



**THE COMPACT**  
OF CAPE COD CONSERVATION TRUSTS, INC.

## **Overlay Protections for Land Trust-Owned Properties**

### **FREQUENTLY ASKED QUESTIONS**

**1. Are properties owned by land trusts protected?**

Not necessarily.

*Pre-1986:* Lands often (but not always) were donated to land trusts with a deed restriction to the effect that the “Land shall be used for conservation and open space purposes only.” This created a charitable trust obligation on the land trust not to use the land for anything else.

*Post-1986:* The IRS issued a ruling that such deed restrictions would devalue the charitable deduction because the gift was not made free and clear. As attorneys of the Massachusetts Land Trust Coalition have recently stated: “One should not assume that land conveyed to a charitable or public entity [i.e., land trust] with the unwritten intention that it will be preserved in its natural or open state must be so preserved by the grantee. As long as the land is used for a charitable or public purpose, which may include sale for development with the proceeds used for other charitable or public purposes, there may be no legal constraint on conversion or disposition.”<sup>1</sup>

**2. Does this mean that land trusts can sell off their land?**

All land trusts have the power to sell land. Their enabling document (either the declaration of trust or articles of incorporation) gives it this power. But without a deed restriction or other overlay protection limiting *how* the land can be used, land trusts could sell off their land to anyone—to a developer who intends to build houses, to the adjoining homeowner who wants to cut down the trees for a view to the pond, to the Town which wants to put in a ballfield, fire station, or whatever on the land. Obviously, it would be a

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<sup>1</sup> [www.massland.org](http://www.massland.org), “Legal Advisory: Public or Charitable Trusts and Protection against Disposition of Conservation Lands” <http://www.massland.org/pages/tools/ILegaladvisoryexist1.html>

potential political and public relations nightmare for the land trust to do this. But they could, so long as the proceeds from that sale were plowed back into the land trust's work, such as used to buy another parcel of land.

**3. Doesn't the land trust's ability to sell the land violate the donor's expectations, and wouldn't it scare off potential future donors?**

Most people who donate land to a conservation organization do so with the unwritten, and even unspoken, expectation that their land will now be preserved forever. The fact that the deed does not explicitly state this does not mean that the land trust does not intend to preserve the land. We would hope that donors trust the land trust to uphold its intention to preserve the land. But right now, you cannot look a donor in the eye and truthfully say, "This land trust will always hold onto this parcel."

**4. How can these lands be protected?**

Blanket Conservation Restrictions (CR) and Charitable Trusts are two protective overlay options that will ensure permanent conservation of land trust properties.

**5. How does a "blanket" Conservation Restriction work?**

The concept of a land trust holding a CR on another land trust's property is nothing new. The only thing that is new is the idea of a "blanket" CR to cover multiple parcels simultaneously. The blanket CR would need to go through the same approval process as for a standard CR. In Barnstable County, Massachusetts (Cape Cod) the Register of Deeds has allowed a blanket CR (i.e., one document listing dozens of properties) to be recorded as one document.

**6. Will the land under a blanket CR be preserved forever?**

A perpetual CR provides the best back-up guarantee that the intention to preserve is upheld. Not only does the CR holder have an obligation to defend the land against disposal or conversion to other uses by the land trust, but it also would have an obligation to stand with the land trust and defend the property against an eminent domain taking by the town or state or other public authority.

**7. Can the blanket CR be broken?**

Yes. Eminent domain trumps all. While state laws differ, in Massachusetts, for example, most analysts believe that the state Attorney General and the state Legislature would have to approve an eminent domain taking of a land under CR because the state Secretary of Environmental Affairs is a signatory to the CR. That protection by the AG and Legislature probably is not available to land trust lands not protected by a CR.

**8. Would a town be more apt to take CR-protected land by eminent domain?**

Not on the basis of value. Attorneys of the Massachusetts Land Trust Coalition have concluded that a public authority taking land by eminent domain must appraise the property *as if unencumbered by the CR* and apportion the fair market value among the respective parties.<sup>2</sup> The model “blanket CR” drafted by The Compact of Cape Cod Conservation Trusts, Inc. ensures that the land trust, not the CR holder, would get all of the proceeds.

**9. Are there other threats to losing title to or converting the use of these lands?**

If a person sued the land trust and won damages beyond the land trust’s insurance coverage, that person could win the right to take title to all or some of the land trust’s assets, including its lands. This court action could convey title to the injured party, but could not break the CR. In other words, the new owner would have to keep the land in conservation use, monitored by the CR holder.

**10. Can the blanket CR be released?**

As with any CR, it is a contract between parties and cannot be released unilaterally by the holder. Depending upon the state, the CR also may not be released even by mutual agreement between with the landowner and the holder of the CR. In Massachusetts, e.g., the town and state that approved the CR also would need to approve the release.

**11. Would placing a CR on land trust properties create any IRS problems for the original land donors?**

Some have raised concerns that if the IRS knew that the land trust was guaranteeing the donor that a CR subsequently would be placed on the land, the IRS might consider it a restricted gift and devalue the deduction. The original donation of the land and the subsequent granting of the CR are and should be separate and unrelated transactions. So long as the CR granting by the land trust is an occasional practice, rather than a standard operating policy or promise of the land trust, this should not be an issue.

**12. Will the blanket CR mean the land trust has to get permission every time it wants to trim a tree, install a fence or cut a trail?**

The model “blanket CR” drafted by The Compact of Cape Cod Conservation Trusts, Inc. simply gives the CR holder legal standing to prevent the land trust (or any subsequent owner, such as another land trust) from using the land for any purpose other than conservation. The intent is not for the CR holder to “micro-manage” any properties.

**13. How does a charitable trust accomplish this overlay of protection?**

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<sup>2</sup> [www.massland.org](http://www.massland.org), “Legal Advisory: Eminent Domain and Restricted Lands”  
<http://www.massland.org/pages/tools/legaladvisoryexist2.html>

The land trust actually would convey title to its lands (the “deed out”) to another land trust or other qualified organization, which in turn would re-convey the land back to the land trust by a deed containing certain restriction language (the “deed in”). There is less paperwork to this method (the deed typically is only one page, there is no town or state involvement). Attorneys of the Massachusetts Land Trust Coalition have stated that despite the different process, a charitable trust would work similarly to a blanket CR.

**14. What assurances under the charitable trust option does the land trust have that title will be reconveyed to it?**

The parties should enter into a memorandum of understanding (“MOU”). The model MOU drafted by The Compact of Cape Cod Conservation Trusts, Inc.’s outlines the process; the parties’ intent, expectations, rights and responsibilities; deed language; successor holders of the charitable trust; and stewardship endowment requirements. One key element to the charitable trust route is that the two deeds would be recorded simultaneously. While some land trusts might not like to convey their title, even for just a moment and even for a nobler purpose, the charitable trust route is a clean, clear and simple way to protect their lands.

**15. Can the charitable trust be broken?**

As stated previously, eminent domain does trump all. Having a protective overlay on the land trust’s lands, however, may provide enough of an obstacle in the path of the public taking authority that it will look elsewhere for land. And, in fact, state statute obligates the Attorney General to defend charitable trusts, so it is believed that having the AG on the side of the land would preempt any taking by a level of government except the federal government, which is superior to the state.

**16. Is there a stewardship endowment fee?**

Under either the blanket CR or the charitable trust option, the land trust would pay a fee to be used solely for the purposes of defending and enforcing the CR or the charitable trust provision. A dedicated fund would be created for this. The fee should be a minimum amount deemed adequate to be able to mount any necessary legal defense (e.g., against a future rogue land trust board of trustees or a hostile town taking). The memorandum of understanding would address the time frame for payment of this fee, and whether the land trust can add to the lands under blanket CR or charitable trust without paying more than the initial stewardship fee.

**17. How do we begin the process?**

The first step is to decide on the protective overlay option, and which lands you want to include. Determine what other land trust(s) or other qualified organization you would like to work with, and contact them about your interest. Providing them with model documents will be helpful. Once you and the other land trust have agreed on how

to proceed, you should have your attorney draft or review the documents for the land trusts to vote on. The approved, signed documents can then be recorded.

**18. What does the Land Trust Alliance say about all this?**

“We think that both conservation easements (or conservation restrictions, as you refer to them in Massachusetts) and charitable trust deed provisions should work well in giving a third party the legal standing needed to help to keep lands intended to be protected, protected.”<sup>3</sup>

For more information, contact:

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<sup>3</sup> April 18, 2006 letter to The Compact of Cape Cod Conservation Trusts, Inc. from Rand Wentworth, President, LTA