



Section 6

Administering Your Stewardship Program & Cultivating Landowner Relationships for the Long Term

To reduce the likelihood of violations, it is important to be in regular contact with landowners via monitoring visits, telephone, and mail. Such regular contact will remind landowners of the restrictions on their property, and more quickly identify transfers of restricted properties. These contacts also help to foster the long-term relationship between the organization or public agency that holds the conservation restriction and the landowner, who is ultimately responsible for the day to day stewardship of the land.

This section of the Manual addresses a variety of topics that relate to administration of a conservation restriction stewardship program, and long-term outreach and communication with owners of restricted properties. These include exercise of reserved rights that require approval, handling suspected violations and requests for amendments, and securing funding for the stewardship and defense of conservation restrictions.

A. Stewardship Options: Staff, Volunteers, or Consultants?

As organizations and public agencies develop more formalized stewardship programs, they will need to consider the best method for addressing conservation restriction stewardship needs. The three principal options are dedicated staff, volunteers, or consultants. The best choice will depend on the number of conservation restrictions held by the organization or agency, the availability of funds, and the level of expertise of volunteers or staff. In some cases a combination of options will be best. Some issues that should be taken into consideration in making the decision are:

- How will stewards be trained? Who will ensure that the work that is done is of sufficient quality and consistency?

Who will recruit, screen, and train volunteers, and review the work that is done?

- Does an existing volunteer or staff member have the needed technical skills to do this work (or will they learn them) or would it be more efficient and cost-effective to hire someone to do this work?
- What is the best way to ensure consistency and continuity – both in relationships with landowners and in the quality of the work? For example, the amount of time needed for monitoring is likely less if the same individual is doing this work every year and does not have to become familiar with the property boundaries and issues each year.
- Might dividing the work be an option? For example, a consultant could be hired for the time-intensive work needed to produce the Baseline Documentation Reports, with a board member or volunteer responsible for annual monitoring. Or, a volunteer might do some of the legwork to gather information, handle correspondence with landowners, or input information into a database so as to reduce the amount of consulting assistance that is needed.
- What authority will those monitoring in the field have to communicate with landowners and resolve violations? Are they knowledgeable enough to answer landowner questions about land management and land protection options? Are there others to whom they can refer the landowner for answers or information? Volunteer board members and staff members may have an advantage over consultants in this situation.

Many land trusts and conservation commissions rely solely on volunteers to accomplish their work. Many larger organizations and agencies have trained staff that are responsible for conservation restriction stewardship. The best solution needs to be individually determined by each organization and agency as they consider which approach — or combination of approaches — offers the best “fit” given budgetary, personnel and time considerations.

B. New Landowner Contacts

Landowners often don't inform holders when land subject to a conservation restriction changes hands, even though this is required by the terms of most conservation restrictions. Typically, changes of ownership are discovered when annual monitoring visit notice letters are returned. New landowners are usually made aware that there is a conservation restriction on their property as a result of title research prior to purchase — but they may not fully understand what this means — and may inadvertently violate the terms of the restriction as a result. Some organizations routinely remind landowners in correspondence to the holder know if they have any plans for the sale of their properties. This can occur as part of the annual notice of monitoring site visits.

When a new landowner is identified, they should be sent a letter introducing the organization or agency that holds the conservation restriction, along with a copy of the conservation restriction itself and the Baseline Documentation Report (see an example in Exhibit E). The letter should briefly summarize the key terms of the conservation restriction, refer them to the actual CR for details, and describe the annual monitoring process. It is a good idea to meet with the landowner during or in advance of the next scheduled monitoring visit to ensure that he or she fully understands the terms of the conservation restriction and understands that it will result in an ongoing relationship with the organization or agency that holds the restriction. The new landowner should be invited to contact the holder if he/she has any questions or concerns about the terms of the conservation restriction, or to inquire about whether certain activities are allowed prior to undertaking them.

C. Estoppel Certificates

An *estoppel certificate* is a document in which a holder of a conservation restriction certifies to a potential buyer or lender that the condition of a restricted property is in conformance with the terms of the conservation restriction. The landowner might request an estoppel certificate just prior to a sale of the property, or after some significant change in property conditions

Exhibit E— Sample New Landowner Letter



Date

Mr. John Smith

Address

City, State Zip

Dear Mr. Smith:

Our records indicate that you recently purchased land in XXXX[municipality]. The property is listed as tax map XX lot XX. I assume that you are aware that this land is subject to a conservation restriction (CR) held by the [town/land trust] which is responsible for monitoring and enforcing the terms of the conservation restriction.

I am enclosing a copy for your files. The CR was conveyed to the [agency/organization] on XXXX[date] and is intended to protect certain conservation interests of the land in perpetuity.

Once a year, you should expect to receive a letter notifying you of the [agency/organization]'s plans for visiting your property to monitor compliance with the terms of the CR. You are welcome to join us for this field visit, and we will work with you to determine a time that will be mutually agreeable.

In the meantime, I would like to schedule a visit with you at your convenience to review the terms of the CR and our respective roles. I will be contacting you shortly to arrange a mutually convenient time for such a meeting. In the meantime, please feel free to contact me at XXX-XXX-XXXX if you have any questions about the conservation restriction or the annual monitoring process.

We look forward to working with you.

Sincerely,

CR Stewardship Specialist



Exhibit F— Sample Estoppel Certificate



Estoppel Certificate

This is to certify that on [date], I [title], of the [name] Agency/Organization, conducted a physical inspection of land subject to a conservation restriction, described in a Conservation Restriction on [name of property; location] from [grantor] to [owner], dated, and recorded on , in Book , Page at the [County] Registry of Deeds. Accompanying me on this site inspection were and [title/owner].

I am familiar with the terms and restrictions of said conservation restriction, which is to my knowledge in full force and effect and neither amended nor released. Upon such inspection I found the premises to be in compliance with the terms and conditions of the aforementioned conservation restriction, except, [list any problems found], subject only to any breach which would not be apparent by an on-site visual inspection of the surface of the premises, and excepting:

1. any conveyances, liens, restrictions, proceedings or other facts affecting the premises which would be revealed by an examination of the record title of the premises;
2. any unrecorded conveyances affecting the premises, or any proceedings in bankruptcy or eminent domain affecting the premises;
3. any unpaid real estate taxes on the premises, due and payable;
4. any debts incurred on the premises which might ripen into liens; and
5. any breach of the conservation restriction of which the owner [name] has actual knowledge.

The original Grantor and Owner prepared and certified as accurate on [date], an inventory of the Premise's relevant features and conditions (the "Baseline Documentation Report") as of the date of the grant, on file with Owner, and incorporated herein by this reference. This certificate indicates that no material changes have occurred on the Premises since that time.

OR

Material changes that have occurred since that time are documented in a *Monitoring Report Form*, prepared and certified by owner and the current owner as an accurate representation of the condition of the Premises as of the date of the above-mentioned inspection. This estoppel certificate is based on the condition of the Premises as documented in the Baseline Documentation Report, as revised by the *Monitoring Report Form*, incorporated herein by this reference.

Agency/Organization By its: (name/title)

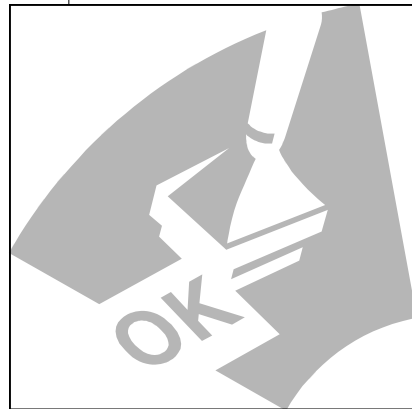


(e.g. construction within a building envelope) even if the landowner is not selling the property. Conservation restrictions often have a provision requiring the holder to issue such a certificate within a specified period of time after the request by the landowner. Estoppel certificates should only be issued after a site visit and a careful review of the Baseline Documentation Report and any monitoring reports (and consultation with counsel if necessary) because, by issuing it, the holder waives its right to claim any violations based on conditions prior to its issuance. An updated monitoring report form should be completed, signed by the preparer, and filed in the Field Notebook along with the estoppel certificate. A sample Estoppel Certificate appears as Exhibit F.

D. Approvals of Permitted Activities

Many restrictions require landowners to notify the organization or public agency that holds the conservation restriction before a certain activity or use can occur on the property. Some restrictions require an additional step of approval by the holder of the restriction for certain activities. These are called “notice” and “notice and approval” provisions. An example might be “creation of additional hayfields provided that 30 days notice is given to grantee” or “cutting of timber pursuant to a forest management plan approved by the grantee”.

When a *notice* is received, the conservation restriction should be reviewed to verify that the planned activity is allowed. A reply should be sent to the landowner acknowledging receipt of the notice, and asking for clarification of the proposed activity if necessary. A site visit may be needed to verify that the proposed activity will not be in violation of the terms of the conservation restriction. Any photographs taken during such visits should be documented as during baseline documentation and monitoring field visits. The notice, reply and any photographs should be filed in the Field Notebook and permanent file. If the activity being proposed is not allowed by the conservation restriction or will adversely affect the conservation values of the property, the landowner should be sent a certified letter noting that the proposed activity or use is not consistent with the terms of



<p>Land Trust Alliance Standards and Practices</p> <p><u>Standard 11: Conservation Easement Stewardship</u></p> <p><i>The land trust has a program of responsible stewardship for its easements</i></p> <p><u>Practice 11E: Enforcement of Easements</u></p> <p><i>The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense.</i></p> <p><u>Practice 11F: Reserved and Permitted Rights and Approvals</u></p> <p><i>The land trust has an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.</i></p>	<p>the conservation restriction. An explanatory call in advance of the letter may be helpful in terms of maintaining a good working relationship with the landowner. In the event that the activity is permitted by the conservation restriction, a response is not required, but may be desirable in the interest of maintaining strong lines of communication with the landowner, confirming the limits of the activity, letting the owner know that the organization or public agency takes its stewardship responsibilities seriously, and documenting the exercise of this right for the file.</p> <p>In the event of a <i>notice and request for approval</i> (as opposed to a simple notice), a written response is required, generally within a timeframe specified in the conservation restriction (often 30-60 days). The organization or agency that holds the conservation restriction should carefully evaluate the request and its consistency with the terms of the conservation restriction. A site visit is likely to be necessary to review the location of the proposed activity and how it may affect the land protected by the conservation restriction. The response to the landowner should specify how the decision addresses the protection of the conservation values of the property, and any conditions being placed on the action in conjunction with the approval to protect these values. If questions arise or more information or clarification is needed, this should also be communicated to the landowner. Be sure to keep any deadlines in mind, particularly if the CR specifies that if no response is received within a specified period of time, the activity is deemed approved. As above, copies of the request and response to the request should be filed in the Field Notebook and the permanent files for the conservation restriction. A follow up site visit may be needed to ensure that the work was done in accordance with the approval, or it may be possible to incorporate this review into the annual monitoring visit.</p> <p>E. Violations</p> <p>Violations range from those that are inadvertent and generally innocuous (e.g., temporary storage of brush within a restricted area) to deliberate and damaging (e.g., filling of wetlands or construction of structures not allowed by the conservation restriction). They may result from the activities of the owner of the</p>
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restricted property, from the activities of an abutter encroaching over the property line, from a third party who is unaware of the terms of the conservation restriction, such as a landscaping company or ATV user, or from an unanticipated incident such as a plane crash or release of hazardous material.

Some violations are discovered during annual monitoring visits. Other potential violations may come to the attention of the holder by the report of a neighbor or other third party. All potential violations should be investigated to determine whether an actual violation has occurred. Sometimes a second opinion may be helpful in making this determination, particularly if the wording of the conservation restriction is ambiguous. The majority of violations can be handled by a cooperative effort between the landowner and holder, while others may only be resolved through litigation. The appropriate reaction by the holder depends on the severity of the violation and the threat that it poses to the conservation values that are protected by the restriction. However, wherever feasible, a goal of enforcement should be to protect the conservation values of the property while maintaining a positive working relationship with the landowner.

All possible violations, no matter how minor, should be addressed systematically according to written procedures and policies and by the individual at an organization or agency with authority to handle potential violations. These procedures should address the process that will be followed for resolution of violations and related issues such as contact with the press. Information on development of an Enforcement Policy is contained in Appendix D. If a violation is identified but not formally resolved, such inaction may later be interpreted by a court as a waiver of the holder's right to enforce certain terms of that restriction. Other landowners may look at an organization's or agency's "pattern of conduct" in enforcement; inconsistent handling of violations may undermine that agency or organization's credibility or its case in an enforcement action.

When a potential violation is found, it should be documented as thoroughly as possible. If previous photographs of the affected area were taken at the time the Baseline Documentation Report was prepared or during a previous monitoring visit,

<p style="text-align: center;">Land Trust Alliance Standards and Practices</p> <p><u>Standard 11: Conservation Easement Stewardship</u></p> <p><i>The land trust has a program of responsible stewardship for its easements</i></p> <p><u>Practice 11I: Amendments</u></p> <p><i>The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.</i></p> <p><u>Practice 11J: Condemnation</u></p> <p><i>The land trust is aware of the potential for condemnation, understands its rights and obligations under condemnation and the IRC, and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The land trust works diligently to prevent a net loss of conservation values.</i></p>	<p>relocate these points and take photographs at the same compass bearing and scale. This creates “before” and “after” documentation of the violation. Take additional photographs to more thoroughly document the surrounding area and to provide context (e.g., photograph an area of dumping, and the apparent means of access as well). Document all photographs as described in earlier sections. Once the site documentation of the possible violation has been prepared, it may be necessary to interview neighbors as well as the landowner (or past landowners) to determine who is responsible. Briefly document each conversation in a memorandum, make note of every attempt to contact the various parties, and keep copies of all correspondence. Make note of any deadlines for compliance agreed to by the violator.</p> <p>Whenever possible, violations should be resolved without going to court. Litigation is expensive, time consuming, may take years to resolve, and has an uncertain outcome. Where it is possible to maintain the conservation values by other means such as mitigation by the responsible party or a negotiated resolution, these are preferable solutions. However litigation by the holder of the conservation restriction may be necessary to defend the conservation values of the property if other reasonable means have been exhausted and the landowner has been notified of non-compliance and refused a demand for corrective action.</p> <p>When the violation has been resolved, write a memorandum that describes the violation and how it was resolved. Put a copy in the Field Notebook and permanent file for the property.</p> <p>F. Amendments</p> <p>Amendments to conservation restrictions should be rare and not undertaken lightly. Landowners and holders should assume that the terms of the conservation restriction are perpetual. A conservation restriction may be amended only with the approval of the grantor or landowner, holder, municipality and the Secretary of Environmental Affairs. In some cases, approval of the municipality's legislative body and a 2/3 vote of the state legislature will also be needed pursuant to Article 97</p>
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of the Massachusetts Constitution. The EOEAs policy is to only approve amendments that will strengthen the original conservation restriction, and have no adverse impact on the restriction's purposes or qualification under applicable laws (including section 170 (h) of the Internal Revenue Code, Article 97 of the Massachusetts Constitution, or sections 31-33 of Chapter 184 of the General Laws of Massachusetts).

Experience has shown that it is important for organizations and agencies that hold conservation restrictions to have clear written policies specifying under what circumstances an amendment might be considered and what the process is for processing requests for amendments. The Massachusetts Easement Defense Subcommittee is in the process of drafting a sample amendment policy for Massachusetts conservation restriction holders. Other examples are currently available through the Land Trust Alliance's website. If an amendment is to be granted, the organization or agency should prepare a letter of approval, including a detailed explanation of how the requested amendment meets the criteria above. Early consultation with the EOEAs Division of Conservation Services is advisable when any amendment is being considered. Approved amendments should be recorded at the appropriate registry, and a copy put in the permanent file for the property and in the Field Notebook for the conservation restriction.

G. Staffing and Funding Conservation Restriction Stewardship

In order to carry out their stewardship obligations and to identify and resolve future violations, it is critical that every agency and organization that holds conservation restrictions ensures that it has – or is committed to providing – the funds to adequately carry out its stewardship and enforcement obligations.

Conservation Restriction Stewardship Costs: Each organization's stewardship costs differ, as they are a function of many factors including staffing, geographic dispersion of restrictions, and the nature of the restrictions. For every organization, the primary elements that comprise stewardship costs are:

Land Trust Alliance Standards and Practices

Standard 6: Financial and Asset Management

The land trust manages its finances and assets in a responsible and accountable way.

Practice 6G: Funds for Stewardship and Enforcement.

The land trust has a secure and lasting source of dedicated or operating funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements, tracks stewardship and enforcement costs, and periodically evaluates the adequacy of its funds. In the event that full funding for these costs is not secure, the board has adopted a policy committing the organization to raising the necessary funds.

<p style="text-align: center;">Land Trust Alliance Standards and Practices</p> <p><u>Standard 11: Conservation Easement Stewardship</u></p> <p><i>The land trust has a program of responsible stewardship for its easements</i></p> <p><u>Practice 11A: Funding Easement Stewardship</u></p> <p><i>The land trust determines the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure these funds and has a policy committing the funds to this purpose.</i></p>	<ul style="list-style-type: none"> <input checked="" type="checkbox"/> Baseline documentation <input checked="" type="checkbox"/> Monitoring <input checked="" type="checkbox"/> Administration <input checked="" type="checkbox"/> Enforcement <p>Baseline documentation is a one-time cost per restriction, the other three are ongoing. Monitoring and administration costs can be estimated based on fairly simple assumptions. Some of the administration costs are largely fixed, such as recordkeeping, writing a landowner newsletter, or developing policies and procedures. Others vary with the number of CRs, such as landowner contacts before and after a visit, and responding to requests for approval of permitted activities, amendments, and estoppel certificates. While the cost of resolving minor violations can be provided for in the stewardship budget, the costs of resolving major violations — those requiring extended negotiations or litigation — can be very significant and are difficult to estimate.</p> <p>Where Will the Funds Come From? Every organization and agency that holds conservation restrictions should identify a source of funds for stewardship of its conservation restrictions. Many organizations and agencies have worked creatively to identify sources of stewardship funds. Some possibilities are listed below:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> The landowner who grants the CR may be asked to contribute endowment funds for stewardship of the conservation restriction. These endowment funds are generally pooled by the holder and invested, and the interest used to fund stewardship activities. <input checked="" type="checkbox"/> The holder can engage in fundraising to cover the costs of conservation restriction stewardship — either on a project by project basis or as part of an overall “stewardship endowment” campaign. <input checked="" type="checkbox"/> The holder may be able to budget for annual stewardship costs from an existing conservation fund or annual appropriation (but beware of changing fiscal circumstances!)
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- ☑ The cost of stewardship may be contributed annually, for example through condominium association dues.
- ☑ A real estate transfer fee could be considered that would generate a source of income to the holder from the sale of one or more nearby developed properties.

Determining How Much is Needed for Stewardship: There are three basic approaches to determine the amount needed for conservation restriction stewardship:

- ☑ A percentage of the value of the property
- ☑ A flat fee
- ☑ Estimated cost based on property specific factors

The **Percentage of Value** approach is based on a percentage of the property's market value. For example, the TNC Conservation Easement Working Group recommends "20% of the land interest's fair market value." The percentage of value could be based on the property's unencumbered value, the value of the restriction itself, or the restricted property value. For donated restrictions, calculating the percentage based on the restriction's donation value ties the amount of the stewardship endowment request to the value of the grantor's income tax deduction.

A drawback of this method is that it is not tied to the real cost of monitoring a given conservation restriction. For example, a very large and ecologically significant tract in the western part of the state may have a lower fair market value but much higher stewardship costs than a small and ecologically insignificant tract in the suburbs.

The **Flat Fee** is typically based on the holder's average cost of stewardship per restriction per year, converted into an endowment request using an assumed rate of return. For example, if annual stewardship costs were \$50,000 and the land trust had 70 CRs in their portfolio, then the average cost of stewardship would be \$715.00 per CR. To generate



	<p>this amount each year at a 5% rate of return, the required stewardship endowment per CR would be \$14,300.</p> <p>To be fair, this calculation should be made using only the recurring and variable costs of stewardship, as fixed costs don't increase directly with the number of CRs held. Unless all staff involved with stewardship keep careful track of their time, it can be difficult to separate out one-time costs (e.g. baseline documentation) and fixed costs (e.g. landowner newsletters) from total stewardship costs.</p> <p>Some organizations apply multipliers or add-on costs to the flat fee where circumstances warrant. For example, the base amount might be increased for large properties, properties with unusual reserved rights, or those with several current or future building sites. For example, for many years the Vermont Land Trust used a matrix that was a function of both the size of the property, and the number of houses, house sites and subdivision rights that might be exercised in the future. VLT has since begun to base endowment requests on estimated recurring annual costs, and "add-on" fees for reserved rights, unusual features (e.g. presence of endangered species), multiple non-contiguous parcels, and large acreage. (see "Vermont Land Trust Reevaluates The Costs of Easement Stewardship and How to Cover Them" in the Fall 2002 issue of the Land Trust Alliance's <u>Exchange</u> newsletter).</p> <p>The Property Specific Factors endowment approach attempts to estimate stewardship costs based on property specific factors. The two principal advantages of this approach are 1) each request is tied to estimated expenses, so over time this technique should end up fully funding variable monitoring costs, and 2), the worksheet itself is a useful tool for making the request, as the potential donor can plainly see the basis for the amount of the endowment request.</p> <p>Most organizations that use this approach rely on a spreadsheet to help calculate property specific stewardship costs. Several examples can be found on the Land Trust Alliance's website.</p>
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Projected costs are principally a function of estimated hours. Estimating hours requires experience with stewardship and some knowledge of the property and the terms of the restriction. Factors determining cost will include: the size of the parcel, the ease of access, the terrain (hills, wetlands), the boundaries (complexity, number of abutters) the conservation values to be monitored, and the complexity of the conservation restriction itself (particularly the prohibitions and the reserved rights). Additional time will be required for preparing for the site visit (reviewing the baseline and previous monitoring visit reports, contacting the landowner), compiling the monitoring visit report, and resolving minor violations. Factor in additional administrative hours if there are multiple landowners, or one or more co-holders of the restriction.

Baseline documentation — a one-time cost — should be estimated separately. An organization or agency might choose to place the budgeted stewardship amount in an endowment, but to use the funds for preparation of the baseline report to pay a consultant to perform this work.

No organization or agency should accept the stewardship obligations of a conservation restriction without having a plan in place to ensure that the short term, long term and unexpected stewardship obligations of the conservation restriction will be met. Where the conservation values of a property merit acquisition of a conservation restriction, every effort should be made to secure resources for long-term protection of this land.