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Putting Together the Deal for a Conservation Restriction

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***You Can't Touch This:
Conservation Restrictions in Estate Planning and as
Mitigation Development Projects and Enforcement Proceedings***

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Boston Bar Association**

May 7, 2014

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¹ The author acknowledges and appreciates the research assistance of Jane Ceraso, of counsel to the Law Office of Susan J. Crane.

I. Obligations of the Conservation Restriction Holder and Evaluating the Land's Suitability for a CR

Before considering any acquisition of a Conservation Restriction (“CR”), the property must be carefully evaluated by the potential CR holder (*i.e.*, land trust, town, or state or federal agency) for its suitability. The holder of a CR will assume stewardship obligations associated with the CR forever.

Prior to or contemporaneous with the acceptance of a CR, the holder must prepare a detailed baseline report of the property’s conditions. Annual monitoring of the CR is required to assure compliance with the CR and to compare conditions with those documented in the baseline. If violations of the CR are identified, the CR holder must “defend” the CR by enforcing those conditions.²

A. Public Benefit Required

All CRs must have a public benefit. CRs require approval of both the local municipality and the Department of Conservation Services (“DCS”) within the Massachusetts Executive Office of Energy and Environmental Affairs (“EOEEA”). Massachusetts is unique in the country in requiring state involvement in the approval of conservation easements.³ State review and approval add a level of consistency and high standards protective of the environment.

Under M.G.L. c. 184, § 31, a CR is defined as:

[A] right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas **predominantly in their natural, scenic or open condition or in agricultural, farming or forest use**

(Emphasis added.)

Although public access is considered a public benefit, it is not required in all CRs. Under M.G.L. c. 21, § 17C, known as the “recreational use” statute, landowners who open their land to the public free of charge for “recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes” are not liable for personal injuries or property damages absent “wilful, wanton, or reckless conduct” by the landowner.

² Although *de minimis* violations are often overlooked or negotiated with the landowner or other violator, some CR violations are so serious that a land trust’s legal obligation to enforce the CR terms requires commencing litigation. *See, e.g., Weston Forest and Trail Assoc., Inc. v. Fishman*, 66 Mass. App. Ct. 654 (2006), a case brought by a local land trust in which the Appeals Court upheld a Land Court order requiring a landowner to tear down a barn that was partially built on land subject to a CR that prohibited structures.

³ Conservation easements are called Conservation Restrictions in Massachusetts.

B. Qualities of a Good CR

A good CR must protect the conservation values of the land. The CR must be crafted to reflect the unique circumstances and attributes of the land. These may include:

- Habitat and species protection, including biodiversity
- Climate change: carbon sequestration and preserving north-south wildlife corridors, which is of increasing importance as species move north
- Preserving intact blocks of open space
- Preserving scenic views and community character
- Historic preservation
- Protection of working landscapes: local agriculture/forestry
- Protection of water resources
- Furtherance of the objectives of towns' open space plans
- Public access: passive recreational opportunities/public trails
- Urban parks and relief from dense development, open vistas surrounding subdivisions

II. CR Structure

CRs are legal documents that must follow a prescribed structure. A copy of DCS's model CR may be downloaded at: <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/>. CRs must include the following:

1. Purposes (*see* Section I(B), above)
2. Prohibited uses
3. Permitted uses
4. Standard legal terms
5. Legal metes and bounds description and/or survey plan, map or other accurate visual depiction of the CR area (*see* M.G.L. c. 184, § 26)

A. Building Envelopes

With approval of DCS, a building envelope may be included in a CR permitting future construction in a designated and clearly identified area, so long as the CR's overall purposes would not be compromised. Although future building envelopes on a property are usually carved out of a CR, an advantage of including them within the CR is that until and unless the construction occurs, the CR's requirements, including prohibited uses, apply to the entire CR. Any building envelope should contain its own set of restrictions, such as allowing only for uses consistent with the land and its surroundings; *e.g.*, as a single family residence, barn, farm stand, etc. CRs should include limitations on the size and number of structures within building envelopes, and they may also include aesthetic requirements.

III. Costs and Funding Sources

The actual costs of acquiring a CR are far greater than the CR's purchase price. Even a donated CR may be costly to acquire. Related costs may include:

- Appraisal
- Baseline report preparation
- Due diligence:
 1. Title search
 2. Survey
 3. 21E site assessment costs⁴
 4. Legal fees
 5. Registry recording fees
- Staff time incurred by a land trust or government entity to put together the deal
- Stewardship funds for future annual monitoring of the CR and any required maintenance of the CR, such as establishing and marking trails⁵
- Legal defense fund for enforcing any future CR violations⁶

A widely-held misconception is that land trusts have funding available to acquire CRs. To the contrary, not only is that generally untrue, but land trusts typically do and *should* require a stewardship and defense fund for future monitoring and enforcement of the CR to assure the land trust's long-term financial viability. See Land Trust Alliance Standards and Practices, § 11(A), included in these materials. Many land trusts will also seek to recoup their out-of-pocket costs and staff time to put together the deal.

Costs for a CR most often come from one or more of the following sources:

- Landowner donation or bargain sale
- Municipality's Community Preservation Fund
- Other municipal funding

⁴ An oil and hazardous material (21E) site assessment is often not performed when a CR is acquired, versus when a fee interest in conservation land is purchased. Chapter 21E explicitly exempts government or non-profit land trust CR holders from strict owner/operator liability, subject to certain limitations. M.G.L. c. 21E, § 5(l). This provision does not apply to common law tort claims for personal injuries or damages associated with a release of oil or hazardous material on the CR.

⁵ Maintenance of the CR is typically, but not always, the responsibility of the landowner.

⁶ These funds are often pooled in a single defense fund account held by a land trust covering multiple CRs.

- State grants
- Federal grants
- Foundation grants
- Private fundraising

A. Landowner Donation or Bargain Sale

Landowners who donate a CR or sell it at a bargain sale price less (*i.e.*, less than its appraised value) may be eligible for state and federal tax benefits.

B. Community Preservation Funds

When a municipality acquires a CR or the underlying fee for open space, in those communities that have adopted the Community Preservation Act, M.G.L. c. 44B (“CPA”), the most common source of funding is that municipality’s Community Preservation Fund. The CPA, enacted in 2000, allows Massachusetts cities and towns to add a local real estate tax surcharge of up to 3% for the following designated purposes:

- Open space protection
- Recreation
- Historic preservation
- Affordable housing

Community Preservation Funds are then leveraged with state matching funds, the percentage of which fluctuates annually, depending upon the available amount of state funds. The state match also varies town by town due to many factors. A municipality must vote and approve adoption of the CPA by a referendum ballot. To date, 155 Massachusetts cities and towns, approaching half, have adopted the CPA. Over 19,000 acres of open space have been preserved with Community Preservation Funds, and close to \$1.2 billion has been raised for community preservation funding statewide.⁷

The CPA has a minimum 10% expenditure or set-aside requirement annually for each of the following categories of projects: open space, historic resources, and community housing. Administrative and operating expenses cannot exceed 5%. M.G.L. c. 44B § 6.

The CPA also provides, “The legislative body may appropriate monies from the Community Preservation Fund to pay a non-profit organization . . . to hold, monitor and enforce the deed restriction on the property. M.G.L. c. 44B § 12(a).

When fee to land is acquired with Community Preservation Funds for open space, the municipality must grant a CR to a separate qualified organization (*i.e.*, land trust or state agency) to ensure its use for that purpose in perpetuity.

⁷ See <http://www.communitypreservation.org/>. The Community Preservation Coalition is a valuable resource for CPA questions and information.

C. Other Municipal Funds

Although municipalities may acquire interests in land, including CRs, with other municipal funds approved by town meeting or the city council, that expenditure often will require a Proposition 2 ½ override.⁸ Suffice it to say that in non-CPA towns and cities, municipal funding for conservation projects is far more difficult. As a result, many good potential conservation projects are not considered due to lack of funding.

D. EOEEA Grants

EOEEA provides reimbursement grants to municipalities, land trusts, and state agencies for conservation land acquisitions in fee or of CRs. The grants are typically awarded on an annual cycle and are competitive. It is important that grant applications be prepared well in advance of the transaction, that funding be allocated in full for the transaction since these are *reimbursement* grants, and that the transaction be completed under the grant's terms and deadlines.

Three state conservation grant programs are described below. More information may be found at the following links:

LAND: <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/grant-programs/massachusetts-local-acquisitions-for-natural.html>

Conservation Partnership: <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/grant-programs/conservation-partnership-grant.html>

Landscape Partnership: <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/grant-programs/landscape-partnership-program.html>

The chart on the following two pages is based on currently available information for the state's Fiscal Year 2015.

⁸ See <http://www.mass.gov/dor/docs/dls/publ/misc/levylimits.pdf>.

Grant	Massachusetts Local Acquisitions for Natural Diversity (LAND) Program	Conservation Partnership	Landscape Partnership
Purpose	Reimbursement for the acquisition costs of land or a CR and for certain additional associated acquisition costs: <ul style="list-style-type: none"> • Title search • Recording fees • Survey 	Reimbursement for the costs of acquiring interests in lands suitable for conservation or recreation purposes <p>Projects must fall into one of two categories:</p> <ul style="list-style-type: none"> • Land or CR purchased by a private non-profit organization • Due diligence for land or a CR gift donated to a private non-profit organization 	Reimbursement for the preservation of large, un-fragmented, high-value conservation landscapes, including working forests and farms <p>Expand state-municipal-private partnerships</p> <p>Increase leveraging of state dollars</p> <p>Enhance stewardship of conservation land</p> <p>Provide public recreation opportunities</p>
Reimbursement Rate and Maximum Award	Maximum of 52% to 70% of total costs Maximum amount of \$400,000	Maximum award for a single acquisition project is \$85,000 Maximum award for due diligence for gifts is \$10,000 (subject to a maximum of 10% of available funding for due diligence costs) Maximum of 50% of total eligible project costs	Maximum of 50% of total costs Maximum amount of \$1.5 million

Qualifications	<p>Lands acquired may include forests; fields; wetlands; wildlife habitat; unique natural, historic, or cultural resources; and farmland</p> <p>Access by the general public is required</p> <p>Appropriate passive outdoor recreational uses such as hiking, fishing, hunting, cross-country skiing, and bird watching are encouraged</p>	<p>The non-profit must convey a CR either to the municipality in which the project is located (to be managed by its conservation or recreation commission) or a state agency, or to both</p> <p>Appropriate public access is required</p> <p>For projects involving a CR donation to or purchase by the non-profit organization, an undivided one-half joint interest in the CR must be conveyed to the municipality in which the project is located or to a state agency</p>	<p>A minimum of 500 acres of land must be permanently protected</p>
Applicant	City or town	Private non-profit organizations	Municipalities, non-profit organizations, and EOEEA agencies acting cooperatively

E. Federal Grants

Federal grants are more commonly awarded in less developed areas of Massachusetts where land values are lower and larger unprotected parcels exist.

For agricultural easements, the Agricultural Conservation Easement Program is administered under the USDA’s Natural Resources Conservation Service pursuant to the 2014 Farm Bill: <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farbill/?cid=stelprdb1242695>

The U.S. Forestry Service program supports states’ efforts to protect environmentally sensitive forest lands, encouraging the acquisition of conservation easements requiring sustainable forestry practices on privately owned forest lands: <http://www.fs.fed.us/spf/coop/programs/loa/flp.shtml>

F. Private Foundations

Local, regional, and national foundations may provide assistance with CR acquisition and stewardship costs. Research should be conducted into the availability of grants in the community in which the potential CR is located.

G. Private Fundraising

For many transactions, land trusts or local advocacy groups will engage in private fundraising for the CR acquisition price, land trust staff time, appraisals, baseline preparation, due diligence (title searches, oil and hazardous material site assessments, surveys), legal fees, recording fees, stewardship, and defense costs.

IV. Legal Incentives for a CR

A. Community Preservation Act

If CPA funds are used to contribute to a municipality's acquisition of a fee interest in open space, whether for conservation or recreation, the CPA requires that a CR be placed on the land to assure its permanent protection. A CR must be granted to a separate qualified organization (*i.e.*, land trust or state agency) to ensure its use for that conservation or recreation purpose in perpetuity. The CR must be a stand-alone document and cannot be incorporated into a deed for the acquisition of the parcel.

Section 12(a) of the CPA, M.G.L. c. 44B, provides:

A real property interest that is acquired with monies from the Community Preservation Fund shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of sections 31 to 33, inclusive, of chapter 184 limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by the city or town or the commonwealth. The permanent restriction may also run to the benefit of a nonprofit organization, charitable corporation or foundation selected by the city or town with the right to enforce the restriction

The CPA itself provides no enforcement mechanism for the CR requirement. As a result, some towns that have acquired open space with Community Preservation Funds have failed to place CRs on these conservation lands, making them potentially vulnerable to development.

For any CPA community that has been awarded LAND grant funds, however, "Successful grant applicants that have purchased real property interests for open space or recreational purposes using money from the Community Preservation Fund must have all conservation restrictions required by Section 12 of Chapter 44B approved by the Secretary of EEA and *recorded prior to reimbursement* payment from EEA." (*Emphasis added.*) See Section 2(a)(4) of EOEEA's LAND Grant Summary: <http://www.mass.gov/eea/docs/eea/dcs/fy15-gr/land-rfr-fy15.pdf>.

This relatively recent LAND grant requirement has been an incentive for at least some communities to place CRs on CPA-funded open space purchases promptly upon applying for a LAND grant.

B. “Chapter Lands”: Land Enrolled in the Massachusetts General Laws Chapter 61, 61A, and 61B Programs

M.G.L. chapters 61, 61A, and 61B offer a local real estate tax break to owners of farms, open space, passive recreational areas, and managed forests. So-called Chapter Lands are assessed on their current use, not for the land’s development value.

These programs not only provide tax relief for landowners who may not be interested in or ready for a permanent Conservation Restriction, but they also provide at least temporary protection for undeveloped lands.

As described in the chart below, if a property is untimely withdrawn from the Chapter Lands program or if it is converted to a non-Chapter use while in or within one year of withdrawing from the Chapter Lands program, a municipality may transfer its right of first refusal to purchase the land to a state conservation agency or land trust. **Then, at least 70% of the land must be permanently protected with a CR.**

Chapter	61 Forested Lands	61A Agricultural Lands	61B Open Space and Recreational Lands
Purpose	Long-term, active forest management	Land in active agricultural or horticultural use	Land in open space and/or recreational use
Qualifications	<ul style="list-style-type: none"> • Ten or more contiguous acres • State-approved forest management plan • Periodic forest management, as recommended by the forest management plan 	<ul style="list-style-type: none"> • At least five acres must have been in agricultural or horticultural use for at least two years before applying • Annual agricultural product sales must be at least \$500 for the first five acres and \$5 for every additional productive agricultural acre or \$0.50 for every additional acre of woodland or wetland 	<ul style="list-style-type: none"> • At least five acres must be retained in a substantially natural condition, in a landscaped or pasture condition, or in a managed forest allowing the preservation of wildlife and other natural resources -or- • A minimum of five acres must be in a recreational use that does not materially interfere with the land’s environmental benefits and is available to the general public or to members of a non-profit organization
Applications and Recorded Lien	<p>After enrollment in c. 61, 61A, or 61B following an application to the municipality’s board of assessors and the submission of a form to the Commonwealth (<i>see, e.g., http://www.mass.gov/dor/docs/dls/mflb/forms/cl161a-ack.pdf</i>), a lien will be recorded at the Registry of Deeds to ensure that the land remains undeveloped. The lien remains on the property after it is sold or transferred to a new owner, unless enrollment is withdrawn, in which case the lien will be released. Annual renewal applications are required to maintain tax relief.</p>		

Right of First Refusal	<p>All Chapter Land programs give the municipality in which the land is located a right of first refusal (ROFR) that is triggered if the land is converted to a non-Chapter use while enrolled in the program or within one year of withdrawal from the program. The municipality has the option to match a bona fide offer by purchasing the property at the offer price. If the owner is not selling the property but is converting it to a non-Chapter use, the municipality has the option to purchase the property at full market value, as determined by an independent appraiser. The municipality may exercise its ROFR or transfer that right to a state conservation agency or land trust.</p>
Transfer of ROFR and CR Requirement	<p>If a municipality elects to transfer its ROFR to a state conservation agency or land trust, at least 70% of the land must be permanently protected with a CR.</p>
Penalties for Withdrawal or Conversion of Chapter Lands	<p>Chapter Lands that are withdrawn from the program or converted to a non-Chapter use while enrolled in the program or within a period of time afterwards are subject to penalties in the form of either rollback taxes or conveyance taxes. For details, <i>see</i> Mass. Gen. Laws c. 61, 61A, and 61B.</p>
Recommended Resources by Mass. DCR and UMass Ext.	<p>http://www.mass.gov/eea/agencies/dcr/conservation/forestry-and-fire-control/ma-current-use-forest-tax-program.html http://masswoods.net/sites/masswoods.net/files/Ch-61-Web.pdf http://masswoods.net/landowner-programs/chapter-61-current-use-tax-programs)</p>

C. Development Mitigation/Enforcement Proceedings

The preservation of open space as a result of development mitigation requirements or state agency enforcement proceedings is discussed elsewhere in these program materials.

V. Is a CR Really Untouchable?

The answer is *almost* always yes, but unfortunately not always. Article 97 of the Massachusetts Constitution and an EEA policy add some protection to CRs held by Massachusetts municipalities or the Commonwealth. Eminent domain powers are vast and can trump a CR.

A. Article 97 of the Massachusetts Constitution

Article 97, approved by Massachusetts voters in 1972, provides that lands and easements taken or acquired for natural resources serve a public purpose and shall not be used for any other purpose absent at least a two-thirds approval vote of the Massachusetts legislature. It provides:

Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: - The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Mass. Const. amend. XCVII.

The significance of Article 97 is explained in R. H. Quinn, Opinion of the Attorney General Regarding the Disposition of Public Lands Under the “Clean Environment” Amendment to the Constitution of Massachusetts, 3 B.C. Env’tl. Aff. L. Rev. 495 (1974).

<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1958&context=ealr>

The State’s “no net loss” policy for implementation of Article 97, EOEA Article 97 Land Disposition Policy (2/19/98), may be found here:

<http://www.env.state.ma.us/mepa/article97policy.aspx>.

The no net loss policy applies not only to state lands, but also to those held by a city or town for “natural resources purposes.” The conversion of municipal conservation lands requires a two-thirds vote of the municipality’s town meeting or City Council in addition to a two-thirds vote of the state legislature. Notwithstanding abundant precedent for the conversion of Article 97 lands, the hurdle of the required votes for a conversion generally serves as some impediment.

It is important that any deed accepted by a municipality for conservation purposes explicitly state that the land is subject to Article 97. In a 2005 SJC case in which a town voted at its annual meeting to accept a deed to land *for conservation* but neglected to place a CR on the property or to reference Article 97 in the deed, it was held that the parcel could be conveyed for a use other than conservation without compliance with Article 97. Hanson v. Lindsay, 444 Mass. 502 (2005).

B. Eminent Domain

Case law on the interplay of eminent domain and conservation easements is developing across the country and is in a state of flux. Although a CR may be some deterrent to a taking, that is

generally not the case when a large project is involved, such as a pipeline or a highway that will typically take the most direct route from point A to point B. The CR itself may be the subject of a taking. When the underlying fee is condemned by an eminent domain action, the CR on that land will be extinguished. For a comprehensive article on this topic, *see* T. Lindstrom, Hicks v. Dowd: The End of Perpetuity?, 8 Wyo. L. Rev. 25 (2008).

Massachusetts CRs contemplate the possibility of an eminent domain taking and routinely include language for the disposition of compensation proceeds between the CR's grantor and grantee in the event of a taking.

VI. Practice Tips

1. Evaluate the CR in the context of its conservation purposes at the outset: Is this land worth protecting?
2. Be realistic about landowner expectations of value, timing, and funding. Do early and sufficient research on funding opportunities.
3. Be realistic about landowner expectations about CR terms: permitted uses, prohibited uses, any building envelopes, future CR management, and public access, especially if the latter is required, for example, under an EOEEA grant.
4. Advise the landowner to seek professional guidance from experienced attorneys, land trust staff, or conservation consultants.
5. Apprise the landowner early in the process of the array of ancillary costs that may be involved in the transaction, such as appraisals, baseline documentation preparation, due diligence (title search, 21E site assessment, survey), land trust staff time, legal review, Registry recording, and stewardship funding for monitoring and defense costs.
6. Allow enough time to complete the transaction within deadlines, especially when municipal, state, or foundation grants or other fundraising is necessary. Draft a timeline that will include any grant funding deadlines, municipal hearing and town meeting dates, CPA application deadlines, and time for DCS review and approval of the CR.
7. For donations or bargain sales, advise landowners to seek professional legal and taxation advice.
8. Take advantage of DCS (*i.e.*, Irene DelBono and her staff) as a resource if stuck on CR terms or legal or procedural issues.
9. Sometimes a CR can take years, if not decades. Persevere if the land is worth protecting!