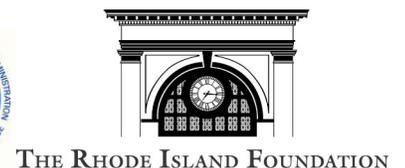


Rhode Island Conservation Easement Guidance Manual



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Please note that the purpose of this manual is not intended to advise or counsel the reader regarding the legal or possible tax benefits of creating a conservation restriction. Always consult with a lawyer and an accountant on such matters.

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INTRODUCTION

Conservation easements have been effectively used for many years to ensure that specific values of undeveloped land are protected in perpetuity. However, there have been several sources that have found that some conservation easements in older cluster developments were not properly recorded.

To ensure that conservation values are preserved in perpetuity, a conservation easement must be carefully written and follow prescribed procedures to maintain the desired conservation restrictions. Conservation easements are commonly used in Rhode Island in several instances, one of them being in Conservation Development projects, which will be referred to throughout the Manual. Since Conservation Development is relatively new, it is important that community officials and others have the knowledge and skills needed to prepare appropriate conservation easements associated with these projects.

Conservation Development is a more effective way to accommodate growth while minimizing impacts to the environment and community character. Conservation Development allows for the same number of house lots as would be allowed in a conventional development, while allowing developers the flexibility to reduce lot sizes and carefully situate them on the site. This process results in the protection of a minimum of fifty percent of the land that could otherwise be developed as meaningful open space. Refer to the *RI Conservation Development Manual (DEM 2003)* for further information (**figure 1**). To date 22 Rhode Island communities have either adopted Conservation Development or an ordinance is pending.

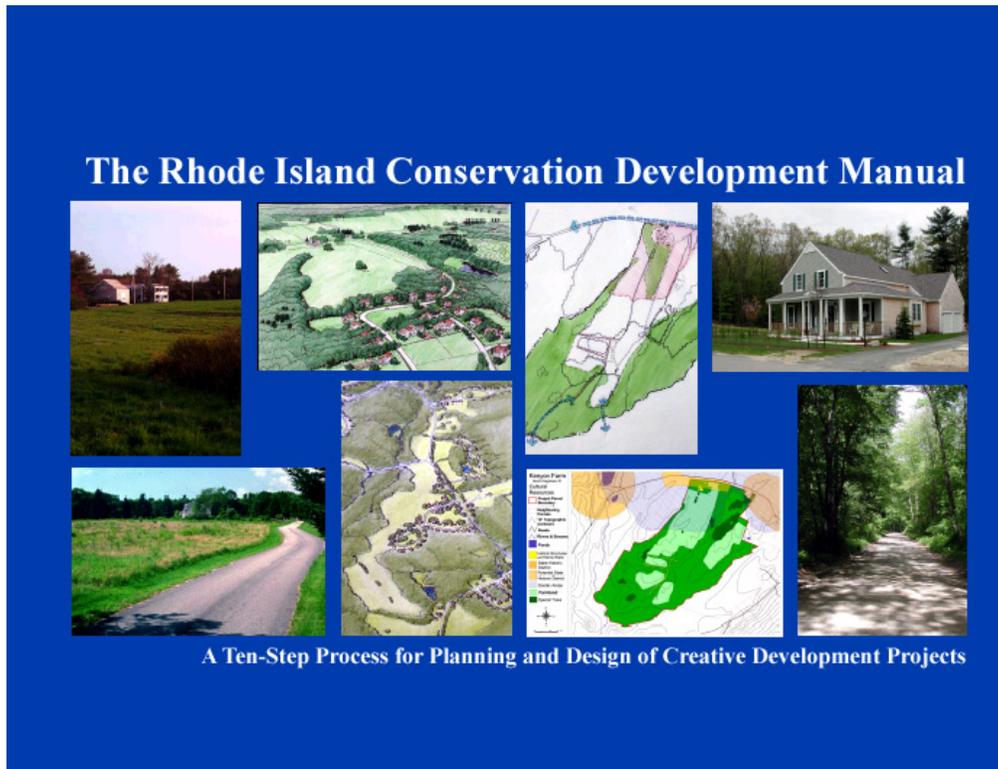


Figure 1. Cover of the RI Conservation Development Manual (DEM 2003)

The RI Department of Environmental Management (RIDEM) and the Narragansett Bay National Estuarine Research Reserve (NBNERR) Coastal Training Program (CTP) have conducted 14 workshops over the last three years to train local officials, designers, developers and others on Conservation Development. Additionally, numerous Conservation Development presentations have been delivered at various conferences and other events as well as to individual towns. It was very clear from the feedback of the workshop participants, as well as a recent needs assessment of target audiences, that more information and instruction is desired to ensure that protected open spaces remain so in perpetuity; such topics include conservation easements and the management, monitoring and enforcement of open space. Therefore, this Conservation Easement Guidance Manual is intended to provide attorneys, town planners, planning board members, land trust members, conservation commissioners, and other interested parties an introduction to and explanation of how conservation easements are drafted, reviewed, put into action and effectively enforced.

Specifically, the purpose of this manual is:

- To ensure that target audiences, particularly attorneys and planners, working with conservation easements thoroughly understand the appropriate Rhode Island legal foundation and proper procedures for preparing, recording and enforcing conservation easements to guarantee that the conservation parcels will remain protected in perpetuity.
- To ensure that target audiences understand the options for ownership and management of conservation parcels, the elements of effective stewardship programs for protected open space lands, and the best strategies for minimizing liabilities so that the conservation parcels' natural resources and other conservation values are guaranteed protection in perpetuity.

I. CONSERVATION EASEMENT BASICS

1. What is an Easement?

In simple language, **an easement is an ownership right in a property that is held by someone other than the property owner.** Most commonly they are a “right of use” such as utility and access easements. Easements are based on property law principles which recognize property ownership as involving a bundle of rights in and to real property or land. The individual rights constituting the several primary characteristics of property ownership are often referred to as “sticks” in a “bundle of rights.”

The five main “sticks” in the “bundle of rights”, often considered the fundamental property rights, are:

- The right to **possess** the property, which lies with whoever holds the property’s title.
- The right to **control the use** of the property, meaning that the title holder can build or alter the property within legal guidelines.
- The right to **exclude** use of the property by others, a common example being a “No Trespassing” sign.
- The right to **quiet enjoyment** of the property, within the confines of the law.
- The right to **dispose** of the property, through a sale, lease or other method of alienation.

The bundle of rights involving property ownership or interest does not need to be completely controlled or held by one person or legal entity. The individual rights or sticks can be sold, encumbered, transferred, leased, granted a license, gifted or burdened in numerous ways to different individuals and/or entities resulting in multiple layers, levels, and interest to and in ownership of a parcel of land. When these type of actions occur, the property is classified as a “less-than-complete” estate or referred to as a “segmented estate”, meaning that no one person or entity has complete and absolute control over every legal incident and/or characteristic of property ownership.

An easement is a grant of a less-than-fee interest in land that entitles the holder(s) to use and/or control land possessed by another.¹ An easement includes a dominant estate and a servient estate.² An easement typically provides its owner an affirmative right to use another’s land or to restrict the use of another’s land or some combination thereof in a particular manner. The person or entity having control of the rights transferred is considered to be the holder of the dominant estate while the person or entity encumbered by the easement is considered to be the holder of the servient estate.³ The most common example of such an easement involves a property owner who has the right to cross the property of another to access their property (commonly referred to as an access or driveway easement). A less common example is an easement which provides the holder the right to prevent another landowner from using their land in a certain way (a conservation or open space easement).⁴

¹ See, e.g., *McAusland v. Carrier*, 880 A.2d 861, 863 (R.I. 2005).

² *Id.*

³ *Id.* at 863, fn 4.

⁴ See, e.g., *Duffy v. Milder*, 896 A.2d 27, 39-40 (R.I. 2006).

Most easements are created expressly by a deed or other type of grant. Because an easement constitutes an interest in land, its creation is subject to the Statute of Frauds which requires a writing signed by the grantor. Generally, a grant of a limited use, for a limited purpose, and/or restricting the use of property of another and/or of an identified space with clearly marked boundaries creates an easement.

2. What is a Conservation Easement?

A conservation easement is the right to prohibit or limit certain actions or uses related to a property in order to maintain and protect the property's identified unique features and natural or scenic condition. Conservation easements are commonly used in Rhode Island in several instances, such as:

- As part of the sale or donation of development rights for conservation purposes or to protect agricultural land, a property owner will record a conservation easement.
- In Conservation Development projects, where 50% or more of a parcel that could otherwise be developed is protected as meaningful open space while the remainder of the land is built upon. The Conservation Development process provides all parties a thorough and in-depth understanding of the site and, in particular, the physical, biological, and visual attributes intended for conservation protection. Using this information, the municipal regulatory authority, usually the Planning Board or Commission, can establish open space areas that are to be protected from development, whether it be wildlife habitat, active and/or passive recreation, scenic vista or some combination of these features (**figure 2**). The open space is protected by the placement of a conservation restriction, also referred to as a conservation easement.



Figure 2. This path and bridge at the Village at Indian Lake in South Kingstown provide access to common waterfront areas.

2a. Legal Definition in Rhode Island

Rhode Island General Laws § 34-39-et. seq.-Conservation and Preservation Restrictions on Real Property (the “Act”) provides the following:

A ‘conservation easement’ shall mean a right to prohibit or require a limitation upon or an obligation to perform acts on or with respect to or uses of a land or water area, whether 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 area or in any order of taking, which right, limitation, or obligation is appropriate to retain or maintain the land or water area, or is appropriate to provide the public the benefit of the unique features of the land or water area, including improvements thereon predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space, wildlife, or forest use, or in other use or condition consistent with the protection of environmental quality.⁵

This definition contained in the Act can be divided into three segments: **(1) description; (2) creation; and (3) purpose.**

(1) description: states that a “conservation restriction shall mean a right to prohibit or require a limitation upon or an obligation to perform acts on or with respect to or uses of a land or water area.” This describes the right or “stick” that the property owner is giving to the conservation organization and/or government entity. The Act allows this “stick” to be customized to the particular situation, depending upon what the landowner and conservation organization and/or government entity wish to do with the property. The rights and obligations of each party can vary depending upon the situation and crafted into the contract between the parties to protect the particular conservation interest or characteristic.

For instance, one conservation easement may authorize the easement holder(s) to perform routine maintenance of horse trails on the property, whereas another conservation easement may allow public access, but not allow horses whatsoever. The point is that a conservation easement can be structured to meet the objectives of the contracting parties and other applicable laws and regulations.

(2) creation: states that a conservation easement can be “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 area or in any order of taking.” This segment shows that a conservation restriction can be created through many different means, “including a conservation easement and” even a court order.

(3) purpose: states that a conservation restriction “is appropriate to retain or maintain the land or water area, or is appropriate to provide the public the benefit of the unique features of the land or water area, including improvements thereon predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space, wildlife, or forest use, or in other use or condition consistent with the protection of environmental quality.” These are the legal conservation purposes for a conservation easement. At least one (and rarely all) of these purposes must appear in the document creating the conservation easement in order to be a valid conservation easement. For the landowner to take advantage of the tax benefits under Internal Revenue Code Section 170(h) (26 U.S.C. § 170(h)), the restriction must include at least one of the following conservation purposes: (a) preservation of land areas for outdoor recreation by, or the education of, the general public; (b) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (c) the preservation of open space (including farmland and forestland) where the preservation is – (1) for the scenic enjoyment of the general public, or (2) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit; (d) the preservation of a historically

⁵ Id.

important land area or a certified historic structure.⁶ These conservation purposes are the reasons why the particular parcel is worth protecting for future generations.

2b. What Uses and Actions can a Conservation Easement Prevent or Restrict?

A conservation easement can prevent or restrict uses on the affected property that are considered undesirable or injurious to the natural environment, community social and/or aesthetic values or other desired attributes of the property. For instance, building location, type and intensity, future subdivision ability, and timber harvesting could be restricted through the application of a conservation easement. A conservation easement is not limited to restricting land use. In addition, a conservation easement may be used to establish affirmative rights for the holder(s) of the conservation easement. For example, the conservation easement would allow the holder(s) and/or its designees to access the property for walking, inspection, and enforcement of the easement provisions. Moreover, the conservation easement could also allow specific public recreation and/or study purposes (**figure 3**).



Figure 3. A path through the protected open space of Brown's Farm, a conservation development in South Kingstown.

2c. How is a Conservation Easement Obtained?

A conservation easement may be obtained by a donation from the landowner, by a purchase and sales agreement, or as a condition of approval for a conservation development.

2d. Who Can Grant a Conservation Easement?

Only the fee owner of the affected property may grant a conservation easement. This person, organization or entity is referred to as the grantor. The grantor may be one or more individuals, an organization of persons, a legal entity such as a limited liability company, a corporation, or some combination thereof. Determining the form of fee ownership of the affected property is critical to ensure that an effective transfer of the easement grant is accomplished. All owners must sign the deed establishing the grant of the conservation easement. Failure to properly obtain all owners' signatures on the deed will render the grant defective and invalid. To ensure that an effective and valid transfer is accomplished, it is critical that legal counsel is consulted to determine the form of ownership and that the grantor(s) follows all of the particular formalities to properly authorize the signing of the easement.

⁶ See 26 U.S.C. § 170(h)(4) (West 2007).

2e. Who Can Accept a Conservation Easement?

Conservation easements may be held by land trusts and similar non-profit organizations such as the Audubon Society of Rhode Island or the Nature Conservancy, municipalities, state agencies such as the RI Department of Environmental Management, federal agencies, or a combination thereof.⁷ In Rhode Island the most common arrangement in a conservation development is for the municipality to hold the easement. In accepting a conservation easement the holder(s) is/are referred to as the grantee(s). Likewise, in determining the grantor(s) form of ownership of the affected property, the grantee(s) must determine the appropriate form of ownership in the conservation easement, and, when appropriate, must also follow the organizational formalities to accept the conservation easement. Consideration must also be given to whether the conservation easement should be held by more than one organization or entity to ensure that its existence is maintained over time.

Consolidation of the easement in one organization or entity presents the risk that the easement holder may relinquish their rights in the future. Whenever possible it is highly recommended that two or more holders of the conservation easement be established. By including two or more holders of the conservation easement, especially those with different policy objectives, such as a municipality, a land trust and a Homeowners' Association for a conservation development, future transfer or sale of the easement can only happen if the easement holders reach an agreement. If no such agreement can be achieved, then the easement remains in place. This arrangement creates a good system of checks and balances to protect the intent of conservation easements.

2f. What are the Responsibilities of the Conservation Easement Holder(s)?

The easement holder's obligations typically involve the preservation, maintenance, study, observation and enforcement of the grant's purpose. An easement holder(s) cannot simply obtain the interest and then take no monitoring, maintenance and enforcement actions. Not taking affirmative actions to monitor and maintain the easement would likely impair the values sought to be protected by the placement of the conservation easement on the affected property. Failure to monitor and enforce an easement may also jeopardize the qualified holder status of the conservation easement owner under State statutes and/or the Internal Revenue Code. The grantor reserves the right to monitor the easement holder's compliance with the property management plan to ensure that the easement values are not squandered by inaction and inattention.

2g. How do Conservation Easements Benefit the Public?

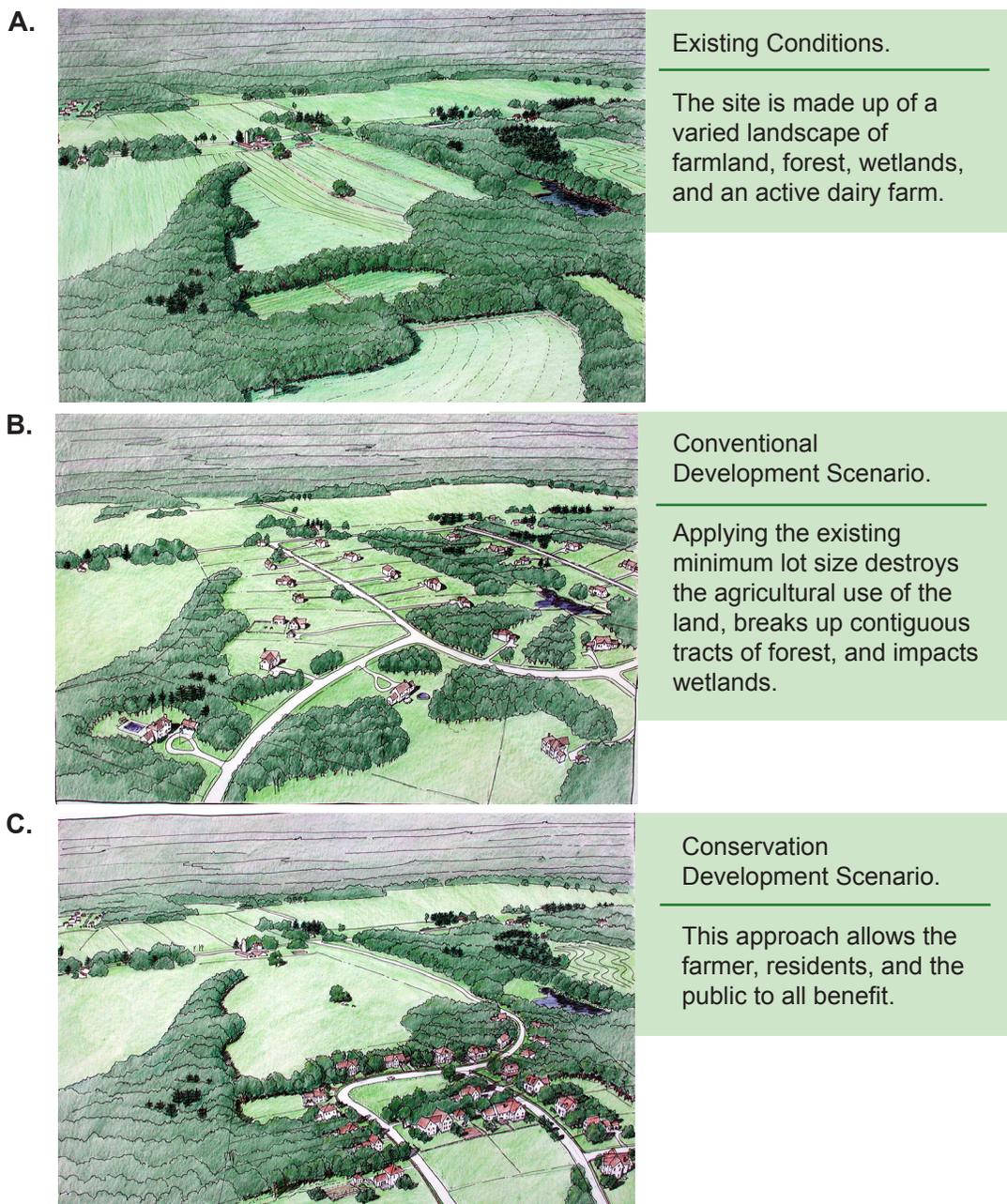
Conservation easements can benefit the public in many ways. For instance, take the hypothetical example of the Kenyon Farm conservation development in South Kingstown as described in the Conservation Development Manual (**figure 4**). The scenic vista and historic farmstead were both protected for the public's enjoyment. Just driving by the property allows an observer to view a scene nearly unchanged by time and can evoke a sense of the beauty enjoyed and hardships endured by our predecessors. This experience represents the public's passive enjoyment of a conservation easement.

Some conservation easements can also provide the public with access to such activities as walking, running, bicycling or horseback riding. Such is the example of the recently purchased Rocky Point Park shorefront land. While the City of Warwick, Rhode Island holds the fee ownership to the property, the Rhode Island Department of Environmental Management holds a conservation easement on the property. The public can now actively enjoy this property along the shore of Narragansett Bay through the benefit of a conservation easement.

⁷ Rhode Island General Laws § 34-39-et. seq.-Conservation and Preservation Restrictions on Real Property.

Both passive and active recreational opportunities provide for the enjoyment of the conservation easement by the public. Of course a myriad of options in between are possible. A conservation easement can be molded to meet the particular requirements of each and every situation. A template conservation easement document may be used as a starting point for discussion but in the end a unique conservation easement document must be drafted for each and every instance. The important point to consider is that when a conservation value is identified to be protected and maintained by placing a conservation easement on the affected property, the public should be able to enjoy the protected values in many ways for years to come. Other conservation easements, particularly those which are donated, may not allow for public access. In that event, the public may benefit from the property remaining undeveloped and preserved for future generations to enjoy.

Figure 4. Kenyon Farm example as described in the *RI Conservation Development Manual*.



II. DEVELOPING, WRITING AND RECORDING A CONSERVATION EASEMENT

1. Document Drafting Procedures

Rhode Island General Laws § 34-39 does not mandate any process to draft or establish a conservation easement, and the process and the parties responsible for drafting and establishing a conservation easement will vary from municipality to municipality. However, general principles should always be followed.

Once the basic terms of agreement have been reached between the parties, legal counsel should be instructed to draft the conservation easement instrument and compose and/or obtain the many necessary supporting documents. Such documents usually include the title evaluation, preliminary title insurance commitment, if available, survey plans, metes and bounds description, physical and natural features survey, property management plan, resolution of municipal and/or state action requisite to authorize and complete the transaction, appropriate state certificates, if required, to facilitate the transaction, releases and discharges, if needed, and evidence that all required deeds and covenants have been recorded in the local land evidence records. A checklist should be composed and reviewed by the entity creating the conservation easement to ensure that all required items have been assembled, properly executed, and filed. Legal counsel should also work directly with the committee or working group to provide status reports and obtain assistance, as needed, to assemble the necessary documents. Incremental sign-offs by the committee or working group may be obtained as appropriate. An entire transaction folder should be assembled for each party.

Certain paragraphs or sections should be included in every conservation easement agreement, even though the wording should be tailored to each particular parcel and situation.

Those paragraphs are as follows:

- 1) Title
- 2) Introductory Paragraph
- 3) Whereas and Now Therefore Clauses
- 4) Purpose
- 5) Landowner's (Grantor's) Reserved Rights
- 6) Grantee's Rights
- 7) Restrictive Covenants/Conservation Values Protected
- 8) Prohibited Uses
- 9) Grantee Remedies (Monitoring, Inspection and Enforcement Covenants)
 - a. Inspection-Study-Monitoring
 - b. Mediation/Arbitration Agreement
 - c. Fines
 - d. Equitable Relief
- 10) Formal Provisions (Representations and Warrants)
- 11) General Provisions (Choice of Law, Severability)
- 12) Amendments, Assignments and Transfers
- 13) Signatory, Witness, and Notary Clauses
- 14) Exhibits

An example of a conservation easement formed in accordance with the provisions of the Act is set forth in Appendix B.

1. Title: It is important that the words “Conservation Easement and/or Restriction” stand out in the title of the document, so as to invoke the definition and protections under the RI Act.

2. Introductory Paragraph: This paragraph introduces the parties involved in the grant of the conservation easement. It lists the names and addresses of the landowner (the grantor) and the conservation easement holder(s) (the grantee(s)). The date the granting of the easement occurs is also commonly listed in the introductory paragraph.

3. Whereas Clauses: These clauses provide the reader with the background information regarding the easement. They begin with the parties involved. For example:

Whereas, the landowner is the owner in fee of a certain parcel of land; and

Whereas, the conservation easement holders are the town of X and a conservation organization which is a private non-profit and is a qualified organization under 170(h) of the Internal Revenue Code; and

Whereas, the landowner desires to protect certain features of the property described in Exhibit A, attached hereto, and the town of X and the conservation organization have offered to protect those same natural features;...

Subsequent clauses should list:

1. The primary purpose of the conservation easement.
2. A listing of the conservation values that are being protected through the conservation easement.
3. The landowner’s intent to protect the conservation values in perpetuity.
4. The conservation easement holder(s) intent to protect the conservation values in perpetuity.
5. A reference to incorporate the report or study that includes an inventory of the conservation values of the property to justify that the encumbrance should be included- often referred to as the baseline documentation report.

Be as clear and specific as possible. The number of these clauses will vary from agreement to agreement, depending upon the conservation attributes of the particular parcel and the specific terms of the agreement between the parties.

Now Therefore Clauses: These clauses state the considerations that are being offered for the easement, state that the considerations are sufficient, state that the landowner does voluntarily grant, bargain, sell and convey the conservation easement and that the easements holder(s) voluntarily accept said conservation easement in accordance with the terms and conditions set forth in the agreement. This is also where references to R.I.G.L. §34-39-1 et. seq. “Conservation and Preservation Restrictions on Property,” and, if applicable, R.I.G.L. §45-36-1 et. seq. “Open Spaces” are mentioned.

4. Purpose: This section formally states the reason for the conservation easement. Such a purpose could be to “assure that the Premises will be retained forever in its open, natural, scenic, agricultural, ecological, or educational conditions and to prevent any use of the Premises that will significantly

impair or interfere with the conservation values of the Premises.” This paragraph also introduces the property management plan, a document that obligates the grantor(s) to certain actions to preserve the conservation values of the encumbered property. For example, the property management plan for the Kenyon Farm was prepared to allow a range of uses for the protected open space. In this instance some open space is to be protected and used as a working farm, some as forested habitat, and some as a small recreational area for use by the homeowners (figure 5). Each use would need to clearly list the types of uses that would be allowed and the type of management activities permitted. For example, the forested habitat may prohibit tree harvesting but allow a foot path for passive recreation.

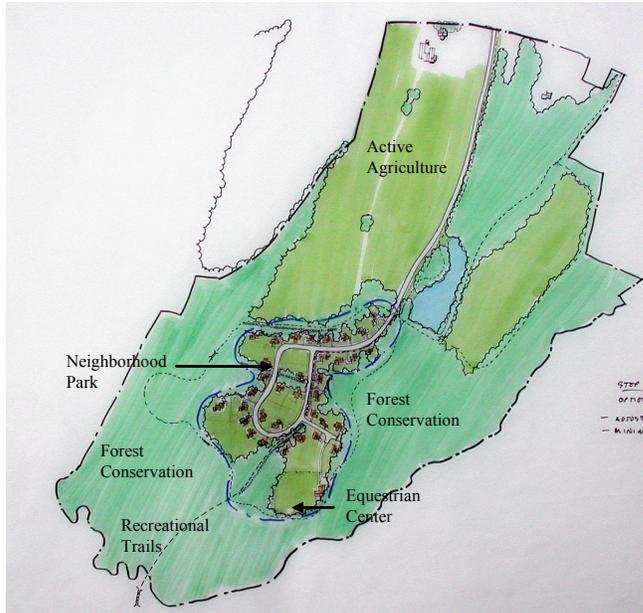


Figure 5. The conservation development plan for the Kenyon Farm contains four types of open space, requiring careful planning for the design and use of each area.

5. Landowner’s (Grantor’s) Reserved Rights: Although the landowner is giving away a big “stick” when a conservation easement is conveyed, all of the remaining rights to the encumbered property are retained by either the grantor or a successive property owner of the grantor’s property, such as a Homeowners’ Association, which is often involved when a Conservation Development subdivision is created. Often these are the rights to use the parcel in its present manner and other manners that are not inconsistent with the conservation easement. The landowner always retains the right of ownership and alienation. However, if the landowner does lease, sell, or mortgage the premises, they do so subject to the conservation easement conditions.

6. Grantee’s Rights: These are the “sticks” given to the conservation easement holder(s) by the landowner. The conservation easement holder(s) are typically conveyed the rights to:

- (1) preserve and protect the enumerated conservation values of the premises;
- (2) enter upon the premises at reasonable times for purposes of monitoring and inspection of the parcel to ensure the landowner’s compliance with the terms of the conservation easement;
- (3) enforce the terms of the conservation agreement; and
- (4) take any and all actions that may be necessary or appropriate to remedy or abate any violations of the conservation easement.

The conservation easement holder(s) may also be given, for example, the right to place signage upon the premises stating that the premises are conserved in perpetuity by a conservation easement.

7. Restrictive Covenants/Conservation Values Protected: Restrictive covenants are paragraphs that state that the landowner has maintained the right(s) to do certain things in a limited time frame or manner. An example of this may be restricted rights to maintain forestland – the restriction being that the landowner shall follow an approved forest management plan, not clear-cut the forest, and be limited to the amount of wood that can be harvested annually. The purpose of this section is based on the intention to protect desirable conservation values that are set forth in the inventory of conservation values report which serves as a basis to protect the property.

8. Prohibited Uses: This paragraph lists those uses of the real estate that are strictly prohibited. Often the prohibited use is any activity or use of the premises that is inconsistent with the purposes of the conservation easement. These can be quite specific such as: no snowmobiles, motorcycles, dirt-bikes, or other all-terrain vehicles allowed. A common prohibited use includes dumping or storing of trash, garbage, waste, refuse, debris or other unsightly or offensive materials. Earth removal prohibitions are also typically contained in such agreements.

9. Grantee's Remedies (Monitoring, Inspection and Enforcement Covenants):

This paragraph or group of paragraphs is often a more detailed writing of the conservation easement holder(s) rights to enter, monitor and inspect the premises. This group of paragraphs usually outlines the method that the organization will use when it does its inspections (which may be weekly, monthly or annually), how the organization will contact the owner if there is a question of a possible violation, how the organization will expect the landowner to correct any alleged violation, and what steps the organization may take in the enforcement of the conservation easement if they find that a violation has indeed occurred. Include a provision in the easement instrument for disclosure of problems and issues early on involving either party that may affect the protected land, such as receivership, bankruptcy, judgment creditor actions, inadequacy of funds to maintain the affected property, and like situations. Identify the monitoring and enforcement entity in the easement agreement and provide notice provisions between the monitoring and enforcement entity and the landowner.

a. Inspection-Study-Monitoring

All easements, to the extent possible, should include an endowment or escrow fund from the landowner to allow for the monitoring, inspection and enforcement of the conservation easement over time. For example, in approving a conservation development subdivision, a municipality could encourage the developer to contribute funds for this purpose, which the Town could then hold in a restricted receipts account.

b. Mediation/Arbitration Agreement

Mediation and arbitration are methods to discuss and amicably resolve disputes between the landowner and conservation easement holder(s). While these methods of dispute resolution are not always effective, they present a quick and efficient method to settle disputes without the need to resort to time-consuming and costly litigation actions. In the most extreme situations litigation may be necessary to enjoin a prohibited activity by a landowner which endangers the conservation values in the conservation easement.

c. Fines

Fines can and should be imposed whenever the conservation values of the protected property are harmed, no matter whether the harm occurred by neglect or intentional conduct. Firm resolve to protect the conservation values is a fundamental aspect in preventing wanton acts from undermining the special features of the protected property.

d. Equitable Relief

Sometimes fines alone are not enough of a deterrent to prevent harm to protected property. Equitable relief is available in certain instances to either restrain an act or to compel an act. In other words, a Court could order someone to stop a particular act that is shown to be harming the protected values of a property or in violation of the conservation easement agreement terms, compel someone to perform an act to restore property to a condition caused by unauthorized harm, or perform some combination of both forms of relief. Equitable relief is available only under particular circumstances and places a heavy burden on the moving party. Consultation with legal counsel is required to understand the standards for relief in seeking equitable relief and the likelihood of success under particular circumstances.

10. Formal Provisions (Representations and Warrants): This is a grouping of paragraphs that deals with subject matters of the conservation easement that do not necessarily involve the conservation values of the parcel but are important to the landowner and the conservation easement holder(s). Some of the issues covered may include payment of real estate taxes, hold harmless clause, indemnification for environmental purposes, internal revenue code conditions, assignment of the conservation easement, eminent domain issues, conveyance or transfer of real estate, public access (is it allowed, and if so, when?), or an executory limitation if the conservation easement holder(s) ceases to exist (naming a successor to the organization's rights and obligations or a reversion to the owner). Include language which evidences that each party has the requisite authority to enter into the easement agreement.

11. General Provisions (Choice of Law, Severability)

This grouping of paragraphs addresses the general provisions that are included, or should be included, in almost every contract. Such provisions include:

- (1) the reasonableness standard to be used by both the landowner and the conservation organization in their dealings with each other;
- (2) successors;
- (3) duration of the easement;
- (4) representation of the agreement between the parties;
- (5) choice of governing law;
- (6) liberal construction clause;
- (7) severability clause;
- (8) recording and notices clauses; and
- (9) captions and headings for informational purposes.

For example, the landowner should be required to disclose the existence of the conservation easement to any prospective buyer and include specific reference to the conservation easement in any future deed. Further easements should include language that requires property owners to notify the conservation easement holder(s) before closing when a property is sold or otherwise changes hands.

12. Amendments, Assignments and Transfers: This section includes provisions detailing the process to amend the conservation easement, assignments of rights, duties and parties under the agreements, and outright transfer of a party's legal interest in and to the agreement. Amendments to contract documents are ordinary and necessary events, especially when contracts involve a long duration of time like conservation easements. These provisions should require that any amendments be in writing, signed by the landowner and easement holder(s), and that the amendment document be recorded in the local land evidence records to be valid and effective.

13. Signatory, Witness, and Notary Clauses: This is where the landowner and the conservation organization or other participating parties to the easement sign on the dotted line. Unlike a normal deed or easement in which only the grantor/landowner must sign the document, all parties to the conservation easement must sign the document.

14. Exhibits: There are usually exhibits recorded with the conservation easement. The exhibits that should always be recorded with the conservation easement include:

1. A legal description of the real estate parcel (either a metes and bounds description defining the exact dimensions of the property subject to the encumbrance or reference to a recorded plat which provides a specific description defining the exact area of the property subject to the encumbrance).
2. A survey of the property to ensure that the encumbered property does not contain any encroachments or other title issues that might result in legal proceedings.
3. A baseline documentation report documenting the conservation values that are protected by the conservation easement.
4. A property management plan.
5. Other relevant documents viewed as helpful or informative to explain the agreement.

2. Required and Desired Information- Supporting Documents

Once the policy decision to protect the desired attributes of the affected property has been made by the appropriate authorities, a series of actions must occur to ensure that the conservation easement can be acquired properly. **At a minimum the following documents and information are recommended to compose a conservation easement agreement:**

1. Obtain a certificate of title identifying the owner, the form of ownership, and any encumbrances (restrictions, mortgages, liens notices, judgments and the like) existing in or to the affected property. In appropriate cases obtain a preliminary title commitment. Some Rhode Island title insurance companies do not offer or provide title insurance to conservation easements because they view them as a restriction on property, which is not an insurable property interest according to their policy standards. During the conservation easement negotiations stage it is useful to obtain an initial determination as to whether title insurance will be available for the contemplated transaction. A legal description of the property can be provided by the title company or by the project surveyor.
2. Commission a survey of the land area to be protected to determine the physical boundaries of the whole property and whether any physical encumbrances or encroachments are present (such as a neighbor's fence or building that is located on the protected property). Natural features may also be illustrated on the survey. A metes and bounds description of the encumbered area of the property should also be established, especially if the easement will be applied to less than the entire area of the property. The survey plan should illustrate the encumbered area if less than the whole parcel will be encumbered.
3. Compose a baseline documentation report to inventory, compile and document existing conditions of all applicable conservation features and values for comparison in the future. This

information should be used for future reference if the easement is violated. Refer to Appendix E for a baseline documentation report checklist.

4. Develop a property management plan that will provide the specific details on how the conservation easement area will be managed. Refer to Appendix C for an example of a property management plan and Appendix D for a property management plan checklist.

5. Other supporting documents can include:

- a. a Phase I Environmental Site Assessment of the property to be conserved, and possible additional assessments if necessary, so that the parties are fully aware of any potential environmental hazards and/or liabilities.
- b. a property site plan showing any proposed alterations/improvements to the property that are described or required in the property management plan.
- c. any particular information and/or document that would be relevant to the specific aspect of the project.

Using the supporting documents, the parties should commission the drafting of the conservation easement agreement as early as possible to allow for the review of the document by all parties well in advance of the anticipated closing date of the transaction. It is even useful to perform this task at the initial stage of negotiations with the property owner as impasses may occur regarding the physical area, nature of desired restrictions, or limitations on the future use of the affected property. Early drafting will enable a meaningful dialogue between the parties to the transaction and hopefully result in clear and unambiguous language that defines the rights and obligations of the parties. **The parties will need to discuss and agree upon the following matters that comprise the terms of the conservation easement agreement:**

- a. The monitoring measures and remedies to enforce compliance with the agreement's terms by either party. It is always better to establish a process to avoid or resolve disputes when everyone is getting along than when a problem occurs.
- b. A communication procedure between the parties that is meaningful, time-sensitive and informative. Include a provision in the easement instrument for disclosure of problems and issues early on involving either party that may affect the protected land, such as receivership, bankruptcy, judgment creditor actions, inadequacy of funds to maintain the affected property, and like situations.
- c. Identification of the monitoring and enforcement entity in the easement agreement and notice provisions between the monitoring and enforcement entity and the landowner.
- d. The representations and warrants in the easement agreement which evidences that each party has the requisite authority to enter into the easement agreement.

In the case of a municipality, the conservation easement instrument may be used during public outreach efforts to explain the nature and extent of public benefits to be derived from the contemplated transaction. The conservation easement instrument should contain all those features set forth in Section I of this Article II.

3. Document Acceptance and Execution

Each municipality, public and private organization, and for-profit and not-for-profit legal entity has different operating requirements to accept a conservation easement. Moreover, the process will be different for land preserved via a conservation development versus the purchase of the development rights. For example, if a conservation easement is being acquired from a conservation development, the planning board may have the authority to accept the easement. If the easement is purchased, a municipality may allow the mayor to unilaterally enter into a conservation easement agreement.

Since these different operating requirements govern the process of acceptance and execution of any contract, including a conservation easement, it is impossible to outline a general process for accepting and executing a conservation easement. Each entity interested in acquiring a conservation easement must consult with their legal counsel who can describe the proper process relevant to the contemplated transaction in the particular situation.

When public entities accept donations or purchase conservation easements, an entire set of statutory and regulatory obligations and procedures must be followed. In addition, an educational element is often required to inform the general public of the merits and reasonableness of the proposed public action to acquire a conservation easement, especially when public funds are involved. Often municipal council action is required to authorize the donation or purchase, and sometimes General Assembly action is required to authorize a local referendum question on the acceptance or purchase of a conservation easement and the use of local funds. These steps can sometimes take months to perfect and sometimes landowners are unwilling to wait for the outcome of the local approval process. Public entities must strictly adhere to the substantive and procedural requirements for the transfer of the conservation easement to ensure that it remains valid and enforceable.

Private organizations have fewer procedural and substantive requirements when purchasing conservation easements. However, sometimes tax issues for the landowner are involved that require the adherence to specific substantive requirements by the purchasing organization, such as site evaluation reports and fair market value appraisals. These steps may also involve some time delays but typically not as many as the municipal approval process.

4. Recording the Conservation Easement

Recording of the fully executed document is rather straightforward. However, this requirement is as important as the financial transfer to perfect the transaction. If the conservation easement documents are not recorded properly or not recorded at all, the desired protection may not be enforceable as a real covenant. Once the conservation easement is fully executed, the original document along with all exhibits must be recorded in the municipal land evidence records where the affected property is located. Sometimes this involves recording the conservation easement in more than one municipal land evidence records office, as a conserved property may cross town lines. The fully executed conservation easement document must be recorded in the municipal land evidence records for the deed to become “perfected” or legally effective. Failure to record the easement can result in use of the affected property or its sale and subsequent use in a manner not consistent with the easement objectives.

Examples exist where conservation easements were obtained during older cluster development approval processes but not recorded in the local land evidence records. A subsequent owner of the property undertook activities that were prohibited in the executed but not recorded conservation easement. As a matter of law, the subsequent owner could not be prevented from undertaking the

prohibited activities since the executed easement was not recorded. It is a best practice that the grantee of the conservation easement have their attorney perform all of the closing formalities which includes the recording of all legal documents to perfect the transaction. For conservation developments, the municipal planning board should establish a standard operating procedure to require that the administrative officer report back to the planning board to verify that the conservation easement and all supporting documents have been properly recorded.

There are usually exhibits recorded with the conservation easement. **Three exhibits that should always be recorded with every conservation easement include:**

- 1) a legal description of the real estate parcel (which should be a surveyed metes and bounds description defining the exact dimensions of the property subject to the encumbrance, or reference to a recorded plat which provides a specific description defining the exact area of the property subject to the encumbrance);
- 2) a Class 1 survey of the property to delineate boundaries and potential title encroachments; and
- 3) the property management plan.

The parties can also record or make reference to their baseline documentation report and any other documentation viewed as helpful or informative in explaining the agreement.

5. Maintaining Necessary Records

In addition to determining whether title insurance is available for the affected property protected by the conservation easement, it is likewise important to determine whether general liability and/or property casualty insurance is available. Most communities in Rhode Island are members of the Rhode Island Interlocal Risk Management Trust. A simple call to the Trust will determine whether coverage is available and its cost. Organizations and legal entities must contact their own insurance agent regarding the appropriate type and availability of insurance coverage for the protected property. General liability insurance is especially important when members of the public have the right to access and/or use the protected property.

Title insurance is also necessary on the protected property for the easement holder(s). Recordkeeping requirements will differ depending upon the legal status of the easement holder(s). For instance, a municipality will want to designate a particular department of government (e.g., the town clerk, conservation commission, land trust, town planner) as the repository for all conservation easement records. Original documents should be preserved as would any other important original legal documents. Copies of the originals should be available at a designated location for public review and inspection.

Legitimizing the value of the conservation easement with the public is best accomplished through outreach and transparency. Private entities holding conservation easements have their own recordkeeping protocols and typically have no obligation to release or disclose the documents related to the conservation easement transaction other than to record the conservation easement document in the local land evidence records.

The custodial recordkeeping duties are equally important to establishing the conservation easement agreement. Once all the documents have been created, signed, and recorded, they must be maintained in a safe environment, accessible to the public. Just as the City or Town Clerk keeps

all documents secured in the municipality's vault, backup hardcopies of all such documents are also maintained off-site. In maintaining the conservation easement documents, the purchasing entity must consider document storage and protection. Perhaps conservation development applicants should be required to provide digital copies of all documents involved in the transaction. In the alternative or in addition, the planning board could require the developer to pay for the cost of document storage in outside environments as a part of the conservation easement transaction. Other arrangements are possible, but what is important is to remember that custodial storage of the transactions documents must be considered and implemented.

6. The Document Amendment Procedure

The conservation easement should contain a provision in the document itself to allow for amendments. Those provisions should require that any amendments be in writing and signed by the burdened landowner and easement holder(s). Moreover, provide that no amendment will affect the qualification of the conservation easement or the status of the grantee under any applicable laws, provide that any amendment shall be consistent with the purpose of the conservation easement and not affect its perpetual duration, and that the amendment document that is recorded in the local land evidence records is valid and effective. Amendments to contract documents are ordinary and necessary events, especially when contracts involve a long duration of time like conservation easements.

However, as discussed in **Section 5 in Article I**, "Forever May Not Last"⁸ if care is not taken regarding the easement holder(s) ownership. As discussed, segmentation of the easement holder(s) ownership is one mechanism to provide that forever really means forever. If more than one party holds the interest to the conservation easement then amendments will typically require all easement holder(s) to agree. If an impasse among easement holders occurs, several legal options exist to address the circumstances of the particular situation.

⁸ See supra Fn 11 & 12.

III. ASSURING THE ACHIEVEMENT OF CONSERVATION OBJECTIVES: OWNERSHIP, MONITORING AND STEWARDSHIP CONSIDERATIONS

Even if a conservation organization and/or municipality closely adheres to the statutory and substantive requirements to create a conservation easement, it does not necessarily mean that the restriction will be observed trouble-free or even that it will remain enforceable over time. There are a number of areas concerning ownership, monitoring, and stewardship that should be given very thorough and careful consideration.

1. Who Should Hold a Conservation Easement?

A conservation easement may be held by land trusts and similar non-profit organizations such as the Audubon Society of Rhode Island or the Nature Conservancy, municipalities, state agencies like the R.I. Department of Environmental Management, federal agencies, or a combination thereof. For example, the Rocky Point Park Conservation Easement is held by the R.I. Department of Environmental Management while the title to the property is held by the City of Warwick.

Many commentators prefer that conservation easements be held by public entities so as to ensure better enforcement of the conservation of the property in perpetuity.⁹ This preference is based on the belief that the crucible of the democratic electoral process will compel public officials to honor the purpose of the conservation easement¹⁰ and because courts have had a tendency to enforce such easements where there is an underlying public policy at stake.¹¹ The Act also serves to support the perpetuation of conservation easements. It is also important to note that certain critical benefits and protections afforded to conservation easements by State statutes and the Internal Revenue Code only accrue when the conservation easement is held by a qualified governmental agency and qualified non-profit land trust. Some holders such as a private individuals do not qualify.

Problems do occur, however, when circumstances appear to change and pressure mounts, causing a governmental entity to renege on its promise to conserve the property in perpetuity.¹²

However, care must be taken regarding the easement holder(s) ownership. As discussed, segmentation of the easement holder(s) ownership is one mechanism to provide that forever really means forever. The preferred method of enforcing and preserving the purposes of a conservation easement should probably involve at least two (three whenever possible) easement holders.

By having two or more separate and independent parties controlling the conservation easement, whether they are multiple government entities or a combination of government and private entities, the probability of terminating the conservation easement is lowered. If more than one party holds the interest to the conservation easement then amendments will require all easement holders to agree. It is a best practice to include the local municipality or an agency thereof as one of the easement holders as well as a homeowners' association and perhaps a land trust.

If an impasse among easement holders occurs, several legal options exist to address the circumstances of the particular situation.

⁹ See, Korngold, *supra* note 21.

¹⁰ Although this theory is somewhat permeable as shown in the story referenced in FN 33, *supra*.

¹¹ Korngold, *supra* note 21, at 476.

¹² See, *supra* note 34.

2. Who Should Own the Open Space ?

For an acquisition there are a number of different options when it comes to the ownership of open space. For conservation developments specifically, State statutes (Section 45-24-47(D)) allow for four ownership options for the open space.

These include:

1. Ownership by a City or Town
2. Ownership by a Non-profit Group
3. Ownership by a Homeowners' Association
4. Private Ownership for Farm, Forest or Habitat Use (**Figure 6**)

The statute also states that the open space is subject to a community-approved management plan that specifies the permitted uses for the open space. The choice of the owner of the open space should be based on careful analysis of the use, character, and resource sensitivity of the open space area. Each of the four options is well-tested and reliable, given the right fit between the ownership scheme, the proposed use, and the site itself (refer to the *RI Conservation Development Manual* (DEM 2003) for further information).



Figure 6. Allowing farmers to keep farming is a no-cost solution to ongoing maintenance of open space.

Ownership Options

Ownership by a City or Town

- o Most accessible to local residents.
- o No cost acquisition of public open space.
- o Town assumes ongoing maintenance responsibilities.
- o Most suitable in the case of lands set aside for public parks and recreation areas.

Ownership by a Non-profit Group

- o Predictable track record of management abilities.
- o Clear goals for use and stewardship.
- o Staff responsibility.
- o Ideal for significant resources and habitat.
- o Strong leadership in habitat and historic preservation.

Ownership by a Homeowners' Association

- o Homeowners “buy in” to management responsibilities.
- o Developer structures association and subsidizes it prior to sale of lots.
- o Membership required and automatic for purchasers and their successors.
- o Association maintains insurance and taxes on open space.
- o Members share cost of maintenance.
- o Most suitable for semi-private recreation, buffers, neighborhood playgrounds, etc.
- o Should be automatic with purchase of property. If a homeowners' association will own the open space then the planning board should require the developer to establish a homeowners' association as a condition of the final subdivision approval.

Private Ownership for Farm, Forest or Habitat Use

- o Keeps land on local tax roles.
- o Streamlines management and maintenance.
- o Gives managers more control over land use decisions.
- o Allows farmers to keep farming just as they have before, while allowing development on a portion of their land.

3. How Will the Easement be Monitored?

In order to avoid the many pitfalls that could eventually occur, how the property and conservation easement will be monitored should be clearly outlined in the conservation easement agreement and accompanying property management plan. The property management plan should provide for regular inspections by the conservation easement holder(s) and should spell out the objectives of the inspections. The size and complexity of the conservation easement will determine how frequently these inspections should occur, but the bare minimum should be annual inspections. Whatever regular period is agreed upon, it would be prudent of the conservation easement holder(s) to include the landowner on such trips so as to keep them involved in the conservation of the land. In addition, the conservation easement holder(s) should provide and circulate a written report detailing the inspection findings and recommended actions, including a timetable, for the landowner to undertake to remain in compliance.

4. Methods of Enforcement

The enforcement of easement restrictions should be carefully considered during the preparation of the conservation easement, and the organization(s) responsible for inspection and enforcement clearly identified. Enforcement starts with good planning and preparation during the development of the easement. The following should be done to avoid and minimize enforcement problems:

- **Baseline Documentation Report:** A good baseline documentation report will make it easier to determine the conditions of the property at the time the easement was recorded. Refer to Appendix E for a baseline documentation report checklist.
- **Inspection Access:** The easement must provide legal access for the conservation easement holder(s). The frequency of inspections should also be specified.
- **Establish Ownership of the Open Space:** This is particularly important for a conservation development, where Rhode Island law allows for four ownership options and there could be different owners depending upon how the open space may be used.
- **Property Management Plan:** This will specify what the open space can be used for and who is responsible for any maintenance. For example, if an open field habitat is to be maintained, the plan will make it clear who mows the field and at what time(s) of the year to avoid harming nesting wildlife.
- **Permanent Monuments to Mark the Open Space Boundary Areas:** Prior to recording the easement, permanent markers should be installed to clearly delineate the easement boundary areas on the ground. Signage should also be used, particularly with conservation developments, to make homeowners aware of the easement boundaries.
- **Easement Endowment:** A fund should be established to allow the easement holder(s) to take any reasonable and necessary action to enforce the easement conditions. Refer to Appendix F for a sample worksheet for calculating costs of a conservation stewardship endowment .

For conservation developments there are some additional considerations as follows:

- ✓ The open space should be large contiguous areas where possible. Avoid narrow buffers or isolated patches since these are very difficult to enforce over time (**figure 7**).

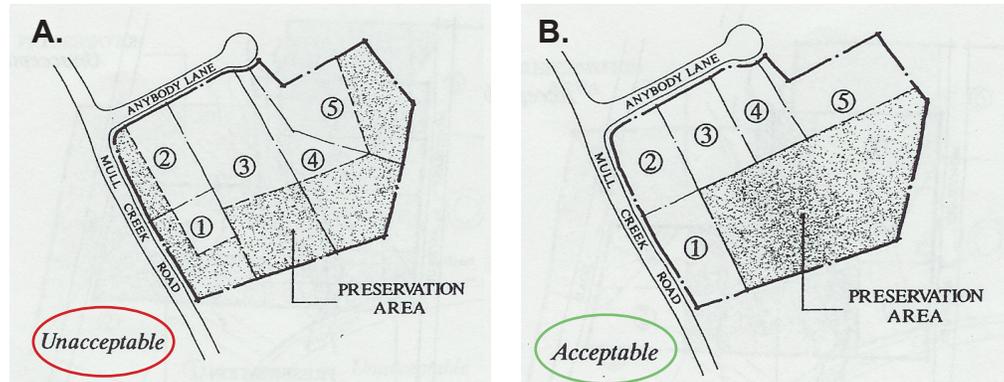


Figure 7. The open space should be designed as one large block of land with logical, straightforward boundaries (example guideline principle from the Natural Lands Trust).

- ✓ Avoid utilities, wastewater disposal systems and stormwater treatment facilities in the easement area.
- ✓ All trails or easement area improvements should be constructed prior to the sale of any lot.
- ✓ Where possible, create a hard edge such as a road or trail to delineate the open space boundary from the development area.
- ✓ The easement area should not include any portion of a private house lot.
- ✓ The developer should be required to incorporate the conservation easement and the property management plan as exhibits in the final homeowners' association documents.
- ✓ The developer should be required to establish an escrow account to monitor and inspect the construction process since earth moving and construction crews have the potential to violate the easement restrictions. Where possible fence off sensitive areas to avoid construction impacts.

Since disputes may arise between the holder(s) of the conservation easement and the burdened property's owner, methods of enforcement should be clearly spelled out in the conservation easement agreement and the accompanying property management plan. Depending upon the circumstances, different enforcement methods may be applicable. Many issues can be dealt with using mediation and/or arbitration. If, for example, a conservation easement prohibited the cutting of timber from the property and the landowner later wished to cut a small amount for use as firewood, such a modification of the agreement could be brokered through arbitration and/or mediation. Sometimes mediation and/or arbitration should be the first step in discussing and settling all disputes that may occur with the agreement. Not only should such a provision be clearly indicated in the agreement, but from a practical standpoint, the easement holder(s) and the landowner should maintain an open dialogue in perpetuity, just like the agreement. By continuously keeping the lines of communication open, when a dispute does arise, strangers will not be meeting at the mediation table.

Court intervention may always be sought if a dispute becomes so severe that litigation is the only prudent remedy. When the conservation easement holder(s) uses legal means to settle an enforcement dispute, then the hybrid ownership model of holding the conservation easement is most useful. Since there would be at least two easement-holding parties seeking to enforce the conservation easement objectives, a court would have both the contractual and covenant rungs upon which to enforce the conservation easement. Even better is the public policy rung when a governmental entity is involved as an easement holder.¹³

5. Stewardship Considerations

Stewardship considerations are numerous but equally important. Aside from the legal issues, preservation of the conservation easement values for current and future generations is imperative for public acceptance and support of these activities, particularly where public funds are used. The property management plan should make it clear who will be responsible for specific stewardship activities. For example, if an open field is preserved for habitat or scenic values, then it must be clear who will mow this field to keep it from converting to forest. The Kenyon Farm in South Kingstown is an everyday reminder of a successful conservation program to preserve and protect important natural and physical features of a property for present and future generations to enjoy.

6. Insurance Considerations

- Title Insurance, General Liability, Property Casualty

In addition to determining whether title insurance is available for the affected property protected by the conservation easement, it is important to determine whether general liability and/or property casualty insurance is available. General liability is especially important when members of the public have the right to access and/or use the protected property. Insurance is also necessary to cover incidents involving volunteers performing monitoring, inspection and maintenance activities on the protected property for the easement holder(s).

Most communities in Rhode Island are members of the Rhode Island Interlocal Risk Management Trust. A simple call to the Trust will determine whether coverage is available and its cost. Organizations and legal entities must contact their own insurance agent regarding the appropriate type and availability of insurance coverage for the protected property. Depending upon the intended and actual use of the property, an owner of property who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes is afforded liability limits pursuant to Chapter 6 of Title 32 of the R.I. General Laws.

¹³ See Korngold, *supra* note 22, at 480-82.