ESTABLISHING CONSERVATION EASEMENTS ON CORPORATE LANDS

A Guide for Corporations and Land Trusts

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

Founded in 1982, the Land Trust Alliance is a national land conservation organization that works to save the places people need and love and need by strengthening land conservation across America. The Alliance represents about 1,000 member land trusts supported by more than five million people nationwide. The Alliance is based in Washington, DC, and operates several regional offices. More information about the Alliance is available at www.landtrustalliance.org.

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Conservation easements can be an important way for corporations to address the challenges of surplus properties and other corporate landownerships. They furnish a number of benefits, including providing potential tax breaks as a charitable donation and a stewardship partner in the land trust that holds the easement. At the same time, easements allow corporations to be civic leaders by promoting clean air, water, wildlife habitat, recreation or other conservation values important to communities. Unfortunately, many corporations are unaware of the many benefits easements bring, and, at the same time, many land trust partners are unfamiliar with working with corporations. This publication is designed to provide critical information about the technical issues involved in placing an easement on corporate land and what corporations and land trusts need to know to develop a solid working relationship.

Chapter 1 sets the stage by providing a brief overview of the challenges corporations face in conserving land with easements. It goes on to provide a short primer on land conservation and its many benefits.

Chapter 2 delves deeper into what corporations need to know about land trusts if they are contemplating partnering with them on an easement. While all land trusts are nonprofits and are subject to federal and state laws regulating nonprofits, no two land trusts are alike because they have different missions and service areas. It’s critical for a corporation to choose the right land trust for the intended project. Does the organization protect the kind of property you have? Is it financially stable and does it enjoy the support of a wide section of its community? Does it have the capacity to finish the project and fulfill its stewardship responsibilities forever? This chapter also discusses common deal breakers for land trusts, so corporations can understand the circumstances around which a project may fail to come to fruition.

In chapter 3, we change direction slightly to focus on what land trusts need to understand about corporations to ensure that a deal
goes smoothly. Land trusts almost always work with individuals or family landowners who seek conservation as a way to preserve a cherished property and to help their financial stability. Obviously, corporations have different motivations and concerns in conserving land that land trusts need to be aware of and respect. Finally, the chapter reminds land trusts that corporations need information on IRS matters, and it highlights corporate decision making and structures that may impact a project.

Chapter 4 covers the steps necessary for a successful project, from the steps a corporation needs to take before contacting a land trust to project plans and budgets to closing the deal and commencing perpetual stewardship. Of particular importance is the issue of a stewardship contribution, which most land trusts request from landowners. This contribution is critical to the land trust being able to meet its perpetual stewardship responsibilities and fulfill its obligations. The land trust should notify the corporation early on about any required stewardship payment, including how it is calculated and used.

Negotiating easements can be challenging, so chapter 5 provides sample language and guidance to help land trusts and corporations avoid common pitfalls. While this chapter provides useful information, it is national in scope; therefore, it is necessary to address state-specific real estate and easement enabling laws and consult a knowledgeable attorney.

Finally, the appendices offer a wealth of additional information on specific topics, from federal law governing donation and appraisals of easements to an outline of an easement to common costs associated with easement stewardship. Additional information can be found on the Land Trust Alliance’s online learning center (http://tlc.lta.org). For information on how to access this site or to find a knowledgeable local attorney or appraiser, go to www.lta.org.
Background

Corporations today recognize that sustainability is essential to long-term success. By exploring innovative strategies and engaging with new partners, corporations can accomplish their goals for managing surplus and buffer property in a sustainable manner. Many corporations have long had an interest in protecting the natural systems that support their work and the communities in which they operate. Whether through teaming with new partners on innovative projects or creating corporate foundations or conserving land, corporations have had a meaningful and positive effect on these natural systems. For landowning corporations, conservation easements offer an exciting new strategy for both managing nonessential corporate lands that possess significant conservation values and fulfilling sustainability goals. Working with a land trust to conserve land with significant conservation resources can be attractive because of potential tax benefits and assurance over future uses of land that a conservation easement provides. At the same time, corporations will also promote clean air, clean water, wildlife habitat, recreation and other conservation values important to communities. Clearly, there is untapped potential for corporations and land trusts to work together on projects that not only benefit business but also the community and the natural world.

Overcoming Barriers to Conservation Easements

Corporations have been divesting properties that are no longer necessary for business needs for years; however, it is only within the last five to 10 years that land conservation, specifically the conservation easement, has emerged as an effective strategy for
managing property. Historically, corporate conservation resulted principally from transfer of title through a donation or bargain sale. Conservation easements were unknown or untested in the corporate world, but this situation is changing slowly. Recently, several companies and others have worked with land trust partners to complete a handful of conservation easement transactions, and additional opportunities to conserve corporate land with conservation easements exist. However, as these transactions have unfolded, specific challenges, unique to corporate land conservation, have been identified. Most notably, these challenges include:

1. A lack of awareness of the benefits conservation easements provide.
2. The often lengthy time needed to structure and complete a conservation easement transaction (sometimes far exceeding the time it takes to complete a more traditional fee sale) contributes to corporate resistance toward easements.
3. Institutional barriers or perceptions regarding the utility or appropriateness of easements for corporations. Corporate culture and land conservation culture have different drivers but can be harmonized.
4. A lack of understanding of partners' perspectives when approaching an easement. (Where is the other party coming from? What is most important to them?) For example, land trusts may not understand that some issues and some easement language may not apply to corporations (or they may require more discussion).
5. Specific easement language that is particularly contentious or complex and requires negotiation. For example, reserved rights on a corporate conservation easement are likely to be driven by business or regulatory requirements, resulting in a less flexible starting place for negotiations than what land trusts experience with a private landowner.
Goals of this Guide

Recognizing that it is in the best interest of corporations and land trusts to overcome these barriers and to understand the complexities of corporate easements and how to partner to conserve important land, the Land Trust Alliance collaborated with a key group of experienced corporate partners to develop this publication.*

The overarching goal of this publication is to increase the number of corporate conservation easement transactions by helping to raise awareness of conservation easements, particularly in the context of corporate decisions on surplus and buffer properties that corporations are looking to manage within their portfolio. Key highlights of this guide include:

• Important information on how land trusts and corporations operate and manage land transactions, including information on each party’s goals, opportunities and challenges that may be unfamiliar to the other

* For more detail on the methodology used in preparing this report, see appendix A.
Chapter One

- Resources to help streamline the conservation easement process and build an understanding of how land trusts and corporations each approach easement transactions
- The main challenges land trusts and corporations face when negotiating and drafting easements and samples of specific conservation easement provisions that tend to be particularly complex or contentious

Although this guide includes sample easement language, it does not offer a model conservation easement nor model easement language. No two easements are alike, and the parties to every easement must negotiate with the conservation values of a specific property and the relevant state laws and regulations in mind. Expert conservation attorneys should review any easement language. Also, it is important that parties to the easement transaction address the state-specific real estate laws and state-specific conservation easement enabling laws. This publication is not a substitute for legal counsel, nor do the authors intend it to provide legal or other professional advice. In addition, throughout this publication, there are references to Land Trust Alliance publi-
An Introduction to Private Land Conservation

WHAT IS A LAND TRUST?

A nonprofit organization that, as all or part of its mission, actively works to conserve land by undertaking or assisting in land or conservation easement acquisition, or by its stewardship of such land or easements.

A Land Conservation Primer

Land conservation is critical to sustaining people, communities and business. It has a profound effect on society, providing numerous benefits from clean water and air to a secure food supply to recreational and exercise opportunities that promote public health to flood control and carbon sequestration. Obviously, land conservation has significant ecological impacts, but a broad spectrum of economic benefits also arises when landowners, including corporations, conserve land. Conservation:

- Supports agriculture, forestry, tourism and recreation by managing the land’s resources sustainably
- Enables sustainable and more cost-effective development
- Reduces the tax burden for communities
- Increases property values in the region
- Increases business investment
- Reduces spending on infrastructure as communities are relieved from providing roads and schools if, for example, the land is used for a housing development

How are these great benefits accomplished? Through the leadership and expertise of the land trust community—a network comprising national, regional and local organizations supported by five million members and financial supporters. By working closely with private landowners and public agencies, land trusts have conserved more than 56 million acres of land (an area about the size of Idaho), making them a critical player in protecting the nation’s most important and threatened landscapes. For more on land trusts, see chapter 2.
Conservation Strategies

Landowners, including corporations, may pursue a range of strategies to conserve their land, including conservation easements (historically the most highly utilized strategy), fee or bargain sales, the nascent but emerging ecosystem services markets (carbon sequestration, water quality trading and so forth), the robust wetland mitigation banks, innovative partnerships with private investors and many other strategies. All of these tools are important and warrant further discussion, but they are beyond the scope of this guide, which focuses on negotiating and drafting conservation easements.

Conservation Easements

Conservation easements (also known as conservation restrictions) are voluntary, legally binding agreements between a landowner and a land trust (or government agency) that permanently limit the use of the land in order to protect its conservation values. Conservation easements offer great flexibility and are tailored to meet specific landowner and conservation goals. For example,
an easement on property containing rare wildlife habitat might prohibit any development, while an easement on a farm might allow continued farming and the addition of agricultural structures. An easement may apply to all or a portion of the property and need not require public access. A landowner may donate an easement or sell it at fair market value and, in some circumstances, sell it at a price below fair market value (bargain sale). The easement encumbers the property in perpetuity, but a landowner can continue to use the land as agreed to in the easement and may sell or pass on the property to heirs. The land trust monitors the land annually to ensure compliance with the easement.

Benefits of Conservation Easements to Corporations

Tax Benefits
The IRS treats gifts or partial gifts (bargain sales) of conservation easements in the same manner that it treats other gifts of land to qualified recipients—taxpayers can deduct the present value
of their easement gifts as charitable deductions from income. A
donated easement is also deductible for state income tax purposes
(or available as a state tax credit) in some states.

Although the charitable donation benefit available to corpora-
tions is more limited than it is to individuals or to pass-through
entities, such as partnerships, limited partnerships and limited
liability companies, the tax benefits could still be significant to
a corporation’s bottom line. For a C corporation, the charitable
deduction allowed to the corporate taxpayer is limited to 10
percent of its “taxable income.” Taxable income, for purposes, of
the deduction is defined in Code section 170(b)(2)(D). For an S
corporation, the charitable deduction passes through to the indi-
vidual shareholders. In this sense, it is like a pass-through entity.
However, for an S corporation, the deduction of each shareholder
is limited to their basis in the stock of the S corporation. (For a
discussion of IRS considerations, see page 32.)

In addition to any tax benefits resulting from a charitable gift
of an easement, a corporation can enjoy a number of other benefits
from conserving its land with an easement.

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of an easement, a corporation can enjoy a number of other benefits
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Site-Specific Benefits
The circumstances of a particular site may make granting an ease-
ment part of the best disposition strategy for a corporation. For
example, in the following circumstances, a conservation easement
could be the best tool to achieve corporate goals:
· The property provides buffer lands to a corporate campus or other corporate-owned facilities
· The property possesses special conservation values (for example, endangered or threatened species, critical habitat) or is adjacent to existing publicly conserved state or federal park land, and the corporation will receive mitigation credits and/or the goodwill of the community

Liability Benefits
Managing liability is a significant priority for corporations. Conservation easements provide a level of certainty (as articulated by the easement’s permitted and prohibited uses) regarding the future uses of a property that may not be afforded by other tools. Conservation easements, similar to deed restrictions, put limits on the use of the property; and while certain deed restrictions may not always run with the land depending on state law, conservation easements provide the additional assurance of use restrictions maintained permanently even when properties are sold to new owners.

This is an added benefit to a corporation with properties that have a history of prior environmental contamination that the corporation, for liability and regulatory reasons, seeks to permanently restrict certain future uses of (for example, no subsurface structures, no residences and so on). In addition, unlike deed restrictions, the land trust is a perpetual steward of the property and monitors the property on an annual basis. This certainty can
be of great value to a corporation that wants to limit how a property is going to be used in the future, especially after the corporation sells it.

Long-Term Management Benefits
Upon completion of a conservation easement, a corporation has a perpetual steward of the property. At a minimum, the land trust will monitor the property on an annual basis, sometimes discovering problems the corporation may not be aware of—especially if its headquarters is out of state. At best, a land trust’s stewardship responsibilities may relieve certain long-term management needs in controlling future uses and costs associated with a specific property that the corporation would otherwise incur. For example, securing a land trust as a long-term land steward and partner may help a corporation:

• Protect its assets and mitigate risk by identifying trespass early on
• Achieve business goals, including sustainability goals
• Find a reliable, financially stable buyer for the property
Public Considerations
Corporations recognize the importance of sustainability, which will manifest itself in a variety of ways when they make land management decisions. When a corporation conserves its land, it meets a business need, but the result is the permanent conservation of land with specific conservation values that will have importance at a local, regional or national scale. It is a win-win-win for the business, the community and the land itself. For a business, conserving land means it:

• Demonstrates a corporation’s social responsibility
• Achieves other societal benefits (for example, it provides public recreation or conserves a scenic viewshed)
• Addresses a public affairs’ or governmental concern (property is located in the heart of a town, adjacent to existing protected land or a local park)
• Fosters loyalty with customers and builds sustainability and trust in local communities

Regulatory
Corporations must comply with certain federal, state and local regulations concerning their landownership. In some situations, a corporation’s partnership with a land trust is a sign of good faith that can help a corporation in working with public agencies to address a myriad of issues related to regulatory requirements. This partnership can help a corporation:

• Address specific IRS regulations and concerns by partnering with land trusts expert in navigating the requirements of a federally deductible conservation easement
• Meet a regulatory or permitting requirement (zoning, permits, end use or remediation-related use restrictions on the property)
• Lower costs of remediation on certain contaminated properties

This spectrum of motivations and the potential benefits associated with conservation easement transactions offers a far greater opportunity (than currently realized) for land trusts to promote and corporations to use conservation easements to achieve their goals for corporate lands with significant conservation values.
A Win-Win-Win on Long Island

In 2012, ExxonMobil formed a partnership with the accredited North Shore Land Alliance (NSLA) and the Peconic Land Trust to permanently conserve an eight-acre waterfront property in the Cold Spring Harbor/Oyster Bay estuary of Long Island. At the time it was conserved, this estuary was listed as one of the 10 most endangered estuaries in the United States. The three parties worked in concert to ensure the land would be restored as wildlife habitat protected in perpetuity. ExxonMobil donated the fee land interest to NSLA and added an extra layer of protection by donating a conservation easement to Peconic at the time of closing.

From ExxonMobil’s perspective, donating the property, which had been used for more than 78 years as a fuel distribution terminal, to NSLA and a conservation easement to Peconic, as well as providing a stewardship contribution to both land trusts for restoration and monitoring, not only mitigated ExxonMobil’s environmental liability but also was the most favorable economic alternative, creating a win-win-win for the environment, the local community and ExxonMobil.

Lessons Learned

It is essential for land trusts and corporations to spend the time to get to know one another and build a strong relationship, which is not something that can be done overnight or with a few phone calls. “The face-to-face time helped us build a trusted partnership to achieve mutual goals,” recounts Lisa Ott, president of the North Shore Land Alliance in New York. “We had to prove to ExxonMobil that we were worthy of taking on this project and show them what the end product would be. Land trusts who want to work with corporations need patience because these deals take time.”

“This was a terrific opportunity to save a very special place and to demonstrate Exxon’s commitment to a region that is home to many of our major business operations. We chose to work with NSLA and Peconic because of the organizations’ deep understanding of easements, strong connections to state and federal agencies and relationships in the community. These connections proved invaluable when dealing with complex land conservation trans-
actions involving remediation efforts,” notes Bob Parker, Global Commercial manager, ExxonMobil Environmental Services.

In the end, the patience of all parties was rewarded. Since the donation, the community of Cold Spring Harbor has embraced the property with hundreds of volunteers from the local garden club, schools and other community organizations planting trees and native grasses. And that is only the beginning. More than 1,000 children have learned about the watershed, seeds and native plants from the education programs offered by NSLA. “ExxonMobil’s decision to conserve this property recognizes the strong desire by the local community to protect valuable natural resources, such as wetlands and shorelines, for the public benefit,” said John v.H. Halsey, president of Peconic Land Trust. “We hope more companies will follow ExxonMobil’s leadership and consider permanently...
protecting surplus property as a way to sustain Long Island’s natural heritage, including the health and ecology of our shorelines, especially given our recent experience with Hurricane Sandy.”

*ExxonMobil is the world’s largest publicly traded international oil and gas company. They hold an industry-leading inventory of global oil and gas resources. They are the world’s largest refiner and marketer of petroleum products, and their chemical company ranks among the world’s largest. They apply science and innovation to find better, safer and cleaner ways to deliver the energy the world needs. [www.exxonmobil.com](http://www.exxonmobil.com)*

*The North Shore Land Alliance is a nationally accredited land trust founded in 2003 by a group of friends and neighbors concerned about how quickly the natural landscape was changing. It works to protect and preserve, in perpetuity, the green spaces, farmlands, wetlands, groundwater and historical sites of Long Island’s North Shore for the enhancement of quality of life and the enjoyment and benefit of future generations. [http://northshorelandalliance.org](http://northshorelandalliance.org)*

*The Peconic Land Trust is a nonprofit organization established in 1983 to ensure the protection of Long Island’s working farms, natural lands and heritage. Since 1983, the Trust has worked diligently with landowners, communities, municipalities and partner organizations to protect more than 12,000 acres of land. [http://peconilandtrust.org](http://peconilandtrust.org)*

Young scientists taking soil samples at the Shore Road Sanctuary.
Similar to corporations, no two land trusts are alike. The land trust community comprises more than 1,500 highly diverse institutions that differ in size, mission, geographic focus, capacity and scope. As nonprofits, land trusts operate under some very different rules than corporations. In some ways, land trusts are more nimble and able to respond to opportunities more quickly. In other ways, they have strict legal requirements that they must follow that prevent them from seizing every opportunity that is presented to them. Above all, as public charities, land trusts must operate for the public good (not their own good or to assist a small group of people), so every project must demonstrate a benefit to the public. In this chapter, we look more closely at land trusts and how they select projects, including what constitutes deal breakers for them, and what a corporation should look for when selecting a partner to help ensure the transaction goes smoothly and the property is protected in perpetuity.

What Is a Land Trust?

A land trust is a nonprofit organization that, as all or part of its mission, actively works to conserve land by undertaking or assisting in land or conservation easement acquisitions or by its stewardship of such land or easements. Land trusts work with willing landowners and the community to conserve land by accepting donations of land, purchasing land, negotiating private, voluntary conservation agreements on land and stewarding conserved land for generations to come. Land trusts have the ability to hold land in fee or accept a conservation easement that will ensure the protection of the land in perpetuity. With more than 200,000 volunteers and five million members, land trusts represent a robust network of practitioners, landowners and other interested parties who understand land conservation.
Land Trust Alliance

The Land Trust Alliance is a national organization that leads a network of about 1,000 land trusts with 8,000 staff, 15,700 board members and five million members to quickly, effectively and permanently save our most valued natural resource across America. The Alliance offers a suite of services to land trusts. It is the go-to place for training in land conservation with Rally, the largest land conservation conference in the nation, webinars and an online learning center that includes self-study courses, publications, sample documents and tools on every aspect of land conservation from board governance to stewardship. The Alliance also offers technical assistance and grant support directly to land trusts via its four regional offices. Finally, the Alliance advocates at the national level for public policies that support land trusts’ conservation goals, including increased land conservation funding and improved tax incentives so that more landowners can afford to choose conservation. The Alliance can be useful to all parties in a conservation easement transaction in providing expert resources and introductions to private practice conservation attorneys in almost every state. The Alliance has assembled a national network of conservation experts and conservation attorneys with more than 500 members. The Conservation Defense Network collaborates nationally to solve problems and manage any legal cases that may arise. See www.lta.org for more information.

The Land Trust Alliance has developed two programs that are cornerstones on which the long-term success and durability of land trusts rest:

Land Trust Accreditation Commission. The Commission was incorporated in April 2006 as an independent program of the Land Trust Alliance. The program is designed to build and recognize strong land trusts, foster public confidence in land conservation and help ensure the long-term protection of land. The Commission is governed by a board of diverse land conservation and nonprofit management experts from around the country. As part of its internal protocols, a corporation may choose to work with a land trust that has undergone the rigorous accreditation process by the Land Trust Accreditation Commission. An accredited land trust has to demonstrate that it follows established standards and practices for sound operations in all aspects of its business and must renew its accreditation every five years. If a land trust follows the same standards and practices but has chosen not to seek accreditation, a land trust can bolster its position by providing supporting documentation to demonstrate its continued commitment to ensuring permanence in conserving land. For more information on the accreditation program, see www.landtrustaccreditation.org.

Terrafirma Risk Retention Group. The Land Trust Alliance created Terrafirma as a charitable risk pool owned by participating land trusts. It insures its members against the legal costs of defending conservation. It is available for all Land Trust Alliance member land trusts with conservation easements or fee lands held for conservation. Terrafirma also provides information and training on risk management to its members. Terrafirma is part of the Land Trust Alliance’s national strategy to build a formidable defense in ensuring conservation permanence. For more information, see www.terrafirma.org.

Land trust staff and board members have extensive expertise in conservation easement transactions—expertise that can be of great value to corporations unfamiliar with easement drafting. Most land trusts are also community-based organizations, deeply connected to and aware of local needs and opportunities, which can be useful to corporations navigating local or regional land use or other public relations issues. In addition, many land trusts are experts at partnering with public agencies and working with private landowners to tailor conservation plans that meet public planning, conservation and development goals—again a skill that can be of value to corporations that are working with public agencies to address specific issues related to corporate land. To find land trusts working in a particular state or locality or to learn more
about the land trust community, visit the Land Trust Alliance’s website at www.lta.org.

Recognizing that land trusts are unique, a corporation should assess a land trust to determine if it is the right partner (does it protect this type of land in this region?), ensure capacity (can it complete an easement transaction and steward it in perpetuity?), compatibility (do we share common conservation goals?) and process (do we understand and can we abide by the trust’s internal needs and requirements?).

**Preassessment: Is This Conservation Easement Project a Good Fit for the Land Trust?**

*Conservation significance:* In contemplating a conservation easement project, the most fundamental issue for a land trust is to identify the conservation values associated with a specific property. The land trust will assess if the property has conservation values, what those
values are and the level of protection warranted. If special conserva-
tion values are present, such as sensitive wetland habitat, threatened
or endangered species, nesting or migration corridors or rare plant
species, the land trust may desire greater protection to ensure that
those species and habitat remain unimpaired. Even if a landowner
(corporations included) has evaluated the conservation values of a
specific property and is willing to share that documentation, a land
trust will need to conduct an independent assessment.

*Mission alignment:* A land trust will also evaluate the project to
ensure that it aligns with the mission, organizational values and
programmatic activities as articulated in a strategic plan or other
board-approved document. If the project does not fit or extends the
land trust far beyond its organizational scope and mission, a land
trust may decline it. At the outset of a project, a corporation should
confirm that it has found an appropriate land trust partner—one
whose mission matches with the property in question. For example,
a land trust that focuses on farmland conservation may not be the
best partner for a corporation looking to divest an urban property
with forest reserves.
Here are some questions a corporation might want to ask the land trust to help guide a preliminary discussion:

· What is your mission (this information is usually found on the land trust’s website)?
· What are your project selection criteria?
· Is this type of property part of your strategic plan?
· Who decides whether or not to pursue a particular project?
· What is your typical time line for completing a conservation easement transaction?

Once the parties answer these fundamental questions, an additional set of questions related to organizational capacity and deal structuring will be useful in understanding if the land trust is the right partner. See appendix F for sample documents that illustrate what land trusts look for when selecting and planning projects.

Feasibility: Does the Land Trust Have the Capacity to Complete This Transaction?

Organizational Capacity and Transaction Structure

Capacity relates to an organization’s ability to move a project forward successfully. Key questions to ask the land trust include:

• Is the land trust in good standing? Evidence of good standing includes:
  º Compliance with all local, state and federal filings
  º Membership in the Land Trust Alliance
  º Accreditation status
• Do you have clear internal policies for guiding project development (what is the process for completing an easement)?
• Do you have a proven record of successfully completing transactions and defending easements?
• Do you have the necessary personnel to:
  º Conduct due diligence
  º Identify and manage the necessary professionals (appraisers, surveyors, attorneys)
  º Conduct or oversee any necessary environmental assessments
Chapter Two

Pristine waters of the Honeycutt Creek flowing through the CSX conservation easement area.

- Structure a transaction
- Negotiate and draft a conservation easement, working with multiple parties in different departments within a single corporation
  - What is the board of directors' role in advancing the project?
  - Who will be working on this project on a day-to-day basis?

Purchased Easements

In situations where the land trust purchases a conservation easement, the corporation should assess whether the land trust has had prior success in securing the necessary public or private funding to provide interim (if needed) and permanent funding. If this is the land trust’s first purchased easement, the successful completion of a capital campaign can be an indicator of an organization’s ability to raise funds to support its program. Additionally, the corporation should note if the land trust’s projections about the timing of funding seem realistic and achievable. Accurate projections are important so both parties have realistic expectations about the timeline for completing a project. From the land trust perspective, if there is a discrepancy between appraised value and asking price or if the asking price places an unacceptable burden on the land trust to raise money, a land trust may decline pursuing a specific project further.
Conservation Easement Drafting

As noted above, a property’s conservation values are the most important consideration for a land trust. The easement terms are the expression of these values and require careful thought and negotiation. Most land trusts have ample experience drafting conservation easements. In addition, the Land Trust Alliance provides a robust set of resources (trainings, manuals, checklists and so forth) to guide land trusts and sets the highest standards for negotiating and drafting conservation easements. As permanent stewards of the land, a land trust must ensure that it can monitor and enforce the final easement terms. For these reasons, the parties should use the land trust’s conservation easement template as a starting point for negotiations. See further discussion in chapter 5.

Sustainability and Stewardship: Can the Land Trust Fulfill Its Long-Term Responsibilities?

Organizational Durability

As permanent stewards of easement-encumbered land, a land trust must be durable. That is, the organization must be able to stand the test of time in order to fulfill its obligations well into the future. It is critical that a corporation evaluate the stability and soundness of the land trust to be confident that a land trust partner is robust.

Deal Breakers for Land Trusts

Though the specific focus may differ, the single most important attribute among all land trusts is their drive to protect specific conservation values (as defined by the IRS). For some, it may be wildlife habitat, for others clean water and for others working lands. A corporation should keep in mind that conservation is the driver for land trusts and that land trusts have legal responsibilities, much like a corporation’s fiscal responsibilities, to protect and steward specific conservation values against harm now and in the future. There a number of situations that will cause most land trusts to decline a transaction. These include:

1. The conservation values are not sufficiently protected under the terms of the easement, leaving the land trust at risk of failing to fulfill its commitment to provide a public benefit or receiving negative press.
2. The land trust believes it cannot effectively steward the property (the corporation resists annual monitoring or puts overly cumbersome or expensive restrictions on monitoring).
3. By accepting the easement, the land trust takes on an unacceptable level of liability or risk.
4. In the case of purchased easements, the corporation asks for above fair market value for the easement, as determined by an independent appraisal.
5. The property does not have meaningful conservation values (or they are minimal), the project fails to meet the land trust’s selection criteria or there are other projects that fit the land trust’s mission better (the latter may delay the transaction until sometime in the future).
6. There may be other issues specific to the land trust that causes it to decline the transaction, which the corporation should inquire about.
Verification tests include asking the land trust:

- Are you a member of the Land Trust Alliance?
- Are you an accredited land trust?
- Are you an insured member of the Terrafirma charitable risk pool?
- Is your stewardship fund of sufficient size to fund future obligations for all of your properties?

Other useful metrics include whether the organization has succession planning in place, deploys risk management strategies to ensure high performance and has a strategic plan that guides programmatic activities. Accreditation is not required to be sustainable, but it is an easily identifiable benchmark of quality.

A corporation may choose to work with land trusts that have undergone the rigorous accreditation process by the Land Trust Accreditation Commission (see page 16 for a description of the program). Alternatively, a corporation can evaluate a land trust’s durability by determining whether the land trust has shown it has a commitment to excellence and permanence in land conservation. One way of demonstrating this commitment is to belong to
the Land Trust Alliance. All Alliance members must adopt *Land Trust Standards and Practices*, the technical and ethical guidelines for the responsible operation of a land trust.

Corporations may also want to review the land trust’s IRS Form 990, which contains information on the organization’s mission, programs and finances. All nonprofits are required to complete a 990 every year to maintain their tax-exempt status. These forms are public documents available from the nonprofit or online at www.guidestar.org or www.foundationcenter.org.

**Stewardship**

Once a conservation easement is completed, a land trust assumes stewardship responsibilities in perpetuity and must monitor the easement annually, possibly more frequently depending on the nature of the conservation values and restrictions articulated in the easement. The corporation needs to determine whether a land trust has the necessary resources, including staff or volunteers, to fulfill these stewardship obligations. To help defray stewardship costs, land trusts often request a one-time stewardship contribution from landowners, including corporations. This common and prudent practice helps enable the land trust to meet its perpetual stewardship responsibilities. See chapter 4 and appendix E for a discussion of the different costs associated with stewardship. Some key questions to ask land trusts include:

- What is the amount of the stewardship contribution?
- How is it calculated?
- What will it be used for?

**CASE STUDY**

**Conserving a Viewshed along the Blue Ridge Parkway**

The Blue Ridge Parkway in North Carolina provides some of the most breathtaking views in the United States, and thanks to the combined efforts of CSX Transportation and the accredited Conservation Trust for North Carolina (CTNC), several of those vistas will be protected forever. After five years of negotiation, in 2009 CSX and CTNC closed on a conservation easement that protects 1,488 acres alongside CSX’s rail line where it climbs the
Blue Ridge Escarpment. With the easement recorded, CSX and CTNC then embarked on a new chapter in their relationship as joint stewards of the property.

During the negotiation process, CTNC land protection director Rusty Painter took pains to educate CSX staff on the stewardship obligations associated with a conservation easement. In the course of this education, one potential stumbling block quickly became apparent. “Due to its strong culture of safety, CSX was unable to allow our staff to cross railroad tracks or walk over tunnels to access isolated portions of the easement area. They felt the risk of injury would be too great,” Painter says. “This meant we had to obtain legal access to all parts of the easement from 12 adjacent landowners, which took a great deal of time. Prior to this project, we had never needed to approach a neighboring landowner with that request.” In the end, the CTNC received permission from the neighbors and commenced stewardship.

“At CSX, two of our core values are ‘Safety is a way of life’ and ‘Right results, right way,’” says CSX Real Property’s Bruce...
McMahon. The property encumbered with the conservation easement has been held by CSX and its predecessors for over 100 years, with the primary purpose of protecting the slopes above and below the CSX rail line as it traverses over the Blue Ridge. “Working with CTNC allowed CSX to address components of both core values,” McMahon says. “Environmental stewardship by assuring the protection of the scenic vistas from the Parkway and rail safety by CTNC securing alternative means of accessing the various tracts of land for monitoring purposes by means other than crossing the active rail line.”

Each year, Painter notifies a CSX real property agent and the road master (the on-site property manager) in advance of his monitoring visit. “The road master has always been very agreeable about monitoring and understands our obligation. After the visit, I submit a report with a reminder that I’ll contact him again next year for the annual monitoring visit. CSX has been very cooperative in enabling us to fulfill our obligations to steward the property,” Painter notes. Thanks to the strong partnership with CSX and adjacent landowners, to date, there has been only one minor violation, a third-party trespass from a neighbor who immediately rectified the situation when informed.

Lessons Learned

It’s more challenging to maintain a relationship with the corporate landowners because contacts often change without a change in ownership, says Painter. “They don’t always think to notify us since they don’t live on the property and aren’t accustomed to dealing with land trusts. Like most large corporations, CSX also has obligations that are higher on their priority list, so I have to take the extra step to reach out to them and remind them of our perpetual stewardship responsibilities.” In the end, Painter says CSX has been a great partner in protecting this important property: “It’s a big commitment to say ‘yes’ to a perpetual easement. Thanks to CSX we protected a property with significant conservation values that is very visible from popular locations along the Blue Ridge Parkway.”

CSX Corporation, together with its subsidiaries, is one of the nation’s leading transportation suppliers. The company’s rail and intermodal businesses provide rail-based transportation services, including traditional rail service and the transport of intermodal containers and trailers. Overall, the CSX Transportation network encompasses about 50,000 miles of track in 23 states throughout the Southeast, Midwest, and Northeast, connecting more than 200 cities and more than 90 percent of the nation’s economic centers.
Community

In order to be a truly sustainable organization, a land trust must be supported by the community in which it operates. Land trusts are community organizations that often have important relationships with local government officials and other public agencies, which can be helpful to corporations in certain situations. Some key questions to ask land trusts include:

- What community activities do you participate in?
- Do you partner with other community groups?
- Do you enjoy financial support from a broad section of your community?
- What community leaders do you work with?

In the end, it’s important for corporations to realize that while every land trust is unique, there are strong similarities among them. As nonprofits, they must act in the public interest. As land trusts, public interest aligns with protecting the conservation values of a particular property and a shared sense of being part of a larger land trust community. If that seems impossible, they will look for other opportunities. If a corporation wants to donate or sell an easement, it’s essential to remain flexible and work with the land trust in setting out the terms of the easement. Corporations should also look carefully at any land trust they seek to partner with to determine whether they have the capacity to complete the deal and to steward the easement in perpetuity.
Land trusts have significant experience working with family and individual landowners to conserve land, but only a handful of land trusts have partnered with corporations to complete conservation easement transactions. For good or bad, negotiating with a widowed farmer who wants to preserve her family legacy or a middle-aged couple who need to pay for college is quite different from working with a multinational corporation with offices around the world. Drivers for pursuing a conservation easement transaction will differ from corporation to corporation, as well as from project to project within a single corporation. For some, a conservation easement transaction is part of a comprehensive strategy to address all buffer and surplus lands; whereas for others, it may address a specific site need or issue or it may be part of a larger effort around corporate sustainability. Key for a land trust is not to expect corporations to act like private landowners and to adapt to its new partner. This chapter highlights some of the differences, including corporate decision making and how corporate structure impacts who a land trust works with, so land trusts aren’t taken by surprise by their new partner and can anticipate and plan for issues leading to swifter resolutions.

Understanding Corporate Fiduciary Responsibility

Family or individual landowners often conserve their land for emotional reasons, but corporations are profoundly different—something land trusts need to be aware of from day one. Understanding what motivates a corporation to donate or sell an easement will help land trusts work successfully with the business. For a corporation, the transaction is primarily a business deal, and a conservation easement or divestment must make business sense (emotions are rarely the impetus for conservation). A corporation has a fiduciary responsibility to its shareholders, so any decision
its staff makes must be in the best interest of the corporation and clearly linked to the current and future performance of the corporation. Frequently, but not always, this means the project needs to generate revenue or reduce costs associated with a specific property. Therefore, easements may not be charitable gifts as is more typical with families or individuals who conserve their land. Although the bottom line is often the primary consideration, *business sense* can be defined in other ways as seen in the benefits outlined in chapter 1.

It is critical for a land trust to understand what is motivating a corporation. Every land trust considering an easement transaction with a corporation should ask its potential partner what business, social or environmental need it is trying to address and what it hopes to achieve through an easement transaction. This is a critical question for land trusts because it will have a significant effect on easement negotiations. In the end, a land trust should not lose sight of the fact that, for corporations, easements should achieve triple bottom-line benefits (financial, social and environmental).
Norfolk Southern and Lowcountry Land Trust: Partners in Preservation

In 2008, Norfolk Southern Corporation and the accredited Lowcountry Land Trust permanently protected some of the most ecologically significant land in United States. The 12,488-acre Brosnan Forest, which lies 35 miles northwest of Charleston, is important because it contains 6,200 acres of mature longleaf pine habitat, one of the nation’s largest remaining stands. Tall, majestic longleaf pine forests once stretched across the Southeast, nearly unbroken for 90 million acres. Today, these forests are one of the most threatened ecosystems in North America, with only three million acres remaining. The trees support an ecosystem that hosts more than 200 plant species and 90 species of birds. Among them is the pitcher plant, a carnivorous species similar to Venus flytraps that feeds on insects. The wildlife includes numerous species of salamanders and songbirds, such as the colorful painted bunting, Bachman’s sparrow and the red-cockaded woodpecker. The forest shelters 79 family groups of the woodpeckers, making it the world’s largest population of these birds on private property under single ownership. Norfolk Southern has managed its property with a conservation ethic for the past 180 years, so donating a conservation easement was a natural next step in protecting this conservation jewel.

The project was the culmination of 12 years of discussions between Norfolk Southern and conservation groups. “Norfolk Southern has been a great partner. They sought us out to provide more protection on land that they were already committed to preserving for future generations,” says Garrett James Budds, director of Conservation for Lowcountry.

The relationship has even spurred additional conservation in the area. Within months, prompted by Norfolk Southern’s lead, the owners of 10 surrounding properties, totaling 2,500 additional acres in the valuable watershed, began working on conservation agreements with the Lowcountry Land Trust. “Our relationship with Lowcountry has continued to develop, and we work with them on many fronts. Most importantly we educate private landowners in our region on the benefits of conservation. We’ve hosted tours and educational events for surrounding families who...
have an interest in conserving their property for future generations, and quite a few of them have protected their properties with voluntary easements. Our easement continues to be a catalyst for land conservation,” says Josh Raglin, general manager Facilities, Norfolk Southern.

Lessons Learned
Lowcountry’s success in partnering with Norfolk Southern was due in large part to the fact that both organizations have a similar perspective on protecting Brosnan Forest. “We were fortunate that our partner had a strong land ethic that matched our own and could see how their fiduciary responsibility to shareholders could be met by an easement donation on this land. I would say that if a land trust is partnering with a corporation with a different land ethic, encourage them to look at their fiduciary responsibilities more broadly,” Budds says. “I have believed for many years that you can’t really understand Norfolk Southern until you’ve visited Brosnan Forest. In a unique way, it exemplifies our commitment to the long term and our belief in the enduring values of conserving and restoring our environment,” says Wick Moorman, who was chairman, president and CEO of Norfolk Southern at the time the easement was donated.

Another reason for their success is that Lowcountry was forthright about stewardship and the company’s responsibilities in that arena. “From the very beginning, we were upfront with our request for a stewardship donation and what is involved with steward-
ing an easement—as we do with all of our prospective easement donors. We share our standard formula and clearly describe the landowner’s role in stewardship. Our point of contact at Norfolk Southern appreciated having this information at the beginning of the process so he could explain it to and obtain approval from corporate headquarters,” says Budds. “Norfolk Southern understood with the donation of our easement that Lowcountry would need financial support to guarantee the long-term monitoring. It made total sense to us,” observes Raglin.

Since the donation, the land trust has annually monitored the easement with no issues. “It’s actually one of our easiest and most enjoyable properties to monitor. We meet with Norfolk Southern
staff and tour about 25 percent of the property at any one time. We supplement on-the-ground monitoring with aerial photography and make sure to cover a different section of the property on foot for every year,” notes Budds.

Norfolk Southern is one of the nation’s premier transportation companies. Its Norfolk Southern Railway subsidiary operates approximately 21,000 route miles in 22 states and the District of Columbia, serving every major container port in the eastern United States and providing superior connections to western rail carriers. Norfolk Southern operates the most extensive intermodal network in the East and is North America’s largest rail carrier of metals and automotive products. www.nscorp.com

Lowcountry Land Trust is a local land conservation organization that is focused on protecting the ecologically, agriculturally and historically significant Lowcountry landscape, throughout the coastal plain of South Carolina. Since its founding in 1986, the land trust has permanently preserved more than 138,000 acres. www.lolt.org

IRS Considerations

When donating an easement (or selling it through a bargain sale), a corporation may be seeking to qualify for a federal income tax deduction under Section 170(h) of the Internal Revenue Code. Because conservation easement transactions require extensive due diligence, documentation and substantiation, all parties must have appropriate, experienced legal and tax counsel and follow all applicable laws and regulations. Land trusts must also follow Land Trust Standards and Practices.

In some cases, an anticipated tax deduction drives the business decision that motivates a corporation to donate an easement (this is often a motivating factor for individual landowners, as well). What is important, however, is for the parties to understand the legal and timing restrictions that apply to the appraisal and the requirements for a qualified appraisal pursuant to IRS regulations. The land trust should not assume that the corporation is familiar with these requirements and should provide the same early notice that it gives any landowner concerning the requirements for appraisals, as required by Land Trust Standards and Practices.
Discussion of these requirements early in the negotiation process will avoid problems later and may be a factor in the corporation’s decision about whether to proceed with the transaction. Because this is an extremely complex and difficult area of law and practice, experienced tax counsel is essential. The land trust shouldn’t assume that a corporation necessarily has this expertise on staff or under contract and should be ready to recommend counsel. For more specific information about appraisals, see appendix B and *A Tax Guide to Conservation Easements*, by attorney Tim Lindstrom, published by the Land Trust Alliance.

Additionally, the land trust should notify the corporation of (and the corporation should ask about) all IRS requirements related
to the documentation of the attributes of a donated conservation easement. Substantiation requirements can be difficult for corporations to manage and time consuming, as well. It’s also important for land trusts to remind corporations that substantiation requirements also apply to bargain sale transactions because they are part donation and part sale of a conservation easement.

If the corporation decides to engage in the transaction based on certain financial assumptions and expects a specific valuation of the donation, the land trust should receive that information early in the process. The parties should agree to a schedule that will allow sufficient time for the appraiser to complete the appraisal after the parties negotiate easement terms but before the easement is recorded. This schedule must allow sufficient time for the land trust and the corporation’s tax advisor to review the appraisal and ensure the closing occurs within 60 days of the date of the appraisal.

The land trust should make it clear to a corporation that it must follow *Land Trust Standards and Practices*, so it cannot make any assurances as to whether the easement will be deductible, what monetary value of the gift the IRS will accept, what the resulting tax benefits will be or whether the corporation’s appraisal is accurate. All parties must exercise great care so that the corporation can preserve its donative intent, especially if the IRS audits the transaction. Additionally, the land trust should be clear that once the conservation easement is recorded, the parties cannot revoke it.

**Partnering with Corporations**

No matter the reason the corporation decided to donate or sell an easement, it is helpful to realize that these transactions may set a precedent for additional corporate holdings, although every transaction is unique. This can frustrate a land trust if, for example, an issue, such as allowing public access or protecting riparian habitat, makes sense for a specific project, but the corporation rejects it because of future implications for other land holdings. This feature of landholding corporations is not typically an issue for family or individual owners who are often single property owners.

Every corporation will also have different processes for advancing a conservation easement project. A land trust should ask how a corporation will work with a land trust partner and what internal
What Land Trusts Need to Know about Corporations

Pertinent Questions to Ask an Appraiser

• Do you hold a current appraisal license from the state in which the property is located?
• Do you have any other special designations, such as the Appraisal Institute’s RM or MAI or the American Society of Farm Managers and Rural Appraisers’ ARA?
• Have you appraised property in this county recently? (The answer to this question will indicate familiarity with the market and may indicate whether there will be additional expense for the cost of updating market research.)
• Have you appraised property similar to this property recently (for example, development land, ranchland, farmland)?
• How long have you been an appraiser? (Time in the business does not necessarily equate to competency, but it provides you with a general understanding of the appraiser’s experience.)
• How many appraisals of this type have you completed, and who have been your clients (for example, private landowners, government agencies, land trusts)?
• Are you qualified to write an appraisal for the purpose of substantiating a charitable contribution for federal income tax purposes? Can you write an appraisal that conforms to the Uniform Standards of Professional Appraisal Practice (USPAP)? Federal Yellow Book standards?
• Do you have experience with the IRS in defending any of your appraisals? (An appraiser who was required to defend an appraisal should not necessarily be discounted because donations can be flagged by the IRS for review for a number of issues.
• Have you received a Certificate of Completion from the Appraisal Institute for the successful completion of the “Valuation of Conservation Easement” program curriculum and program exam?
• Have you appraised property similar to this property recently (for example, development land, ranchland, farmland)? Are you familiar with the before-and-after approach to appraising conservation easements?
• Are you familiar with the requirements to meet the “qualified appraisal” standard? Are you a “qualified appraiser”?
• If you have not yet written a conservation easement appraisal, what steps will you take to familiarize yourself with this type of appraisal? Would you consider affiliating with a more experienced appraiser?
• What are the fees and time line to complete the appraisal?
• Please provide three references from past clients.

processes are required. As the conservation easement negotiation and drafting evolves, it is highly likely that different departments and individuals will be involved at different times. Depending on the priority of a particular project, response times from these parties may be unpredictable. The land trust needs to understand the following:

• What steps are necessary?
• What is the review process for legal documents?
• Who gets involved when?
• What is the timing for receiving feedback?
• What authorizations, including regulatory review, are necessary?
• What is your targeted completion date?

This understanding is crucial so a land trust can set realistic expectations, evaluate how the project affects other land trust projects underway and coordinate this transaction with its other activities.

Internal Challenges

Conservation easements represent a relatively new real estate strategy for most corporations, and, as with any new tool, inevitably challenges emerge. Conservation easements do not fit neatly within established policies and practices that have governed corporate land management decisions for years, so institutional barriers may exist. Specifically, within the context of traditional real estate transactions (fee sales, for example), which are often straightforward and well understood, it can be difficult to make the case internally that conservation easements are an appropriate or practical tool, particularly when they may take longer than a year to complete.

Easements may be viewed as peripheral to a corporation's core mission. There may also be a lack of clarity around who should be responsible for pursuing these transactions and leading specific projects. Additionally, depending on who is advancing the concept (top-down or bottom-up), the response that a land trust receives from an inquiry or even in the midst of negotiations may significantly affect how much resistance a land trust encounters when approaching or working with a corporation. However, this gap in understanding provides a significant learning opportunity for land trusts to explain how and why conservation easements can be an important tool for corporations in meeting their goals.

It may be helpful to remind corporate partners of the benefits of owning property in fee while also encumbering the land with a conservation easement. For example, a corporation could structure a transaction to divest all interest by conveying the conservation easement to a land trust and then selling the underlying retained fee simple title to a public agency or other conservation partner.

Corporations can be strong partners with land trusts in protecting communities’ most important landscapes. However, land
trusts must realize that corporations have motivations for conserving land that are very different from traditional landowners. To be successful, land trusts need to understand that businesses have a fiduciary obligation (similar to a land trust’s obligation to operate in the public interest), and their structure and internal processes can present challenges. The next chapter provides tips on how to overcome other challenges that could derail even the best project.
If the corporation has decided a conservation easement makes business sense and found a solid land trust partner with whom it can structure a relationship, it’s time to start the negotiation process. Because negotiating the terms of an easement can take considerable time and effort, corporations and land trusts should take some sensible steps to help ensure they don’t squander precious time and resources. This chapter outlines the necessary analysis and steps that both parties should take before, during and after a project to be successful.

**Before Starting the Transaction**

1. **Set the Stage for Success**

   Before meeting with a land trust, the corporation should have a clear understanding of the current condition of the property, including the boundaries, and how it intends to use it. The corporation should also evaluate whether a conservation easement is consistent with its business objectives for the property. These factors are important to a land trust’s evaluation of a project. For example, a corporation retaining a fee interest in the property is likely to have different needs than one seeking to divest its ownership of the property. If there are regulatory considerations that dictate the timing of the transaction, the corporation should explain these requirements to the land trust at the initial meeting. If the corporation plans to transfer the property subject to the easement and already knows the intended recipient, it would be advisable for a representative of that future owner to be involved in the negotiations so that everyone understands and agrees on future uses of the property. Additionally, the corporation should be prepared to explain to the land trust its management approval process for the project to ensure the parties have consistent expectations.
For its part, the land trust must evaluate whether the current condition of the property warrants protection and whether the corporation’s desired future uses are compatible with the conservation values that the land trust, as holder of the easement, must preserve. Both parties have an interest in protecting the public benefit served by the easement, as well as clearly defining the permitted uses and prohibited activities that the easement describes. This is a critical first step in determining whether the project is viable.

To help inform a corporation, the land trust may want to consider sharing a brief (one-page) introductory document on the organization that explains what the organization is, how the organization functions and how it anticipates working with a corporate partner. This may be particularly valuable when dealing with a corporation that has no previous experience with land trusts or conservation easements.

2. Framing the Project
At the outset, key staff from both parties should meet to identify the most important issues and potential sensitivities involved in the project, discuss the biggest concerns, and describe their approval and decision-making processes. This exploratory discussion will

Mother Lode Land Trust and PG&E worked together to permanently conserve land owned by PG&E in the Lower Bear Reservoir (CA).
help create a relationship built on trust, understanding and transparency, which will go a long way in helping to avoid delays and in making the project successful. A kickoff meeting is particularly important for corporations and land trusts because they often come from very different perspectives and may have little or no understanding of or appreciation for the needs and concerns of the other party.

The land trust representative who first meets with a corporation to discuss the easement and visits the property is unlikely to have the authority to approve the project—that is typically a decision made by the board of directors. For the land trust, the purpose of the initial meeting is to gather the information necessary to determine whether the project meets the land trust’s mission and project selection criteria. Different land trusts have different criteria for how they prioritize and select projects. The land trust representative should be prepared to describe the selection process at the first meeting.

After evaluating the project, the land trust representative then presents the project to their board (or a smaller decision-making
body, such as a lands committee, with authority delegated by the board) that determines whether to pursue the project. Sometimes, the board needs additional information to make a decision, necessitating further discussion with the corporation. The pace of the land trust’s approval process may vary, and it is important for the land trust to explain the process at the outset in order to avoid misunderstandings.

3. Project Work Plan
Given the complexity of conservation easement transactions, the land trust and a corporation should create a comprehensive work plan with a checklist that identifies key responsibilities, critical internal processes and deadlines for certain activities (for example, a list of who in the corporation reviews a draft easement, including how many departments need to review the document and the timing for sharing comments with the land trust). Additional work plan items may contain:

- Initial (and necessary follow-up) site visits to evaluate the property and its conservation significance
- Identification of due diligence needs, including surveys, title work and environmental assessments
- Funding application deadlines and award dates (when grant funding or fundraising is part of a transaction)
- Drafting and review process for the conservation easement, both the land trust’s and corporation’s schedules (how many divisions within a corporation must review and sign off on the draft easement document and must they sign off on all subsequent drafts)
- Timing and costs of completing the baseline documentation and any special requirements, such as aerial flights

4. Project Budget
Corporations operate in an environment where financial statements, budgets and accounting are the norm. With this in mind, it is critical that businesses have an accurate understanding upfront of all potential costs associated with a conservation easement transaction. The creation of a project budget is a critical step that will minimize unexpected surprises that can disrupt, delay or even terminate potential transactions. A clear understanding of costs is particularly important for the corporation. It enables senior
management and operations teams to develop realistic project budgets that, once approved, are often inflexible because approval and funding having limited duration, regardless of the size or success of a specific company. It is true that not all costs can be predicted, but making corporations aware of the range of potential expenses is essential. Key budget items include:

- Appraisals, if necessary
- Surveys
- Phase I or II environmental assessments or other assessments as needed
- Transactions costs, such as title work, recording fees and legal fees
- Baseline documentation reports
- Stewardship and legal defense funding
- Restoration, if necessary

5. Conservation Easement Drafting

Land trusts and corporations typically approach easements differently. This section tries to illuminate the differences and highlight key questions and concerns in a succinct manner. Chapter 5 includes specific examples of easement provisions, particularly those that are often highly complex, contentious or sensitive.

The land trust may have several hundred or even more than 1,000 easements to keep track of, so keeping the format consistent to the greatest extent possible among all of its easements is critical. Even for small land trusts, a consistent template aids enforceability and streamlines administration. For example, the template will include particular requirements imposed by the state enabling statute, use the standard attorney fees clause, the standard enforcement clause and the standard monitoring clause, all of which enable a sound system of ongoing stewardship.

The land trust staff member who knows the most about the transaction is usually an expert in land protection but not an attorney. To facilitate the drafting process, they usually follow a template that the land trust’s attorney has already approved. For some land trusts, more than one template may be in use depending on the type of land that is being protected. Final review of the easement by the land trust attorney may not occur until later in the process, after the land trust and corporation have agreed on the permitted and prohibited uses.
If the land trust does not use a template and relies on a staff member who is not an attorney to negotiate the easement, it is important for the land trust attorney to be involved early in the process to address the legal aspects of the transaction. The land trust should be willing to consider modifications to address unique restrictions and reserved rights applicable to a particular conservation project that do not jeopardize the public benefit of the conservation easement.

If the land trust uses a standard easement template, it should share that template with the corporation early in the drafting process. Note that there is no single model easement used across the country because of variances in state law, land trust missions and the characteristics of the land conserved. In addition, corporations should not expect land trusts in the same state (or even region) to use the same template because missions vary among land trusts (however, there are often common core provisions that can be found in most easement documents).

The person in the corporation most familiar with the property may not be an attorney. This person may be able to negotiate the permitted and prohibited uses on the property but probably does not have the authority to sign off on the deal unilaterally. The corporation will need sufficient time for legal review by its attor-
The corporation’s attorney may be located in a different part of the country or even outside the corporation. It is important that the corporation’s attorney and the land trust’s attorney are able to discuss legal issues early in the process to avoid delays.

6. Baseline Documentation Report
The baseline documentation report (baseline or BDR) provides detailed information on the conservation values and general condition of the property at the time the corporation conveys an easement to the land trust. A thorough and well-documented baseline is critical to the land trust’s ability to monitor the easement because it can provide clues in interpreting vague or ambiguous easement terms and is an important tool in explaining the easement to successor owners of the land. As such, for both parties, the accuracy of the baseline cannot be overstated. IRS regulations also require the landowner to document the condition of the property at the time of the donation of the easement (easements not intended to qualify for federal tax benefits must still have a baseline). However, in practice, most land trusts prefer to create the baseline, with advice and assistance from the landowner. Given its experience crafting baselines, turning over the responsibility for this task to the land trust will facilitate the process. It is very
likely that the land trust will have many questions for the corporation while preparing the baseline. A corporation may already have reports, surveys, environmental assessments and other information that can assist the land trust in preparing the baseline. For this reason, a land trust may request all documentation relating to the condition of the property. The parties should work together to avoid duplicating efforts, while ensuring that the report is an accurate depiction of the property as close to the closing date as possible. The corporation may also wish to attend the site visit for baseline preparation. The corporation should also review the fully completed baseline well before the closing date in order to correct any errors or highlight any important points.

Timing is particularly important because the baseline needs to be prepared prior to closing, and the landowner and land trust must sign it at closing. The baseline needs to reflect the condition of the property at closing, and the land trust may need to update it if the parties delay the closing or weather prevents access to the property.

Each land trust may follow a different format for its baseline, but best practices require the report to include aerial (if available) and on-site photographs of any improvements located on the property and the natural features of the land. Additionally, the report must document:

- Metes and bounds information
- The specific conservation values protected by the easement
- The public benefit served by the easement
- The location of any roads, structures or buildings on the property
- Any areas that may be affected by the exercise of a reserved right

The parties may negotiate the number and type of photographs required in a baseline, as well as the process for certifying the photographs. Photographs assist in understanding how the easement applies to the land. For example, a photograph may show a broken silt fence installed for compliance with storm water regulations, and the corporation may feel that it has corrected the problem so the fence should not be included in the baseline. The land trust will want to include the photo because it depicts a human-installed improvement that is still in place on the land. The parties
should jointly negotiate these issues. The corporation can ask for additional photographs to depict more accurately the true condition of the property.

Some land trusts require the landowner to initial each photograph in a baseline. From a corporation’s perspective, initialing each photograph can be difficult because it is not an individual landowner living on the property and intimately familiar with it. In those cases, compromise may be required. For example, the corporation’s representative will sign the baseline acknowledgment rather than initialing each photograph. The signed acknowledgment avers that the entire baseline, including all photographs, is an accurate representation of the current condition of the property.

If the corporation’s representative responsible for verifying the condition of the property is not at the closing, the parties must work out the details for when and how the corporation approves and signs the baseline prior to the closing. The baseline must be signed at or before the closing by all parties. In addition, because of recent challenges to the admissibility of baselines in court, some land trusts notarize their baselines and record the signature pages (check your state laws on admissibility). For a checklist of what is commonly included in a baseline, see page 136.

7. Stewardship
When a conservation easement transaction is completed, the beginning of a long-term relationship between the corporation (assuming it retains ownership of fee title) and the land trust begins. As the perpetual steward of the easement-encumbered land, the land trust is responsible for annual or more frequent monitoring (additional site visits may be warranted if the easement protects special attributes like nesting grounds) and enforcement of the easement’s terms, if necessary. These responsibilities require logistical coordination between the corporation and the land trust, which is different from other real estate transactions where once the deal is completed, there is no ongoing relationship.

Because corporations may be newcomers to easements and to this unique requirement, it is incumbent upon a land trust to explain what stewardship means and why stewardship is so important to fulfill land trust responsibilities. Early in the process, the corporation should identify which personnel will be the points of contact and manage the stewardship relationship on behalf of the corporation. Ideally, these personnel should be involved when drafting the easement, both to initiate a strong stewardship rela-
tionship and to ensure that the intent of the easement provisions is equally understood by the first generation of land trust and corporate easement stewards.

The land trust is the party with the responsibility and the right of enforcement in the event that the land trust believes a breach of the conservation easement has occurred. Corporations typically value the commitment of land trusts to uphold the conservation purposes of the easement forever. Usually successor owners present the most challenges to following conservation easements, so land trusts typically have programs to educate them on what owning an easement-encumbered property means. It is also why land trusts must have the capacity to defend their easements. This capacity is greatly enhanced if they are insured members of Terrafirma Risk Retention Group LLC (www.terrafirma.org).

Stewardship Funding

A land trust must assess the immediate and long-term financial and management implications of each project and secure the dedicated or operating funds necessary to fulfill its obligations under federal, state and local laws and with respect to Land Trust Standards...
and Practices. If the land trust does not secure the funds before the completion of the project, best practices require the land trust to have a plan to secure these funds soon after.

It is critical that land trusts share their stewardship funding expectations early on because corporations may not expect or understand why most land trusts request a one-time, administrative, stewardship and legal defense contribution from the landowner along with the conservation easement. The land trust should be upfront about how it calculates the contribution and how it will be used.

If the corporation is donating the easement, this contribution is usually deductible as part of the cost of completing the project. However, even if the corporation is not seeking a federal income tax deduction or a state tax credit, the land trust, nonetheless, as a tax-exempt entity under the Tax Code, has a federal legal obligation to steward the easement.

Land trusts determine the amount of stewardship contributions in different ways, and the land trust needs to communicate...
this information to the corporation as early as possible, preferably in writing. The land trust should be transparent about how these amounts are determined and explain what factors increase or decrease the requested contribution. For example, if the corporation or subsequent property owner retains reserved rights that require ongoing involvement of land trust staff, the calculation is likely to be higher. On the other hand, property left in its natural state with few, if any, reserved uses may mean a lower stewardship contribution. In such cases, the exact amount of the contribution may not be determined until the parties fully negotiate the easement.

The Land Trust Alliance recommends that land trusts have an endowment or dedicated fund sufficient to generate enough income to cover an annual cost of between $200 and $500 per easement (equal to an endowment/dedicated fund amount per easement of $4,000 to $10,000, or a minimum of $3,500).

Land trusts also may request an amount for future legal defense of the public benefit of the conservation easement. Sometimes the land trust includes the legal defense amount within the stewardship contribution, and sometimes it is a separate calculation.

In addition to the stewardship and defense funding, the land trust may have additional administrative requirements that should be shared upfront with the corporation. For example, if separate checks are required (e.g., if there is an administrative fee and a stewardship endowment contribution that are processed separately by the land trust), the land trust should provide early notice to the corporation of these requirements.

It may surprise corporations that, in addition to the transaction costs associated with granting an easement and any costs the corporation may already have incurred in connection with remediation and maintenance of the property, land trusts also expect to receive a cash contribution from the corporation at closing. The corporation’s representative must be prepared to explain to senior staff the legitimate reasons for this funding—why it is important, what it is used for and how it is calculated. Written materials from the land trust on its stewardship fund policy would be helpful in making the case to senior management who may not expect or understand the request for an additional gift. For a description of typical stewardship expenses, see appendix E.
8. After the Closing: The Ongoing Relationship

Once the easement is recorded, the relationship between the land trust and corporation changes, but it does not end unless the corporation divests its fee interest in the property. If the corporation retains fee title, there will be ongoing communication between the land trust and the corporation in connection with monitoring visits and for any reserved rights that require notice to, or approval of, the land trust. Maintaining open channels of communication is important for both parties.

*Land Trust's Acknowledgment of the Donation*

The first postclosing matter that will require contact and cooperation between the land trust and the corporation is (for donations and bargain sales) when the land trust acknowledges the gift by signing IRS Form 8283 and any applicable state forms. If the land trust pays full value for the conservation easement or if a regulatory body requires the easement, then it is not a gift for which a corporation can receive a tax deduction, and Form 8283 and other forms are not required.

If the land trust has provided information about the requirements for obtaining a qualified appraisal and its need to receive a copy of the appraisal for gifts intended to qualify for a federal income tax deduction, as recommended on pages 33–4, this process should not create any surprises. *Land Trust Standards and Practices* requires that the land trust sign Form 8283 only when it is complete and accurate (i.e., it includes the landowner’s name, a detailed description of the gift, the amount received by the landowner in a bargain sale, the appraiser’s signature and the date of the gift and that the appraisal supporting the deduction meets the IRS regulations). Ideally this issue is addressed before the easement is recorded, but sometimes the final appraisal is not ready then, so this is handled after closing.

*Scheduling Monitoring Visits*

Prior to closing or soon after, the land trust should introduce its stewardship personnel to the corporation’s contact for the property. The land trust is required to visit the property at least annually to fulfill its monitoring responsibilities. The first visit should occur before the one-year anniversary of the date the easement is recorded, but it will most likely be near the end of that period. More frequent visits may be necessary if the property is in active remediation or undergoing permitted development for use as
a park or for other public access, particularly if the location and construction of improvements requires the land trust’s consent to confirm that the conservation values of the property are protected.

The corporation may be surprised that the land trust cannot schedule a precise date for the first monitoring visit. The timing of these visits is often determined by competing demands on the stewardship personnel’s time and the location of the property. Land trusts often group visits to properties by geographic proximity to one another. Seasonal conditions also play a role in the timing of monitoring visits. The notice provisions of the easement will dictate when and how the land trust provides notice to the corporation of an upcoming monitoring visit.

In this regard, it is important for the corporation to inform the land trust if the corporation’s point of contact changes from the person originally identified in the easement. Because of corporate restructuring and staff turnover, the corporation should remember to provide notice of these changes to the land trust.

A corporation may need more lead time than an individual landowner in order to arrange access to the property or to have the appropriate person available for the monitoring visit. Many times the department within the company that is responsible for the property is not in the same location as the property itself. Therefore,
more coordination and advance preparation may be necessary on the part of a land trust before each annual monitoring visit. Land trusts should also be aware that a corporation’s safety protocols for a particular property may require anyone on-site to wear personal protective equipment, such as steel-toed boots, and that these requirements apply to land trust personnel conducting annual monitoring visits, as well as corporate representatives.

If the corporation has divested fee title and a third party owns the property, the land trust will contact that party before the monitoring visit. If the corporation has retained any responsibility for the property (i.e., pursuant to regulatory requirement or for restoration activities), all parties involved need a clear understanding of the rights and responsibilities of one another. The allocation of responsibility between the corporation and subsequent owner will often be addressed in a separate document. To the extent any of the provisions of that agreement affect the easement, the corporation should provide a copy of it to the land trust. By the terms of the easement, the subsequent owner will be considered the grantor, and the land trust will be dealing with that third party in the future. If the corporation wants or needs to remain involved at some level, the parties should clarify how this will be accomplished. See page 147 for a sample easement monitoring form.

CASE STUDY

“The course of true love never did run smooth.”

In November 2014, after an intense multiyear negotiation process, Pacific Gas and Electric Company (PG&E) and the accredited Sequoia Riverlands Trust (SRT) recorded a conservation easement on more than 43 acres of land along the Tule River, surrounded by the Sequoia National Forest in California’s Sierra Nevada foothills. This was the first conservation easement recorded in fulfillment of PG&E’s Land Conservation Commitment.

Over the next several years, PG&E will work with nearly a dozen other local land trusts to place easements on 140,000 acres in the Sierra Nevada and Southern Cascade ranges. How PG&E came to work with local land trusts and the lessons learned from that partnership can be a model for corporations and land trusts seeking to collaborate on land conservation.
Background
In the early 2000s, PG&E, an investor-owned utility providing natural gas and electricity to the northern two-thirds of California, declared bankruptcy as a result of unanticipated impacts associated with the deregulation of electric energy markets. As part of the settlement of its bankruptcy, the company agreed to permanently protect 140,000 acres of its hydroelectric watershed lands, an idea that had been floating in conservation circles since the mid-1990s.

“We were able to turn lemons into lemonade,” says Mike Schonherr, PG&E’s Land Conservation Commitment manager. “PG&E’s bankruptcy turned out to be the perfect opportunity to bring together the legal, regulatory and stakeholder interests in a way that allowed us to do what PG&E really wasn’t able to do on its own. Not only were we able to protect PG&E’s ability to continue operating our hydroelectric generation facilities, we were able to craft a framework for ensuring the permanent protection of the amazing resources associated with our watershed lands.”

Partners
Identifying the right partner to develop the first of these conservation easements was an initial challenge in implementing the Land Conservation Commitment. The nonprofit Pacific Forest and Watershed Lands Stewardship Council was created, in accordance with the bankruptcy settlement, to identify prospective local land trust partners for PG&E, among other things. Once those land trusts were identified, the work of crafting a conservation easement that was satisfactory to all began.

While recognizing that involvement in these negotiations would be a significant investment of her organization’s resources, SRT’s executive director, Soapy Mulholland, nonetheless volunteered to engage in developing with PG&E a template easement that would be used by all land trusts entering into easement agreements with PG&E. “It takes money to do these kinds of deals so someone needs to front the money. In this case, the Stewardship Council provided the funding for SRT’s participation in the negotiations and eventual stewardship activities, as well as its stewardship endowment. It’s really important for the corporations to help identify funding sources because land trusts can’t always afford the costs of negotiating legal issues in these transactions,” Mulholland observes. With a solid easement template in place, everyone knew it would be much easier to bring the other land trusts on board.
However, getting to that easement template required months and months of dedicated work by all parties.

Conservation Easement Template
Developing a model easement that fit the unique circumstances involved in protecting lands containing working hydroelectric generation was a challenge. PG&E had a steep learning curve regarding conservation easements, Land Trust Standards and Practices and the rules governing land trusts. SRT had an equally steep learning curve about hydroelectric generation.

“We had to learn about PG&E’s regulatory and operational requirements, and PG&E had to learn about how land trusts protect conservation values,” Mulholland says. That education turned into a 1.5-year-long detailed negotiation process as PG&E and SRT worked out how to craft reserved rights that allowed PG&E to continue its business activities and meet regulatory requirements, while still protecting the conservation values. “Every permitted and prohibited use had to be negotiated and evaluated for consistency with PG&E’s obligations to provide electricity to its customers, ensure it is able to comply with the myriad laws, rules and regulations governing its operations and to protect public and employee safety,” says Aimee Crawford of PG&E’s Land Conservation Commitment team.

Negotiators eventually developed language that balances PG&E’s exercise of its reserved rights with the conservation values. For example, if regulators require PG&E to build a road through conserved land, the utility has permission to build the road, but the easement provides for consultation with the land trust on siting of that road.

Tips for Working Together
The process of developing an easement that effectively blended the objectives of PG&E and SRT was challenging, but the many lessons they learned can benefit other corporations and land trusts.

• Seek to understand. Corporations and land trusts need to understand where each is coming from and the constraints they face, Crawford says. “Corporations need to know that the professional land trust community operates with a very high public trust ethic. Commitment to mission is what drives land trusts, so that mission must be served if a negotiation is going to be
successful.” Likewise, Crawford observes that land trusts have to understand where corporations are coming from: “While corporations have much to gain from working with land trusts and want to develop partnerships, they have to make sure their conservation efforts align with their business objectives.”

- **Discuss costs upfront.** Financial issues related to land conservation, such as transaction costs and stewardship donations, must be addressed at the beginning, to ensure that the land trust has adequate resources to fully engage in the negotiation and the corporation isn’t surprised by funding requests late in the negotiation.

- **Talk about the big picture before drafting.** A good strategy to get everyone on the same page is to bring decision makers in the land trust and the corporation together to go through the needs of each side prior to circulating draft documents. “The most important thing is that you have to start with mutual understanding of the requirements of both sides at the fundamental level,” notes Mulholland. “Remember, if you have a huge corporation, you may find 15 attorneys may need to approve every change to the easement. It is better to get the
big issues agreed upon before you bring in the lawyers. That way you are not just passing edits back and forth.” Schonherr echoes this point: “The principal negotiators need to engage and understand one another’s priorities and objectives and establish mutual goals for the easement, before beginning negotiations regarding easement terms.”

• **Think about forever.** If the corporation is going to do more than one or two easements, Crawford suggests that it may be worth the time to develop in-house conservation easement stewardship expertise. “This is a very specialized field, so early on a corporation should think about obtaining its own expertise instead of relying solely on the land trust to contribute that expertise to the long-term relationship,” she notes.

• **Educate each other.** Crawford also recommends that the land trust and corporation identify respective single points of contact right from the beginning. The corporation point of contact may have no experience in conservation easement stewardship, so take the opportunity to provide education on the long-term commitment required by perpetual stewardship. Likewise, the land trust will need to be educated about the corporation’s operations and regulatory requirements. Having these single points of contact allows information to flow in a direct and meaningful way, enabling the parties to identify and resolve any questions or misunderstandings before they turn into points of contention in negotiations.

• **Seize the opportunity.** Finally, both Mulholland and Crawford recommend that corporations and land trusts seize the opportunity to build relationships with each other. “Land trusts and corporations make great partners,” Crawford observes. “Corporations have considerable resources and interest in developing positive relationships with the communities in which they operate, and land trusts can certainly further those interests. Just understand that both sides will have to do a lot of educating and listening.”

*Pacific Gas and Electric Company (PG&E) is one of the largest combination natural gas and electric utilities in the United States. Based in San Francisco, the company provides natural gas and electric service*
to approximately 16 million people throughout a 70,000-square-mile service area in northern and central California. PG&E and other utilities in the state are regulated by the California Public Utilities Commission. [www.pge.com](http://www.pge.com)

Sequoia Riverlands Trust (SRT) is a regional nonprofit land trust dedicated to strengthening California’s heartland and the natural and agricultural legacy of the southern Sierra Nevada and San Joaquin Valley. The land trust has protected more than 23,000 acres. SRT owns and manages six nature preserves that conserve more than 4,000 acres of remnant landscapes, woodland communities and wildlife habitat. SRT holds conservation easements on more than 8,200 acres of protected land, most of them on working farms and ranches. SRT has also collaborated with agencies, other nonprofit conservation organizations and landowners to protect nearly 8,000 additional acres. [www.sequoiariverlands.org](http://www.sequoiariverlands.org)

9. Issues Not Covered by the Easement

Despite the time spent negotiating and drafting the easement and both parties’ efforts to anticipate and identify all necessary reserved rights and permitted uses, questions will arise from time to time about a permitted action or use of the property for which the easement does not provide clear guidance. This is why it is important to build a relationship of trust, maintain an open dialogue and keep contact information current. Also, depending on the size of its easement portfolio, a corporation should commit sufficient resources to ensure that key legal and program staff stay current in emerging conservation easement interpretation issues.

If the easement is silent or ambiguous about a proposed course of action, the corporation should consult with the land trust before taking action. It is much better for the corporation to check with the land trust before taking action than to find out afterward that it may have violated the easement. Land trusts take their obligations with the utmost seriousness and are required by state and federal law to take action to enforce and uphold the public benefit in conservation easements. Land trusts also have a risk retention group created specifically as a safety net to provide for the liabilities land trusts incur in conservation defense. For more information, see [www.terrafirma.org](http://www.terrafirma.org).
As we have seen in this chapter, negotiating an easement is no simple matter. In addition to analysis, there are important steps that land trusts and corporations should take, before, during and after a project, if they want to successfully conserve land using an easement. The next chapter goes into detail on specific issues in easements that can be contentious. It offers sample language that can be used as a starting point for negotiations.
For many corporations and land trusts, the opportunity to work together to protect the conservation values of a property will be their first experience working with each other. Therefore, it is essential that they begin easement discussions with some common assumptions. This chapter provides sample easement language that can form the basis of that common ground. Its broad purpose is to lay out general core issues that the parties need to address and to offer some examples of language and practice tips to avoid pitfalls that may slow down the negotiation process. This chapter is not an exhaustive list of all components of an easement but instead highlights certain provisions that are likely to be the subject of negotiations. For an entire sample easement with commentary, see appendix D.

It is also important to remember that no one model conservation easement fits all purposes and needs. However, some common issues arise when negotiating conservation easements with corporations as landowners.

This chapter is not a substitute for legal counsel, nor does the Land Trust Alliance intend this chapter to be legal or other professional advice. Securing appropriate legal counsel to navigate through these complex issues will save both the land trust and the corporation time and money. Also, the parties to the easement transaction must remember and address the state-specific real estate laws and state-specific conservation easement enabling laws.

For more specific information about drafting a conservation easement and sample language, see the Land Trust Alliance’s *The Conservation Easement Handbook*. 
Anatomy of a Conservation Easement

Recitals
Recitals or whereas clauses describe in detail the conservation values of the property, show its size, reference the legal description of the property and describe the public benefit of the easement. The recitals are also important to document that the easement project fits within the land trust’s stated mission, meets its project selection criteria and delivers a significant public benefit, as defined in the state’s conservation easement enabling act. If the corporation is seeking a federal tax deduction, then the recitals also must satisfy Internal Revenue Code Section 170(h)(4)(A) (see appendix C for a discussion and the text of the Code).

In conservation easements, recitals serve a unique and important purpose in providing necessary information to support the conservation purposes. Though legal drafters generally consider background introductory sections optional in contracts, recitals in easements contain extensive material, including ecological and historical data and references to state and local programs to recognize and encourage the protection of land. Documentation of these values strengthens the legal defensibility of the easement.

In most cases, corporations will rely heavily on the land trust to draft the recitals; however, both parties need to ensure that the recitals comply with the applicable requirements and reference relevant laws relating to conservation easements. From a corporation’s perspective, the recitals provide the added benefit of an upfront detailed listing of conservation values and areas to be specifically protected. For corporations with staff and other organizational changes, the recitals can serve as a point of continuity. From a land trust’s perspective, the recitals should accurately reflect the conservation values that the easement is designed to protect.

Purpose
The purposes clause summarizes the conservation values on the property. It may appear to duplicate the recitals section but actually the recitals expound upon the purposes, and then the purposes section incorporates the recitals by reference. Drafters do this so that the part of the deed that courts view as having legal effect (the purposes) includes the preliminary background information preceding the “magic words” that convey the property right. It also specifically limits any future use or development of the land
to those practices that are consistent with the preservation of the conservation values. If not included in the recitals clause, the purpose section is also a good place to reference relevant federal, state and local laws.

**Definitions**

Some easements may include an optional, separate section that contains definitions for important terms used in the document. A separate definition section can make the document easier to read and understand and is particularly beneficial for easements involving previously contaminated properties. In this situation, including definitions is helpful for both parties to clearly understand
each other’s obligations (for further discussion, see the remediation section on page 77).

Including definitions can be risky as well. For example, definitions can become rapidly outdated as language evolves or technology changes. Another significant risk is that drafters can fail to use definitions consistently, which will weaken the easement. Consider including the definitions in other documents incorporated in and referenced by the easement but not in the easement itself. For example, management plans can contain definitions subject to future change. This practice allows for ease of adaptation as science, remediation, regulation or other circumstances change over time without having to amend the perpetual conservation easement.

Baseline Documentation Report

Easements may include language requiring a baseline and incorporating it by reference into the easement. Some land trusts may record the baseline as an exhibit when they record the easement itself, but this can be expensive because recording fees are based on the pages in the document and some states do not allow the recording of photographs and other nonstandard materials that typically comprise a baseline. It is preferable to identify the location of the original baseline in the baseline document report acknowledgment or to state in the easement deed that the baseline is on file with the land trust. In addition, because of recent challenges to the admissibility of baselines in court, some land trusts notarize their baselines and record the signature pages (check your state laws on admissibility).

Baseline Documentation Report Acknowledgment

Sample Language

Baseline Documentation Team:

Sam Smart, Land Stewardship and Acquisition Specialist
Samantha Solid, Land Stewardship Specialist
Zoe Ground, PhD, Soil Scientist
Very Large Corporation, Land Specialist, accompanied the documentation team on site

Location of the Original Document

The original signed document is held by [Land Trust] with its permanent records.
This baseline documentation report is prepared to document the current status of the [Property] conserved with the [Land Trust]. We declare that, in the preparation of this baseline documentation 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 [Land Trust]. Further, we declare that the information contained herein accurately reflects our personal knowledge gained by our field observations on [Date]. 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 [Property]. We 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 documentation reports. This document was created in the regular course of our business for the purpose of managing our conservation easement portfolio.

SIGNATURES OF LAND TRUST PREPARERS

____________________________________________
Sam Smart    Samantha Solid    Zoe Ground

I, AUTHORIZED CORPORATION SIGNATORY, AUTHORIZED OFFICER [TITLE] OF VERY LARGE CORPORATION, is the current owner of the [Property] subject to the conservation easement dated [Date] conveyed HEREWITH to the [Land Trust] and recorded in the official records of [County]. I have read and independently reviewed this baseline documentation report and declare that this report accurately describes the status of the physical features and uses of the [Property].

SIGNATURES OF CORPORATION

____________________________________________
AUTHORIZED CORPORATION SIGNATORY

Restrictions and Permitted Uses
The heart of the easement is the restrictions and permitted uses sections (also referred to as reserved rights, prohibitions, etc.). These should be consistent with the purpose statement and recitals. Clear and unambiguous drafting is critical here. For example, drafters must ensure that the restrictions and reserved rights do not conflict with each other and that the baseline consistently documents them.
Drafters must also take into account current and future uses of the property and that land trusts must be able to easily monitor and enforce the restrictions and reserved rights. This capacity will vary from land trust to land trust, which means this section must be tailored to the land trust as well as the property. Placement of these rights in the easement can also vary.

Conservation easements may include a list of restrictive or prohibited rights followed by a section on reserved rights. Another technique is to list them with the land area to which they apply. In rare occasions, they may be included as appendices, but this is not a common practice.

From a corporation’s perspective, listing all the restricted uses in one section and permitted uses in the subsequent section is easier to understand. If a corporation retains deed restrictions as an additional institutional control, ensure those restrictions are consistent with the restricted uses identified in the easement. Use the conservation easement as the basis for the additional deed restrictions that the corporation holds in conformance to the corporation’s procedure.

Easements may first include general restrictions, such as “no industrial, mining or commercial activities” and “no residential or other building development” and permitted uses, such as “[t]he Protected Property shall be used only for conservation and be compatible with the preservation of the Property's Conservation Values, and for uses specifically reserved below.”

Follow such sections with specific prohibitions or restrictions and reserved rights. The following are some common examples of prohibitions, reserved rights and affirmative rights.

*Public Access*

Public access is not required for an easement to meet the public benefit requirement. Whether access is appropriate on a particular property will depend on a number of factors. For example, if the property has ongoing or past contamination, the landowner may include a specific prohibition against public access or limit public access to pedestrian recreational activities or to a specified list of activities. Attorneys hired to assist the corporation can assist in assessing any liability issues related to public access. An additional concern in recent years (for all parties) is compliance with the Department of Justice accessibility requirements under the Americans with Disabilities Act. Consult competent counsel on these very technical requirements. Also, keep in mind that access
can also be addressed in a recreation management plan that is not in the easement.

**Sample Language**

*Recreational Uses.* Minor structures not to exceed X square feet of useable space and no more than 10 feet in height, and footpaths necessary to provide the general public with pedestrian noncommercial, nonresidential, nonmotorized, nonmechanized outdoor access to the Property for pedestrian noncommercial, nonresidential, nonmotorized, nonmechanized outdoor recreational purposes and educational purposes only are permitted.

**Buildings and Structures**

Similar to public access, corporations may request restrictions and reserved rights based on past and current uses of the property.
For example, certain corporations may remove all structures and improvements aboveground, whereas others may include structures or allow new structures consistent with conservation values.

Sample Language

Restrictions. The property may not be used for any residential use of any kind whatsoever, nor for churches and places of worship, schools, nurseries and other preschool facilities, nursing or convalescent homes, hospitals, health clinics or other medical facilities, day-care facilities, playgrounds, recreational parks, hotels, motels, bed and breakfasts, parks and any other residential, commercial or industrial use, including without limitation light intensity industrial and industrial research uses. The construction or installation of any water supply well, whether for drinking, irrigation or any other purpose on the Property, is prohibited.

Restoration Activities

A corporation, even if it divests its interest in fee, may need to reserve the right to gain access to the property and engage in restoration and mitigation activities relating to contamination from prior operations at the site. For the land trust, this offers the opportunity for enhanced restoration, while ensuring that conservation values are preserved. For a corporation, this can potentially offer a readily available mitigation alternative, as may be required under federal and state environmental laws in instances such as accidental releases of contaminants within the same watershed.

Sample Language

The Grantor shall have the right to engage in or contract with others to engage in any and all types of restoration, enhancement and protection of the Property’s natural resources and significant relatively natural habitat, pedestrian noncommercial, nonresidential outdoor recreation and education of the general public provided that such activity shall be conducted in accordance with this Conservation Easement and is consistent with the Purposes of this Easement. This right includes Grantor’s reservation of the right to initiate a proposal for and to perform restoration and/or mitigation activities (including approved or required restoration, creation or enhancement) on the Property subsequent to any divestment of its interest in the Property. Any
restoration and/or mitigation activities shall require prior written approval of the Grantee.

If a land trust wants more certainty about the remediation activities, it should get it in writing. The parties might consider additional clauses such as “in accordance with a written mitigation plan approved by the Grantee.”

### Enforcement: Grantee’s Rights and Remedies

In order to meet the requirement that the easement be granted in perpetuity, a land trust’s authority to enforce the easement must be clearly stated in the document. Enforcement provisions may vary, but at a minimum, they must include the ability of the land trust to enter the property to determine compliance with the easement and to enforce the easement. There is room to negotiate the required notice period that the corporation needs to respond to the land trust’s concern about a potential violation, but the ability of the land trust to seek an injunction when it believes the conservation values of the property would be irreparably damaged is important to its ability to enforce the easement terms.

Because the land trust has a perpetual obligation to enforce the easement, it is in both parties’ best interests to continue periodic communications after closing. In many cases, an action that a corporation or subsequent landowner wishes to take may not be addressed by the terms of the easement. It is in these gray areas that the need for good communication between the land trust and the corporation is paramount.

### Sample Language

Grantee’s Right to Enter and Inspect Property; Protection and Restoration. The Grantee shall have the right to enter upon the Property for the purpose of inspection and monitoring, to determine whether this Easement and its Conservation Purposes and other provisions are being upheld. Except in cases where the Grantee determines, in its reasonable discretion, that immediate entry is required to investigate a use or condition on the Property in order to prevent, terminate or mitigate a violation or potential violation of the terms of this Easement, the Grantee shall enter during customary business hours and upon two calendar days prior notice to the Grantor and shall be made in a manner that will not unreasonably interfere with Grantor’s

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use and quiet enjoyment of the Property. The Grantee shall not have the right to permit access upon the Property by the general public.

On certain properties where corporations have continuing remediation responsibilities, easements may provide the land trust with recourse beyond those offered at law or equity, including rights to enter and take reasonable efforts to restore the property and to seek temporary injunction to enjoin activities that are in violation of the conservation purposes (see the remediation section on page 77). Such provisions could also include a notice or cure period before recourse is sought, except where the land trust determines, in its sole discretion, that immediate action is necessary. Depending upon the size and organizational structure, a corporation may need a longer notice and cure period than other landowners. In no event may the land trust be foreclosed from seeking an injunction or other immediate remedy where it deems that irreparable harm may be or is being caused to the conservation purposes or the conservation easement.
Below is another sample clause that addresses in detail the continuing responsibility of the corporation to address third-party actions. This clause also acknowledges that in some cases trespass occurs without the corporation’s knowledge, consent or permission.

Sample Language

Acts Beyond Grantor’s Control. Notwithstanding the Grantor’s obligations under this Conservation Easement and the Grantee’s rights to require restoration of the Protected Property pursuant to this Agreement, the Grantor shall have the following rights and obligations for acts or occurrences at the Protected Property beyond the direct or indirect control of the Grantor: The Grantee may not bring an action against the Grantor for modifications to the Protected Property or damage to the Protected Property or its Conservation Values resulting from natural causes beyond the Grantor’s control, including, but not limited to, natural disasters such as unintentional fires, floods, storms, natural earth movement or other acts of God that impair the Conservation Values.

The Grantor shall be responsible for modifications or damage to the Protected Property that impair or damage the Conservation Values at the Protected Property and result from the acts of third parties whose use of or presence on the Protected Property is authorized by the Grantor explicitly or implicitly. Grantor shall perform such restoration pursuant to and in accordance with a restoration plan prepared by a competent professional selected by the Grantor subject to the reasonable approval of the Grantee. The contents of the restoration plan shall be subject to the prior written approval of the Grantee, which shall not be unreasonably delayed or withheld.

In the event of an unauthorized third-party violation of the Conservation Values on the property, the Grantee shall not seek restoration or exercise remedies available to it if and so long as the Grantor diligently pursues all available legal remedies against the violator. In the event illegal actions taken by unauthorized third parties impair the Conservation Values protected by this Conservation Easement, the Grantee reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to
compel restoration. An easement holder might take the additional steps of requiring the landowner to agree to join any legal action the holder pursues, to assign its rights to the holder or to appoint the holder as its attorney-in-fact.

This language will allow the land trust to proceed against a violator with the corporation’s cooperation. A land trust utilizing this language would not completely exculpate the corporation. Instead, the easement holder retains its right to pursue the landowner and thereby potentially splits the responsibility of protecting the easement between the landowner and easement holder.

Sample Language

Enforcement Rights of Grantee. The Grantor acknowledges and agrees that the Grantee’s remedies at law for any breach of or challenge to this Easement may be inadequate. Therefore, in addition to, and not in limitation of, any other rights of the Grantee hereunder at law or in equity, in the event any breach, default or violation of any term, provision, covenant or obligation on the Grantor’s part to be observed or performed pursuant to this Easement is not cured, or a bona fide attempt has not been begun by the Grantor within 15 calendar days of Grantor’s receipt of Grantee’s written notice of such breach, default or violation (which notice requirement is expressly waived by the Grantor with respect to any such breach, default or violation which, in Grantee’s reasonable judgment, requires immediate action to preserve and protect any of the Conservation Purposes or otherwise to further the Conservation Easement), the Grantee shall have the right at Grantor’s sole cost and expense and at Grantee’s election,

a) To institute a suit to enjoin or cure such breach, default or violation by temporary and/or permanent injunction and/or to require the restoration of that portion of the Property affected by such breach, default or violation to the condition that existed prior thereto;
b) To enter upon the Property and exercise reasonable efforts to terminate or cure such breach, default or violation and/or to cause the restoration of that portion of the Property affected by such breach, default or violation to the condition that existed prior thereto, and
c) To seek or enforce such other legal and/or equitable relief or remedies as the Grantee deems necessary or desirable to ensure compliance with the terms, conditions, covenants, obligations and purposes of this Easement; provided, however, that any failure, delay or election to so act by the Grantee shall not be deemed to be a waiver or a forfeiture of any right or available remedy on the Grantee’s part with respect to such breach, default or violation or with respect to any other breach, default or violation of any term, condition, covenant or obligation under this Easement.

If the Grantee prevails in any court of competent jurisdiction in enforcing its rights under this Easement or in the event of a settlement of any dispute between the parties, the Grantor shall pay, either directly or by reimbursement to the Grantee, all reasonable attorneys’ and experts’ fees, court costs and all other expenses incurred by the Grantee in connection with all proceedings under this Section. If a court of competent jurisdiction determines that the Grantee acted maliciously, frivolously, without reasonable cause or in bad faith in enforcing its rights under this Easement or if the Grantor prevails in full, but not in part, in any final determination by a court of competent jurisdiction after the expiration of all appeal periods, then each party shall be responsible for its own fees and costs.

Representations and Warranties
At a minimum, the corporation must represent and warrant that it has good title to the land that is subject to the easement. In addition, the easement must be in first position so any encumbrances on the property that could affect the easement’s priority must be removed or subordinated prior to closing. The parties should be careful to have their legal counsel add or modify the sample language to reflect state law conveyancing requirements.

Sample Language
Representation of Title. The Grantor represents and warrants that it owns valid, fee simple absolute title to the Protected Property and has the right to grant and convey this Conservation Easement and that the Protected Property is
free and clear of any and all mortgages, liens and encum-
brances of any nature whatsoever.

Additional and more detailed warranties and representations may be negotiated, depending on prior use of the property, and may deal with the property’s environmental conditions. This language is highly dependent on state law and should only be drafted by knowledgeable, local attorneys. The responsibility for any liability arising out of a breach of any representations and warranties should also be addressed.

In general, the land trust will not want to assume any liability with respect to the property simply by virtue of accepting a conservation easement, so it is likely to require some warranty and representation language. However, from a corporation’s perspective, the sample language below may require further negotiation due to uncertainties relating to historical industrial uses, transfer of ownership and sometimes bankruptcies. The corporation may want to limit this language based on the documentation provided for the baseline report or its actual knowledge. The key here is to be specific and comprehensive. The land trust should never accept any abdication or transfer of liability for any regulatory compliance or payment of costs associated with regulatory compliance.

Sample Language

A. Except as provided in the Baseline Documentation, the Grantor represents and warrants that it has no actual knowledge of a release or threatened release of any Hazardous Materials on the Property.

B. Except as disclosed in the Removal Action Documents, no substance defined, listed or otherwise classified pursuant to any federal, state or local law, regulation or requirement as hazardous, toxic, polluting or otherwise contaminating to the air, water or soil, or in any way harmful or threatening to human health or to the environment exists or has been released, generated, treated, stored, used, disposed of, deposited, abandoned or transported in, on, from or across the Protected Property in a manner not in compliance with applicable federal, state and local laws, regulations and requirements;

i. There are not now any underground storage tanks located on the Protected Property, whether now in service or closed, abandoned or decommissioned, and
no underground storage tanks have been removed from the Protected Property in a manner not in compliance with applicable federal, state and local laws, regulations and requirements;

ii. The Grantor and the Protected Property are in compliance with all federal, state and local laws, regulations and requirements applicable to the Protected Property and its use;

iii. There is no pending or threatened litigation in any way affecting, involving or relating to the Protected Property;

iv. No civil or criminal proceedings or investigations have been instigated at any time or are now pending, and no notices, claims, demands or orders have been received, arising out of any violation or alleged violation of, or failure to comply with, any federal, state or local law, regulation or requirement applicable to the Protected Property or its use, nor do there exist any facts or circumstances that the Grantor might reasonably expect to form the basis for any such proceedings, investigations, notices, claims, demands or orders; and
v. There are no outstanding surface or subsurface mineral rights associated with the Protected Property.

Hold Harmless Clause

The complexity of negotiations associated with a hold harmless clause may depend upon whether the property’s prior use was industrial or commercial and has potential environmental contamination. In addition, prevailing state laws and transaction-specific facts affect negotiation of this type of clause. Corporations may expect to see a mutual indemnity clause, but the Alliance strongly recommends that land trusts never use a reciprocal indemnity.

Typically, a corporation and land trust should be able to agree on the broad principle that the corporation shall hold harmless, indemnify and defend the land trust from any and all claims except those caused by the negligent act or willful conduct of the land trust. Because the land trust does not have control of the property, it should not indemnify the corporation. The only appropriate limitation to corporate indemnity and hold harmless is restricted to land trust negligence or willful wrongdoing (liability should follow the right and ability to control risk). Indemnity clause reciprocity is not appropriate when the parties are not similarly situated with respect to the care, custody and control of the property. Nor does the land trust carry liability insurance that would cover any claims other than from the negligence of its own employees and volunteers. The limited exception not only makes the indemnity generally acceptable but also ensures that it will be enforceable.

It is true, however, that the sweeping indemnification clause provided below may require more negotiation between the corporation and the land trust. Usually, a prefatory statement, which immediately precedes the broad indemnity clause, may be appropriate to explain the unusual context of a conservation easement and the reasons for the one-way indemnity.

If a land trust nonetheless negotiates the indemnity provisions, it should only do so if it is willing and able to bear the risks noted above and if it has up-to-date and adequate liability insurance with broad coverage that will protect the land trust if it takes on liability risks that are more typically (and more appropriately) the corporation’s responsibilities. Corporations should also consider the land trust capacity to actually fulfill such an indemnity; most land trusts have annual budgets of less than $250,000 and operate using volunteers with minimally adequate insurance.
The typical indemnification provision agreeable to a land trust does not require any fault on the part of the corporation but provides for indemnification of the land trust against any claim against it by virtue of its holding the conservation easement.

Sample Language

Grantor Indemnification. The Grantor and the Grantee acknowledge and agree that the Grantor retains primary ownership of the Property, and therefore, the Grantor controls day-to-day activities on, and access to, the Property, except for Grantee’s limited rights to monitor the condition of the Conservation Purposes and to enforce this Easement. The Grantor therefore agrees that general liability for risks, damages, injuries, claim or costs arising by virtue of Grantor’s continued ownership, use and control of the Property shall remain with the Grantor as a normal and customary incident of the right of Property ownership.

The Grantor acknowledges that the Grantee has neither possessory rights in the Property nor any responsibility nor right to control, maintain or keep up the Property. The Grantor has and shall retain all responsibilities and shall bear all costs and liabilities of any nature related to the ownership, operation, upkeep, improvement and maintenance of the Property, except as otherwise provided herein. The Grantor, therefore, hereby releases and agrees to hold harmless, indemnify and defend the Grantee and its members, directors, officers, employees, legal representatives, agents and contractors and the heirs, personal representatives, successors and assigns of each of them (collectively “Indemnified Parties”) from and against any and all liabilities, penalties, fines, charges, costs, losses, damages, expenses, causes of action, claims, demands, orders, judgments or administrative actions, including, without limitation, reasonable attorneys’ fees, arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition or other matter related to or occurring on or about the Property, regardless of cause, except to the extent due to the negligent act or willful misconduct of any of the Indemnified Parties; or (2) violation or alleged viola-
tion of, or other failure to comply with, any state, federal or local law, regulation or requirement by any person, other than one or more Indemnified Parties, in any way affecting, involving or relating to the Property. The Grantor hereby releases, waives any rights and covenants not to sue Grantee with respect to any Losses identified in this Section. Grantor's obligations to hold harmless, indemnify and defend the Grantee as specified in this Conservation Easement shall survive indefinitely and shall not be abrogated if the Grantee transfers this Conservation Easement to another party. The Grantee shall have no liability to the Grantor or any other owner for Grantee's acts, taken in good faith, in connection with the administration of this Conservation Easement.

In addition, where the easement involves a property with a history of environmental contamination, a land trust may seek additional protections for any continuing obligations that may arise from those activities. Defining environmental responsibilities, as referenced below, will very clearly provide some assurance to the corporation in terms of the limitations of this provision, while providing the additional protection the land trust seeks.
Sample Language

Environmental Indemnification by Grantor. The Grantor shall hold harmless, indemnify and defend the Grantee and its respective members, directors, officers, employees, agents and contractors and its respective successors and assigns from and against any and all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including, without limitation, attorneys’ fees, arising from or in any way connected with the Environmental Responsibilities as defined herein. [The easement should include a section on Environmental Responsibilities that very clearly lays out the obligations.] This indemnification shall remain in full force and effect, notwithstanding the conveyance of the Protected Property to the subsequent landowner or transfer of this Conservation Easement to another holder.

Remediation Activities

Formerly contaminated properties where federal and state regulatory agencies require mitigation and restoration activities will add complexity to the easement negotiations. The parties should have a clear understanding about the appropriate time to enter into a conservation easement. While active remediation is underway, it may not be the best time for conservation. If they decide to go forward with the easement, the parties may also want to state in the easement document that they will discuss and work in good faith to resolve any new government regulations that conflict with the conservation easement’s terms.

Given the complexity of remediation, land trusts and corporations must come to an agreement on certain key provisions. For example, corporations will need to ensure that the remediation obligations are clearly specified in the easement as permitted uses by both the current and any subsequent landowners. Corporations may also wish to restrict the land trust activities in certain sensitive areas or where the corporation conducts remediation work.

These provisions will require careful negotiations to ensure that the land trust clearly understands that the activities will not affect the conservation value of the easement, and the corporation will need to understand the limitations within which it may have to operate in order to preserve the conservation purposes and to abide by terms of the conservation easement. A separate section that clearly lists the corporation’s environmental responsibilities is recommended in
these types of situations. The parties might also consider a management plan (not included in the easement) for ongoing activities.

The sample language below is specific to a particular set of facts where the corporation’s continuous obligations include groundwater monitoring, monitoring stream water levels and limiting erosion on the property. It may not apply in every circumstance; however, it clearly demonstrates the level of detail that needs to be provided in the easement to avoid any ambiguity. For example, the grantor in this sample clearly wants to restrict any groundbreaking activities to certain areas with institutional controls required by regulatory authorities. To ensure compliance with this provision, the easement includes clearly delineated maps of the restricted areas.

Sample Language

Subsequent to conveyance of the Protected Property, Grantor’s environmental responsibility will be limited to active remediation (including soil removal and disposal), passive remediation (natural degradation), investigation and monitoring, or risk assessment of impacted soil or groundwater or any combination of these activities as may be required or permitted by [specific regulatory order, consent decree].

The Grantor and its employees, agents, contractors and subcontractors and their successors reserve the right, in order to meet the requirements of the foregoing agreement and order, to conduct activities, including, but not limited to the following:

1. Groundwater monitoring. To create a groundwater monitoring well network that will include the installation of shallow monitoring wells. Upon completion of the monitoring well network, a baseline groundwater sampling event will be performed to document post-removal groundwater conditions across the Protected Property. Following the baseline groundwater sampling event, the Grantor will summarize the data, evaluate the need for additional monitoring wells and, if necessary, propose a monitoring well network for additional groundwater monitoring. If no additional groundwater monitoring wells are recommended, then long-term groundwater monitoring and sampling will be conducted semiannually for the
first three years and then annually during the fourth and fifth years. The data from these sampling events will be summarized in a Groundwater Monitoring Report (GMR), which will be submitted to the [specify regulatory agencies] for review and approval. The need for continued sampling will be reassessed with the [specify regulatory agencies] at the end of the five-year monitoring period. [Specify regulatory agencies] may seek to modify the limitations on groundwater usage based on the findings of the groundwater monitoring.

B. Surface Water Elevation Gauging. To install surface water elevation gauges in the unnamed tributary to X Creek to provide surface water elevation data that will be used to evaluate the relationship between surface water and shallow groundwater and to prepare a shallow groundwater potentiometric surface map for the Protected Property. All stream gauges will be measured during the baseline groundwater monitoring event and all subsequent monitoring events.

C. Inspections. To perform inspections of the Protected Property to verify that erosion is limited and that no ground-disturbing activities are being performed in the areas under institutional controls, as more particularly identified as “Restricted Area With Barrier” and “Restricted Area” on Exhibit B. If erosion is observed, the Grantor shall have the right to perform restoration activities, which may include but are not limited to the following: backfilling, compacting, reseeding/planting, installing geo-fabric or other erosion control measures and watering. An annual inspection report will be submitted to [specify regulatory agency with a copy to the Grantee]. Inspections will continue until such time as the [specify regulatory agencies] agree that inspections are no longer warranted.

D. Inspection of Trees. To perform inspections to quantify the survival rate of the planted trees after the first year of planting until a survival rate of at least 80 percent is achieved. If such a rate is not achieved, the Grantor will replace the trees as required and continue its inspections until an 80 percent survival rate is achieved.

E. Inspection and Repair of Retaining Wall. To perform inspections and repair the waste block retaining wall
located on the southwest portion of the Protected Property as needed.

During and after its ownership of the Protected Property, the Grantor shall have the right of access for the purpose of carrying out the above responsibilities and activities, provided, however, that the Grantor shall give the Grantee and their respective successors and assigns at least 15 calendar days advance written notice of such access and a description of the specific work to be performed when such work will include ground-disturbing activities that may affect Conservation Purposes or violate Prohibited Uses.

Land trusts will want to restate important restrictions in specific reserved rights in order to limit damage to the property. For example, in the above permitted use or reserved right, a land trust will want to be clear that the corporation will not change topography, create roads, add utilities or use motor vehicles. The land trust attorney should advise on the interpretation rules in case law particular to the state where the property is located.

Sample Language Addition

... and that the Grantor under no circumstances shall construct, create, install or otherwise cause to appear any road of any kind nor any utility services of any kind on the Protected Property. Lightweight passenger truck or smaller access is permitted on existing roads and dirt tracks only. Pedestrian access is permitted. Furthermore, in the event the performance of such work causes any damage to the Conservation Purposes of the Protected Property or causes the Grantee to notify the Grantor of a breach of the Conservation Easement, the Grantor shall promptly repair such damages or take other action in accordance with the Conservation Easement to fully restore the Protected Property and the Conservation Purposes to the prior state to the reasonable satisfaction of the Grantee.

Additional clauses that may be helpful to corporations are those that clearly reserve the corporation’s sole right to negotiate with any applicable regulatory agencies overseeing the environmental remediation activities on the property. The land trust may want to have a voice in future remediation activities that could affect the conserva-
tion easement, purposes and values, so the parties should negotiate appropriate language to address this concern. The land trust will want limitations on the corporation’s right to agree to any regulatory actions that damage the conservation purposes or limit its rights.

**Sample Language**

*Negotiation with Regulators.* The Grantor reserves the right to negotiate with [specify regulatory agencies] with respect to environmental matters. With respect to its obligations under [specify regulatory agencies], the Grantor reserves the sole right to negotiate with [specify regulatory agencies] with respect to any [specify pollutants] impacted soil or groundwater that may exist on the Protected Property arising from Grantor’s predecessors’ operations at or in the vicinity of the Protected Property.

Environmental statutes may have different requirements. This wording is very fact specific, but a land trust must make clear that the corporation must negotiate with the land trust in the event that any government remediation requirement is directly contrary to the conservation easement. The land trust may want to add this clarifying language.
Sample Language Addition

However, in no event may the Grantor accede to any activity that would breach or contravene the Conservation Easement or harm the Conservation Purposes.

Land trusts may want to remain engaged and have opportunities to inspect the ongoing remediation activities to determine compliance with the conservation easement. An additional entry and inspection clause can provide specificity to this requirement.

Sample Language

Entry and Inspection. The Grantee and its agents, contractors and representatives will have the right, in a reasonable manner, at reasonable times and at no cost, to enter the Protected Property for the purpose of inspecting it to determine compliance with the Conservation Easement. The Grantor and its employees, agents, contractors and subcontractors and their successors retain the right, subsequent to divestment of interest in the Protected Property, of site access in a reasonable manner, at reasonable times, without prior written consent and at no cost, to enter the Protected Property for the purpose of monitoring and maintenance as set forth in the Conservation Easement or as in accordance with the [specify regulatory order; settlement order] or subsequently imposed requirements. Should such work include ground-disturbing activities that may affect Conservation Values, the Grantor shall give the Grantee and their respective successors and assigns at least 15 calendar days advance written notice of such access and a description of the work to be performed. Grantor’s access rights [where the Grantor is not a landowner] will terminate upon completion of all requirements under the [specify regulatory order; settlement order].

Other Provisions

Many of the remaining parts of a conservation easement, often referred to as boilerplate or miscellaneous provisions, are largely dictated by state enabling acts or the Treasury regulations. It is important for the land trust to articulate these requirements during negotiations because the corporation may not be familiar with the reasons for these provisions. Because these are standard clauses, they are not included here. See appendix D for an example of boilerplate language; for more specific information about draft-
Drafting Conservation Easements and Baseline Documentation Reports

ing a conservation easement, see the Land Trust Alliance’s *The Conservation Easement Handbook.*

**Condemnation and Termination**

IRS regulations require that if land subject to an easement is condemned, the land trust is entitled to a portion of the condemnation proceeds equal to the land trust’s interest in the property. Similar provisions apply in the event that circumstances surrounding the property change so much that the purpose for which the owner granted the easement becomes impossible to fulfill and both parties ask a court to terminate the easement. In this case, the parties must use a judicial proceeding to terminate the restrictions, and the land trust must use any proceeds it receives in a manner consistent with the original conservation purposes of the easement.

Language in the easement should establish that the easement gives rise to a property right immediately vested in the land trust with a fair market value at least equal to the proportionate value that the easement bears to the value of the property as a whole at the time of the grant of the easement. It is important for the land trust to receive a copy of the appraisal because it will help establish these values.

**Amendment**

Unlike a contract, a conservation easement is not easily amended. Treasury Regulations impose certain restrictions to ensure that the conservation values of the property are protected in perpetuity. Even though state law may permit an easement to be amended by mutual agreement of the parties, the parties should reconcile any differences between state and federal law in a way that ensures that they protect the property’s conservation values in perpetuity.

*Land Trust Standards and Practices* requires the land trust to meet certain requirements before agreeing to any amendment. The primary consideration is that the amendment does not compromise the conservation values of the property or confer impermissible private benefit or private inurement. When considering an amendment, the land trust must evaluate its likely effects and determine that it:

1. Will clearly serve the public interest and be consistent with the land trust’s mission
2. Will comply with all federal, state and local laws
3. Will not jeopardize the land trust’s tax-exempt status under federal or state law (i.e., does not result in private inurement or impermissible private benefit)

4. Is consistent with the conservation purposes and intent of the easement

5. Is consistent with the documented intent of the donor, grantor and any direct funding source

6. Will result in a positive or not-less-than neutral conservation outcome

Land trusts may have to take the request for an amendment through the same process required for original project approval, depending on the substance of the request. An appraisal may be required to determine that the proposed amendment does not create impermissible private benefit.

These requirements are necessary to ensure conservation permanence. In addition to the foregoing requirements, most land trusts have an internal policy governing amendments and should be willing to share this policy with the corporation if asked. Finally, a land trust may charge a fee to cover the costs (staff time, appraisals, surveys, etc.) of evaluating the amendment—the fee is payable whether or not the land trust approves the amendment.
Amendments are a nuanced and technical area of law and practice that require the guidance of experienced legal counsel. For more information see, the Land Trust Alliance’s *Amending Conservation Easements: Evolving Practices and Legal Principles.*

**Assignment and Subsequent Transfers**

Assignment provisions generally deal with the situation where the responsibilities of the land trust are assigned to another entity, and subsequent transfers deal with transfers of title to the property by the corporation. In both situations, the interests of the parties are similar. They each want timely notice before such a change occurs, and they want some assurance that the subsequent holder or owner understands the terms of the easement and is willing to abide by them.

The ability of a land trust to transfer its responsibilities under an easement is governed by IRS regulations and sometimes by state law. IRS regulations prohibit a land trust from assigning its responsibilities under the easement unless it is to a qualified organization dedicated to upholding similar conservation purposes. This entity assumes responsibility for monitoring and enforcing the easement. In some states, the determination of an acceptable assignee may require approval by the Attorney General or other governmental or judicial authority. Some land trusts identify backup holders for their easements, in which case the corporation may want to conduct due diligence to determine that it is comfortable with the identified backup holder.

Placing an easement on its property does not limit the right of the corporation to transfer the underlying fee interest. The easement should contain a notice provision that requires the corporation to give the land trust the name and contact information of the subsequent owner before or at the time it transfers the underlying fee. It is in everyone’s best interest for the subsequent owner to have a good understanding of the restrictions that encumber the property before accepting title to it. Most land trusts are happy to meet with prospective owners to answer any questions they may have.

**Arbitration/Mediation**

While commonly found in contracts, an arbitration provision is often not included in a conservation easement. The IRS Office of General Counsel has stated that arbitration clauses are binding, unappealable in nature and may undermine perpetuity. Therefore, the Land Trust Alliance recommends land trusts do not include
arbitration language in easements. However, corporations may ask for mediation provisions to resolve any disputes that may arise with a conservation easement. While a mediation clause is acceptable, as with the enforcement clause, the land trust may not be restricted from any appropriate action in an emergency. The land trust should reserve the right for emergency action without mediation. The clause should also state that mediation is not binding without the explicit agreement of both parties.

Signatures
The corporation should provide a clear, comprehensive certificate of authority (for example, power of attorney) for the employee or corporate officer who signs the conservation easement and baseline documentation report. This certificate should be recorded with the conservation easement.

Exhibits
Exhibits to the conservation easement may vary depending on the facts of the transaction, but most will include a property description and survey. It may also be beneficial to include other maps to delineate prohibited uses or restrictions to aid in interpreting terms of the easement. For example, if there are maps that delineate prohibited uses or show permitted locations of future improvements, these can be included as exhibits. Exhibits may also include maps that identify areas subject to restrictions arising out of remediation agreements, such as specific areas where digging and surface disturbance are prohibited. Other exhibits can include a land management plan, if required by the easement, and sometimes the entire baseline documentation report may be included as an exhibit. What can be attached will be affected by state laws and by land trust customary practices. All parties must bear in mind that the conservation easement is permanent. Items that may change over time should be carefully evaluated before being included in the conservation easement. Consider using the unrecorded baseline or a management plan for maps and definitions that are subject to change. This allows for practices to change over time without amending the easement as science, remediation, regulation or other circumstances evolve.

This chapter delved into the portions of easements that tend to be complex or contentious. By providing these examples, the Alliance hopes to help corporations and land trusts jumpstart negotiations. As noted above, they are not intended to be “models” but simply examples to start the conversation.
Conclusion

This guide is a collaborative effort by the Land Trust Alliance and its corporate partners to create a resource that will help raise awareness of the benefits of conservation easements, particularly in the context of corporate land management decisions, and, more important, provide guidance to corporations and land trusts when dealing with conservation easements as practical tools for property divestment. With this added resource, the Land Trust Alliance and its partners hope to increase the pace, quality and permanence of land conservation by corporations. For more information on land trusts or to find local attorneys, appraisers or other professionals to assist in a conservation easement transaction, go to www.lta.org.
APPENDIX A

Methodology Used in Preparing This Publication

This publication represents a first effort at gathering information on corporate use of conservation easements, specifically those businesses with surplus and/or buffer lands. The findings in this guide represent the insights and experiences of a handful of land trusts and corporations in the transportation, manufacturing and energy sectors that have completed, or are in the process of considering, conservation easement transactions. This guide is not a comprehensive investigation but a sampling of a small number of corporations and land trust leaders; nor does it include other landowning businesses, such as timber companies, which have significant experience with conservation easements. The Alliance conducted a series of targeted telephone interviews with these corporations and their consultants and nine land trust executive directors or conservation directors. Their experiences and insights, along with best practices, are represented in this guide.

In addition, a work group that included land trust and corporate attorneys provided insights and feedback on the project. A land trust general counsel and one corporate counsel prepared parts of chapter 4 and all of chapter 5 based on actual conservation easements and negotiations. Additionally, two external experts conducted a review of the initial draft.
APPENDIX B

Internal Revenue Code and Treasury Regulation Appraisal Requirements

Adapted from Tax Benefits and Appraisals of Conservation Properties published by the Land Trust Alliance (2007).

The Internal Revenue Code requires substantiation of value for the donation of any charitable gift of appreciated property whose value exceeds $5,000. The regulations implementing this substantiation requirement (given in Treasury Regulations §1.170A-13(c)) state that no deduction will be allowed for charitable contributions of real property in excess of $5,000 unless the donor obtains a “qualified appraisal” prepared by a “qualified appraiser.” (For a copy of the relevant sections of Treasury Regulation §1.170A-13[c].)

The effective date of value in the qualified appraisal must be no earlier than 60 days before the date of the contribution, and the appraisal must be in the hands of the taxpayer no later than the due date (including extensions) for filing the tax return in the tax year in which the contribution is claimed.

In 2004, the IRS adopted new rules in IRC§170(f)(11)(D) that govern donations in excess of $500,000. In such cases, the full appraisal must be submitted with the taxpayer’s return.

Pension Protection Act of 2006 Changes Regarding Appraisers and Appraisals

Prior to the Pension Protection Act of 2006 (“Pension Act”), Internal Revenue Code §170(f)(11)(E) defined a “qualified appraisal” as an appraisal completed pursuant to the regulations or other guidelines of the Secretary of the Treasury. The Pension Act revised this section to define a “qualified appraisal” as an appraisal completed pursuant to the regulations of the Secretary of the Treasury and conducted by “a qualified appraiser in accordance with generally accepted appraising standards” and subject to other guidance of the Secretary.
The Pension Act defines a “qualified appraiser” under Internal Revenue Code §170(f)(11)(ii) and (iii) as an individual who:

- Has earned an appraisal designation from a recognized professional appraisal organization or has otherwise met minimum education and experience requirements
- Regularly performs appraisals and receives compensation
- Meets other requirements as may be prescribed by the Secretary
- Demonstrates verifiable education and experience in valuing the type of property subject to the appraisal
- Is not an individual who has been prohibited from practicing before the Internal Revenue Service during the prior three years

Qualified Appraisal

A “qualified appraisal,” as defined in Treasury Regulation §1.170A-13(c)(3), is an appraisal that:

- Is made not earlier than 60 days prior to the date of contribution
- Includes certain information, which is described below
- Is prepared, signed and dated by a “qualified appraiser”
- Does not involve a prohibited appraisal fee, such as a fee based on the percentage of the valuation

A “qualified appraisal” must include the following information:

- A description of the property in sufficient detail to determine that the property appraised was the property donated
- The physical condition of the property
- The date (or expected date) of donation
- The terms of any agreement or understanding entered into (or expected to be entered into) by the donor that relates to the use or sale of the donated property
- The name, address and identifying number of the qualified appraiser (note that often two ID numbers can be required: the appraiser’s Social Security number and the employer’s ID number)
• The qualifications of the qualified appraiser
• A statement that the appraisal was prepared for income tax purposes
• The date on which the property was appraised
• The appraised fair market value on the date (or expected date) of contribution
• The method of valuation used to determine fair market value, such as the income approach or comparable sales approach
• The basis for the valuation

Qualified Appraiser

Both the Pension Act and Treasury Regulation §1.170A-13(c) (3) define a qualified appraiser, but the way in which the Pension Act definition was meant to relate to the definition in the Treasury Regulations was initially unclear. As a result of this uncertainty, a request to the Internal Revenue Service for clarification generated “Internal Revenue Service Notice 2006-96: Guidance Regarding Appraisal Requirements For Noncash Charitable Contributions.” Notice 2006-96 provided clarification on a number of definitions. In particular, it provided guidance on the following phrases:

• “Qualified appraisal” means an appraisal that complies with the requirements of Treasury Regulation 1.170A-13(c) and is conducted by a “qualified appraiser” in “accordance with generally accepted appraisal standards.”
• “Generally accepted appraisal standards” are consistent with the substance and principals of the Uniform Standards of Professional Appraisal Practice (USPAP).
• An “appraisal designation from a recognized appraisal organization” is an appraisal designation awarded on the basis of an appraiser’s demonstrated competence in valuing the type of property for which the appraisal is performed.
• “Education and experience in valuing the type of property” means that the appraiser should make a declaration in the appraisal that, because of the appraiser’s background, experience, education and membership in professional associations, the appraiser is qualified to make appraisals of the type of property being valued.
“Minimum education and experience” for an appraiser valuing real property means that:
- For returns filed on or before October 19, 2006: the appraiser is a “qualified appraiser” within the meaning of Treasury Regulation §1.170A-13(c)(5).
- For returns filed after October 19, 2006: the appraiser is licensed or certified for the type of property being appraised in the state in which the appraised real property is located.

For returns filed after February 16, 2007, the appraiser’s declaration required by Treasury Regulation §1.170A-13(c)(5)(i) must include an additional statement that the appraiser understands that any substantial or gross valuation misstatement resulting from an appraisal that the appraiser knows, or reasonably should have known, would be used in connection with a tax return or claim refund, may subject the appraiser to a civil penalty under Section 6695A.

This section of the Treasury regulations defines a “qualified appraiser” as a person who:

a. Holds himself or herself out to be an appraiser or performs appraisals on a regular basis;
b. Because of his or her qualifications, is qualified to make appraisals of the type of property being valued;
c. Is not an excluded individual, e.g., the donor or related party to the donor; and
d. Understands that an intentionally false overstatement of property value may subject him or her to a penalty for assisting in an understatement of tax liability.

In addition to the Pension Act requirements and the above requirements from the Treasury Regulations, a land trust should understand whether there are licensing or certification requirements for appraisers in the state in which the land trust is located.
Accuracy-Related Penalties

Prior to the Pension Act, the law imposed accuracy-related penalties of 20 percent for an underpayment of tax resulting from a “substantial” valuation misstatement, and 40 percent for a “gross” valuation misstatement. The definition of a “substantial” valuation misstatement was that the value was at least 200 percent or more of the amount determined to be the correct value. A “gross” valuation misstatement meant that a value claim was 400 percent or more of the amount determined to be the correct value.

The Pension Act lowers the threshold for these accuracy-related penalties. A “substantial” valuation misstatement now is a value 150 percent or more of the amount determined to be the correct value, and a “gross” valuation misstatement is a value 200 percent or more of the amount determined to be correct. The Pension Act also eliminates the reasonable cause exception in the case of any “gross” valuation misstatement. This means that the taxpayer may not rely upon an “I thought I received good professional advice” defense.

The Pension Act also streamlined the procedural requirements for the Secretary of the Treasury to impose civil penalties or disciplinary action against an appraiser.

Treasury Regulations Regarding Valuing Conservation Easements

Comparable Sales
Comparable sales of conservation easements are the required basis for valuation, if there is a substantial record of sales of conservation easements in the locality. However, except for an area where there are regular, full-value purchases of conservation easements by a governmental program or government-funded program, there is usually no substantial record of marketplace sales of conservation easements for comparison purposes. Where comparable sales are not available, the “before and after” valuation method is appropriate.

The before and after valuation method is accomplished by doing two valuations: (1) the value of the property before the granting of the conservation easement (the “before value”); and (2) the value the property will have after the granting of the conservation easement (the “after value”). The value of the conservation
easement is the difference between the before value and the after value. Most parts of the country do not have sufficient comparable sales of conservation easements to allow the appraiser to value the easement by comparing it directly to other sold conservation easements. Therefore, almost all conservation easements are valued by the before and after valuation method.

**Special Rules: Contiguous Parcels**

Two special rules apply when other adjacent or nearby property is owned by a family member or a related party.

**Rule 1. The valuing the entire property rule.**
The deduction amount for a conservation easement covering a contiguous property owned by the donor and the donor’s family (as defined in IRC §267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the restriction. “Family” is defined in IRC §267(c)(4) to include an individual’s brothers and sisters, spouse, ancestors and lineal descendants.

**Rule 2. The enhancement rule.**
If the donor grants a perpetual conservation easement and it increases the value of any other property owned by the donor or a related person, whether or not such property is contiguous, then the amount of the deduction for the conservation contribution must be reduced by the amount of the increase in value (the “enhancement”) of the other property.

For example, the value of a property located on a hillside physically removed from property in the valley that it overlooks might be increased by the protection of that valley from development. If the hillside parcel is owned by the donor or a related person, then there may be an enhancement of value to that property, and that enhancement in value must be taken into account in determining the value of the donation. “Related person” has a broader meaning than “family.” The IRC §267(b) definition of a related person includes not only family, but also corporations, trusts and partnerships where the donor and/or related persons control such an entity.
When Do I Need to Secure the Services of an Appraiser?

Under IRS rules, conservation easement appraisals must be completed no sooner than 60 days prior to the date of donation and no later than the date of filing federal income taxes, including extensions.

Because good conservation easement appraisals can take time, it is frequently necessary for the landowner to contact an appraiser as soon as he or she is considering donating or selling an easement. The appraiser can advise the landowner as to the timeframe for securing the necessary documents and other aspects of the appraisal process.

It is also possible to ask an appraiser for a preliminary estimate of value. Although it would not be considered a complete appraisal for tax purposes, a preliminary valuation might be helpful to a landowner in determining whether or not to pursue a conservation easement.
Those seeking to donate or accept a conservation easement need to know about Internal Revenue Code Section 170(h) because it defines when the conveyance of less than all of a person’s interest in real property (e.g., a conservation easement) may still qualify as a charitable donation for tax purposes. IRC §170(h) defines “qualified conservation contribution” as a contribution:

1. Of a qualified real property interest
2. To a qualified organization
3. Exclusively for conservation purposes

Qualified Real Property Interest

Section 170(h) of the Internal Revenue Code defines a “qualified real property interest” as any one of the following:

1. The entire interest of the donor other than a qualified mineral interest
2. A remainder interest
3. A restriction (granted in perpetuity) on the use which may be made of the real property

A conservation easement is the third of these qualified real property interests. It is a perpetual conservation restriction, which is granted in perpetuity on the use that may be made of real property.
The laws of the state in which the property is located will determine whether a restriction granted in perpetuity, such as a conservation easement, is enforceable under state law. An example of a state law requirement that must be satisfied in order for a donated easement to be deemed a qualified real property interest under §170(h) is the Colorado requirement that a nonprofit entity must be in existence for at least two years before it can accept a conservation easement donation. A Colorado conservation easement donation made to a 501(c)(3) organization before that organization had been in existence for two years would not qualify as a qualified real property interest under the Internal Revenue Code because the interest would not qualify under Colorado law.

It is essential to understand the laws of the state or states where a conservation easement is located.

**Qualified Organization**

According to Section 170(h) of the Internal Revenue Code, a “qualified organization” is either:

1. A governmental entity; or
2. A 501(c)(3) organization that, pursuant to the Treasury Regulations, has:
   - A commitment to protect the conservation purposes of a donation; and
   - The resources to enforce the restrictions of the donation

The Internal Revenue Service considers an organization operated primarily for the conservation purposes described in IRC §170(h) to have the necessary commitment. An organization with a mission completely unrelated to any conservation purpose, such as an urban charitable educational program, probably would not have that commitment. On the other hand, a program for at-risk children located in a natural, rural setting might have the necessary commitment. While the Treasury Regulations do not require that an organization set aside specific funds to protect and enforce the conservation easement, the IRS likely contemplated something more than a general promise that the financial resources will be available as needed.
In addition, the Treasury Regulations require that the instrument of conveyance of the “qualified conservation contribution” must provide that the donee is prohibited from transferring the conservation easement unless the donee, as a condition of that transfer, requires of the transferee that “the conservation purposes which the contribution was originally intended to advance continue to be carried out.” At the time of transfer, any transferee must also be a “qualified organization.”

That is, if a land trust wants to transfer the conservation easement to another entity, the new holder must agree to carry out the conservation purposes and also be qualified to hold the easement.

Exclusively for Conservation Purposes

Section 170(h) of the Internal Revenue Code defines “conservation purposes” as:

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
   I. for the scenic enjoyment of the general public, or
   II. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit,
iv. or the preservation of an historically important land area or a certified historic structure.

What kinds of easements on land truly meet one of these “conservation purposes” is a controversial question closely scrutinized by the Internal Revenue Service.

Internal Revenue Code §170(h) Qualified Conservation Contribution

(1) In general. For purposes of subsection (f)(3)(B)(iii), the term “qualified conservation contribution” means a contribution

(A) of a qualified real property interest,
(B) to a qualified organization,
(C) exclusively for conservation purposes.

(2) Qualified real property interest. For purposes of this subsection, the term “qualified real property interest” means any of the following interests in real property:
(A) the entire interest of the donor other than a qualified mineral interest,
(B) a remainder interest, and
(C) a restriction (granted in perpetuity) on the use which may be made of
(D) the real property.

(3) Qualified organization. For purposes of paragraph (1), the term “qualified organization” means an organization which
(A) is described in clause (v) or (vi) of subsection (b)(1)(A),
(B) is described in section 501(c)(3) and
   (i) meets the requirements of section 509(a)(2), or
   (ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.
(A) In general. For purposes of this subsection, the term “conservation purpose” 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
      (I) for the scenic enjoyment of the general public, or
      (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
   (iv) the preservation of an historically important land area or a certified historic structure.
(B) Special Rules with Respect to Buildings in Registered Historic Districts. In the case of any contribution of a qualified real property interest which is a restriction with respect to the exterior of a building described in subparagraph (C)(ii), such contribution shall not be considered to be exclusively for conservation purposes unless
   (i) such interest
(I) includes a restriction which preserves the entire exterior of the building (including the front, sides, rear and height of the building), and

(II) prohibits any change in the exterior of the building which is inconsistent with the historical character of such exterior,

(ii) the donor and donee enter into a written agreement certifying, under penalty of perjury, that the donee

(I) is a qualified organization (as defined in paragraph (3)) with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and

(II) has the resources to manage and enforce the restriction and a commitment to do so, and

(iii) in the case of any contribution made in a taxable year beginning after the date of the enactment of this subparagraph, the taxpayer includes with the taxpayer’s return for the taxable year of the contribution

(I) a qualified appraisal (within the meaning of subsection (f)(11)(E)) of the qualified property interest,

(II) photographs of the entire exterior of the building, and

(III) a description of all restrictions on the development of the building.

(C) Certified historic structure. For purposes of subparagraph (A)(iv), the term “certified historic structure” means:

(i) any building, structure, or land which is listed in the national Register, or

(ii) any building which is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor’s return under this chapter for the taxable year in which the transfer is made.
(5) Exclusively for conservation purposes. For purposes of this subsection
   (A) Conservation purpose must be protected. A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.
   (B) No surface mining permitted.
      (i) In general. Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.
      (ii) Special rule. With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.
(6) Qualified mineral interest. For purposes of this subsection, the term “qualified mineral interest” means
   (A) subsurface oil, gas, or other minerals, and
   (B) the right to access to such minerals.
APPENDIX D

Anatomy of a Conservation Easement

The diagram on the following pages illustrates and defines the important sections of the easement. The diagram also contains suggestions for fashioning the language of your easement template. This example demonstrates how one land trust, following good practices, drafts its easements in response to the issues raised in this chapter. Thanks to Columbia Land Conservancy for providing an easement for this diagram, which was originally published in Conservation Easement Drafting and Documentation, published by the Land Trust Alliance (2008)
DEED OF CONSERVATION EASEMENT

[Subject to minor changes pending final CLC attorney review]

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

WHEREAS:

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

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

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

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

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

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

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

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

(d) The Town of XXXXX has planning, zoning and land use laws that partially regulate the Property. The Town has adopted provisions in its planning and zoning laws that encourage the preservation of agricultural, rural open space and scenic resources. The stated goal of the current Town of XXXXXXX Comprehensive Plan, adopted January 2005, is to “Protect and enhance the natural scenic vistas and the publicly visible aspects of the man-made environment, in keeping with the Town’s rural and “small town” character.” Among the stated objectives of the Plan is to “Preserve scenic vistas of the area’s natural beauty including vistas of woodlands, fields, ridgelines, hillsides, hilltops, and valleys” (Section III-1) and “Protect surface water, wetlands and groundwater from potential sources of pollution and reduce or eliminate existing sources of water contamination”; “Prevent
iv. **Significant public benefit.** The Property’s open fields, woodlands, rocky outcroppings, prominent ridgeline, and wetlands are rich in biodiversity and provide habitat for a variety of terrestrial and amphibious species. The Property is of particular importance as an ecologically diverse and scenic natural area, being visible from the Mount Lebanon Shaker Society National Historic Landmark and being part of an ecological system of hills and wetlands of the Taconic Mountain Range and the Shaker Swamp.

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

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

(c) The Shaker Swamp has both ecological and historical significance, at one time, being a source of natural resources for the local native American population, the Shakers, and the Tilden Pharmaceutical Company. The Tilden Pharmaceutical Company was founded in 1824 and based its operations for more than a century on medicinal plant extraction knowledge gained from the Shaker community until it closed in the 1960s. As a result of the cultural and ecological significance of the Shaker Swamp, a study is currently underway by the Farmscape Ecology Program and other botanists and members of the community to conduct a full assessment of the Swamp’s ecological diversity and historical background. Among many other animal species noted to date as part of the on-going biological study, otters, Northern Harrier, Willow Flycatcher, and Red Loon have been observed there. The diverse plant community of Shaker Swamp is indicative of calcareous conditions and contains regionally rare or scarce plants.
(according to Kiviat & Stevens, 2001) such as Blue Cohosh, Highbush Cranberry, Walking Fern, Northern Gooseberry, American Larch, and Mayapple (Knab-Vispo and Vispo, pers. com.).

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

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

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

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

D. Maintaining the Property's scenic beauty, ecological significance, and agricultural and woodland viability, and, in particular, maintaining the Property free from new structures that would substantially interfere with its scenic, open rural character, woodlands, and wetlands, and permitting only appropriate uses and limited development compatible with the natural surroundings and scenic beauty of the Property, are critical to the protection of this scenic ridgeline Property as well as the open and scenic character of the general area. The conservation of the Property, subject to the terms of this Easement, will yield significant
6. This is a statement of the consideration paid for the easement, indicating that this easement was donated to the Columbia Land Conservancy. If an easement is purchased, whether at full fair market value or at a bargain sale, the purchase price would generally be inserted here.

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

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

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

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

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

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

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

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

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

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


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

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

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

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

XXXX Conservation Easement Draft #1  Page 5 of 23
2. Definitions. When used in this Conservation Easement, the following terms shall be defined as follows:

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

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

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

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

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

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

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

10. The Columbia Land Conservancy chose to create a separate section in its easement that contains definitions for important terms used in the document. The land trust could also have chosen to define these terms the first time they are used in the easement, but CLC believes a separate definition section makes the document easier to read and understand for both land trust personnel and landowners. Whenever a defined term is used in the easement it is capitalized.
2.6. Agroforestry. Agroforestry intentionally combines agriculture and forestry to create integrated and sustainable land use systems, taking advantage of the interactive benefits from combining trees and shrubs with crops and/or livestock. Agroforestry practices include such options as alley cropping (the cultivation of food, forage or specialty crops between rows of trees or shrubs), growing ginseng and gourmet mushrooms, combining forest management with livestock grazing, and selling specialty wood items. For purposes of this Conservation Easement, timber harvest is not included in this definition; see “Conservation Forestry,” below.

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

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

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

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

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

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

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

2.14. Forestry Management Plan. A plan that provides for the identification and application of resource specific managerial and/or structural Best Management Practices designed to enhance forest productivity and economic viability as well as to mitigate potential adverse environmental impacts of Commercial forestry activities.
2.15. **Grantee**. The term “Grantee” includes the original Grantee and its successor and assigns.

2.16. **Grantor**. The term “Grantor” includes the original Grantor her heirs, successors and assigns, and all future owners of all or any portion of the Property.

2.17. **Habitat Management Structures and Improvements**. A Structure or Improvement (as defined herein) used for enhancing or viewing wildlife and habitat. Habitat Management Structures and Improvements may include observation towers, deer stands, and bird blinds. When located outside of the ADAs and the AASA, such Habitat Management Structures and Improvements shall not include nor be served by any permanent utilities, and/or septic systems.

2.18. **Hazardous Substances**. For purposes of this Conservation Easement, Hazardous Substances shall be defined as: (a) any hazardous waste as defined by the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC s. 6901 et seq.) as amended; (b) any hazardous substance as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (15 USC s. 9601 et seq.) as amended; (c) any substance regulated by the Toxic Substances Control Act (TSCA) (15 USC s 2601 et seq.) as amended; (d) any substance regulated by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 USC s. 136 et seq.) as amended; (e) any pollutant as defined by the Water Pollution Control Act (33 USC s. 1251 et seq.) as amended; (f) any air pollutant as defined by the Clean Air Act (42 USC s. 7401 et seq.) as amended; (g) any hazardous waste as defined by §27-0901(3) and §27-1301 of the New York State Environmental Conservation Law and regulations promulgated thereunder; (h) friable asbestos or asbestos-containing material of any kind or character; (i) polychlorinated biphenyls; (j) any substances regulated under the provisions of Subtitle I of RCRA relating to underground storage tanks; (k) any other substance, pollutant or contaminant subject to any form of environmental law or regulation by any Federal, State or local governmental authority.

2.19. **Height of Structures**. The Height of a structure shall be determined by measuring the highest point of the roof or structure, excluding chimneys, as measured from the mean grade level prior to construction or grade alteration.

2.20. **Home Occupations and Rural Enterprises**. Home Occupations and Rural Enterprises, as permitted by local laws, are permitted, so long as their associated structures and improvements do not physically extend outside of the ADAs. Home Occupations and Rural Enterprises may include, but are not limited to, farm stands, lawful home occupations, professional home offices, bed and breakfasts, farm machinery and auto repair, restaurants, antique shops, saw mills, firewood distribution, campgrounds, schooling, day care and other educational programs. However, enterprises which market petroleum are prohibited. The construction of golf courses and other activities that significantly alter the terrain and soil profile and that adversely affect the open space and natural qualities of the Property are expressly prohibited outside of the ADAs on the Property.

2.21. **Improvements**. Improvements shall include anything that is constructed, installed or placed upon the ground or a structure, that is not a Structure (as defined herein), and includes but is not limited to, driveways, parking areas, gardens, ponds, wells, septic systems, drainage ways, utility lines, fences, stone walls, paths and walkways, and signs.
Appendix D

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

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

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

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

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

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

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

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

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

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

**This easement is organized topically, with restricted and permitted uses discussed under headings (such as “subdivision” or “permitted structures and improvements”). Two other common types of easement organization include listing restricted uses in one section, followed by permitted uses in another section; or, listing the restricted and permitted uses by the easement land area to which they apply.**
Easement are permitted only within the ADAs as specified below. Agricultural Activities are permitted on the Property, as are Conservation Forestry, Agroforestry, environmental management, educational programs, and passive recreation such as (but not limited to) walking, hiking, cross-country skiing and horseback riding, as well as institutional uses (including the use of the Property and its Structures for education, including museums) so long as they are not inconsistent with the terms and purposes of this Conservation Easement.

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

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

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

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

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

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

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

4.3. Permitted Structures and Improvements. No permanent or temporary structures or other improvements shall hereafter be placed or maintained on the Property, except as specifically provided for below, with prior notice and/or approval pursuant to Section 5.2.
4.3.1. **Existing Structures and Improvements.** The existing structures and improvements on the Property, including, without limitation, the existing residence, and accessory structures (detached garage, shed, studio, and cabana), swimming pool, stone walls, fences, access and farm roads, and trails are permitted. The existing structures and improvements, including the residence may be maintained, repaired, removed, rebuilt, improved or replaced within their respective areas as defined below, provided that any such activities are not inconsistent with the restrictions set forth in this Conservation Easement. All existing residential structures and their accessory structures are located within ADA #1 or the AASA, as documented in the Baseline Documentation Report, and as described in Section 5.1.

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

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

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

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

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

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

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

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

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

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

17. Special use areas (defined in this easement as Environmental Protection Areas) have greater restrictions on human use and development than other parts of the property, given the sensitive nature of the conservation values located in these areas. Each EPA is shown on the easement map and detailed in the baseline report.
4.3.7. Incidental Landscape and Garden Structures and Improvements. Incidental Landscape and Garden Structures and Improvements are permitted, without size limitations within the ADAs and the AASA. Outside of the ADAs and the AASA, such structures are permitted anywhere on the Property, but are limited to 400 square feet in Foot Print or less, and less than 35 feet in Height. Boardwalks and paths are permitted anywhere on the Property and are not subject to the 400 square foot size limitation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

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

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

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

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

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

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

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

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

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

The current Grantor (owner) shall reimburse Grantee for all reasonable expenses incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, including, without limitation, costs and expenses of suit and reasonable attorneys' fees, and any costs of restoration necessary to cure the violation. Should Grantor prevail in a judicial enforcement action, each party shall bear its own costs. Failure to enforce any restriction or covenant herein contained shall in no event be deemed a waiver of a right to do so thereafter as to the same violation or breach or as to one occurring prior or subsequent thereto.

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

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

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

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

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

25. The State of New York requires an amendment clause in order for an easement to be amendable. CLC finds the clause helps educate landowners about what amendments it might consider and under what terms they will be considered. An amendment clause is recommended for all conservation easements. For more examples of amendment clauses and a further discussion of issues a land trust should consider prior to amending an easement, see the Land Trust Alliance research report Amending Conservation Easements: Evolving Practices and Legal Principles.
an amendment to this Conservation Easement is sought. Grantee, on a case-by-case basis, may agree to amend individual provisions of the Conservation Easement, subject to the following limitations:

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

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

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

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

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

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

5.8. Taxes and Assessments. Grantor shall pay all taxes, levies, and assessments and other governmental or municipal charges, which may become a lien on the Property, including any taxes or levies imposed to make those payments. If Grantor fails to make such payments, any such sums. Some states have adopted laws providing that conservation easements are not extinguished when foreclosed by a public trustee for failure to pay property taxes.

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

Section 5.8 clarifies that a landowner still retains all the responsibilities of land ownership after the conveyance of an easement. CLC reserves the right to pay any taxes that might result in a public sale of the property (and possible extinguishment of the easement) and provides for repayment to itself of any such sums. Some states have adopted laws providing that conservation easements are not extinguished when foreclosed by a public trustee for failure to pay property taxes.
5.9. **Severability.** Invalidation of any provision of this Conservation Easement by court judgment, order, statute or otherwise shall not affect any other provisions, which shall be and remain in force and effect.

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

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

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

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

27. **Indemnification or hold harmless provisions are important to include in easements, particularly in those states in which a conservation easement is an interest in real property. It is unlikely that a land trust will cause damage to property or individuals due to its ownership interest in an easement, but landowners may create liability for a land trust through their actions. Therefore it is important to have the landowner indemnify the easement holder for any claims that might arise through ownership of the land.**
under Article 49, Title 3, of the Conservation Law or any regulations promulgated pursuant thereto, and (c) if applicable, carry out the Grantor's intent that as of the date hereof this Conservation Easement shall be deemed a transfer of a qualified real property interest for conservation purposes as defined by Section 170(h) of the Internal Revenue Code.

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

6. Qualified Conservation Contribution Covenants.

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

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

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

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

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

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

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

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

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

Grantor: ________________________________

Date: __________________________

Grantee: COLUMBIA LAND CONSERVANCY, INC.

By: Peter R. Paden, Executive Director

Date: __________________________

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

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

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

34. These are the notary or acknowledgment blocks. Each state specifies the form necessary for this attestation, but they generally conform to the language shown here.
On the ____ day of ______________ in the year 2007, before me, the undersigned, personally appeared XXXXXXXX, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or person upon behalf of which the individual(s) acted, executed the instrument.

_____________________________
Notary Public

STATE OF NEW YORK
) ss:
COUNTY OF COLUMBIA

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

_____________________________
Notary Public
EXHIBIT A

DESCRIPTION OF PROPERTY

(legal description from the deed and/or survey)

35. If a legal description is long it is generally placed in an exhibit to the easement and incorporated by reference into the easement itself. If the legal description is short, it can be placed in the body of the easement. If water rights are protected by an easement they are generally described here as well. Title exceptions are also sometimes described in this section.
36. If an easement map summarizes reserved rights and restrictions contained in the easement, it should clearly state that the specific provisions of the easement apply, not the map summary. In addition to the easement boundaries, a thorough easement map will show all improvements on the land as of the date of the easement and the locations of any building envelopes and special use areas.

EXHIBIT B
CONSERVATION EASEMENT MAP

(To be drawn at 1” = 200’, reduced and attached to the easement)
Labor Costs for Monitoring

All land trusts, whether they use paid staff or volunteers for easement stewardship, must consider labor costs.

Volunteer-based land trusts need to consider if and when the organization will need easement stewardship staff, even if volunteers complete the job today. In a survey conducted by the accredited Colorado Cattlemen's Agricultural Land Trust, land trusts of all sizes and from all parts of the country reported that stewardship staff time and costs were higher than originally anticipated. Part of the reason for this is that organizations almost always increase paid staff time as easement stewardship programs mature.

Why is staffing likely to be needed? Many organizations start a stewardship program with volunteers, but as the program grows, volunteers alone cannot manage the volume of work. Furthermore, many land trusts find that as easements age, problems emerge that must be solved. They need regular, trained staff to deal with increasingly complex issues, questions and tasks necessary for an easement’s stewardship. This situation is particularly true if an organization’s easements involve reserved rights that require land trust review or approval prior to execution. Timely, consistent treatment of landowner requests is often the best method for ensuring strong, constructive landowner relationships—and is often the best defense against possible violations.
Volunteer-based land trusts should consider the costs of their stewardship program down the road, when paid staff may take over monitoring responsibilities. Such organizations should consider building their per-easement fundraising goal around a cost estimate based on staffed easement stewardship. For most land trusts, volunteer-based stewardship is most likely a temporary gift—a gift that buys time to help the organization build a funded easement stewardship program that can support staff-based stewardship.

When evaluating the costs of staff time (salary and benefits) or volunteer time for routine monitoring, a land trust should consider the following activities:

- Preparing for and visiting the property during annual monitoring.
- Answering landowner questions; communicating with other interested parties, such as neighbors or the local governing body; keeping good records; and communicating with the board and staff about stewardship issues.
- Following up on problems or questions that arise during the monitoring visit.
- Reviewing and approving the exercise of reserved rights. If a land trust accepts an easement that includes reserved rights or other activities for which land trust review and approval will be needed, it should factor in the cost of this time. In some cases, paid consultants, such as natural resource experts, architects, land use planners or legal advisors, may be needed as well.
- Additional monitoring visits when reserved rights are exercised. For example, a land trust that controls the size and placement of structures may send easement stewardship personnel to the property periodically during construction of a permitted structure. These visits allow the land trust to spot any possible misunderstandings or errors before construction is completed and can go a long way toward building landowner trust.
- Extra monitoring if an easement involves affirmative obligations of the landowner for specific management activities.
- Overseeing volunteer monitoring programs (e.g., arranging for training and supporting volunteers, tracking paperwork and following up on problems).
As a guideline for planning labor needs, consider that one full-time trained staff person or volunteer may be able to oversee the stewardship of 50 to 100 easements in a year. However, this figure is highly dependent upon easement program variables and should be carefully evaluated on a case-by-case basis.

**Additional Labor Costs: Establishing and Maintaining Landowner Relationships**

Maintaining good relationships with landowners can involve time and expense beyond the required monitoring functions, and the stewardship cost estimate should consider these extra costs.

Strong relationships with landowners are based on person-to-person contact with the organization. Routine stewardship involves fielding questions throughout the year from landowners and related parties (e.g., farm managers, family members, attorneys, realtors and neighbors) in a timely manner. Some land trusts work toward a more proactive relationship with easement landowners to foster good communication and land management. Some prepare and send regular newsletters to their easement landowners; others hold annual events to gather easement landowners for fun and education. These outreach activities can help keep landowners attentive to the easement and offer additional information or opportunities for collaborative resource improvement projects with the land trust or related organizations.

Land trusts must pay special attention to cultivating a relationship with the new landowner when an easement property changes hands. Land trusts that have experienced turnover to “second-generation” landowners know that at this point enforcement challenges commonly begin. Most land trusts try to meet with a new landowner as soon as possible to review the easement, answer questions and head off potential conflicts. The Society for the Protection of New Hampshire Forests finds that roughly 3 percent of its easement properties change hands each year. Other experienced land trusts find that the figure can be as high as 5 percent, although this number varies by region and type of property. Land trusts should factor in extra time for cultivating relationships with new landowners.

When calculating the annual costs associated with landowner relationships, it helps to imagine all possible tasks and then assign an average time factor and frequency for each. These tasks will vary, based on the philosophy of the organization and the particulars of the easement program.
Consultants

Routine monitoring may require expert advice that is not available from staff or volunteers. Experts such as appraisers, professional foresters, wetland ecologists or wildlife biologists may be called in for certain monitoring tasks or to answer questions that arise during monitoring.

Office Overhead

Because organizations usually need an office and associated amenities to run an easement program, some land trusts add a factor for overhead into their easement stewardship cost calculation. There are a variety of models for calculating these costs. Estimates may be based on a percentage of actual office overhead costs or on a percentage of estimated easement stewardship costs and then added on to the stewardship estimate. If a land trust incorporates overhead into the easement stewardship calculation, it should be used consistently from easement to easement.

Travel and Mileage

Depending upon the size of the land trust’s service area, travel costs can be anywhere from an incidental cost to a significant expense. Some larger land trusts hold easements that are located an eight-hour drive or more from their headquarters. Some routinely fly to get to their easement destinations. In addition to the mileage costs, travel time becomes a significant consideration.

Supplies and Equipment

Cost of supplies is usually a relatively minor component of easement stewardship costs. Consider, for example, the costs of cameras, image processing, GPS units, fireproof file cabinets, copying and mailing, along with any expenses unique to your program.

Larger easement programs may design special systems to manage large easements or large volumes of individual easements and incur additional expenses. For example, the Society for the Protection of New Hampshire Forests, which holds more than 500 easements, has begun using aerial imagery as one component of its easement stewardship program. The Society includes the annual cost of purchasing this imagery in its stewardship budget. Other organizations may have dedicated computers and printers for their easement stewardship programs, or even a vehicle to transport volunteers or staff on monitoring visits.
Storage and Records Management

Land trusts should consider storage and recordkeeping as part of the cost of an easement stewardship program. Costs associated with recordkeeping include:

- Direct costs (such as fireproof files, archival materials, etc.)
- Labor costs (staff time involved in documentation of landowner contacts and other functions)
- Administrative support (filing, mailing, database updates, etc.)

This often-overlooked aspect of stewardship expense is one that becomes substantial once an organization has accepted a large number of easements.

Legal Costs

Over time, monitoring activities inevitably result in legal questions about easement interpretation, compliance issues, process and other points of law. Sometimes these questions come directly from the landowner as a request for easement interpretation, discretionary approval or amendment. For the easement holder, having ready access to an attorney is essential. Many land trusts seek board members who are attorneys to help address the day-to-day legal matters. Some land trusts keep an attorney on staff or on retainer. These approaches can help keep legal costs down, but for some situations, it may be necessary to hire outside counsel. Easement holders should consider these predictable, ongoing legal expenses in their stewardship planning.

Enforcement Costs

When easement issues or disputes arise, a land trust typically first attempts to resolve the matter through discussion with the landowner, with supporting legal advice from land trust counsel. Most land trusts consider this action a routine stewardship expense. But if issues remain unsolved and require more extensive legal advice or litigation, these enforcement costs may exceed the usual stewardship costs.
Additional Management Costs with Affirmative Obligations
If a land trust accepts affirmative obligations in an easement, it must estimate these ongoing stewardship costs as well. These costs could include:

- Habitat management. Habit management includes such activities as weed control, prescribed burns and species monitoring or inventories. Habitat improvement investments can range from one volunteer workday to a major, multiyear restoration project involving heavy equipment. The challenge, when factoring in this cost on an annual basis, is to be realistic. Land trusts frequently underestimate the true cost of these types of activities.

- Public recreation or access. Opening land to the public can lead to additional stewardship expenses, particularly to resolve conflicting uses, maintenance issues and landowner concerns. For example, if a land trust accepts responsibility for trail maintenance on an easement property, it should plan for regular monitoring, maintenance to keep the trail up to acceptable standards and perhaps collaboration with public user groups on trail issues.

- Educational activities. If an easement requires that educational activities are to take place on the protected land, the land trust will need to allocate sufficient time to ensure that these events are conducted.

- Demonstration areas. Some land trusts include easement provisions that require cooperation with the landowner to provide demonstration projects on the easement land—usually in a specific location or relating to a specific habitat improvement. While often the idea of the original landowner, subsequent landowners may be less enthusiastic about this level of “partnership” with the land trust. The land trust will need to calculate the time and resources necessary to implement this provision into the future.
Each land trust will have its own forms. The samples provided on the following pages are for illustration purposes only.
### Sample Checklist of Steps in the Easement Transaction Process*

<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>Landowner</th>
<th>Land Trust</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landowner expresses interest in conservation easement.</td>
<td>✔</td>
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<td></td>
</tr>
<tr>
<td>Land trust staff/volunteer visits property with landowner.</td>
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<td>✔</td>
<td></td>
</tr>
<tr>
<td>Land trust staff/volunteer evaluates conservation values of property and</td>
<td></td>
<td></td>
<td>✔</td>
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<tr>
<td>determines if the property meets protection criteria (is the land appropri-</td>
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<tr>
<td>ate for a conservation easement?).</td>
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<tr>
<td>Land trust staff/volunteer provides information (not advice) to landowner</td>
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<td></td>
<td>✔</td>
</tr>
<tr>
<td>on the conservation easement, potential tax consequences (income, property) and advice to seek independent legal and financial counsel.</td>
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</tr>
<tr>
<td>Land trust staff/volunteer and landowner determine general restrictions, exceptions and conservation values.</td>
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<tr>
<td>Landowner consults with attorney.</td>
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<tr>
<td>Landowner consults with financial advisors.</td>
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</tr>
<tr>
<td>Landowner contacts local assessor (if property taxes are of consequence).</td>
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<tr>
<td>Land trust obtains title report and title documents.</td>
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<td></td>
</tr>
<tr>
<td>Land trust determines if mortgage is held on property and, if so, obtain mortgage subordination.</td>
<td></td>
<td>✔</td>
<td></td>
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<tr>
<td>Land Trust submits project to land protection committee.</td>
<td></td>
<td>✔</td>
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<tr>
<td>Land trust submits committee-approved projects to board for board decision (board approval of all projects is required).</td>
<td></td>
<td>✔</td>
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<tr>
<td>Landowner and land trust staff/volunteer negotiate final terms of the conservation easement.</td>
<td></td>
<td>✔</td>
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<tr>
<td>Land trust legal counsel assists with drafting and/or reviews conservation easement.</td>
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<tr>
<td>Land trust stewardship staff are involved in determining stewardship obligations and meet landowner.</td>
<td></td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Landowner hires qualified appraiser to determine donation value (if applicable).</td>
<td>✔</td>
<td></td>
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<tr>
<td>Land trust and landowner determine legal description and identify boundaries. Surveyor hired if necessary.</td>
<td></td>
<td>✔</td>
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<tr>
<td>Prepare baseline documentation report (responsibility of landowner, but land trust usually prepares).</td>
<td></td>
<td>✔</td>
<td></td>
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<tr>
<td>Land trust and landowner sign final conservation easement and it is recorded.</td>
<td>✔</td>
<td></td>
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<tr>
<td>Landowner signs baseline documentation report at closing and meets with stewardship staff.</td>
<td>✔</td>
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<tr>
<td>Land trust writes up newsletter story and press release (with cooperation and permission of landowner).</td>
<td>✔</td>
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<tr>
<td>Land trust establishes protocol for annual monitoring visits.</td>
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<tr>
<td>Land trust determines protocol for maintaining good relations with conservation easement landowner.</td>
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</tbody>
</table>

*not necessarily in sequential order
Project Selection and Planning

Every land trust has its own set of criteria for choosing projects. It is very common for a land trust to have an extensive list of questions its staff will explore to determine whether this project is a good fit. At the outset of a project, a corporation should ask for a copy of the land trust’s land protection criteria and/or site assessment form. Included on the following pages is a project planning template that the Land Trust Alliance shares with land trusts to help them meet Practice 8G from *Land Trust Standards and Practices*. As noted on the template, some organizations combine the project planning and site inspection forms into one document.
**PROJECT PLANNING TEMPLATE**

Note: Some of this information will already have been gathered through the site inspection and project selection processes for board approval, and is included here. For some organizations, the site inspection form and the project planning form may be the same document.

**Summary of Site Inspection/Project Planning Template**

<table>
<thead>
<tr>
<th>Land Trust Mission:</th>
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<table>
<thead>
<tr>
<th>Person responsible/lead contact for the project:</th>
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<table>
<thead>
<tr>
<th>Board approval for the project (attach information sent to the board and resolution):</th>
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</table>

**Project information**

Is the proposed project:

- [ ] A donation of conservation easement?
- [ ] A proposed bargain sale of a conservation easement?
- [ ] A proposed sale of a conservation easement at fair market value?
- [ ] A donation of the fee interest in land?
- [ ] A proposed bargain sale of the fee interest?
- [ ] A proposed sale of the fee interest at fair market value?

What are the possibilities for funding the purchase? Discuss.

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What is the estimated time period for raising the funds necessary for the purchase?

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</table>

**Landowner information**

<table>
<thead>
<tr>
<th>Landowner Name(s):</th>
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<table>
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<th>Address:</th>
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<table>
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<tr>
<th>Phone number:</th>
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<table>
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<tr>
<th>Email address:</th>
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<th>Fax:</th>
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<tr>
<th>Cell phone:</th>
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<thead>
<tr>
<th>Farm/land manager name:</th>
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</table>
**Project Planning Template**

**Contact information:**
How long has the landowner owned the land?
Who will be the key decision-makers regarding this land protection project—will the landowners involve other family members, etc.?

**Current restrictions on the land**
Has the landowner leased any/all of the land? __________________________
If so, to whom and for how long? __________________________
Are there any deed or right-of-way restrictions on the land? __________________________
If so, where on the land? ______________________________________
Can the landowner provide you with a copy of these restrictions? ________________
Is the land subject to special use valuation? __________________________

**Location/site characteristics (tailored to the project selection criteria)**
Town/county where land is located: ______________________________________
Acreage involved: ______________________________________
Is this all the land owned by the landowner in the region? ________________
What are the topographic characteristics of the land? (Attach a copy of a topographic map.) ______________________________________
What watershed is the property in, draining to where? Is it part of a public water supply or public waterbody/watershed (i.e., drains into the ___ River, a publicly accessible river)? ________________
What is the vegetative cover like on the land? (Attach a copy of a recent aerial photograph.) ______________________________________
Coniferous forest? ______________________________________
Deciduous forest? ______________________________________
Fields? ______________________________________
Wetlands? ______________________________________
Wet meadows? ______________________________________
Are there any important wetlands, waterbodies, etc.? (Attach a copy of any related wetland maps, surveys, if available. This information can also come from the aerial photographs, topographic maps, etc.) ________________
Does the land contain farmland soils of local, statewide or national importance? (If yes, attach a copy of the relevant soil map.) ________________
Has the land been actively logged in the past 25 years? Logging information of note? ________________
Is the land currently under agricultural use? If so, clarify what kinds. ________________
Any other information of note? ________________
Are there wildlife species of particular note that reside on the property (check Natural Heritage Inventory maps, refer to local information)?

Are there habitat types of note that could provide habitat for important species (check biological assessment manuals for likely occurrence for habitat types, e.g. this type of ridgeline is cited in the Journal of "y" as prime habitat for "x" species)?

**Public views, zoning, development pressure**

How much road frontage exists on the property, and on what public or private roads?

What is the current zoning (if any) for the property?

Is there development activity in the area that could render the conservation of this property obsolete?

What are the adjacent land uses?

What will the zoning permit for adjacent lands?

How does the property fit within any adopted local master or comprehensive plan?

**Structures/cultural information**

How many residential structures are currently on the land?

What is their approximate size?

Are they all owned by the landowner?

Is there a survey for the property?

If so, can the landowner send you a copy?

When was the survey completed?

Is it for the property's boundary?

Other survey details?

What other structures exist on the land?

Are there historic structures or historic artifacts of record or based on local knowledge that you should know about? Cemeteries, Native American burial grounds, cellar holes, historic battlefields, etc.?

Are there public access points, trails or potential public access issues associated with the property?
**Project Planning Template**

**Landowner goals**
(NOTE: this information may be obtained later, in different conversations over time)
What are the reasons the landowner wishes to protect the land?
________________________________________________________________
________________________________________________________________

For easement projects: does he/she plan to sell any of the property within the next five
years (if so, what portion)?
________________________________________________________________

For fee acquisition purchases: does he/she need to sell the land within a specific
timeframe?
________________________________________________________________

For easement projects: is there a desired timeline/time to protect the land? __________

If a donation or bargain sale, is the landowner likely to request a tax deduction? _____

Does he/she have an attorney/landowner advisor? If so, who?
________________________________________________________________

Phone: __________________________________________________________
Fax: _____________________________________________________________
email: ___________________________________________________________

Are there children involved in the property? _______________________________________________________________________
If so, how? _______________________________________________________________________

For fee acquisitions: does the landowner wish to continue use of the land or desire to
influence the use of the land? __________________________________________
________________________________________________________________

Explain any specific/noteworthy conservation goals that would result in a deviation from
the model conservation easement or from the land trust's standard fee land management
goals.  ___________________________________________________________
________________________________________________________________
________________________________________________________________

Did you explain to the landowner that this is unusual, and that the organization would
have to assess if, and how, these goals could be achieved? _________________

**Organizational outreach/clarity**
Have you explained the land trust’s overall conservation goals and its general conserva-
tion philosophy? ____________________________

For easement projects: have you reviewed the model conservation easement with the
landowner? ____________________________

For fee acquisition purchases: have you explained the process for raising funds and clos-
ing the project? ____________________________
Appendix F

Project Planning Template

For easement projects: did you explain, using a sample baseline documentation report, what a baseline report would look like, and how the landowner would be involved in the process of its creation? __________________________________________

For fee acquisitions: did you explain that a land management plan will be developed for the property and its conservation values prioritized for preservation? __________________________

Does he/she understand the land trust’s organizational capacity, and thus its prioritization of restrictions for the land? __________________________________________

If the landowner wished to conserve the land with restrictions the land trust is unable to provide, did you discuss other possible partners? Which organizations did you discuss? Did you discuss the land trust’s commitment to long-term easement/land stewardship and the requested/required stewardship contribution? __________________________________________

________________________________________

________________________________________

________________________________________

________________________________________

________________________________________

Sketch map
For easement projects: when did you agree to send the landowner a sketch map and draft conservation easement? __________________________

For fee acquisition purchases: when did you agree to send the landowner a draft purchase contract? __________________________

(Attach sketch map, etc. when completed.)

For easement projects: when did the landowner approve the final sketch plan, and thus initiate the creation of the final conservation easement map? __________________________

Process timeline
Have you generally mapped out the turn-around-time the land trust needs to complete the process within the landowner’s stated timeframe? __________________________

What were the benchmarks agreed upon? __________________________

________________________________________

________________________________________

________________________________________

________________________________________

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________________________________________

________________________________________

________________________________________

________________________________________
Project Selection

Colorado Open Lands’ Project Intake and Selection Guidelines

Mission
To preserve the significant open lands and diminishing natural heritage of Colorado through private and public partnerships, innovative land conservation techniques, and strategic leadership.

Land Protection Policies
Colorado Open Lands (COL) works to preserve significant open lands primarily through the acquisition of conservation easements; however, COL also may acquire fee title or accept transfers of conservation easements from other entities. In addition, we may assist project partners, such as local governments, with the acquisition of fee or other interests in property or may play a discrete advisory role in other approaches to land protection such as estate planning and zoning incentives.

As a statewide organization, COL must be careful to work strategically and effectively. The following are several fundamental factors in establishing land protection policies and selection criteria:

- To solidify the understanding by the COL staff of the conservation values to be protected by the project
- To understand the needs and goals of the landowner (or organizational partner)
- To understand potential risks of a project
- To identify the project’s alignment with our mission statement, current organizational strategic plan, and any other strategic planning documents that we may have developed for a particular geographic area
- To determine whether COL has the capacity to complete a project in the most effective and efficient manner possible that meets the landowner’s needs
- To ensure COL’s future activities stay focused on the goal of protecting the conservation values and to begin a formal record of the project
- To determine if another land trust is the more appropriate entity to handle the project

Project Selection Process
Colorado Open Lands first conducts a staff level review of potential projects using our “Project Selection Criteria” form. This review is done after a visit to the property and once enough information has been gathered for the project manager to be able to provide an overview of the conservation values and project benefits, the project structure and proposed reserved rights, and an organizational considerations (such as conflict of interest or capacity concerns). The staff may recommend a project, identify threshold questions that need to be answered prior to recommending that a project move forward, or suggest that the project is not a good fit for the organization at that time. If recommended by the staff, a potential project is then reviewed by the Conservation Committee of the Board of Directors, where it may again be recommended, tabled with questions, or not recommended. The Conservation Committee recommends potential project to the Board’s Executive Committee for ultimate approval. Once Board approval is obtained, COL staff has the discretion to negotiate the specifics of the project. If a project substantially changes, staff will present updated information to the Board.
Project Selection Criteria for Staff Review

**General Information**
Potential Project Name:

Landowner name(s)/entity name:

Primary contact (if different):

Total property acreage:
Proposed project acreage (if different):
County:
Zoning (and permitted development under current zoning):
Date of Site Visit:

☐ Priority Landscape:
☐ Contact in database
☐ Landowner application complete
☐ Context Map
☐ Site Map
☐ Other Maps (conservation value)
☐ Photos

Proposed Transaction:

☐ CE Donation  ☐ CE Bargain Sale
☐ COL assistance to local government or 501(c)3 (fee or access)
☐ Fee Donation to COL  ☐ Fee Purchase by COL

Is there a conflict of interest for COL? Yes ☐ No ☐ If yes, describe:

Presenter:
Date Reviewed:
Staff decision:
☐ Proceed with recommendation to Board
☐ Do not proceed
☐ Table and address the following concerns:
**Project Summary**

**Project Values and Benefits**
1) Property resources and Conservation Values they support

2) Property context and significance
   Discuss as applicable:
   - value of the project within local community
   - value to COL in achieving Priority Landscape objectives and Strategic Plan goals
   - consistency with priorities established by other organizations and/or government agencies

3) Development pressure or other threats

**Project structure and Reserved Rights**
1) Ownership structure of the property

2) Historic/current uses and reserved rights (division, existing improvements and building envelope(s), inclusion of water, mineral ownership and development or leases)

3) Proposed transaction (discuss as applicable: funding needed, if needed, possible sources and feasibility, phasing)

4) If phasing is proposed, does each proposed phase have stand-alone conservation value? Would we recommend the project if only one phase were to be successful?

**Organizational Considerations**
1) Project management capacity

2) Project concerns
   Discuss as applicable:
   - title or access issues
   - owner expectations of value or funding
   - potentially inconsistent reserved rights (e.g. mineral, building envelopes, etc.)
   - ethical or public image problems

3) Is this project anticipated to generate additional conservation activity in the surrounding area or region?
Baseline Planning

Baseline Documentation Report Checklist

______________________________LAND TRUST

GUIDANCE ON PREPARING A CONSERVATION EASEMENT BASELINE DOCUMENTATION REPORT

If a donor is considering claiming a federal income tax deduction for the gift of a conservation easement, the donor should be aware that IRS regulations require an easement donor to provide the donee with documentation of the property’s condition at the time of the gift [Treasury Regulation 1.170A–14 (g)(5) (i)]. Even if tax considerations are not part of the donor’s plans, it is a good idea—and the policy of the _______ Land Trust (“Land Trust”)—to compile baseline data.

A baseline documentation report documents the conservation values of the property to be conserved and describes the existing conditions of all the property’s features that are relevant to the conservation easement. The Land Trust’s policy requires that a baseline documentation report must:

- Meet IRS requirements for documentation
- Be specific, but include no more detail than necessary
- Be objective and easy to understand

A baseline documentation report can be prepared by a consulting professional, by the easement donor, or by staff of the Land Trust, depending on the nature of the easement agreement and the type of conservation values being protected. Regardless of who prepares the report, both the donor and the donee organization must agree that the baseline study report is accurate and complete before a conservation easement is signed.

Elements of a good baseline study are listed in the attached checklist. Not all categories will apply in every case. The matters that must be documented in a baseline report depend upon the conservation values to be protected by the conservation easement. Items marked with a ✓ must be included in all cases; other items are necessary in only some circumstances. Please consult the staff of the Land Trust for further information and helpful publications on baseline reports for conservation easements.

It is the policy of the Land Trust to require that all baseline documentation reports be presented to the Land Trust prior to their finalization for review and approval by Land Trust staff/volunteers. The Land Trust will not accept the donation of a conservation easement without a baseline documentation report that meets Land Trust’s approval.
Land Trust

Checklist: baseline study, conservation easements

✓ Cover Page, showing signatures of donor, donee, and study preparer and acknowledgement and notary blocks for the donor and donee
✓ Table of Contents listing all attachments, maps and lists
✓ Owner Acknowledgement of condition. This is an IRS requirement if the property or easement is a gift for which a deduction will be claimed and is required as a part of the Land Trust’s policy as well.

Background Information
✓ Owner(s) and LT’s contact information: name, address, phone
✓ Historical information regarding the donation/acquisition
✓ Summary of easement provisions
✓ Purpose of easement
✓ Evidence of the significance of the protected property; summary of conservation values
✓ Directions to property from closest public road
✓ Description of easements, leases and other encumbrances on the Property
✓ Proximity to other conserved properties

Physical and Ecological Features
Maps (all maps must be in type large enough to be legible)
✓ Regional map showing easement location
✓ Survey of property
✓ Section of local road map showing easement location
✓ Section of USGS 7.5 minute topographic map showing easement location
✓ Map(s) or surveys of property showing all relevant physical and ecological features, including man-made improvements (roads, buildings, fences, etc.), irrigated lands, water ways, wetlands and riparian areas
✓ Man-made features: Improvements including buildings, roads, trails, power lines, water conveyances, fences, ponds and other relevant features must be identified in maps and photos and described in the text
✓ Agricultural features (if applicable): Products, methods, grazing intensity, water rights, and any agricultural plans in place such as NRCS soil plans must be described and the location of any prime or unique soils or soils of statewide interest
Ecological features: Flora, fauna, extent and nature of natural communities, threatened or endangered or sensitive species, identify critical or significant habitat or migration corridors, regional significance of biotic resources, attach data from qualified sources indicating significance of features (such as Division of Wildlife maps or biologist report)

Scenic features (if applicable): Nature of scenic qualities, from where does general public see the scenic features, identify whether the property is visible from a public road, scenic byway, public lands, water ways

Recreational features (if applicable): Nature of recreation, any existing or proposed public access

Local Governmental Policies: The easement as furtherance of current and adopted local government land use policies; copies of master plans or other existing government policies must be attached

Archaeological or Historical features (if applicable): Document significance of historical structures or uses; document archaeological features

Photographs
- Aerial photos of the entire property
- Onsite photos, documenting all important natural and man-made features as well as conservation attributes, from easy-to-find photo points recorded on a map

References
- List of sources, books, maps, names of persons interviewed and other technical or scientific materials used to complete Baseline Study

The Land Trust strongly advises that landowners who decide to prepare their own baseline documentation have a draft of such documentation reviewed by a party familiar with the preparation of such instruments prior to submitting the document to LT for review and approval. Please contact LT for a list of qualified baseline preparers.
## Easement Monitoring

**2015 Columbia Land Conservancy**  
**Annual Ground Site Visit Report**

<table>
<thead>
<tr>
<th>Easement Name:</th>
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<tbody>
<tr>
<td>Owner(s):</td>
<td></td>
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<tr>
<td>Other Contact (if different from Owner):</td>
<td></td>
</tr>
<tr>
<td>Lead Monitor:</td>
<td>Additional Monitor:</td>
</tr>
<tr>
<td>Date of Visit:</td>
<td>Time of Arrival:</td>
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<tr>
<td>Weather Conditions:</td>
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</tbody>
</table>

**Did anyone meet or accompany you on the inspection?**  
Yes [ ] No [ ][ ]

**If yes, specify who:**

### Pre-Site Visit:

**What method(s) were used to contact the owner(s):**

- [ ] Phone
- [ ] E-mail
- [ ] Mail
- [ ] Other

Since last monitored, does CLC have knowledge of:

- [ ] Yes
- [ ] No

- [ ] the property or part of the property being transferred, leased or sold
- [ ] the property or part of the property being subdivided or boundary lines adjusted
- [ ] construction of any structures, ponds, trails and/or any improvements
- [ ] active logging
- [ ] change in caretaker/manager for the property
- [ ] any reserved rights being activated
- [ ] any concerns of the landowner to be addressed at this site visit

If yes provide additional comments or notes:

### Site Visit:

- **Are there any man-made alterations or management activities, occurring or planned?**
  
  If Yes check all that apply and describe below:

  - [ ] Ind./commercial activity
  - [ ] Home Occupation
  - [ ] Residential structures
  - [ ] Agricultural structures
  - [ ] Depositing/Dumping
  - [ ] Wetland or Stream alteration
  - [ ] Other

  - [ ] Tree/shrub removal or timbering
  - [ ] Road/driveway construction
  - [ ] Recreational/hiabitat structures
  - [ ] Fences
  - [ ] Excavation (soil, rock...)
  - [ ] Pond construction

- **Add/Update measurements of new or improved structures or areas with size limitations, if needed:**
- Are there any natural alterations or occurrences
  If yes, check all that apply and describe location and extent below:
  - ☐ Erosion  - ☐ Flooding
  - ☐ Fire  - ☐ Storm damage
  - ☐ Invasive species  - ☐ Other

- Describe current uses of the property (i.e. forestry, agriculture, restoration, wildlife habitat improvement)

- Describe general impression of inspected area, including observations of current conditions. Include method of observation (by car or by foot; attach map indicating route taken)

- If Photographs/GPS Points taken describe below: (attach necessary maps and associated photograph descriptions and GPS coordinates)

Post Site Visit:
- Is a follow-up visit required?  Yes ☐  No ☐
  If Yes specify by whom, when, why etc.:

- Are there any land management issues that need to be addressed: Yes ☐  No ☐
  If yes describe below:

Next Monitoring Visit:
- If there are specific areas or landowner concerns to be reviewed or viewed in the field during the next monitoring visit describe below (i.e.: projects to be completed in upcoming year, problem areas identified, etc)

Report Completed by:

Name - title

Date

Report Reviewed by:

Heidi Bock- CE Stewardship Manager

Date

*Disclaimer: The information contained in this report is based upon the best information available to the Columbia Land Conservancy at the time it was collected. It is not possible to monitor the entire surface area of the easement property during a monitoring visit; therefore this monitoring report shall not serve as a certification that the landowner is in compliance with or in violation of the terms of the applicable conservation easement*