations and nonprofit organizations involved in myriad environmental and policy issues including conservation, land use, climate, energy, marine conservation, international security, and nonprofit capacity building. Karen has managed her own consulting business since 1997. Before becoming a consultant, Karen worked in the Conservation Department at the David and Lucile Packard Foundation. She was also Executive Director of the Ploughshares Fund where she was responsible for raising and administering $2 million in grants to support international security programs. Karen is currently a member of the Advisory Council of the Upper Valley Land Trust in Hanover, NH and serves as a volunteer facilitator for school board and town functions in Norwich, VT. Perhaps more importantly, she is raising two future circus performers, a legitimate claim to her children's' abilities that most parents can only lament.

Bill Long, Solid Ground Consulting, Montana

After 30 years with the Montana Land Reliance, Bill was a founding team member of Solid Ground Consulting's national conservation team in 2009. As one of three Managing Directors at the Montana Land Reliance, he was responsible for managing land transactions, fundraising, financial management and planning. For over 20 years he has facilitated the Devil's Kitchen Management Team, a Montana stakeholder group that helps manage hunting and wildlife management issues on private, state and federal land. Bill's work has given him the opportunity to develop critical skills in strategic planning, mediation and conflict resolution, organizational development, and team building. He is currently Treasurer of Yellowstone Park Foundation. Bill holds a B.A. in Business Administration from Western Michigan University and a M.A. in Economics from the University of Montana.

Tom Pierce, Solid Ground Consulting, Hawaii

Tom runs a law firm on Maui (mauilandlaw.com) focusing on land conservation, land use and planning, real property and environmental law (transactional and litigation), and nonprofit law. He publishes Ti Leaf Express (tileafexpress.com) an online newsletter geared to providing land conservation, environmental and nonprofit information. He has been an adjunct professor at the University of Hawai`i, William S. Richardson School of Law, teaching conservation property law. Tom was the founding President of Maui Coastal Land Trust, now Hawaiian Islands Land Trust. He also initiated the meetings that resulted in the formation of the Na Hale O Maui Community Land Trust. He currently volunteers with Public Access Trails Hawaii.

Marc Smiley, Solid Ground Consulting, Oregon

Marc is co-owner of the Solid Ground Consulting. Marc has more than 20 years experience providing direct organizational development consulting services to land trusts nationwide, and has done training and development work through the Land Trust Alliance, state services centers, private foundations and others in support of land conservation. In addition, Marc has experience working with community land trusts and other affordable housing groups, historic preservation organizations, and other groups connected to land.

Wesley Ward, The Trustees of Reservations, Massachusetts

Wes is Vice President for Land and Community Conservation for The Trustees of Reservations in Massachusetts. He joined The Trustees' staff in 1981 and has been involved in the conservation of more than 30,000 acres of land and numerous historically significant properties. Wes was co-founder of the Massachusetts Land Trust Coalition and served as a member the Land Trust Accreditation Commission.

Bill Weeks, Indiana University – Maurer School of Law, Indiana

Bill is currently President of the Conservation Law Center, and Adjunct Professor of Law and Director of the Conservation Law Clinic at Indiana University Maurer School of Law. He has represented clients in natural resource conservation matters in private practice as a member of the Bar in Indiana and the District of Columbia. He also worked for the conservation of biodiversity as Vice President, Chief Operating Officer and Executive Vice President of The Nature Conservancy. He is a graduate of the Indiana University School of Law and the author of *Beyond the Ark* (Island Press, 1996).

Barb Welch, Solid Ground Consulting, Maine

Barb served 14 years as Executive director of the Frenchman Bay Conservancy, a local land trust on the coast of Maine. As the only staff member for the first eight years, she was responsible for all aspects of program implementation, administration and fundraising. She has particular experience in planning, developing management systems, and building strong boards for a small, local land trust. Her work with the Conservancy has given her a very practical approach to helping nonprofits do their work effectively, and an understanding of how to develop systems at an appropriate scale while maintaining the basic principles of excellence. Barb chaired the statewide committee that developed the original charter of the Maine Land Trust Network, and served on the Network Steering Committee for ten years. She holds a B.A. from Stanford.