



# Conservation Stewardship Transfer Fees

*The conservation gifts that keep on giving*

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SOCIETY FOR THE  
PROTECTION OF  
NEW HAMPSHIRE  
FORESTS



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Since 1901, the Society for the Protection of New Hampshire Forests has worked to establish permanent conservation areas and promote the wise stewardship of private lands. Supported by 10,000 families and businesses, the Forest Society is the state's oldest and largest non-profit land conservation organization.

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Cover photo: Stewardship transfer fees and Stewardship Legacy Agreements can be effectively applied to conservation subdivisions. *Photo by Jerry and Marcy Monkman, EcoPhotography.*

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By Paul Doscher and Thomas N. Masland, Esq.

## INTRODUCTION

Land protection begins when a conservation-minded landowner and a land trust or other conservation entity work together to create a long-term protection plan for a parcel of land. These collaborations generally take the form of either a conservation easement or the transfer of the fee ownership of property to a land trust, municipality, or state agency.

The process can be time consuming and sometimes expensive, but when it's done, the success of the effort results in the obligation of the land trust or agency to ensure that the protection never wavers. That unwavering commitment to the stewardship of the land or conservation easement is an obligation entered into cautiously by the land trust or agency, because brings with it costs that the land owner or easement holder must incur as a permanent obligation.

Fortunately, there are ways to meet these costs and honor the intentions of those who protect their land. This is most often done with Stewardship Endowments, restricted funds established by the land trust (and sometimes by agencies where law provides for them) into which contributions are placed and that can only be used for stewardship activities. Land trusts are very familiar with stewardship endowments, as they are part of meeting the recommendations of the Land Trust Alliance's Land Trust Standards and Practices and the requirements of the Land Trust Accreditation Commission. New Hampshire was the first state to create a permanent endowment for the stewardship of conservation lands. The fund was created by the Land Conservation Investment Program (LCIP) through the Conservation Stewardship Program, now part of the State's Office of Energy and Planning. The Conservation Stewardship Program uses the fund to meet its obligations to monitor and enforce restrictions created through the LCIP.

## THE COSTS OF STEWARDSHIP

### I. Conservation Easement Monitoring and Enforcement

Every conservation easement has a “grantee”, or holder of the easement, whose responsibility it is to monitor the restricted land, work with the landowner to be sure that activities on the land are consistent with the easement terms, and take enforcement action in the unfortunate event of a violation. Annual monitoring is an expense that each grantee must cover, whether its easements are monitored by volunteers or professional staff. At the Society for the Protection of New Hampshire Forests (Forest Society), which holds hundreds of easements and monitors with professional staff, the average annual cost for monitoring an easement has been calculated at approximately \$500. Other land trusts and many towns monitor their easements with volunteers, but they still incur costs for administration, record keeping, photography, travel, etc. There is no such thing as “free” monitoring.

Enforcement, while rare, is potentially expensive. Monitoring is analogous to annual maintenance on one’s home. Heating, painting, and repairs are often predictable expenses. But a violation is like a furnace failure. It can be unpredictable, and when it happens, it can’t be ignored, and it’s going to cost a lot. Land trusts must have reserves of funds to cover the potential costs of investigating a possible violation, as well as court action if the problem can’t be resolved through negotiation. One recent conservation easement dispute in New Hampshire cost the Forest Society more than \$100,000 in court costs to achieve a favorable decision that upheld the easement.

Many conservation easements contain unique provisions (reserved rights) that the landowner can exercise at his or her discretion. Often, the easement holder must be consulted or must approve how the rights are used, and this too carries a cost to the land trust for staff time, legal review, documentation, and document recording.

### II. Fee-owned Lands

The State, counties, municipalities, and land trusts also own conservation land outright. These lands provide public benefits including the protection of wildlife habitat, clean water, healthy forests, and scenic beauty. But most of the time, they are also a public recreation resource for hiking, wildlife watching, hunting, fishing, snowmobiling, etc. These activities incur costs for the landowner for maintenance, trails, bridges, signage, parking areas, litter removal, etc. Like any other landowner, the land trust or agency must maintain the boundaries, prepare management plans, and sometimes pay taxes.

Establishing a stewardship endowment for fee-owned lands is also a practice promoted by the Land Trust Alliance and required by the Land Trust Accreditation Commission. Government entities often have a difficult time creating endowments for land management using taxes, but

some have specific trust funds established by private donors or bequests that are governed by charitable trust laws.

### ***Where Does Stewardship Money Come From?***

For most land trusts, the traditional source of funding for stewardship comes from the donor of the land or easement. It is rare today to find a land trust that does not seek a contribution to its stewardship funds at the time the land or easement is acquired. But not every land or easement donor has the capacity to make such contributions.

Sometimes a land trust or agency will seek to include stewardship funds while raising money to acquire a property or easement. When the State purchased the conservation easement on the Connecticut Lakes Headwaters Forest (146,000 acres) in northern New Hampshire, it partnered with other groups to raise a substantial stewardship fund. At the other end of the size scale, most land trusts now seek stewardship funds when acquiring new parcels, and these often come from private donors, municipal conservation funds, and private grants.

If one uses the example of the Forest Society, where the average annual easement monitoring cost is \$500/year, an endowment contribution of \$10,000 is necessary to generate that amount (assuming that the endowment generates 5% income per year from principal).

But often, these endowment funds are the hardest to raise. Grant makers, donors, and public funding sources are often eager contributors to the protection (purchase) of land, but in many cases less eager to contribute to stewardship endowments. Often the stewardship needs are not met or do not reach a sufficient level.

For many land trusts and agencies, raising stewardship funds has not always been possible as a condition of an easement or land acquisition. This means that many acquisitions in the early years of the land trust's history did not come with endowment funds. Thus, for most land trusts and agencies, the size of current endowments does not reflect the size of the stewardship obligations of the organization. In other words, the funding must catch up to the needs.

### ***Stewardship Transfer Fees***

Because endowments are designed to be funds from which annual costs are paid through the growth and interest earned on principal, stewardship endowments are like a person's retirement account. You must have enough in the fund to generate the income necessary to cover annual expenses, or the fund will shrink over time. If the fund shrinks, it could run out, especially if some major unanticipated expense – like a violation or court case – demands a large payment from the fund.

It's also important to have a way to continuously build a stewardship fund as the amount of protected land that it supports increases. One creative and increasingly popular way to build stewardship funds gradually over time is through the use of transfer fees.

All transfer fees have the purpose of providing a payment to the holder of the conservation easement or land when the parcel encumbered with the transfer fee is sold. We will define **stewardship transfer fee** to include provisions written into a conservation easement deed or a fee deed with restrictive conservation covenants requiring the payment of a small percentage, or a specific pecuniary (i.e. dollar) amount, from the proceeds of any sale of the real estate encumbered by the easement to the easement holder.

We will define a **Stewardship Legacy Agreement (SLA)** as a separate document signed by the land trust (or agency) and the landowner that imposes a similar fee on the sale of property for stewardship purposes to benefit either existing land owned by the landowner that is subject to a conservation easement previously granted to the land trust, or to benefit adjoining conservation land. In either case, the fee would apply to a sale of the land to a third party only. Transfers to family members by gift during life or at death would be exempted from the imposition of the transfer fee.

Also, a conservation easement deed could include a future stewardship fee payment triggered by the exercise of a reserved right that increases the easement holder's enforcement obligation. This might be the exercise of a right to construct a building, divide the land into multiple parcels, or utilize a reserved house lot.

In each case, the goal is to create a revenue-raising mechanism that runs with the land. Conceptually, the stewardship fee could be used by the land trust for general purposes unrelated to the land. In the narrowest sense, the fee would be utilized for the benefit of the restricted land only. A middle ground would allow the fee to be utilized for general land stewardship purposes, directly or indirectly related to the encumbered property.

**A. Transfer Fees:** A transfer fee can be written into a conservation easement deed to secure the payment of the fee any time the property sold. Generally, conveyances within families are exempt from the fee, as the transfer is by gift or inheritance and no money changes hands.

Because a transfer fee places a restriction (in the form of an affirmative obligation) on the sale of the property, it is legally deemed to be a "restrictive covenant" that runs with the land. Also, because it is for conservation purposes, it can be analyzed in the context of the New Hampshire statute that enables conservation easements and restrictions.

RSA 477:45 I defines a "conservation restriction" to include "a right to...require...an obligation to perform...acts on or with respect to...a land or water area, whether stated in the form of

a restriction...covenant or condition, and any deed, will or other instrument executed by or on behalf of the owner of the area...which right...or obligation is appropriate in retaining or maintaining such land or water area...predominantly and its natural, scenic, or open condition...” This broad language provides legal support for a restrictive covenant requiring the payment of a fee to support the purposes of the easement: it is an obligation that is appropriate to provide for the maintenance of the conservation purposes of the easement. In fact, a transfer fee may not only be an appropriate, but arguably the best mechanism to assure that the financial resources exist to make certain that the “area” can be “retained or maintained” in its natural condition.

Note, however, that the enabling statute includes reference to “such land or water area”, which may infer that the restriction must apply to the land that is subject to the easement, and none other. A transfer fee that requires the funds to be allocated to the ongoing support of the particular land is clearly supported by the statute. Thus, the question is whether the funds received from a transfer fee must be restricted to the stewardship of the particular parcel involved or could be added to a more general stewardship fund. Because the land trust’s stewardship obligation to monitor and enforce the conservation restrictions of all its fee and easement properties is central to its mission, there is a strong legal argument that the payment of a transfer fee related to one property in support of the broad stewardship responsibility directly relates to each particular property.

Generally, a restriction or easement must “touch and concern” a particular parcel to be enforceable. To meet this requirement, a promise to pay a sum of money must be related to the land bound by and subject to the covenant. The relationship between the payment of the fee and the benefit to the property stems from the landowner’s use and enjoyment of the property.

New Hampshire law recognizes and supports restrictions and restrictive covenants. Generally, a court will apply a test of reasonableness to determine whether a restriction is enforceable. However, the New Hampshire Supreme Court has also recognized that gifts to charitable organizations are viewed more generously than private restrictions because charitable donors are permitted to place conditions on their gifts that might not be upheld in a private context. Thus, to the extent that the payment of the fee relates directly to the purposes of the conservation gift, and enables and supports the grantee’s ongoing stewardship obligations, the obligation to pay the fee should be supported as a reasonable restriction on the conveyance of the land.

New Hampshire courts also recognize and enforce an ongoing contractual obligation in the form of a covenant against a subsequent purchaser of real estate in a commercial context. The Court held that reasonable covenants could be specifically enforced “not only between immediate parties, but also against subsequent purchasers with notice, even when the covenants are not

of a kind that technically run with the land”. This case supports the enforcement of a covenant that is unrelated to the real estate as an interest in real property, as it bound a successor owner of real estate to an ongoing contractual obligation to which he was not a party.

It is important that the subsequent purchasers (and would-be purchasers) of property subject to a transfer fee have notice of this important ongoing obligation. For a transfer fee written into a conservation easement, the document should highlight the fee language in a clearly titled section and in an early reference in the deed itself. In addition, we recommend that the title of the document include a reference to the fee, such as, “Conservation Easement Deed with Stewardship Covenant” or something similar.

**B. Stewardship Legacy Agreement:** The Stewardship Legacy Agreement is a transfer fee in a different form, as it is a separate agreement executed by a landowner and the land trust that imposes a similar transfer fee on the subsequent sale of the land subject to the agreement. As noted above, The SLA could be utilized in two instances:

First, in instances where land is already subject to an easement, the current landowners could enter into the SLA with the land trust, effectively creating a transfer fee arrangement after the fact. This would be a preferred approach to amending the easement itself, particularly if the amendment required Attorney General review or Probate Court approval.

Second, The SLA can be used to impose a transfer fee on property that is not itself protected, but that abuts or is close to conservation property. In this case, the proximity of the conservation land benefits the property that is subject to the SLA, and the SLA thus provides financial support to the ongoing stewardship of the conservation land. In other words, a landowner who owns property that adjoins conserved land can enter into an SLA to support the neighboring land. In this case, it can be established that the land upon which the SLA or transfer fee is imposed receives some distinct benefit from the nearby open space as a result of proximity (see “Massachusetts Audubon” section below). The SLA would recite how the burdened land is benefitted by the conservation attributes of the adjoining land, hence the agreement would “touch and concern the land” in the traditional legal sense.

In order for these separate agreements to be enforceable, it would be useful to have them mix between a “servitude” or “restriction” in the traditional property law context, and a contractual obligation. In the former, the obligation to pay the fee would be an affirmative covenant that runs with and “touches and concerns” the land burdened by the SLA obligation. In the latter, the land trust would agree to and assume an affirmative obligation to continue to steward the benefitted property and to enforce the conservation restrictions in return for (or legally speaking in consideration of) the transfer fee obligation imposed on the adjoining land.

A hybrid of a restrictive covenant and a contractual service agreement would provide the best chance of enforcement.

A question that land trusts should consider is whether the obligation will be a lien on the property that must be satisfied before title can be transferred. In the most extreme example, the obligation can be stated as a mortgage, giving rise to the land trust's right to foreclose for failure to pay.

### III. Possible Projects/Audiences

The following are situations or projects within which stewardship transfer fees or Stewardship Legacy Agreements would be possible:

- The transfer fee concept could clearly be included in new conservation easements as they are negotiated.
- Landowners with existing easements could be approached about a new Stewardship Legacy Agreement, or an addition or amendment to a conservation easement to include a transfer fee concept.
- Owners of properties that abut existing protected reservations, parks, or preserves and that benefit from the connection can place an SLA on their properties to benefit the nearby conservation land.
- Owners of properties that abut properties subject to existing conservation easements.
- In a conservation easement that allows for limited development, there is clearly the opportunity for the payment of fees at the sale of withdrawn lots, exercise of reserved rights, and potentially even the sale of the excluded area apart from the conserved land. Similarly, in a conservation subdivision, the sale of each lot could include a transfer fee covenant to benefit the conserved land and related stewardship obligations (see PLC sidebar). The latter could be a “developer” program with transfer fees on lots in a development with an open space component.
- The transfer fee should also be considered when the conservation easement benefitted by the fee includes reserved rights for the withdrawal of a house site or other excluded area that can be subdivided from the conservation easement land. The transfer fee should extend to the exercise of these rights as the increased stewardship burden is required. Again, there could be a negotiation or a limitation on sales within families.
- The sale of land owned by the land trust as “trade lands”, or land conveyed with conservation restrictions.

### WHERE HAS THIS CONCEPT BEEN USED?

Transfer fees have been used for a number of years in other states. In her book *A Field Guide to Conservation Finance* (Island Press, 2007), Story Clark describes how transfer fees ranging from 0.2 to 10 percent have been employed since 1989 beginning in South Carolina. The Jackson Hole Land Trust (JHLT) in Wyoming began using transfer fees in 1990 in collaboration with a developer who was creating a large open space area within a project abutting Grand Teton National Park.

While the JHLT's normal easement stewardship request for a conservation easement was \$15,000, the organization knew that in a development with 37 lots, the stewardship expenses for the easement would not be supported by so small an endowment. Through 2005, the transfer fee instead generated a total of more than \$1 million from more than 60 transactions.

Since the pioneering work of Story Clark and the Jackson Hole Land Trust, transfer fees have been used in a number of other states including Illinois, California, Colorado, Ohio, Massachusetts, and Pennsylvania.

### **The Massachusetts Audubon (Mass Audubon) Program**

As one of the Commonwealth's major land trusts, Mass Audubon has a long history of protecting land in fee ownership and with the use of conservation restrictions (conservation easements are called "conservation restrictions", or "CRs", under Massachusetts law). Recognizing that their well-distributed statewide sanctuary system – the largest of any private conservation organization in Massachusetts – provides many tangible benefits to owners of nearby properties, and also recognizing the importance of identifying new sources of funds to facilitate continued high-quality stewardship and protection activities at those sites, Mass Audubon began a program to create transfer fee agreements on properties abutting or nearby their sanctuaries. Mass Audubon is also pursuing transfer fee agreements with donors of CRs to enable continued high caliber stewardship of those less-than-fee interests.

Before embarking on the program, Mass Audubon commissioned a study of real estate values and confirmed the conventional wisdom that properties abutting conservation land actually have greater value than similar land not adjoining conservation land. They deemed it important to demonstrate to the real estate professionals of the state that conservation land provides not only intangible benefits of open space to neighboring land and homes, but also a very real financial enhancement. In 2006 they held a focus group with real estate professional to get feedback on the program. Mass Audubon subsequently initiated the program and gave their transfer fees the name "Conservation Legacy Agreements" (CLAs) and trademarked that name.

When asked by property owners, "Will a Conservation Legacy Agreement affect my ability to sell my property? Will it affect the price?" Audubon can confidently say that, "Because Conservation Legacy Agreements involve a small percentage of the sale price and go to a popular cause, there is no evidence that they have adversely affected any sales to date."

Audubon has also observed that, "Since 1980 the average home in Massachusetts has appreciated at an average rate of 8% per year. Even assuming a slowdown in this pace, a Conservation Legacy Agreement with a 3% payment will still amount to foregoing less than one year's average appreciation while generating tens of thousands of dollars of support for conservation over a lifetime."

The organization also has a program titled “House to Habitat” through which it accepts and then sells donated real estate and uses the proceeds for conservation purposes. Sometimes these parcels are conservation lands, and a transfer fee or CLA can be included in the deed to the new owner. This program is very similar to the Forest Society’s Assets to Acres program.

Mass Audubon describes the advantages of the CLA to include:

- Minimal or no cost to set up the CLA
- Simple to establish
- Fees are typically between 1% and 3% of the sales price (family transfers are exempted)
- The average 14- to 15-year turnover rate for property in Massachusetts indicates that the program could be a significant source of income to help enable continued stewardship, protection, and program activities over time. (Mass Audubon’s program provides that the CLA fee can also be used for additional land protection that benefits the nearby conservation property as well as the stewardship of the property sold.)
- The CLA includes a notice of lien, which is released upon payment

At the date of this publication, Mass Audubon had 10 CLAs in place.

## **SUMMARY**

Transfer fees offer the opportunity to conservation-minded landowners to help support the ongoing stewardship of protected lands and can be used throughout the state. At the time a conservation easement is created, a stewardship transfer fee can be inserted into the easement deed. An SLA can be added later if a landowner’s property is already protected by conservation easement. A land trust or agency can place a transfer fee in the deed of a conserved parcel or other land it owns that abuts its conservation properties when it sells that conserved parcel. An abutter to a conservation parcel can support stewardship by putting an SLA or transfer fee in their own deed. In each of these cases, the use of funds from transfer fees is best linked either directly to the stewardship of the benefited conservation property or to the general stewardship activities of the land trust that in turn benefit the conservation property.

Each of these tools is possible under New Hampshire law, and each has great potential to create an ongoing assurance that the lands we protected in the past, secure today, and acquire in the future will always be well stewarded, and their conservation benefits available to the neighbors and the community.

There are, of course, limits beyond which these tools are applicable, and every land trust, agency, landowner, or contributor should consult with competent legal counsel before attempting to utilize them.

## **CASE STUDY**

### **Piscataquog Land Conservancy Pioneers Transfer Fees**

In 2010 a developer in New Boston approached the Piscataquog Land Conservancy (PLC) with a proposal to accept the fee title to the conservation area associated with an open space style residential development project. The town endorsed the idea that the open space – more than 100 acres within the town’s conservation focus area because of high wildlife habitat values – would be owned in fee by the land trust.

Normally, PLC would have requested a relatively modest, one-time donation to its stewardship funds to cover the cost of monitoring and managing the land and supervising the public use of the property. But after considering possible costs of maintaining boundaries with more than 40 house lots and establishing relationships and good communication with so many abutters, the PLC knew that their normal stewardship request was insufficient. They instead approached the developer and asked if he would consider a stewardship transfer fee in the deeds of each house lot as it is sold. Given that the developer anticipated building houses and selling lots gradually over a number of years, he was amenable to the proposal.

While the details in cases such as this are unique to each situation, it’s clear that the developer recognized the value of having the PLC own and manage the land, and that PLC needed to receive sufficient funding to achieve high standards of stewardship. Being next to a large tract of accessible conservation land is a marketing advantage to the developer, and he anticipates that the modest fee will be embraced by the home buyers. For PLC, this arrangement means that as the number of new houses increases and the stewardship duties grow proportionately, so will the amount of funding to support that work. In the final analysis, it’s a win/win/win/win for the town, the homeowners, the developer, and the PLC.



The Piscataquog Land Conservancy has protected 57 acres bordering a portion of Ferrin Pond in Weare.

*Photo by Pat Nelson.*

## APPENDIX

### SAMPLE CONSERVATION EASEMENT DEED WITH STEWARDSHIP TRANSFER FEE COVENANT

#### CONSERVATION EASEMENT DEED With Stewardship Transfer Fee Covenant

[**NAME OF GRANTOR(S)**], single/husband and wife, of/with a principal place of business at [street name and number], Town/City of \_\_\_\_\_, County of \_\_\_\_\_, State of New Hampshire,

...

for consideration paid, with WARRANTY covenants, grant[s] in perpetuity to

the [**name of Qualified Conservation Organization**], a corporation duly organized and existing under the laws of the State of New Hampshire,

...

the Conservation Easement (herein referred to as the “Easement”) hereinafter described with respect to that certain parcel/area of land (herein referred to as the “Property”); ...

and

as provided in Section [4 B.] below, the covenant to pay a transfer fee to the Grantee upon the subsequent sale of the Property.

...

#### 4. TRANSFER: NOTIFICATION AND STEWARDSHIP FEE COVENANT

- A. The Grantor agrees to notify the Grantee in writing at least 10 days before the transfer of title to the Property or any division of ownership thereof permitted hereby.
- B. The Grantor covenants and agrees that at any time the Property [or a portion thereof as may be permitted hereunder] is transferred, sold or conveyed for value, the Grantor shall pay a Stewardship Transfer Fee of \_\_\_\_ % of the purchase price to the Grantee. This fee is paid in recognition of the Grantee’s continuing obligation and responsibility to monitor and enforce the easements held by the Grantee, and to otherwise further the Grantee’s land conservation mission, all of which the Grantor and the Grantee agree benefit the Property and the maintenance of the Purposes of this Easement.

## THE AUTHORS

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**PAUL DOSCHER** is vice president for Land Conservation at the Society for the Protection of New Hampshire Forests, where he has worked for 25 years. He is co-author of *Determining Stewardship Costs and Raising and Managing Dedicated Funds*, a standards and practices curriculum book of the Land Trust Alliance, and *Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements – Guidelines for New Hampshire Easement Holders*.

