



## Practical Pointers Series

### **RECORDKEEPING—PURGING CONSERVATION EASEMENT FILES**

The passage of the Sarbanes-Oxley Act, numerous IRS conservation easement audits and Congressional scrutiny of land trust practices in the valuation, monitoring and enforcement of conservation easements have all served to permanently elevate for land trusts the issue of what records to keep and what records to destroy. Although choosing which records a land trust should retain may seem simple, sometimes the decisions about what records to keep and what records should be destroyed can be complicated and difficult. The temptation may be to keep everything “just to be safe,” but keeping too much information may risk unnecessary litigation and expense. **You should consult an experienced attorney to help you understand the laws of your state regarding evidence and matters likely to arise in court regarding records retention.** The following are points to consider when deciding which documents to keep and which ones to discard.

1. **Any documents retained should be clear and unambiguous.** Unambiguous records are comprehensible, concise and complete without interpretation, implied meaning or special knowledge. An unambiguous document will not be open to different interpretations by different reasonable people. For example, a “small house” can mean different sizes to different reasonable people, depending on life experience and income.
2. **Keep records that are essential to the land trust’s operation and defense of each easement transaction.** Land trusts should strive to ensure that the intent, purpose and context of the easement transaction are clearly reflected in the conservation easement itself and in the baseline documentation report. In determining what documents your land trust should retain in its easement files, consider materials that address these points:
  - Original easement grantor’s intent
  - Funder’s intent or requirements (for purchased easements)
  - Land trust’s intent
  - Original grantor’s mental capacity to comprehend what they signed
  - Original grantor’s representation by independent legal counsel and advice from a financial expert
  - Evidence that the land trust dealt with the original grantor in an ethical, honest and open manner (may be necessary to address potential claims of fraud or misrepresentation)
  - Land trust’s legal obligation to uphold the conservation easement in perpetuity, as required by IRC Section 170(h)
  - The minimum documents listed as essential to the transaction in [Practice 9G2](#) of *Land Trust Standards and Practices*
3. **Destroy drafts and duplicates.** This generally includes drafts of the conservation easement, the baseline documentation report, maps, preliminary appraisals and any other draft document. A draft document that shows the course of negotiation is rarely helpful, and sometimes damaging,

because it introduces doubt and ambiguity. An exception to this general rule, however, is for those drafts or duplicates that provide substantial unambiguous evidence of intent; these may be important to keep (see 2, above). Retain all original agreements that are final and fully executed.

4. **Destroy transmittal letters, scraps of paper with notes, jottings, partial thoughts, cryptic phone or e-mail messages and similar records that are not clear and unambiguous.** If the notes are not helpful, clear and concise, destroy them. People deciding a court case or IRS agents auditing your land trust are strangers to the transaction and will scrutinize the records from their own perspectives, not yours.
5. **Be knowledgeable about the retention period for original records and documents.** Retention periods for documents differ based on the type of document and applicable local, state and federal government laws and regulations. A land trust should consult with an experienced attorney to develop a records policy regarding the destruction and disposal of different types of documents. While some records and documents must be retained indefinitely, others that are not critical should be destroyed.
6. **Refrain from destroying documents in connection with pending or suspected litigation.** The Sarbanes-Oxley Act prohibits land trusts from destroying, altering, covering up or falsifying any document once the land trust has notice of, or suspects, that a particular case will be litigated.

#### **Disclaimer**

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