



Massachusetts Land Trust Coalition
www.MassLand.org

MASSACHUSETTS LAND TRUST COALITION

LOOKING AHEAD

Identifying and avoiding the perils of perpetuity

REPORT OF THE
MASSACHUSETTS EASEMENT DEFENSE SUBCOMITTEE

MARCH 29, 2008

March 29, 2008

Mr. Bernie McHugh, Director
Massachusetts Land Trust Coalition
18 Wolbach Road
Sudbury, Massachusetts 01776

Dear Mr. McHugh:

The Massachusetts Easement Defense Subcommittee (MEDS) * is pleased to provide herewith a report of its work. Our mission was to look as far ahead as we dare to identify hazards that may impede land conservation generally and the protection of particular parcels. We did not have access to a crystal ball, merely our collective wisdom and experience, and our best hunches as to how the future might unfold.

We concluded, in short, that potential hazards abound. As for conservation in general, laws can be repealed, circumstances, policies and conditions will change, public support for conservation may decline, enforcement organizations may atrophy. As for particular properties, sharp lawyers can find defects in legal documents, holders may find themselves without the means or the will to enforce restrictions or the land may be badly needed for a new school. It takes a lot of work, perseverance and determination to insure that forever means forever.

Massachusetts land trusts have no control over the national conservation *zeitgeist*, global warming or politics of eminent domain, but we can act in a number of ways to strengthen the walls we started building against sprawl some forty years ago, and to reinforce protections accorded habitats and natural resources, principally through the use of conservation restrictions (CRs). We hope this report will be accepted as a checklist of suggestions and techniques for doing just that.

Thank you for the opportunity to address this vital topic. We are especially grateful to Joel Lerner for his contribution to the genesis of this project, to Elizabeth Wroblicka for her inspired leadership of the subcommittee for most of its term, and to Massachusetts Audubon for the use of their facilities.

MASSACHUSETTS EASEMENT DEFENSE SUBCOMMITTEE (MEDS)

Kate Connolly
Buzz Constable
Irene Del Bono
Dick Evans

Andrea Freeman
Andy Goldberg
Bob Levite
Laura Mattei

Kathy Orlando
Chris Pryor
Kathy Sferra
Peg Wheeler

* The subcommittee employed the term "easement" in its name as it is more universal than "conservation restriction." It also made for a better acronym.

Contents

1. Operating Principles for Land Conservation Organizations.....	4
The bare necessities for staying fit, alert and prepared for foreseeable challenges over the long haul.	
2. Conservation Restriction Enforcement Policy Guidelines.....	7
Things you'll wish had been thought about before needing to call the lawyer.	
3. Model Conservation Restriction Amendment Policy Guidelines.....	10
Knowing when and how to bend, and when and how not to.	
4. The Decennial Declaration.....	15
Keeping memory alive, and covering bases.	

1.

Operating Principles for Land Conservation Organizations

Conservation restrictions (CRs) are an important tool for permanently protecting open space, forests, farmland, water and other natural resources. Because provisions of CRs are intended to be perpetual, holders of these restrictions must provide stewardship that sustains them throughout inevitable changes in ownership and surrounding conditions. Holders must also consider their own longevity as organizations and have the proper policies and systems in place, as well as the financial resources, to uphold their responsibilities to defend CRs against violations.

As the best defense is a strong offense, land trusts must develop strong stewardship programs to minimize the likelihood of violations, and plan on what to do when they are faced with requests for amendments or violations in the future.

Over the long term, there is little doubt that CRs will be violated and land trusts, municipalities, and state agencies must be prepared to defend these restrictions in a court of law as well as in the court of public opinion. As the number of CRs increases, the land conservation community as a whole must continue to strengthen its CR stewardship practices. One holder's success or failure may affect not only existing conservation restrictions, but also our ability to conserve land in the future.

The following are operating principles that all land trusts, municipalities, and state agencies that hold CRs should aspire to implement. We hope that by leading by example and helping others to implement these operating principles, conserved land in Massachusetts—that we have all worked very hard to protect—will remain protected forever.

To be prepared for foreseeable challenges, holders of CRs are urged to adopt and implement protective measures, including but not limited to the observation of the following operating principles.

- 1. For every CR that a land trust, state agency, or municipality holds, there should be an accurate and complete record on file including the deeds to the fee interest and the CR, baseline document report, monitoring reports, and plans of record. The location and boundaries of every CR should be known on the ground and documented in the file; holders are encouraged to share this information with MassGIS, local assessors and regional and local mapping authorities.**

In order to defend its restrictions, a holder must first know and document the CRs that it holds. It is incumbent upon all land trusts, state agencies, and municipalities to ensure the legal validity of and to protect the conservation values expressed in their CRs. A complete record of title and the condition of the

land at conveyance and over time will help CR holders prevent violations, assess problems quickly, and enforce the CR. Sharing location and boundary information of CRs with state, regional and local mapping authorities will assist in tracking all CRs, and provide broader public awareness of the existence of conserved land throughout the Commonwealth.

- 2. Land trusts, state agencies, and municipalities should have a current property conditions report completed at closing for every CR that they hold and should systematically monitor and prepare monitoring reports for every CR that they hold. Monitoring should occur as often as needed but at least annually.**

Holders of CRs cannot effectively monitor future changes in restricted properties if they do not have thorough documentation of the site conditions on the property at the time a restriction is conveyed. Current property conditions reports compiled contemporaneously with the CR ensure an accurate history of these acquisitions and document the initial conservation values and the intent of the grantor and grantee. A sound baseline report, coupled with regular, systematic monitoring, are the essential components of good conservation restriction stewardship—ensuring that conservation values are documented at the time of the restriction conveyance, that violations are promptly discovered and addressed, and that the purposes of the restriction are upheld. The level of monitoring depends on the facts and circumstances of the particular CR.

- 3. Regular contact with landowners of CR properties is a critical component of successful stewardship programs.**

When a land trust, state agency, or municipality accepts a CR from a landowner, regardless of whether it was donated or sold, the holder has agreed to uphold the purposes of the CR in perpetuity. Since this is a promise that outlives individuals, it is necessary for holders to have ongoing stewardship programs to carry out their perpetual responsibilities. In addition to baseline documentation reports and systematic monitoring, strong collaborative relationships with landowners can minimize and often prevent violations and challenges to CRs. Cultivating landowner relationships helps reduce the risk of violations by (a) fostering trust between the CR holder and the landowner and (b) promoting a better understanding of the specific CR, as well as CRs in general. Cultivating relationships is especially important with successive landowners.

- 4. Land trusts, state agencies, and municipalities should have a written amendment policy ensuring that the conservation purposes of the original CR are protected and that conservation values are maintained or improved.**

Amendments can be perilous. Inappropriate amendments can diminish the conservation value of the land, jeopardize the holder's status under the IRS regulations or the donor's tax deduction or constitute reportable income to the owner, and undermine the holder's reputation as a protector of land in the community. An amendment policy fosters consistency and fairness in the decision-making process and provides criteria that a holder must consider when evaluating proposed amendments to ensure that conservation purposes and values are maintained or improved. A well-articulated, consistently followed, amendment policy provides guidance to landowners to help reduce frivolous requests for amendments.

- 5. Land trusts, state agencies, and municipalities should have a written enforcement policy that ensures that conservation purposes and values are maintained and the property restored.**

An enforcement policy defines the procedures that a CR holder will follow to ensure that violations are promptly and thoroughly investigated, documented, and acted on in an effective manner that will survive legal scrutiny. Adhering to an enforcement policy ensures that violations are addressed fairly and consistently in light of all circumstances. Such a policy also demonstrates that the CR holder takes its responsibilities seriously and is prepared to enforce the terms of restrictions against future violations.

6. Land trusts should consider and plan for what entities may receive title to their CRs in the event of the land trust's dissolution. If dissolution is imminent, a land trust should take affirmative steps to ensure that every CR is assigned or transferred to an appropriate subsequent holder.

If land is to be protected forever, the CR must be enforceable forever. A holder of a CR must plan for the possibility that it may no longer be able to carry out its responsibilities as a holder or that it may eventually dissolve as a nonprofit corporation. In the event that it is no longer able to hold or enforce a CR, a holder's primary concern should be locating a suitable subsequent holder because a judicial distribution of a land trust's assets could result in the land losing its protected status.

7. Land trusts, state agencies, and municipalities should have a stewardship endowment, conservation fund, or other mechanism to cover perpetual CR monitoring and defense costs.

A holder of a CR has accepted an obligation to uphold the terms of the restriction forever—a period extending much longer than any individual involved in the transaction. Over the long term, there is a high probability that CRs will be violated, either intentionally or accidentally. In order to carry out its stewardship obligations and to adequately defend against future violations, it is critical that every holder have the financial resources to adequately carry out its stewardship obligations and defend future violations.

2.

Conservation Restriction Enforcement Policy Guidelines

Enforcement of conservation restrictions (CRs) is a fundamental activity of land trusts and public agencies that hold such CRs. The purpose of an Enforcement Policy is to define the procedures that a CR holder will follow to ensure that apparent violations are promptly and thoroughly investigated, documented, and acted on in an effective manner that will survive legal scrutiny. A formally adopted Enforcement Policy helps ensure that violations are addressed fairly and consistently in light of all circumstances. Such a policy also demonstrates that the CR holder takes its responsibilities seriously and is prepared to enforce the terms of restrictions against future violations. Every organization and agency that holds CRs is urged to adopt a written Enforcement Policy.¹

Recognizing that Enforcement Policies must be tailored to the capacity and methods of operation of an individual agency or organization, the level of their existing CR stewardship expertise and the types of lands that they steward, this memorandum is not intended to be a sample Enforcement Policy, but rather an outline of the issues that an organization or agency needs to address in its development of its CR Enforcement Policy.

A variety of sample policies is available from LTA's resource library, www.ltanet.org.

Enforcement Principles

- A. Preparation for Enforcement—Avoiding and Addressing Violations
- Assemble and maintain baseline documentation reports
 - Identify the resources necessary to monitor and enforce CRs, including financial resources and expertise dedicated to CR stewardship
 - Foster and maintain positive working relationships with landowners
 - Monitor regularly, and maintain CR and monitoring documentation
 - Maintain procedures to discover and resolve potential violations including training, response checklists, documentation and decision-making protocols
 - Train staff and board in resolution of enforcement matters
- B. Objectives of Enforcement

- Defend the purposes and terms of the CR, the conservation values of the property, and the intent of the original parties
- Prevent or stop ongoing environmental harm
- Restore land to the extent feasible or remediate conservation values
- Discourage any windfall or financial gain accruing to a perpetrator of a violation
- Maintain and enhance public/donor confidence in the organization and land conservation
- Avoid negative precedents
- Evaluate the situation to prevent similar violations
- Maintain positive relationships to the extent possible.

The Enforcement Policy Components

- A. Identify a clear plan for organizational response to reported violations that includes the following elements:
- Name and contact information for the organization’s enforcement officer (Executive Director, Stewardship Director, or other person as directed in the Enforcement Policy, as well as an emergency contact if the primary contact is unavailable and swift action is needed).
 - Assess reported violations, including whether immediate action is required: Is there ongoing damage or irreparable harm? Is the source reporting the violation credible? What are the risks of inaction?
 - Initiate and document contacts with the landowner (and violator if different); verify details of the violation, determine the facts, review the CR and any applicable laws affected by the violation or potential remediation
 - Contact any necessary public authority (e.g., Conservation Commission)
 - Document specific action steps taken (correspondence, site visit reports, phone calls, attempts to contact owner); include facts (sources, photos, reports) and opinions (interpretations, excuses, assessments) with attention to maintaining credibility and possible evidentiary needs
- B. Identify guidelines to assess reported violations: Is it a clear violation or is the CR ambiguous? Is it a willful violation or an accidental one? Are there minor or significant impacts? Is the violation precedent setting? Is it a repeat violation? If you are considering legal action, how strong is your case? What proof do you have? What are the violator’s potential defenses?
- C. Consider whether “major” and “minor” violations will be handled differently in terms of procedures. Note that major violations should be reported to MLTC and/or MACC.
- D. Assess the organization’s or agency’s range of potential actions which best achieve the objectives of enforcement. Is affordable legal advice available? What resources are available to seek redress? What are the violator’s resources and defenses? What are the precedential implications for a win or loss? Will the landowner benefit financially for the violation (private inurement)? What are the public relations implications? What other organizations or agencies might assist with enforcement? (including EOEEA, the Attorney General, MLTC, other land trusts, etc.).
- E. Consider alternatives for resolution, including written warning, written acknowledgement of violation by landowner, CR amendment (see sample policy) or formal interpretation (“discretionary consent”), pre-litigation settlement (by agreement, mediation, or arbitration), or litigation. Any final resolutions must be in accordance with the organization’s or agency’s adopted Enforcement Policy and signed by an individual with delegated authority.

- F. Evaluate remediation goals, as feasible and achievable, including remediation of the violation, alternative improvements of parcel to offset damage, alternative conservation benefits (land, program, finance), clarification or amendment of CR (with due consideration for accountability and future enforcement, avoiding negative precedents and publicity, and avoiding private inurement).
- G. Implement the final action, including, as necessary, final documentation and archiving, legal approval of documentation, ratification by Board or their designee, public relations statement, etc.
- H. Throughout enforcement process, strive to maintain positive relationships – assume good intentions (hope for the best), but document adequately (prepare for the worst).

3.

Model Conservation Restriction Amendment Policy Guidelines

Because conservation restrictions (CRs) are an important tool for permanently protecting open space and are intended to be perpetual, holders must be prepared to uphold and enforce these restrictions both in the letter and the intent of the document. Responsible stewardship is at the heart of this protection. This stewardship is dependent upon many practices, including strong and lasting relationships with landowners, appropriate and adequate baseline and monitoring records, reasonable flexibility interpreting permitted rights, and adequate plans for contingencies and potential problems and changes of circumstances.

While it is anticipated that restrictions are comprehensively written in the first place and that all issues of rights and responsibilities have been accounted for in the final document, the fact still remains that changes in time, law, practice and circumstances may give rise to a need to strengthen or improve the enforceability and coverage of a particular restriction¹. As the need to protect valuable conservation land increases and land uses and management practices evolve, it may become necessary to consider changes to existing restrictions in order to uphold their purposes. A formally adopted Amendment Policy will help to ensure that proposed changes to existing restrictions are handled fairly and consistently and with appropriate consideration of all circumstances. Recognizing that Amendment Policies must be tailored to the resources and expertise of a particular organization, this document is intended to be a guideline more than a sample policy. Each organization must adapt its own policy to its own needs. The Massachusetts Land Trust Coalition's Easement Defense Subcommittee recommends that every organization and agency, both state and local, that holds a CR, adopt an Amendment Policy.²

The following guidelines for an amendment policy have been endorsed by the Massachusetts Land Trust Coalition. Additional sample policies are also available from the LTA's resource library, www.ltanet.org.

¹ **Standard 11 I. Amendments** in the LTA Standards and Practices (adopted Sept., 2004) states: 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.

² Massachusetts Easement Defense Operating Principles state: 5. *Land trusts, state agencies, and municipalities should have a written amendment policy ensuring that the conservation purposes of the original CR are protected and that conservation values are maintained or improved.*

I. BACKGROUND AND SCOPE

Amendment of an existing CR is an extraordinary procedure and is not available to a landowner as a matter of right, notwithstanding the inclusion of an amendment provision in the CR.³ The success and stability of CRs is dependent upon the confidence of the landowners who contribute restrictions, those who fund land conservation, and the public at large, as well as the stewardship of the CR holder. It is imperative that these stakeholders be able to rely on a land trust to meet its obligation to monitor and enforce these agreements. This confidence may easily be eroded if a land trust permits frequent or inappropriate modifications to its CRs. Amendments could also raise problems with the Internal Revenue Service – for a land trust in relation to its tax exempt status and for a donor of a CR in relation to any charitable deduction that owner may have claimed when donating or consummating a bargain sale of a CR. For these reasons, it should be the general policy of the land trust to hold, monitor and enforce its CRs as written. There are rare circumstances, however, that may justify the need for an amendment. The right to approve or deny any request for an amendment must be at the land trust’s sole discretion. Any request for a modification of an existing CR will be reviewed with strict adherence to a written policy and implemented only when the land trust Board of Directors has determined that the proposed amendment meets the substantive and procedural requirements under its policy. The land trust will amend a CR only if the level of protection of both the conservation purposes and conservation values subsequent to the amendment is equal to or greater than that in place under the terms of the most recently recorded CR.

II. STANDARDS FOR APPROVAL OF AN AMENDMENT

The following standards are all required to be met before approval of the amendment:

- A. The proposed amendment is consistent with and furthers the mission and conservation goals of the land trust and the CR;⁴
- B. The amendment shall not:
 - (i) effect or permit any private inurement or private benefit for any individual or entity;⁵
 - (ii) violate the land trust’s conflict of interest policy; or
 - (iii) jeopardize the land trust’s nonprofit status.
- C. The amendment must not result in the loss or destruction of, or material damage to, the natural features or conservation values associated with the property;
- D. The proposed amendment shall not effect a termination of the existing CR unless contemporaneously replaced by an amended CR consistent with this policy, nor shall the amendment cause the duration of the existing CR to be terminable;

³ This model policy is intended to guide the amendment process regardless of whether the original CR includes an amendment clause.

⁴ The amendment must be compatible and in agreement with all aspects of the land trust’s mission and advance the land trust’s mission in some concrete manner. Failure of the amendment to be completely compatible with the mission or to advance the mission in some tangible way is cause for denying the amendment.

⁵ This standard may be difficult for a land trust to assess. Legal counsel should be consulted and land trusts should err on the side of caution. IRS regulations will offer some guidance, but may not be dispositive of how to address this issue. An appraisal is likely to be necessary not only of the affected property, but, potentially, of connected properties. The appraisal should account for uses or activities that would be permitted as a result of the amendment.

III. ADDITIONAL FACTORS TO CONSIDER WHEN EVALUATING PROPOSED AMENDMENTS

The following factors should be considered in evaluating any proposed amendment. In order to approve or deny the proposed amendment, these factors should be considered in their entirety and satisfactorily addressed before recommending approval or denial of the amendment.

- A. Does the CR address amendments and, if so, what procedures or standards are required?
- B. Was the CR funded by a grant or gift, donated, purchased or required as the result of a permitting process? If so, are there requirements attached to the conveyance of the original CR (e.g., donor letters of intent, Self Help requirements, or permit requirements) that would limit our ability to amend?
- C. If the CR involved a charitable donation, does the amendment have the potential to jeopardize the IRS qualification of the CR?⁶
- D. Is the property or any portion of the property encumbered by a mortgage or other type of lien? Prior consent of the lien or mortgage holder may be necessary to complete an amendment.
- E. Are there any other parties or co-holders, including those referenced in Paragraph B, above, who need to approve the amendment?
- F. Could the amendment
 - (i) undermine the confidence of the community or alter the community's positive view of the land trust?
 - (ii) affect the attitude of the land trust's supporters or future CR grantors?
 - (iii) have any adverse impact on neighbors, abutters, or the community as a whole?
- G. Have local officials or the Executive Office of Energy and Environmental Affairs, Division of Conservation Services, taken any position on the amendment?
- H. Will denial of the amendment cause any undue hardship on the landowner? (Note that hardship by itself is never a reason to approve an amendment, but hardship—or lack thereof—may be a factor in the land trust's decision)
- I. Will the amendment cause any additional issues regarding stewardship responsibilities for the property or for neighboring conserved properties?
- J. Are there any feasible alternatives to an amendment? If not, is the proposed change in language the minimum change necessary to address the issue raised by the amendment?
- K. Will the amendment result in the release of any land interest by the land trust or by the landowner?⁷

⁶ A landowner should be advised to seek advice from his/her legal or tax counsel.

⁷ It is necessary to check the organization's bylaws to determine the nature of the vote required to release an interest in land. A "supermajority" vote may be required to validate such a step.

- L. Will the amendment terminate or impair existing public access rights?
- M. Does the amendment result in a change in location of a building envelope? If so, does the relocation positively or negatively impact the conservation values or natural features of the CR?
- N. Is the amendment requested by circumstances beyond the control of the landowner and the land trust or in relation to a proposed extinguishment of rights by a public agency or court?
- O. Does the amendment comply with all applicable laws and regulations, including Article 97 of the Massachusetts Constitution, M.G.L. c.184, §§ 31-33 and Internal Revenue Service regulations and is it consistent with charitable trust, public trust and public use issues?
- P. Are there important resources not identified in the original CR that would be adversely affected by the proposed amendment?
- Q. Are there other terms of the CR that should be amended to strengthen or improve its enforceability or are there any errors or ambiguities in the language of the last recorded CR that can be corrected?
- R. Should the old CR be replaced with a new CR instead of amending the existing CR?

IV. PROCEDURES

A. Landowner Initiated Amendments

A landowner requesting a CR amendment shall do so in writing, giving specific reasons why the landowner deems an amendment to be necessary and warranted, and describing in detail any proposed construction, re-grading, landscaping, planting, or other plans or activities affecting the land area in question. The landowner shall provide information on the alternatives to an amendment that were considered and the reasons why the alternatives were not deemed feasible. The landowner shall provide all documentation necessary for the land trust to make an informed evaluation of the relevant circumstances. The land trust may consult with the original donor, neighboring property owners, government officials and others who might have an interest in the restricted property or the restriction or proposed changes to the CR.

The land trust may require the party making the request to pay all staff, legal costs and out of pocket expenses incurred by the land trust to review and amend the restriction, whether or not the amendment is approved, including costs incurred for any hearings and/or approval by the host community and/or EOEEA. The land trust may also require the payment of an additional stewardship endowment to cover expanded costs likely to be incurred as a result of the amended provisions. A money deposit may be required to cover the costs of considering the amendment. Any unused balance will be returned. The party making the request may be billed for all costs, including staff time, over and above the amount of the deposit.

Where applicable, the landowner may be required to cover the cost of an appraisal of the value of the CR before and after the proposed amendment, as well as the before and after values of any other property of the landowner if the proposed amendment has the potential to impact the value of other land. Property of the landowner shall include any other property that is anticipated to be the subject of negotiation, agreement, or acquisition in the foreseeable future. If the amendment has the potential to result in a gain to the economic value of the landowner, the owner should be

advised to report this information to the DOR and the IRS. The land trust will evaluate the request and present an evaluation to the Board of Directors.⁸ Reasons and an explanation for accepting or denying the proposed amendment shall be documented in the property file. This narrative shall describe the analysis of whether the proposed amendment meets the standards set forth in Section II, above, and include an analysis consistent with the evaluation of factors set forth in Section III, above. Any conditions to be mandated in relation to a positive recommendation shall also be documented together with the reasons for such conditions. This review may include a requested written evaluation by an attorney addressing whether the proposed amendment complies with local, state and federal law and whether any private benefit will inure to any individual or entity.

The land trust will notify the landowner of its decision in writing. If the land trust wishes to reconsider the amendment based on additional information, it shall notify the landowner that he/she may submit further written justification and documentation.

The amendment must be approved in accordance with M.G.L. c. 184, §32, and any applicable municipal laws.

B. Land Trust Initiated Amendments

If the land trust recognizes the need for an amendment consistent with this policy, it will contact the landowner and recommend the amendment to the existing restriction. If the land trust and the landowner reach agreement on the language of the amendment, which conforms to the policy set forth above, the proposed amendment will be submitted to the land trust Board of Directors for consideration. The land trust will follow the same procedures as outlined in IV.A., Paragraph 1, above. The land trust should consider covering some portion or all of the legal and other expenses, including appraisal costs, related to the completion of the amendment, dependent upon what arrangements are negotiated by the parties.

V. LIMITATIONS

The recommendation to grant or deny a request for an amendment shall be within the sole and absolute discretion of the land trust, whose determination shall be final, conclusive and binding upon all parties. Approval or denial by the land trust is not binding on, and is subject to, approval by the town/city and the Executive Office of Energy and Environmental Affairs. No action by the land trust with respect to a particular request for amendment shall be deemed to establish any precedent applicable to any subsequent request for amendment, whether by the same or any other party.

⁸ The land trust should place its own chain of decision making here.

4.

The Decennial Declaration

Among the perils that a statutory conservation restriction may encounter along the long road to eternity is that it may simply fade from notice, by not showing up in deeds and mortgages and other recorded land documents. Another is that an adverse court ruling could deny our familiar restrictions the principal benefit of the enabling statute (General Laws, Ch. 184, s. 31-33), namely, the promise of perpetuity.

That statute carved out a significant exception to venerable English and American legal tradition, which for centuries has frowned severely on the control of property by the “dead hand from the grave,” regularly invalidating restrictions on the use of land that the creators expected to last forever. Take away the statutory exception to that legal tradition, and the promise of perpetuity is broken. Statutes are politically fragile. In the event that economic or other circumstances shift public support away from conservation, then the mere complicity of the legislature and the governor are sufficient to “restore” ancient rules of law by amending or repealing the statute, and thus severely undermining, if not wiping out, most of our restrictions. This is an unlikely, but not implausible, scenario over the long haul.

To fortify conservation restrictions against these perils, the subcommittee suggests that land trusts consider adopting what we are calling “The Decennial Declaration.” The Declaration is a formal listing of all restrictions held by the land trust, signed by the officers and recorded in the registry of deeds. We propose that it be updated and re-recorded every ten years thereafter (hence the name).

It performs several functions.

First, it keeps the land trust’s inventory of restrictions in recent recorded history, militating against claims of ignorance by landowners or anyone else. Drawing up the instrument will require the land trust to update its title records to identify present fee owners, and provide another opportunity to engage them as a conservation ally.

Secondly, if a CR or Agricultural Protection Restriction (APR) is found by a court as not in strict compliance with the enabling statute, thus denying its chief benefit of perpetuity, having a fresh acknowledgment and ratification on record may be valuable to validate the restriction under common law principles and/or other statutes. It gives something to fall back on.

Finally, the Declaration may have a useful organizational purpose, by giving the land trust—which we expect to be around in perpetuity well after all the saveable land has been saved—an important milestone upon which to review all its restrictions and be reminded of its history and responsibility. After the land trust has diligently updated all the necessary information, we visualize a formal signing ceremony, perhaps at an annual meeting in the presence of supporters and landowners, with a splash in the local press, highlighting the land trust’s accomplishments and its pledge to future generations.

[To be updated by the land trust and recorded in the Registry of Deeds every ten years]

Notice of Restrictions

Marshville Land Trust, Inc., a Massachusetts non-profit corporation with a principal office at Marshville, Massachusetts, and a current mailing address of P.O. Box 123, Marshville, Massachusetts 01234, having as its principal mission the protection of open spaces and natural resources in the Marshville area, for the benefit of the public and for posterity; and having acquired certain restrictions on the use of land in furtherance of said mission, and intending hereby to confirm, ratify, acknowledge and reaffirm said restrictions, without waiving any claim that such restrictions are valid in perpetuity regardless of this notice, does hereby so confirm, ratify, acknowledge and reaffirm the restrictions listed on Exhibit A hereto, and gives NOTICE of its intention to enforce the provisions thereof.

Executed at Marshville, Massachusetts, this ____ day of _____, 20__.

Marshville Land Trust, Inc.

By: _____
President

By: _____
Treasurer

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss _____, 20__

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the persons whose names are signed above, and acknowledged to me that they signed it voluntarily for its stated purpose as President and Treasurer of Marshfield Land Trust, Inc.

Notary Public
My commission expires _____.

Exhibit A

Original Instrument Date, Book & Page	Original Grantor(s)	Current Owner(s)	Current Deed To Be Marginally Referenced	Description
Aug. 1, 1974 Book 1961, Page 122	Robert B. Smith and Susan J. Smith	Ellen B. Hurst, 260 West Brook Road, Marshville, Mass. 01234	Book 2703, Page 263	14 acres on the north side of West Brook Road in Marshville; Plan Book 204, Page 31. (Assessors Map __, Parcel __.)
Dec. 22, 1979 Book 2961, Page 311	August V. and Ludmilla L. Peronski	James P. Peronska and Emily G. Peronska, 18 Peronska Road, Marshville, Mass. 01234	Book 3004, Page 72	The Peronska Farm, so-called, being 140 acres on the north and south sides of Peronska Road in Marshville. Plan Book 312, Page 45. (Assessors Map __, Parcel __.)
Etc	Etc.	Etc.	Etc.	Etc.