

Appendix C Operating Principles for Land Conservation Organizations

Developed by the Massachusetts Easement Defense Subcommittee and Adopted by the Massachusetts Land Trust Coalition Steering Committee in October 2005, rev. February 2006

How to Use These Operating Principles: It is the goal of the Massachusetts Easement Defense Subcommittee and the Massachusetts Land Trust Coalition that every land trust and government entity that holds conservation restrictions adopt and implement these operating principles. **If you have questions about them, or questions about stewardship or a CR violation, please contact any of the members listed below, or the Chair of the Massachusetts Land Trust Coalition for help.**

PREAMBLE

Conservation restrictions are an important tool for permanently protecting open space, forests, farmland, and other natural resources. Because their provisions are intended to be perpetual, holders of conservation restrictions must provide stewardship that sustains restrictions 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.

While each conservation restriction holder is ultimately responsible for defending the restrictions that it holds, we believe that by working together as a land conservation community we will be able to collectively offer a more formidable defense. Our goal is to create the best possible defense to conservation restriction challenges by advising land trusts, municipalities, and state agencies on how to build strong stewardship programs to minimize the likelihood of violations, and on what they can do when they are faced with requests for amendments or violations in the future.

Over the long term, there is little doubt that conservation restrictions (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 trust, municipalities, and state agencies that hold CRs should seek to implement. The operating principles have received the endorsement of the Steering Committee of the Massachusetts Land Trust Coalition and are drawn from years of land conservation experience. MEDS is compiling and drafting sample policies and instructional materials to assist holders in implementing these recommended operating *principles*. *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.*

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MEDS Operating Principles for Land Conservation Organizations

1. For every conservation restriction 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 to the conservation restriction, 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 and other statewide or regional mapping authorities.

Comment: 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 and regional 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 baseline documentation report completed at closing for every conservation restriction 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. In the event that seasonal or other conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgement of interim data should be signed by the landowner at closing. Interim data should consist of documentation submitted to the Division of Conservation Services as part of the conservation restriction application process and should depict the condition of the land at the time of closing.

Comment: Holders of conservation restrictions 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. Baseline 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.

Comment: When a land trust, state agency, or municipality accepts a conservation restriction 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 of CRs 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.

Comment: 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, 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 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.

Comment: An enforcement policy defines the procedures that a conservation restriction 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 conservation restriction 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 conservation restrictions 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.

Comment: If land is to be protected forever, the conservation restriction 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 conservation restriction monitoring and defense costs.

Comment: A holder of a conservation restriction 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 conservation restrictions 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.

Appendix D

Massachusetts Easement Defense Subcommittee Conservation Restriction Enforcement Policy Guidelines January 2006

I. Why Adopt an Enforcement Policy?

Enforcement of conservation restrictions (CRs) is a fundamental activity of land trusts and public agencies that hold such conservation restrictions. The purpose of an Enforcement Policy is to define the procedures that a conservation restriction 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 conservation restriction holder takes its responsibilities seriously and is prepared to enforce the terms of restrictions against future violations.

In recognition of the importance of a clear Enforcement Policy, both the Land Trust Alliance and the Massachusetts Easement Defense Subcommittee have recommended that every organization and agency that holds conservation restrictions adopt a written Enforcement Policy.

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 conservation restriction 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 are available from LTA's resource library, www.ltanet.org.

II. 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 perpetrator of violation
- Maintain and enhance public/donor confidence in organization and land conservation
- Avoid negative precedents
- Evaluate the situation to prevent similar violations
- Maintain positive relationships to extent possible.

III. 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 [see "Types of Violations" below].

D. Assess 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 EOE, 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).

IV. Types of Violations – Suggested Definitions

A. A **minor violation** is an action that technically violates specific language in the CR but is not inconsistent with the purpose of the CR and does not significantly degrade the conservation values of the land protected by a conservation restriction. Examples may be dumping of a small amount of organic debris, or minor tree pruning.

B. A **major violation** is an action that may or may not violate specific language in the CR but is inconsistent with the purpose of the CR or significantly degrades the conservation values of the land protected by a conservation restriction. Examples may be construction of structures, excavation, or clearing prohibited by the conservation restriction or a spill of hazardous materials on the property.