

**THE MASSACHUSETTS CONSERVATION  
RESTRICTION HANDBOOK**

FIRST EDITION 1991

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THE MASSACHUSETTS CONSERVATION

RESTRICTION HANDBOOK

A  
SAMPLER  
&  
GUIDELINES

FOR

RECEIVING APPROVAL BY THE SECRETARY

OF

ENERGY AND ENVIRONMENTAL AFFAIRS

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS  
DIVISION OF CONSERVATION SERVICES

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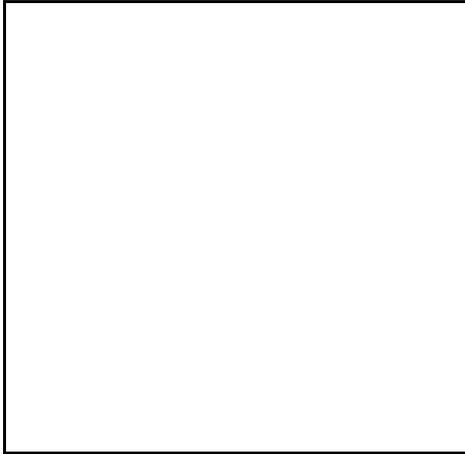
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## FORWARD



If we are to continue to preserve Massachusetts' unique natural heritage and recreational resources in these times of lessening public financial support, we must be innovative. Municipalities through their regulatory and zoning powers and the private, non-profit land trust community are using a relatively new preservation tool known as the *conservation restriction* with great success.

Conservation restrictions are interests in land acquired through gift, purchase, or regulatory exaction which are designed to preserve natural resources from adverse future change.

The more forward thinking communities have developed cluster zoning by-laws which allow for more efficient land use by clustering houses on small lots and permanently protecting common open space under perpetual restriction. Conservation Commissions, too, ask for and receive conservation restrictions on wetland portions of subdivisions subject to Chapter 131, section 40 wetlands permits.

Charitable contributions of conservation restrictions are actively being solicited by the 116 or so land trusts throughout the Commonwealth. Though these gifts are generally tax driven, many landowners truly wish to see their property preserved for its intrinsic value.

The unique features of conservation restrictions are that they leave land on the tax rolls (though sometimes much reduced in value), preserve land without public ownership and allow, in many instances, for public access.

In its wisdom, the Legislature has given my office the responsibility for approving all conservation restrictions held by municipalities and private land trusts. Without my determination of public benefit and approval, conservation restrictions would be unenforceable over time.

This booklet therefore has been developed to assist municipal and private, non-profit organizations in crafting conservation restrictions and to guide them through the state approval process.

I am confident the handbook will prove to be a useful guide to all.

## ACKNOWLEDGEMENTS

The development of the Massachusetts Conservation Restriction Handbook represents an outgrowth of the Secretary of Energy and Environmental Affairs Conservation Restriction Program Review Board work started in 1986. With the 1980 tax law of conservation easements and Internal Revenue Service regulations of 1986 driving the effort, review board members R. Lisle Baker, professor, Suffolk Law School; Kingsbury Browne, Esq., Hill and Barlow; and Stephen Small, Esq., Powers and Hall, agreed to form a sub-committee to draft a new Massachusetts model conservation restriction. Included within this Handbook is the handiwork of their efforts. The "Sampler", as it is being called, is designed to aid the users and drafters of conservation restrictions alike understand how such documents should be crafted to qualify for IRS and EOEEA approval.

In addition to the Sampler, the Handbook contains the step procedures for seeking approval of the Secretary, approval criteria employed by the Secretary, a compilation of EOEEA policies developed over the past 24 years pertaining to Conservation Restrictions as well as the application form utilized to file a request for the Secretary's approval.

This Handbook represents the latest guide in the continuing evolution of conservation restrictions as a land preservation tool in Massachusetts. Its production would not have been possible without the legal expertise of Messrs Baker, Browne, and Small and the Sweetwater Trust whose grant made printing of this publication possible. To all, the Commonwealth and I owe a great deal of gratitude.

Irene Del Bono  
Director

## TABLE OF CONTENTS

FORWARD	i
ACKNOWLEDGEMENTS	ii
CONSERVATION RESTRICTION DEFINED	1
ROLE OF THE EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS	2
SECRETARY'S APPROVAL STEP PROCEDURES	2
APPROVAL CRITERIA	4
SECRETARIAT POLICIES PERTAINING TO CONSERVATION RESTRICTIONS	5
Agricultural Lands	5
Amendments	5
Baseline Data	6
Building Rights	6
Charitable Corporation or Trust	7
Condominium Common Lands	7
Director	8
Down Zoning	8
Enforcement of Conservation Restrictions	8
Floating Building Lots	9
Public Access	9
Public Interest, Determination of	10
Release of Conservation Restrictions	10
Subordination	11
Surveys	11
Term Restrictions	12
CONSERVATION RESTRICTION SAMPLER WITH COMMENTARY	13
APPENDICES	35
APPENDIX A	36
APPENDIX B	41
APPENDIX C	48
APPENDIX D	49
APPENDIX E	51
APPENDIX F	52

## **CONSERVATION RESTRICTION DEFINED**

A conservation restriction, formerly known as a conservation easement, is a means authorized by Sections 31-33 of Chapter 184 of the General Laws of the Commonwealth of Massachusetts<sup>1</sup> to limit the use of land in order to protect specified conservation values including the natural, scenic or open condition of the land. As it is statutorily defined, a conservation restriction does not require re-recording as is the case with the conventional restrictions under Chapter 184, §26.

Conservation restrictions differ from other kinds of specified restrictions created under Massachusetts law such as preservation, watershed, and agricultural preservation restrictions also described in Section 31. For example, every conservation restriction must be submitted according to the written procedures of and approved by the Secretary of Environmental Affairs. By way of contrast, preservation restrictions must be approved by the Massachusetts Historical Commission, watershed preservation restrictions by the Commissioner of the Metropolitan District Commission and agricultural preservation restrictions by the Commissioner of Food and Agriculture.

Grantors may want to consider the alternatives these other forms provide. For example, if there is an historic building on the property, the Grantor may want to consider placing a preservation restriction on the property. A preservation restriction ensures that the architectural and historical integrity of the building will be preserved. The Massachusetts Historical Commission is the state agency responsible for approving preservation restrictions on buildings and archeological sites. Information and guidelines are available from the Massachusetts Historical Commission, 80 Boylston Street, Boston, MA 02116.

Thus, there are five categories of conservation restrictions:

First, the conventional conservation restriction which is perpetual and for the charitable gift of which the donor-landowner may be seeking a charitable deduction for federal income tax, gift and estate tax purposes.

Second, historic preservation, watershed or agricultural preservation restrictions discussed above.

Third, the perpetual conservation restriction required by a government agency in the permitting process; e.g., pursuant to the increased density/open space bonus provisions provided for in Section 9 of Chapter 40A of the General Laws, for which income tax charitable deductions are not available, but which still require approval by the Secretary of Environmental Affairs.

Fourth, development rights restrictions which are purchased by a governmental agency or private, non-profit organization; for example, under the Aquifer Land Acquisition Program or the Open Space Program. (A so-called bargain purchase may place the purchase in the first category.)

Fifth, other restrictions not falling into one of the first four categories; e.g., restrictions for a term of years.

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<sup>1</sup> Please refer to Appendix A, M.G.L. Chapter 184, §31-33.

## **ROLE OF THE EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS**

Under the provisions of Massachusetts General Laws Chapter 184, §31-33, the Secretary of Energy and Environmental Affairs must approve conservation restrictions in order for certain legal protections to apply to their creation.<sup>2</sup> Because the Director of Conservation Services administers certain open space programs for the Secretary, he has been delegated the process of review, in the first instance, of requests for approval of conservation restrictions by the Secretary of the Executive Office of Environmental Affairs. The Director is then charged with making recommendations for approval, modification, or rejection of such requests to the Secretary.

### **SECRETARY'S APPROVAL STEP PROCEDURES**

Proponents seeking the approval of a conservation restriction may find it helpful to submit a draft of the conservation restriction for prior review before proceeding with executing the document and seeking the necessary local approvals. Prior review and approval by the Director is particularly recommended where the conservation restriction provisions are complex or provide for certain retained rights which the Secretary may find inconsistent with the preservation of the natural resource values of the property. In any event, the following procedures apply.

#### **STEP PROCEDURES**

**A. Applicant submits draft conservation restriction to Director together with:**

- 1. Application form - See Appendix B**
- 2. Plan of land**
- 3. Field Report - See Appendix C (to be filled out by local conservation commission)**

**together with:**

- a. USGS topographical map showing restricted area thereon and any adjacent or nearby public or quasi-public land holdings**
- b. Municipal Certification - See Appendix B**

**B. Staff Review**

- 1. State review, interagency if applicable**
- 2. Inter-municipal review, if applicable**

**C. Modification, if necessary**

**D. Review by EOEEA counsel**

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<sup>2</sup> The reader may find the recent Supreme Judicial Court case *James G. Bennett and another v. Commissioner of Food and Agriculture* (410 Mass. 1991) of interest regarding some of these legal protections afforded all types of restrictions created by M.G.L. Chapter 184, s.31

- E. Approval and Signature by Secretary**
- F. Return of conservation restriction to applicant by Director**
- G. Recordation by applicant**
- H. Notice of registry and GIS data and copy of recorded instrument sent to Director by applicant (see Appendix F)**
- I. Copy of recorded CR sent to the local Board of Assessors for assessing records**

The Secretary's approval is not a given, thus executing and recording a conservation restriction without approval is not advised. The Secretary is the last person to sign the conservation restriction and chooses not to approve and sign certificates for previously recorded documents. In situations where approval for a previously recorded document is sought, a confirmatory conservation restriction shall be required. The above step procedures apply for approval of confirmatory document approval as well.

The Director maintains a complete record of all conservation restrictions approved or released by the Secretary showing grantor, grantee, acreage, type (term or permanent), dates of receipt and approval, and the registry recordation information. Microfiche file records are also maintained. Both records and files are maintained in chronological order by municipality; for example, Boston C.R.#1, Boston C.R.#2 etc.

The records are public documents and are available upon request from the Division of Conservation Services, 100 Cambridge Street, 9<sup>th</sup> Floor, Boston, MA 02114; telephone (617) 626-1138.  
Email: Irene.Del-Bono@state.ma.us

### **APPROVAL CRITERIA**

To quote Thomas Barrett, "An easement is more than the sum of its restrictions: it is a right to protect certain values. The more drafters focus on the future, which cannot be known, the more emphasis they place on articulating those values in the easement. As critical for easements long-term enforceability as its express restrictions, the thinking goes, is the clarity with which its purpose and intent are set out."

The format and proper crafting of a conservation restriction is thus critical to receiving the approval of the Secretary. In addition to minimum construction standards (see the "Sampler" page 18) which clearly spell out the purpose and intent of the conservation restriction, the document must also display consistency and balance. For example, the prohibitions must be sufficient to protect the identified conservation values and the retained rights for use of the property must not be contradictory to the prohibited uses or to the purpose(s) of the conservation restriction.

And finally, public benefit must be demonstrated by the proponent for the Secretary to make a finding of "public interest" in approving the conservation restriction. For more detailed discussion on policy regarding findings of public interest, please refer to *Secretariat Policies Pertaining to Conservation Restrictions* on page 5. Particularly note the policies on "Public Interest, determination of" and "Condominium Common Lands." Drafters of conservation restrictions should find Appendix D, "Plans, Policies, Programs and Lands Helpful in Demonstrating State and Local Benefit" useful. The Executive Office of Energy and Environmental Affairs provides a resource library for most of the plans listed in that appendix.

## **SECRETARIAT POLICIES PERTAINING TO CONSERVATION RESTRICTIONS**

During the past 24 years, over a thousand conservation restrictions have been approved by the Secretary of Environmental Affairs. Like the accumulation of common law, the following policies have accumulated over this period and represent the collective legal thought of current and past EOEEA Counsels and have been developed by staff, which, in the judgement of the Secretary, insure that conservation restrictions will be coherent and well drafted documents which will stand the test of enforceability over time.

### **Agricultural Lands**

It is the policy of the Secretary to preserve and protect prime and unique agricultural lands throughout the Commonwealth. Conservation restrictions which include such agricultural lands need extra care in drafting in order to protect viable agricultural uses as well as their scenic amenities or other natural resource values.

Thus the grantee should:

1. Retain an affirmative right, but not an obligation to mow agricultural fields should the grantor be unable or fail to do so. This right is especially important where scenic values represent one of the purposes of the conservation restriction.
2. Retain the absolute right of approval as to the location of agricultural related buildings permitted to be built or rebuilt on restricted lands.
3. Define the type of fencing which may be permitted as a right of the grantor. For example, site pervious fencing at locations where scenic values are a primary purpose for preserving the property would be required by the Secretary. Where a conservation restriction lies over common agricultural land within a residential development, fencing which would divide farm fields should not be permitted.
4. Subdivision of agricultural fields should not be permitted without the expressed permission of the grantee.
5. Where agricultural use is permitted within the context of another primary natural resource value such as water supply protection, the Secretary may require such agricultural use be performed in accordance with a USDA Soil Conservation Service prepared farm plan and/or meet current non-point source pollution standards.

### **Amendments**

While M.G.L. Chapter 184, §32 is silent on the subject of amendments to conservation restrictions, it is strongly suggested that amendments be treated as something less than releases but subject to the approvals of the grantor, grantee, municipality, and the Secretary. Amendments should then be recorded in the registry of deeds. However, as Thomas Barrett states in the Conservation Easement Handbook, "...either change it for the better or change it for the neutral."

The Secretary's policy shall be to approve amendments to conservation restrictions only if they serve to strengthen the original conservation restriction or will have a neutral effect upon the provisions of the

conservation restriction. No amendment will be approved which will affect the qualification of the conservation restriction or status of the grantee under any applicable laws, including Section 170(h) of the Internal Revenue Code, as amended, Article 97 of the Massachusetts Constitution, including EOEEA's Article 97 Land Disposition Policy, or Sections 31-33 of Chapter 184 of the General Laws of Massachusetts.

### **Baseline Data**

If requested by the applicant, the Secretary will maintain duplicate originals of all baseline data. Data and documents will be placed in the custody of Massachusetts State Archivist, Massachusetts Archives at Columbia Point, 220 Morrissey Blvd., MA 02155, and will be available for review or retrieval, if necessary.

Baseline data includes such documents as:

1. USGS topographic map showing the property lines
2. Aerial photograph(s) taken at the time of donation<sup>3</sup>
3. On-site photographs showing particular natural resources
4. A map of the area drawn to scale showing all existing improvements such as roads, buildings, fences, etc.; natural features and locations; rare species locations and the like
5. Special documents or plans such as soil survey reports, scenic landscape inventories, archeological surveys, etc.

The documentation including the maps and photographs, must be accompanied by a statement signed by the donor and the donee clearly referencing the documentation and in substance saying "This natural resources inventory is an accurate representation of the property at the time of the transfer."

### **Building Rights**

See also *Condominium Common Lands* and *Agricultural Lands*.

While it is recommended that existing buildings be excluded from restricted lands, the Secretary may approve such restriction schemes where cost provisions associated with subdivision requirements are beyond the financial capacity of the grantor to absorb, or where the buildings permitted have been located within surveyed building envelopes, and include restrictions on size or additions to buildings.

On restricted lands where buildings (residential or farm related) exist, the conservation restriction should provide for reconstruction possibilities within the same footprint, or nearly so, or within a new beneficial location - all subject to approval by the grantee.

If the existing building is of historic interest, it is recommended that a joint historic preservation and conservation restriction be crafted into a single document which includes the building and land. Such a restriction would have to be approved and signed by both the Massachusetts Historic Preservation Officer and the Secretary of Energy and Environmental Affairs.

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<sup>3</sup> Negatives of the photographs are required by the State Archivist

## **Charitable Corporation or Trust**

To determine if a charitable organization is a suitable holder of conservation restrictions, the Secretary may review the language in its charter or articles of incorporation, the constitution and bylaws, purposes declared and actual work performed. Consistent with *Troy* (1973) 306 N.E 2d 203, 364 MASS 15, a charitable corporation or trust's purpose(s) must be carried out for the benefit of the public at large or for some indefinite class of persons. It must also meet the requirement of M.G.L. c. 184 section 32, which is that the Conservation Restriction must be held by a governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area

Since it is the opinion of the Secretary that once acquired, conservation restrictions become subject to the same restraints on alienation applicable to parkland open spaces, it is important that such restrictions continue to benefit the public over time. Thus the holder may be asked to demonstrate some assurance of financial capacity and commitment that the land subject to the conservation restriction will be maintained and preserved over time, including monitoring and enforcement. Please refer to Appendix E for the Land Trust Alliance's "*Recommendations to Increase the Reliability of Grantees as Conservation Restriction Managers*".

## **Condominium Common Lands**

The Secretary strongly encourages the use of conservation restrictions in zoning techniques such as PUD's and cluster developments to preserve common open space as authorized by M.G.L. Chapter 40A, §9. In order to receive approval of the Secretary, however, the following applies:

1. Local approval certification is evidence of public benefit, but is not by itself sufficient for the Secretary's determination of public interest. For the Secretary to approve cluster of PUD housing schemes with restrictions, such land must display some or all of the following additional public benefits:
  - \* The protection of archeological or historic resources or sites.
  - \* Minimization of "damage to the environment" as defined in M.G.L. Chapter 30, §61.
  - \* The protection of beautiful scenery visible from a public road or waterway.
  - \* The protection of public drinking water sources.
  - \* The preservation of the historic rural or cultural character of a municipality.
  - \* The maintenance of critical wildlife habitat or wetlands or other important ecosystems.
  - \* The preservation and conservation of farm, forest, or grazing lands.
  - \* Public use and public access to the restricted site.
2. No dwelling units, parking lots, roadways, or accessory uses such as sewage treatment plants; or private recreational amenities associated with the development should be included within the restricted land.

3. No future rights to construct the above-mentioned structures should be included in the restricted land. Underground utility easements would be acceptable providing unique resource areas are not destroyed and where the site will be restored to a naturally vegetated condition. Where such utility easements have not been determined in advance by the grantor and surveyed out, future rights to lay out such easements shall require the prior approval of the grantee.
4. Construction phase provisions such as stockpiling of material and the like should not be included in the conservation restriction. If it is necessary to perform construction work within the proposed restricted land, the conservation restriction should be executed upon completion of the work and upon restoration of the site.

### **Director**

The Director of the Division of Conservation Services, Executive Office of Energy and Environmental Affairs to whom the responsibility for review of conservation restrictions has been assigned by the Secretary of Environmental Affairs.

### **Down Zoning**

It shall be the policy of the Secretary not to use conservation restrictions solely as a down zoning tool.

### **Enforcement of Conservation Restrictions**

It is the opinion of EOEEA Counsel that enforcement of conservation restrictions held by local governments is within the scope of powers envisioned by the Legislature as lying within the Executive Office of Energy and Environmental Affairs. The Attorney General has the authority to enforce conservation restrictions held by governmental entities as well as those held by private entities.

Authority to enforce conservation restrictions would be bolstered, however, if EOEEA was designated as having authority to enforce a restriction on behalf of the grantee in the instrument creating it. In that event, the law of contracts would support EOEEA's enforcement rights.

Since conservation restrictions will be enforced through court proceedings, the Department of the Attorney General will be the moving force acting as the attorney of record for EOEEA. Nevertheless, the Secretary does have an enforcement role to play regarding conservation restrictions, provided that 1.) a decision is made by the Secretary that a particular restriction is important enough to initiate some action, and 2.) the Attorney General concurs that his resources are being utilized efficiently by pursuing such action.

The "Sampler" which follows, however, remains silent on the issue.

## **Floating Building Lots**

Generally, floating building lots are not acceptable for inclusion within restricted lands. If however, the land to be restricted is of sufficient size and can absorb the building(s) without disturbing the natural attributes thereof, the Secretary may approve such a retained right providing the grantee has non-revocable approval as to location.

## **Public Access**

Public access to conservation restricted lands is strongly encouraged by the Secretary but is not required if other public benefits exist. Public access, however, may prove to be the only public interest gained from placing land under a conservation restriction - in the Secretary's opinion. The Recreational Use Statute provides protection from liability only if there is public access.

IRS regulations present the various forms and degree of public access required for charitable donations. The regulations give guidance to drafters of all types of conservation restrictions. They are:

1. Outdoor recreation and education substantial and regular use by the general public. Reg. 1.170A-14(d)(2)(ii);
2. Protection of environmental systems allows limitation on access, as appropriate to protect environment. Reg. 1.170A-14(d)(3)(iii);
3. Open space/scenic enjoyment requires visual access to or across the property by the general public. Reg. 1.170A-14(d)(4)(ii)(B);
4. Open space/governmental policy allows limitation on access, unless conservation purpose is frustrated or undermined; if governmental policy is for scenic protection, visual access is required. Reg. 1.170A-14(d)(4)(iii)(C);
5. Historic sites and structures require some visual public access to protected features; otherwise, physical access by public on regular basis is required. Reg. 1.170A-14(d)(5)(iv).

## **Public Interest, Determination of**

See also *Condominium Common Lands*

"In making her determination as to approval or conservation restrictions, Massachusetts law requires the Secretary to:

"take into consideration the public interest in such conservation..., and any national, state, regional, or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for the use of the land." M.G.L. Chapter 184, §32.

Aside from the statutory requirement that the Secretary consider the plans and proposals cited in section 32, the Secretary must also determine the public interest in such conservation.

The Secretary will deem it sufficient evidence of the "public interest" if the applicant can show that the restriction meets any of the tests for deductibility under the Internal Revenue Code Section 170 (h) and the Regulations promulgated thereunder, and a private ruling letter by the Internal Revenue Service shall be deemed sufficient for establishing such deductibility, or the applicant makes an independent showing of public benefit.

Conservation restrictions granted for other than charitable purposes or exacted through regulatory processes must display some additional public benefit if not for the purposes above. Please refer to the policy discussion in *Condominium Common Land* for further guidance. See also Appendix D.

### **Release of Conservation Restrictions**

Massachusetts General Law Chapter 184, section 32 states that conservation restrictions

*"may be released, in whole or in part, by the holder for such consideration, if any as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose approval shall be required, and in case of a restriction requiring approval by the Secretary of Environmental Affairs... only with like approval of the release."*

It is the policy of the Secretary not to release conservation restrictions except under the following circumstances:

1. Under the doctrine of changed conditions when the restriction becomes a burden without benefit or when
2. There is no practical alternative to some other public action which requires a complete or partial release and there is overriding public benefit in the release.

Releases must be in compliance with the MEPA regulations 301 CMR 11.26(5) and with EOEEA's Article 97 Land Disposition Policy.

It is the opinion of the Secretary, however, that once acquired, conservation restrictions become subject to the same restraints on alienation applicable to public parkland, including consent by a two-thirds roll call vote of the Massachusetts legislature.

A suggested sequence of events for release would be as follows:

1. The holder (conservation commission, etc.) votes to release the restriction.
2. Notice of the decision to Selectmen, Mayor and City Council, and the Secretary of EOEEA in writing.<sup>4</sup>

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<sup>4</sup> It is suggested from step 2 on the municipality consult with the Secretary of EOEEA for the purpose of coordinating the public notice and hearing process, in order to save time and effort and as a means of coordinating appropriate responses to the request for release. The Secretary

3. The Selectmen (City Council) publish notice of hearing at which time they will consider release of the restriction. After the public hearing the Selectmen (City Council) vote to release the restriction for such consideration they determine to be appropriate.
4. The Selectmen (City Council) convey the release document to the Secretary after two-thirds vote of approval by Town Meeting or City Council and the legislature and MEPA approval.
5. Secretary's approval and recordation by proponent.

### **Subordination**

The Secretary shall require a subordination agreement from any mortgagee holding a mortgage on property proposed to be restricted.

### **Surveys**

A survey plan of land is desirable but not required for conservation restrictions, but may be required under the circumstances described below. In the absence of a survey plan, however, a well drawn sketch plan of the limits of the restriction, with metes and bounds determined and shown, should be recorded with the deed to avoid disputes in the future on whether or where the restriction applies upon a particular parcel of land. Please note that Registries of Deeds have specific rules regarding the size and content of sketch plans.

A survey plan should be prepared under the following circumstances:

1. for a taking where no prior plan is on record and the deed description cannot be confirmed on the ground;
2. where the acquisition results in a division of a parcel, i.e., a new property line is created (this is a Registry of Deeds requirement under the Massachusetts Subdivision Law, Chapter 41, Section 81X);
3. in a subdivision scheme where an "envelope" is created around a dwelling or other portion of land to indicate its exclusion from a conservation restriction;
4. where the conservation restriction is over a portion of a lot, rather than over the entire lot; or
4. where the deed description is so unclear that it cannot be confirmed on the ground and there is no extrinsic evidence (e.g., abutting property plans or recorded boundary agreements between abutting owners) which defines the boundaries.

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reserves the right to further condition the release for such consideration she determines appropriate.

## Term Restrictions

M.G.L. Chapter 184, section 31 allows for conservation restrictions for a period of years or in perpetuity. Less than perpetual restrictions will be approved only where demonstrated critical public interest exists. The drafter should carefully review the IRS state tax implications before entering into a less than perpetual conservation restriction.

## **CONSERVATION RESTRICTION SAMPLER WITH COMMENTARY**

The Division of Conservation Services of the Executive Office of Energy and Environmental Affairs offers this sampler as a guide to draftsmen in thinking how to do their work. Neither the DCS, the EOEEA, the Commonwealth, nor individual advisors to the DCS are hereby offering any legal advice, and the DCS presents this sampler as an educational tool, not a form to be followed without independent analysis and careful drafting by counsel. Each reader must rely solely on the advice of his or her legal counsel. Also, check with the Division of Conservation Services of the Executive Office of Energy and Environmental Affairs to determine the most recent version of this Sampler. **COMMENTS OR SUGGESTIONS FOR IMPROVEMENTS TO BE INCORPORATED IN ANY SECOND EDITION ARE WELCOME AND SHOULD BE SENT IN WRITING TO THE DCS, 100 Cambridge Street, 9<sup>th</sup> Floor, Boston, Massachusetts 02114.**

The Sampler which follows is intended to serve as a guide to the draftsman of a perpetual conservation restriction for charitable gift purpose,<sup>5</sup> but draftsmen interested in other types of restrictions can contact the appropriate state agency for further information, though the outline of this Sampler might well be useful in those contexts.

The content of each section of the document may vary depending upon the policies of the grantee acquiring or exacting the conservation restriction and the Executive Office of Energy and Environmental Affairs. The draftsman of an "exacted" conservation restriction which is imposed over portions of residential lots may also wish to omit the sections of the Sampler on extinguishment and assignability entirely.

In summary, the provisions of this Sampler are designed to meet three overlapping objectives: satisfying the tests for favorable federal tax treatment, Secretarial approval and workability for the grantor and grantee.

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<sup>5</sup>The draftsman may want to refer to the Model Conservation Easement and Commentary prepared by Thomas S. Barrett, Esq., of the Public Resource Foundation of San Francisco, which helped in the preparation of this Sampler. It is part of the Conservation Easement Handbook which may be purchased from the Land Trust Alliance, 1331 H Street, NW, Suite 400, Washington, D.C. 20005.4711 (lta@lta.org)

## Sampler Index

- I. Grantor Clause
- II. Purpose(s)
- III. Prohibited Acts & Uses, Exceptions Thereto, and Permitted Uses
  - A. Prohibited Acts & Uses
  - B. Exceptions to otherwise Prohibited Acts and Uses [If Any]
  - C. Permitted Acts & Uses
- IV. Legal Remedies of the Grantee(s):
  - A. Legal & Injunctive Relief
  - B. Reimbursement of Costs of Enforcement
  - C. Grantee(s) Disclaimer of Liability
  - D. Severability Clause
  - E. Non-Waiver
- V. Access
- VI. Extinguishment
  - A. Grantee's Receipt of Property Right
  - B. Value of Grantee's Property Right
  - C. Right of Grantee to Recover Proportional Value at Disposition
  - D. Grantor/Grantee Cooperation Regarding Public Action
  - E. Allocation of Expenses Upon Disposition
  - F. Continuing Trust of Grantee's Share of Proceeds of Conservation Restriction Disposition
- VII. Assignability
  - A. Running of the Burden
  - B. Execution of Instruments
  - C. Running of the Benefit
- VIII. Subsequent Transfers
- IX. Estoppel Certificates
- X. Effective Date
- XI. Recordation

**SAMPLER**

**CONSERVATION RESTRICTION  
TO  
GREENWAYS ASSOCIATION, INC.**

**I. Grantor Clause:**

**We, [JOHN LANDOWNER and MARY LANDOWNER], husband and wife having an address at \_\_\_\_\_, our successors and assigns ("Grantor(s)"), acting pursuant to Sections 31, 32 and 33 of Chapter 184 of the General Laws, grant, with quitclaim covenants, to [GREENWAYS ASSOCIATION, INC., a Massachusetts non-profit corporation located at 1 Green Place, Boston, Massachusetts], and its successors and permitted assigns ("Grantee") in perpetuity and exclusively for conservation purposes, the following described Conservation Restriction on a parcel of land located in the Town of Exurban, Massachusetts, constituting approximately acres, said parcel being described in Exhibit A attached (the "Premises"). For Grantor's title see \_\_\_\_\_ Registry of Deeds Book \_\_\_\_\_, page \_\_\_\_\_.**

Comments:

Introductory Note: Throughout these comments references to "the Regulations" shall mean the regulations promulgated by the U.S. Treasury regarding Section 170(h) of the Internal Revenue Code of 1986, as amended.

1. The draftsman may prefer instead of "Grantor(s)" to use "Owner" and instead of "Grantee" to say "the Holder" or "Holders" if more than one is involved. If, for example, the restriction is contained in a deed from a charitable or governmental organization to a new owner who must comply, this change of definitions may be particularly needed. Also, it is important for draftsmen to recognize that while Conservation Restrictions have all the incidents of traditional rights in property and the transfer of them, Conservation Restrictions involve the creation of a continuing relationship between the owner of the land subject to the restriction and the holders of the restriction, and to some degree, public authorities involved with its approval.
2. Section 31 of Chapter 184 of the General Laws recognizes testamentary grants. This sampler, however, addresses only lifetime transfers of Conservation Restrictions.
3. The Grantee must meet the requirements of Section 32 of Chapter 184 of the General Laws. For federal tax purposes the Grantee must be a "qualified organization" within the meaning of Sections 170(h)(1)(B) and 170(h)(3) of the Internal Revenue Code. Governmental units (such as towns), charitable corporations, and private non-profit land trusts, exempt under Section 501(c)(3) and enjoying public foundation status are examples of "qualified organizations". Section 1.170A-14(c)(1) of the Regulations requires the Grantee to have the commitment and resources to enforce the terms of the restriction. If the Grantee is not "organized or operated primarily or substantially" for a qualified conservation purpose or if its

resources are limited, special attention should be given to Section 1.170A-14(c)(1) of the Regulations, above.

4. The Exhibit A device eliminates from the body of the Conservation Restriction the often lengthy legal description of the Premises and puts it into a separate attachment. If the description can be condensed by sufficient identification to a plan already recorded or registered or to be simultaneously recorded or registered, or by reference to a deed or deeds already recorded, it may not be necessary to resort to the Exhibit device. Thus, if the land to be restricted is registered, normal identification of acreage, type of land, abutting or nearest streets or public ways and numbers thereon, if any, and the Land Court plan and certificate of title numbers and lot number or numbers, if any, should be sufficient. If the land is unregistered, there should be proper reference by Book and Page to the deed or other source of the grantor's title, and if all conveyed is being restricted, adding "to which deed" or "to which deed and plan" reference is made for more particular description.

If the Conservation Restriction applies to less than the entire premises, or rights are reserved in specific portions of the premises such circumstances should be clarified with the same specificity as required for the description itself. If discrete areas are mentioned in the conservation restriction, such as a field to be mowed, or an existing driveway or trail to be maintained, attach a "sketch plan" as an Exhibit (or attachment to Exhibit A) showing the approximate location of those features (and labeling the location as "approximate".

Most new surveys include some tie-in to latitude and longitude or the State Plan Coordinate System. Agencies and charities are increasingly likely to require such plans and tie-ins for ease of monitoring and enforcement. If not provided initially, provision should be added to encourage them and necessary amendments later.

5. The grantor clause does not warrant title. A title search is desirable to reveal liens and encumbrances which might adversely affect the Conservation Restriction.
6. Baseline documentation should be maintained by the Grantee for enforcement purposes. Such documentation should include a topographic map and any available written reports documenting the significance of the land. EOEEA may require such material as part of the approval process. The baseline documentation will also be important to the Internal Revenue Service. (See the requirements in Section 1.170A-14(g)(5)(i) of the Regulations, especially the signed statement requirement.) The baseline documentation need not be included in the body of the Conservation Restriction, itself, and thus recorded. Some draftsmen may wish to incorporate it by reference. The Sampler does not do so out of concern with ambiguity.
7. Note that Section 31 of Chapter 184 of the General Laws also authorizes term restrictions. Only perpetual restrictions are deductible for federal income, gift and estate tax purposes.
8. Any mortgage on the land to be restricted must be subordinated to the restriction. See Section 1.170A-14(g)(1) of the Regulations.

## **II. Purposes:**

**The Premises, comprised of approximately \_\_ acres of land (and/or water) contain unusual, unique or outstanding qualities the protection of which in their predominately natural or open condition will be of benefit to the public. These qualities include:**

**[Insert here a description of such qualities whether cultural (for example, an historic battleground or a colonial mill site); scientific (for example, a geological feature comprised of sedimentary rock containing the footprints of dinosaurs or habitat for endangered or threatened animal or plant species); aesthetic (for example, a vista of a scenic range of hills or seashore); economic (for example, farming, agriculture, or water resources); and recreational values.] [If the conservation restriction is required for a permit, state so and reference the permit; include copies of the permit(s) with the application]**

Comments:

1. The above purpose clause is intended to be specific in terms of the values to be protected. Some draftsmen prefer to use "whereas" clauses in addition to a specific description of purpose. Given the statutory interest of the Commonwealth and the Internal Revenue Service in the underlying public benefit to be derived and the desirability of an historical record, specific description seems desirable. The description must fit and fully describe the situation. A reasonably specific purpose clause may help provide guidance if, at some point in the future, a court or a party is called upon to determine exactly what it was the Grantor was trying to protect with this particular deed of easement. For example, if the purpose of a Conservation Restriction is to protect a scenic vista from the county road and to permit the continued use of property for agricultural purposes, the implicit prohibition against construction of barns in such a manner that would impair the scenic vista could make easier future enforcement efforts directed against that sort of infringement. The draftsman should study the defining language in the first paragraph of Section 31 of Chapter 184 of the General Laws.
2. A Conservation Restriction authorized by Sections 31-33 of Chapter 184 of the General Laws is a "qualified real property interest" within the meaning of Section 170(h)(1)(A) of the Internal Revenue Code governing the deductibility of charitable gifts of Conservation Restrictions.
3. If the Premises are subject to any governmental conservation or recreational policies or programs (for example, watershed or floodplain regulation), reference to such policies or programs will enhance the purpose clause. Section 1.170A-14(d) of the Regulations expands on this point.

## **III. Prohibited Acts and Uses, Exceptions Thereto, and Permitted Uses:**

- A. **Prohibited Acts and Uses. Subject to the exceptions set forth in paragraph B below, the Grantor will neither perform nor allow others to perform the following acts and uses, which are prohibited on, above and below the Premises:**

1. **Constructing or placing of any temporary or permanent building, tennis court, landing strip, mobile home, swimming pool, fences, asphalt or concrete pavement, sign, billboard or other advertising display, antenna, utility pole, tower, conduit, line or other temporary or permanent structure or facility on or above the Premises;**
2. **Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit;**
3. **Placing, filling, storing or dumping on the Premises of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste or other substance or material whatsoever or the installation of underground storage tanks;**
4. **Cutting, removing or otherwise destroying trees, grasses or other vegetation;**
5. **The subdivision of the Premises; no portion of the Premises may be used toward building requirements on this or any other lot;**
6. **Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation;**
7. **The use, parking or storage of motorized vehicles, including ATV's, motorcycles, campers, except as necessary by safety officials in the performance of their official duties;**
8. **Any other use of the Premises or activity which would materially impair conservation interests unless necessary for the protection of the conservation interests that are the subject of this Conservation Restriction.**

Comments:

1. In paragraph A certain acts and uses are prohibited. In paragraph B exceptions are made. Paragraph C makes clear the intent of the Conservation Restriction to permit all uses not specifically prohibited, provided they do not materially impair the purposes or conservation values. (In some situations, an alternative drafting approach is to enumerate permissible acts and uses and to prohibit all others.) Note that compatible commercial activities are not prohibited. Thus, businesses such as riding instruction are permitted unless prohibited.
2. Most of the prohibited acts and uses are familiar ones. The prohibition against subdividing is intended to protect conservation values such as agriculture that may be practical only on a large parcel in single ownership. The prohibition may not be desirable in estate planning contexts where, for example, children may wish to divide the property, in which case the prohibition should either be dropped in paragraph A or modified in paragraph B(6).

3. The prohibition stated in paragraph 8 is intended to comply with the requirement in Section 1.170A-14(e) of the Regulations. This is the so-called "pesticide" prohibition which applies when the use of pesticides would impair significant conservation interests. The prohibition is broadly stated and has the effect of protecting conservation values beyond those envisaged by the purpose provision of the restriction. Thus, in the case of a restriction intended to protect only the scenic qualities of a meadow, the use of pesticides which would not adversely affect the scenery must also be prohibited if the use of pesticides would destroy significant unique habitat.

**B. Exceptions to Otherwise Prohibited Acts and Uses [If Any]. The following acts and uses otherwise prohibited in subparagraph A are permitted but only if such acts or uses do not materially impair conservation interests.**

1. **[Construction of a building, other structure, or improvement incident to woodland, farming and animal husbandry operations carried on in accordance with sound agricultural and forest management practices.]**
2. **[Excavation and removal from the Premises of soil, gravel or other mineral resource or natural deposit as may be incidental to the installation or maintenance or removal of underground tanks, septic systems, utilities, and other underground structures or to the maintenance of good drainage, soil conservation practices or to other permissible use of the Premises.]**
3. **[The maintenance of piles of limbs, brush, leaves and similar biodegradable material originating on the Premises provided such piles are not conspicuous or otherwise interfere with the conservation objectives of this Conservation Restriction.]**
4. **[The placement or construction of facilities for the development and utilization of energy resources, including without limitation, wind, solar, hydroelectric, methane, wood alcohol, and fossil fuels, for use principally on the Premises.]**
5. **[Subdivision of the Premises in which case the Grantor shall make reference to this restriction in the conveyance.]**
6. **[The placing of fences that do not interfere with the conservation purposes of this restriction.]**
7. **[Digging or drilling of water wells.]**
8. **[Selective cutting of trees for fire protection, unpaved trail and road maintenance, tick control, or otherwise to preserve the present condition of the Premises.]**
9. **[Woodland, farming and animal husbandry operations carried on in accordance with sound agricultural and forest management practices]**

**(including but not limited to the cultivation of fields, the mowing and grazing of meadows and the selective cutting and planting of trees).]**

- 10. [Erection of signs by the Grantor or Grantee identifying the Grantee as holder of the restriction and to educate the public about the conservation values protected and any limitations relating to public access.]**

Comments:

1. THE ENUMERATED EXCEPTIONS ARE EXAMPLES ONLY AND ARE BRACKETED TO INDICATE THEIR OPTIONAL NATURE AND THE NEED FOR SPECIAL CARE TO INSURE THAT THE CONSERVATION PURPOSES OF THE RESTRICTION ARE PRESERVED.
2. Situations will arise when a prohibited use may be irrelevant to the protection of the conservation purposes involved. The addition of a building, a septic tank, or the selective cutting of trees may not in every case derogate from the conservation objectives involved and therefore exceptions may be made to permit them. When exception to the broadly stated prohibition is sought, consideration should be given to the likely consequences of an excepted act or use. If experience teaches that selective cutting of trees may impair scenic qualities for a substantial period of time (old field pines at the edge of a great meadow, for example), then the draftsman may wish to require the prior written approval of the Grantee. In some instances prior notice suffices as a practical matter. In others--the construction of a building, for example--not only may prior notice be desirable but prior approval as well. Section 1.170A-14(g)(5)(ii) of the Regulations calls for prior notification before exercising any right which "may have an adverse impact on the conservation interests". While the Sampler does not contain a Notice Provision, the need for such a provision should be considered in each actual situation.
3. Accessory uses such as a building or house, a well, an earth dam to create a pond, a tennis court, or swimming pool are prohibited by paragraph III(A)(1). Consequently, specific exception must be made in subparagraph (B) if any of those or similar uses are intended. Flexibility is desirable on economic grounds as long as the conservation objectives are not significantly threatened. As an alternative to carving out exceptions, the landowner may decide to redefine the premises so that an area such as the house, barn, and accessory building are not subject to the Conservation Restriction.
4. The draftsman will want to consider making one or more exceptions subject to the prior written approval of the Grantee in which case it may be desirable to provide that if such approval is not forthcoming within a stated period after receipt of notice, it shall be deemed given. As an alternative to prior approval, written advance notice may be sufficient.
5. The reservation of one or more building rights presents drafting problems if the approximate location of a future building is not defined and is therefore omitted in this Sampler. The Secretary of Energy and Environmental Affairs will not approve a "floating" building right because of the potential for impairment of conservation

values; scenic values, for example. The Regulations limit the use of such rights. See Section 1.170A-14(f) (Examples 3 and 4) of the Regulations. One solution is to define "building envelopes" on the Premises within which future building may be placed. The draftsman may want to exclude such envelopes entirely from the Premises or to include the envelopes but with exceptions to permit building. The latter approach means the owner-builder is more confined than if the envelopes are entirely unrestricted. If the envelope technique is used, the draftsman may wish to consider language permitting access roads and excavating for utility lines and septic tanks in the Premises, themselves, outside of the envelope, as long as such exception does not impair conservation values.

6. Note that Paragraph B permits enumerated acts otherwise prohibited by Paragraph A, "but only if such acts or uses do not materially impair significant conservation interests." This limitation reflects the so-called "inconsistent use" prohibition found in Section 1.170A-14(e)(2) of the Regulations. An example given involves the use of pesticides on lands protected by a scenic easement if such use would threaten endangered animal species found on the land. Landowners should avoid activities presenting significant risk of triggering this limitation.

**C. Permitted Acts and Uses. All acts and uses not prohibited by subparagraphs A and B are permissible provided they do not materially impair the purposes or conservation values of this conservation restriction.**

Comment:

The listing of permissible activities is not necessary since all activities not prohibited are permissible. Some landowners, however, want the comfort provided by listing examples such as fishing, clamming, hunting, boating, hiking, horseback riding, and any other passive outdoor recreational activity.

**IV. Legal Remedies of the Grantee(s):**

**A. Legal and Injunctive Relief**

**The rights hereby granted shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Premises to its condition prior to the time of the injury complained of (it being agreed that the Grantee(s) may have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantee(s).**

**B. Reimbursement of Costs of Enforcement**

**The Grantor(s), and thereafter the successors and assigns of the Grantor(s) covenant and agree to reimburse the Grantee(s) for all reasonable costs and expenses (including without limitation counsel fees) incurred in enforcing this Conservation Restriction or in remedying or abating any violation thereof.**

**C. Grantee(s) Disclaimer of Liability**

**By its acceptance of this Conservation Restriction, the Grantee(s) do(es) not undertake any liability or obligation relating to the condition of the Premises not directly caused by the Grantee(s), their agents or assigns.**

**D. Severability Clause**

**If any provision of this Conservation Restriction shall to any extent be held invalid, the remainder shall not be affected.**

**E. Non-Waiver**

**Any election by the Grantee as to the manner and timing of its right to enforce this Conservation Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.**

**Comments:**

1. Restoration of premises is a form of relief the availability of which is required by Section 1.170A-14(g)(5)(ii) of the Regulations.
2. Opinions vary on the wisdom of a reimbursement clause; leaving it silent allows reimbursement according to statute.
3. Section 32 of Chapter 184 of the General Laws speaks of the restriction being enforced by the "holder", which may involve more than one "holder", hence the reference here to grantee(s) to highlight the issue. See Comment 3 relating to access, below.

4. The issue of which public parties, such as the Secretary of Energy and Environmental Affairs, or even conceivably private parties, might have rights to enforce a Conservation Restriction without being explicitly named a "holder" as §32 provides, is not addressed in this Sampler.

**V. Access:**

**The Conservation Restriction hereby conveyed does not grant to the Grantee, to the general public, or to any other person any right to enter upon the Premises except there is granted to the Grantee and its representatives the right to enter the Premises at reasonable times and in a reasonable manner for the purpose of inspecting the same to determine compliance herewith.**

Comments:

1. Public Access.

The following additional language is optional:

"The Grantor grants to the Grantee and to the general public an easement to pass and repass upon said parcel on foot for purposes of fishing, hiking, winter sports or nature study, and to permit the Grantee to clear and mark trails for said purposes."

The Grantor and Grantee will want to define such an access easement with great care.

Draftsmen in considering public access will want to examine §17c of Chapter 21 of the General Laws which grants limited liability to the landowner who permits access for recreational purposes.

2. Access Easement for Grantee

"The Grantor grants to the Grantee a permanent easement to enter said Premises by its conservation commission or its designees to plant and selectively cut or prune trees, brush or other vegetation to improve the scenic view and to implement disease prevention measures."

If the conservation restriction is not accessible except over other land of the Grantor, or over private roads not yet accepted by the municipality, an access easement may be required to allow the Grantee access to the conservation restriction:

"The Grantor grants to the Grantee a permanent access easement over Grantor's unrestricted land for monitoring purposes as follows:

3. Access for Compliance Monitoring.  
§32 of Chapter 184 of the General Laws provides that "Such a [Conservation Restriction] . . . shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance."

4. **Co-Holders.**  
It is the apparent practice of some co-holders to share the responsibility for monitoring and enforcement, with the local holder seeing to on-site inspection and the larger holder to enforcement, if any, as required. (Such a practice may be reduced to a written understanding between the holders.)

**VI. Extinguishment:**

**A. Grantee's Receipt of Property Right**

The Grantor(s) and the Grantee agree that the donation of this Conservation Restriction gives rise for purposes of this paragraph to a real property right, immediately vested in the Grantee, with a fair market value that is at least equal to the proportionate value that this Conservation Restriction determined at the time of the gift bears to the value of the unrestricted Premises at that time.

**B. Value of Grantee's Property Right**

Such proportionate value of the Grantee's property right shall remain constant.

**C. Right of Grantee to Recover Proportional Value at Disposition**

If any occurrence ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then the Grantee, on a subsequent sale, exchange or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds equal to such proportionate value, exclusive of improvements, subject, however, to any applicable law which expressly provides for a different disposition of proceeds.

**D. Grantor/Grantee Cooperation Regarding Public Action**

Whenever all or any part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Grantor(s) and the Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action.

**E. Allocation of Expenses upon Disposition**

All related expenses incurred by the Grantor(s) and the Grantee shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Grantor(s) and Grantee in shares equal to such proportionate value.

**F. Continuing Trust of Grantee's Share of Proceeds of Conservation Restriction Disposition**

The Grantee shall use its share of the proceeds in a manner consistent with the conservation purposes of this grant.

Comments:

1. The proceeds rule is derived from Section 1.170A-14(g)(6) of the Regulations.
2. Note that no provision is made at this time for the amendment of the Conservation Restriction. If amendment, release or termination is under consideration, counsel should examine section 32 of Chapter 184 of the General Laws, Article 97 of the Amendments to the Massachusetts Constitution, EOEEA's Article 97 Land Disposition Policy, and the common law of charitable uses, and also consult with the Executive Office of Energy and Environmental Affairs for compliance with the Massachusetts Environmental Policy Act and for further information on this issue. (See: 301 CMR 11.26, Clause 5.)
3. Article VI does not directly address the disposition of proceeds in the event of a condemnation. If the proceeds reflect the fair market value of the land unrestricted, then allocation of the proceeds between the Grantor(s) and Grantee according to the formula in Article VI would be appropriate. If the proceeds are some lesser amount, application of the formula would be inappropriate. Until the underlying legal questions are resolved, it seemed inappropriate to make any provision in this sample Conservation Restriction for the disposition of condemnation proceeds (other than to call for the cooperation of the Grantor(s) and the Grantee in recovering damages). Section 1.170A-14(g)(6) of the Regulations is silent on this point.
4. If the conservation restriction is over a portion of a residential housing lot, and is required by a permit, this section can be left out or simply allocate that the Grantee does not obtain any proceeds in the event of an extinguishment. This is advisable because in the event of a eminent domain taking or disaster, the owner will likely have to replace their home, and should not have to lose a large portion of the value of their home.
5. If the conservation restriction was mandated by one or more of the funding sources, such as the Community Preservation Act or a grant, the parties may allocate the proceeds of any disposition as they deem proper, including the Grantee receiving no funds from any disposition.
6. Municipally held CR's require any such proceeds derived under VI.F. be placed into a special fund as per M.G.L. ch.44, s.63.

**VII. Assignability:**

**A. Running of the Burden**

**The burdens of this Conservation Restriction shall run with the Premises in perpetuity, and shall be enforceable against the Grantor(s) and the successors and assigns of the Grantor(s) holding any interest in the Premises.**

**B. Execution of Instruments**

**The Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Conservation Restriction; the Grantor(s) on behalf of themselves and their successors and assigns appoint the Grantee their attorney-in-fact to execute, acknowledge and deliver any such instruments on their behalf. Without limiting the foregoing, the Grantor(s) and their successors and assigns agree themselves to execute any such instruments upon request.**

**C. Running of the Benefit**

**The benefits of this Conservation Restriction shall be in gross and shall not be assignable by the Grantee, except in the following instances and from time to time:**

- (i) as a condition of any assignment, the Grantee requires that the purpose of this Conservation Restriction continue to be carried out, and**
- (ii) the assignee, at the time of assignment, qualifies under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder, and under Section 32 of Chapter 184 of the General Laws as an eligible donee to receive this Conservation Restriction directly.**
- (iii) the grantee complies with the provisions required by Article 97 of the Amendments to the State Constitution.**

Comment:

Subparagraph (i) and (ii) are required by Section 1.170A-14(c)(2) of the Regulations.  
Subparagraph (iii) required only for municipal CRs.

**VIII. Subsequent Transfers:**

**The Grantor(s) agree to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument by which they divest themselves of any interest in all or a portion of the Premises.**

Comment:

This provision is particularly important in the case of Conservation Restrictions obtained from developers as a precondition to the granting of permits.

**IX. Estoppel Certificates:**

**Upon request by the Grantor(s), the Grantee shall within twenty (20) days execute and deliver to the Grantor(s) any document, including an estoppel certificate, which certifies the Grantor(s) compliance with any obligation of the Grantor(s) contained in this Conservation Restriction.**

Comment:

Subsequent purchasers and lenders will want to know they are not buying into prior violations. The burden on the Grantee is slight.

**X. Effective Date:**

**This Conservation Restriction shall be effective when the Grantor(s) and the Grantee have executed it, the administrative approvals required by Section 32 of Chapter 184 of the General Laws have been obtained, and it has been recorded, or if registered land, it has been registered.**

Comments:

1. The effective date provision in this Sampler reflects a design that the instrument will not be effective between the parties until the requisite public approvals and recordation or registration have occurred.
2. Ordinarily, a conveyance between grantor and grantee is effective when made as between them. Under Massachusetts law, however, "a conveyance of an estate in fee simple...shall not be valid as against any person, except the grantor...his heirs and devisees and persons having actual notice of it, unless it, is recorded in the registry of deeds for the county or district in which the land to which it relates lies." General Law, Ch 183, §4. While a conveyance of a Conservation Restriction might not be deemed to constitute a "conveyance of an estate in fee simple," careful conveyancers advise recordation as consistent with the statutory scheme of minimizing encumbrances without record notice.
3. Moreover, as for registered land, "... [N]o deed ... or other voluntary instrument ... purporting to ... affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as contract between the parties .... The act of registration only shall be the operative act to convey or affect the land ...." M.G.L. Ch. 185, §57.

4. Thus for enforceability against the world, some additional action is advised or required beyond the conveyance itself.
5. Also, a Conservation Restriction does not acquire perpetual, as opposed to terminable, status (requiring re-recordation under M.G.L. Ch. 184, §26 *et seq.*) until the restriction acquires the character of a Conservation Restriction approved by the Secretary of Energy and Environmental Affairs and other relevant agencies as set out in Ch. 184, §§31-32.
6. Thus, it is these twin concerns: enforceability against third parties, and duration of the restriction, that argues for making relevant approvals and filings events conditions precedent to the restriction being effective, moving the effective date of the restriction to after they have occurred. (The Division of Conservation Services also has indicated that it wants to have assurance that the restriction, once imposed, will be also be clearly binding on third parties.)

## **XI. Miscellaneous**

**“Approval of this Conservation restriction pursuant to M.G.L. Chapter 184, Section 32 by any municipal officials and by the Secretary of Energy and Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.”**

Comments:

1. The Town of Rockport was sued to prevent the town from improving a trail across the plaintiff’s property, which the town believed the public had a right of access. The town lost. One of the arguments used by the plaintiff’s attorneys was that in approving a conservation restriction given by the plaintiffs that did not include any mention of public access rights, the Secretary of Energy and Environmental Affairs acknowledged that no such rights existed.

The Secretary’s approval of conservation restrictions is intended to carry no such implication.

**XII. Recordation:**

The Grantor(s) shall record this instrument in timely fashion in the \_\_\_\_\_ County Registry of Deeds.

Executed under seal this \_\_\_ day of \_\_\_\_\_, 20\_\_ .

**XIII. Amendment:**

If circumstances arise under which an amendment to or modification of this Conservation Restriction would be appropriate, Grantor and Grantee may jointly amend this Conservation Restriction; provided that no amendment shall be allowed that will affect the qualification of this Conservation Restriction or the status of Grantee under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Sections 31-33 of Chapter 184 of the General Laws of Massachusetts, and any amendment shall be consistent with the purposes of this Conservation Restriction, and shall not affect its perpetual duration. Any such amendment shall be approved by the parties herein and recorded in the \_\_\_\_\_ Registry of Deeds.

\_\_\_\_\_  
John Landowner

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20

Then personally appeared the above-named [JOHN LANDOWNER and MARY LANDOWNER] and acknowledged the foregoing instrument to be [their] free act and deed, before me.

Notary Public

My Commission Expires:

**ACCEPTANCE OF GRANT**

The above Conservation Restriction is accepted this \_\_\_ day of \_\_\_\_\_, 20\_\_ .

[GREENWAYS ASSOCIATION, INC.]

By

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20

**Then personally appeared the above-named [GREENWAYS ASSOCIATION, INC.] and acknowledged the foregoing to be its free act and deed, before me.**

**Notary Public**

**My Commission Expires:**

**APPROVAL BY [SELECTMEN]**

**We, the undersigned, [being a majority of the] [Selectmen] of the [City/Town] of \_\_\_\_\_, Massachusetts, hereby certify that at a meeting duly held on \_\_\_\_\_, 20\_ the [Selectmen] voted to approve the foregoing Conservation Restriction to [GREENWAYS ASSOCIATION, INC.] pursuant to M.G.L. Ch. 184, §32.**

**[Selectmen]**

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20

**Then personally appeared the above-named \_\_\_\_\_ and acknowledged the foregoing to be his or her free act and deed, before me.**

**Notary Public**

**My Commission Expires:**

Comments:

1. If the Conservation Restriction is held by any governmental body including a commission, authority, or other instrumentality, Section 32 of Chapter 184 requires only the approval of the Secretary for Environmental Affairs. Note, however, that Section 8C of Chapter 40 of the General Laws requires approval by a board of selectmen of gifts of Conservation Restrictions.
2. If the Conservation Restriction is held by a charitable corporation or trust, it must be approved not only by the Secretary but also by the mayor in the case of a city in which the land is situated (or in cities having a city manager, then the city manager) as well as the city council. If the land is situated in a town, then in addition to the Secretary's approval, the board of selectmen or the town meeting must approve. See M.G.L. Ch. 184, §32. The Draftsman should make appropriate adjustments in the relevant language.

3. WHILE THE SECRETARY'S APPROVAL FALLS AT THE END OF THE SAMPLER, EARLY REVIEW WITH THE DIVISION OF CONSERVATION SERVICES IS ADVISABLE TO AVOID UNDERTAKING A PROTRACTED EXERCISE ONLY TO BE DENIED APPROVAL AT THE END.

**APPROVAL BY SECRETARY OF ENVIRONMENTAL AFFAIRS  
COMMONWEALTH OF MASSACHUSETTS**

The undersigned, Secretary of the Executive Office of Energy and Environmental Affairs of the Commonwealth of Massachusetts, hereby certifies that the foregoing Conservation Restriction to [GREENWAYS ASSOCIATION, INC.] has been approved in the public interest pursuant to M.G.L. Ch. 184, §32.

Date: \_\_\_\_\_, 20\_\_

Secretary of Energy and Environmental Affairs

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20\_\_

The personally appeared the above-named \_\_\_\_\_ and acknowledged the foregoing to be his or her free act and deed, before me.

Notary Public

My Commission Expires:

Comments:

1. The approvals required by the local Board of Selectmen and the Secretary for Energy and Environmental Affairs tend to establish the "significant public benefit" required by Section 170(h)(4)(A)(iii) of the Internal Revenue Code and by the Secretary.

EXHIBIT A

[Deed Description and/or sketch plan]

## **APPENDICES**

- A. Massachusetts General Law Chapter 184, §§31-33
- B. Conservation Restriction Application Form
- C. Conservation Restriction Field Inspection Form
- D. Plans, Policies, Programs and Lands Helpful in Demonstrating State and Local Public Benefit
- E. Recommendations to Increase the Reliability of Grantees as Conservation Restriction Managers
- F. Notice of Registry and GIS Data form

## APPENDIX A -- Chapter 184, §§31, 32, 33

### §31. Restrictions, defined

A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

A preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site historically significant for its architecture, archeology or associations, to forbid or limit any or all (a) alterations in exterior or interior features of the structure, (b) changes in appearance or condition of the site, (c) uses not historically appropriate, (d) field investigation, as defined in section twenty-six A of chapter nine, without permit as provided by section twenty-seven C of said chapter, or (e) other acts or uses detrimental to appropriate preservation of the structure or site.

An agricultural preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.

A watershed preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land predominantly in such condition to protect the water supply or potential water supply of the commonwealth, to forbid or limit any or all (a) construction or placing of buildings; (b)

excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance except as needed to maintain the land and (c) other acts or uses detrimental to such watershed. Such watershed preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner, including the right to privacy.

An affordable housing restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, mortgage, will, agreement, or other instrument executed by or on behalf of the owner of the land appropriate to (a) limiting the use of all or part of the land to occupancy by persons, or families of low or moderate income in either rental housing or other housing or (b) restricting the resale price of all or part of the property in order to assure its affordability by future low and moderate income purchasers or (c) in any way limiting or restricting the use or enjoyment of all or any portion of the land for the purpose of encouraging or assuring creation or retention of rental and other housing for occupancy by low and moderate income persons and families. Without in any way limiting the scope of the foregoing definition, any restrictions, easement, covenant or condition placed on the deed, mortgage, will, agreement or other instrument pursuant to the requirements of the Rental Housing Development Action Loan program or the Housing Innovations Fund program established pursuant to section three of chapter two hundred twenty-six of the acts of nineteen hundred eighty-seven or pursuant to the requirements of any program established by the Massachusetts housing partnership fund board established pursuant to chapter four hundred five of the acts of nineteen hundred eighty-five, including without limitation the Homeownership Opportunity Program, or pursuant to the requirements of sections twenty-five to twenty-seven, inclusive, of chapter twenty-three B, or pursuant to the requirements of any regulations or guidelines promulgated pursuant to any of the foregoing, shall be deemed to be an affordable housing restriction within the meaning of this paragraph.

### **§32. Effect, enforcement, acquisition, and release of restrictions**

No conservation restriction, agricultural preservation or watershed restriction as defined in section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area, and no preservation restriction, as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance or of a particular such building or site, and no affordable housing restriction as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include creating or retaining or assisting in the creation or retention of affordable rental or other housing for occupancy by persons or families of low or moderate income shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes or on account of the governmental body, the charitable corporation, or trust having received the right to enforce the restriction by assignment, provided (a) in case of a restriction held by a city or town or a commission, authority or other instrumentality thereof it is approved by the secretary of Energy and Environmental Affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and

agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the secretary of the executive office of communities and development if an affordable housing restriction, and (b) in case of a restriction held by a charitable corporation or trust it is approved by the mayor, or in cities having a city manager the city manager, and city council of the city, or selectmen or town meeting of the town, in which the land is situated, and the secretary of Energy and Environmental Affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the secretary of the executive office of communities and development if an affordable housing restriction.

Such conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which have power to acquire interest in the land, in the same manner as it may acquire other interests in land. Such a restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. Such a restriction may be released, in whole or in part, by the holder for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose approval shall be required, and in case of a restriction requiring approval by the secretary of environmental affairs, the Massachusetts historical commission, the commissioner of the metropolitan district commission, the commissioner of food and agriculture, or the secretary of the executive office of communities and development, only with like approval or the release.

No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value. Funds so received shall revert to the fund sources from which the original purchase, loan, or grant was made, or, lacking such source, shall be made available to acquire similar interests in other land. Agricultural preservation restrictions shall be released by the holder only if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good. Watershed preservation restrictions shall be released by the holder only if the land is deemed by the commissioner of the metropolitan district commission and the secretary of Energy and Environmental Affairs to no longer be of any importance to the water supply or potential water supply of the commonwealth or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good.

Approvals of restrictions and releases shall be evidenced by certificates of the secretary of Energy and Environmental Affairs or the chairman, clerk or secretary of the Massachusetts historical commission, or the commissioner of food and agriculture, or the secretary of the executive office of communities and development or the city council, or selectmen of the town, as applicable duly recorded or registered.

In determining whether the restriction or its continuance is in the public interest, the governmental body acquiring, releasing or approving shall take into consideration the public interest in such conservation, preservation, watershed preservation, agricultural preservation or affordable housing and any national, state, regional, and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land.

This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable. Nothing in this section or section thirty-one and section thirty-three shall diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain or otherwise to use land for public purposes.

Nothing in this section shall prohibit the department of public utilities from authorizing the taking of easements for the purpose of utility services provided that (a) said department shall require the minimum practicable interference with farming operations with respect to width of easement, pole locations and other pertinent matters, (b) the applicant has received all necessary licenses, permits, approvals and other authorizations from the appropriate state agencies, (c) the applicant shall compensate the owner of the property in the same manner and the same fair market value as if the land were not under restriction.

### **§33. Public restriction tract index**

Any city or town may file with the register of deeds for the county or district in which it is situated a map or set of maps of the city or town, to be known as the public restriction tract index, on which may be indexed conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions and restrictions held by any governmental body. Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record on the public records of the instrument imposing the restriction. Maps used by assessors to identify parcels taxed, and approximate boundaries without distances, shall be sufficient, and, where maps by parcels are not available, addition to other maps of approximate boundaries of restricted land shall be sufficient. If the names of the holders and the instrument references cannot be conveniently shown directly on the maps, they may be indicated by appropriate reference to accompanying lists. Such maps may also indicate similarly, so far as practicable, (a) any order or license issued by a governmental body entitled to be recorded or registered, (b) the approximate boundaries of any historic or architectural control district established under chapter forty C or any special act, ordinance or by-law where certificate of appropriateness may be required for exterior changes, (c) any landmark certified by the Massachusetts historical commission pursuant to section twenty-seven of chapter nine, (d) any other land which any governmental body may own in fee, or in which it may hold any other interest, and (e) such additional data as the filing governmental body may deem appropriate.

Whenever any instrument of acquisition of a restriction or order or other appropriate evidence entitled to be indexed in a public restriction tract index is at the option of the holder of the right to enforce it submitted for such indexing, the register shall make, or require the

holder of the right to enforce the restriction or order or interest to make, appropriate additions to the tract index.

The maps shall be in such form that they can be readily added to, changed, and reproduced, and shall be a public record, appropriately available for public inspection. If any governmental body, other than a city or town in which the land affected lies, holds a right to enforce a restriction or order or an interest entitled to be indexed in a public restriction tract index for any city or town which has not filed such an index, or if the secretary of Energy and Environmental Affairs or the Massachusetts historical commission or the commissioner of food and agriculture or the secretary of the executive office of communities and development approves a conservation or preservation restriction or agricultural or watershed preservation restriction or affordable housing restriction held by a charitable corporation or trust so entitled, and the city or town does not within one year after written request to the mayor or selectmen file a sufficient map or set of maps for the purpose, the holding governmental body or approving secretary or commissioner may do so.

The registers of deeds, or a majority of them, may from time to time make and amend rules and regulations for administration of public restriction tract indexes, and the provisions of section thirteen A of chapter thirty-six shall not apply thereto. No such rule, regulation or any amendment thereof shall take effect until after it has been approved by the attorney general. New tract indexes may be filed, from time to time, upon compliance with such rules and regulations as may be necessary to assure against omission of prior additions and references still effective.

**APPENDIX B**

*EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
DIVISION OF CONSERVATION SERVICES  
100 Cambridge St., 9<sup>th</sup> fl.  
Boston, MA 02114-2150  
(617) 626-1011*

DATE: \_\_\_\_\_  
MUNICIPALITY: \_\_\_\_\_  
\_\_\_\_\_   
NUMERIC  
ASSIGNMENT: \_\_\_\_\_

**CONSERVATION RESTRICTION APPLICATION FORM**

Pursuant to the provisions of M.G.L. ch. 184. §32. the Secretary of Energy and Environmental Affairs is hereby requested to approve a conservation restriction as described below:

**A. GENERAL INFORMATION**

1. GRANTOR(S): ALL owners must be named, and must sign, the conservation restriction  
 (Name) \_\_\_\_\_  
 \_\_\_\_\_  
 (Address) \_\_\_\_\_  
 \_\_\_\_\_  
 (Telephone No.) \_\_\_\_\_ (Contact Person) \_\_\_\_\_
  
2. GRANTEE:  
 \_\_\_\_\_  
 (Name) \_\_\_\_\_  
 \_\_\_\_\_  
 (Address) \_\_\_\_\_  
 \_\_\_\_\_  
 (Telephone No.) \_\_\_\_\_ (Contact Person) \_\_\_\_\_
  
3. TYPE OF RESTRICTION:
  - a. Conservation Only:
  - b. Joint Restriction:
 Type: \_\_\_\_\_  
 (agricultural, historical, watershed)
  
4. STATE FUNDS INVOLVED yes  no 
  - CPA
  - Grant (type)
  - Other
  
5. PUBLIC OFFICIALS:
  - State Representative(s) \_\_\_\_\_
  - State Senator(s) \_\_\_\_\_
  - Other involved Official(s) \_\_\_\_\_

**NOTES:**

If the grantee is a non-profit charitable corporation or trust, proof will be required that it is a qualified charitable organization in accordance with M.G.L. c. 180 §4(a) or (l) and the I.R.S. Code Section 501(c) (3). The Division also reserves the right to review the organization's by-laws and list of officers if warranted.

Regardless of whether the grantee is a qualified private non-profit organization or a city or town or commission, authority, or other instrumentality thereof, the local conservation commission must define the reasons for preserving the property and certify that the restriction is in the public interest (please refer to page 7).

A conservation restriction is a voluntary limitation on the use of land designed to preserve it from adverse future change. But

it should be distinguished at the outset from an agricultural preservation restriction which is approved by the Commissioner of Food and Agriculture for the Commonwealth, 251 Causeway Street, Boston, MA 02114-2150, and from an historical preservation restriction, which is approved by the Massachusetts Historical Commission 80 Boylston Street, Rm. 310, Boston, MA 02116, and from a watershed preservation restriction which is approved by the Commissioner of the Department of Conservation and Recreation, 251 Causeway St., Boston, MA 02114-2150.

It is possible for a restriction to fit into more than one category, requiring more than one approval. If a joint restriction, has the approval process been started with either the Commissioners of Food and Agriculture, DCR or the Massachusetts Historical Commission?

Yes  No

4. GRANTOR'S INTENT

- a. Charitable contribution:  Yes  No  
Do you intend to claim an IRS income tax deduction?  Yes  No
- b. Required as part of municipal or state permitting process:  Yes  No
  - 1. Is this restriction required by a M.G.L. C.40A §9 special permit?  Yes  No  
(Please attach a copy of the permit(s) as an exhibit)
  - 2. Is this restriction required by M.G.L. C.131, §40 Wetlands Order of Conditions?  Yes  No  
(Please attach a copy of the Order of Conditions)
  - 3. Other?  Yes  No (please explain)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

c.. Other: Please explain (for example, sale of a C.R. to a public agency):

\_\_\_\_\_  
 \_\_\_\_\_

d. Is this a perpetual restriction?  Yes  No If less than permanent, for how many years: \_\_\_\_\_

**B. PUBLIC BENEFIT**

- 1. Is the restriction for the preservation of land areas for outdoor recreation by, or the education of, the general public?  Yes  No
- 2. Is the restriction for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems?  Yes  No
- 3. Is the restriction for the preservation of open space (including farmland and forest land) where such preservation is:
  - a. pursuant to a clearly delineated federal, state, local governmental policy, and will yield a significant public benefit?  Yes  No
  - b. for the scenic enjoyment of the general public and will yield a significant public benefit?  Yes  No
- 4. Is the property historically significant? One that meets National Register Criteria or is within a registered historic district or contributes to the integrity of an historic building or property?  Yes  No
- 5. Other public benefit?  Yes  No (if yes, please explain)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**NOTES:**

The Secretary will find sufficient evidence of the "public interest," if the applicant can show that the restriction meets any of the tests for deductibility under the Internal Revenue Service Code Section 170(h) and the Regulations promulgated thereunder, or a private letter ruling by the Internal Revenue Service shall be deemed sufficient for establishing such deductibility, or the applicant makes an independent showing of eligibility for deductibility.

The letter ruling or documentation demonstrating eligibility for deductibility should be attached along with this application. Regardless of the intent of the grantor's gift, the Secretary's determination of public interest will be dependent upon how well the applicant demonstrates public interest; however, grantors should be advised that the Secretary reserves the right to

require modifications to the conservation restriction where in his/her opinion the retained rights adversely impact the public interest or natural resource values of the property or when the document is improperly drafted.

**C. SITE DATA**

Location:

- 1. Municipality \_\_\_\_\_ Street Location \_\_\_\_\_
- 2. Grantor's Registry of Deeds Bk. # \_\_\_\_\_ Page # \_\_\_\_\_
- 3. Assessors Map # \_\_\_\_\_ Lot # \_\_\_\_\_
- 4. New Site: \_\_\_\_\_ Addition to existing restricted area: \_\_\_\_\_ (please specify)

Zoning: Commercial  Industrial  Residential  (check all that apply)

Title: Is there a mortgage?  Yes Assent of mortgagee(s) is required  No  
Does application have clear title?  Yes  No If no, please explain:

\_\_\_\_\_  
\_\_\_\_\_

Encumbrances: Is the property encumbered by any easement(s)?  Yes  No  
Please explain:

\_\_\_\_\_  
\_\_\_\_\_

Geographic Information:

- 1. Total acres covered by restriction: \_\_\_\_\_
- 2. Cover: acres in A. Upland Forest \_\_\_\_\_ B. Open (field, pasture, etc.) \_\_\_\_\_  
C. Vegetated Wetland \_\_\_\_\_ D. Water \_\_\_\_\_
- 3. Topography: acres in A. Flat \_\_\_\_\_ B. Hilly \_\_\_\_\_  
C. Rolling \_\_\_\_\_ D. Mountains \_\_\_\_\_
- 4. Water front: feet on A. Ocean \_\_\_\_\_ B. River \_\_\_\_\_  
C. Stream \_\_\_\_\_ D. Lake \_\_\_\_\_

Please identify waterbody \_\_\_\_\_

General information:

- 1. Are there nay improvements existing on the property, or to be permitted after execution of the C.R.?  
 Yes  No If yes, please describe in detail. Provide a sketch plan showing location(s).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 2. Is the property currently under any of the preferential real estate tax assessment programs?

Yes  No If yes, which one: c.61  c.61A  c. 61B

NOTE:

If the restriction lies in more than one community, the Site Data form must be completed for that portion of the

restriction within each community.

3. If the property is under agricultural use, is the soil considered prime or of statewide agricultural significance?

Yes       No      (If yes, USDA Soil Conservation Service data must be provided)

4. Is the property adjacent to any public or quasi-public land or buildings?       Yes       No

Describe briefly:

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5. Does the property lie within an historic district, include an archaeological or rare species site, fall within a Department of Environmental Management designated scenic landscape, river, or within an Executive Office of Energy and Environmental Affairs designated Area of Critical Environmental Concern, a Zone II of a public water supply etc.? Please explain:

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6. Will public access be allowed?       Yes       No      If yes, explain any limitations, type, etc.:

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Prepared by:

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Address:

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(telephone number)

**ATTACHMENTS:**

- |    |   |                              |                             |
|----|---|------------------------------|-----------------------------|
| a. | Conservation Restriction (required)   | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| b. | USGS Topographic map with area identified thereon (required)  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| c. | Photographs, aerial (optional)  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| d. | Reference page of applicable federal, state or local plans, programs (exerpts therefrom) Or zoning ordinances, if appropriate | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| e. | Survey, plotmap, or sketch plan (required)  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| f. | Special reports, studies, (if available)  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

- |    |  |                              |                             |
|----|--|------------------------------|-----------------------------|
| g. | Natural resource inventory, (if available)               | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| h. | Wetlands Order of Conditions C.131. §40, (if applicable) | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| i. | C. 40A, §9 Special Permit, (if applicable)               | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| j. | I.R.S. letter ruling, (if applicable)                    | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| k. | Charitable status documentation, (if applicable)         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| l. | Assent of mortgagee(s) (if applicable)                   | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| m. | USDA Soil Data, (if applicable)                          | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| n. | Other (please specify – include NEHGS or other permits)  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

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NOTES:

The conservation restriction must be prepared in a form suitable for recording and be approved and signed by the grantor, grantee, and municipal official(s). The applicant may wish to submit a draft of the conservation restriction document for a determination as to whether it is acceptable for approval by the Secretary. This procedure is recommended in situations in which the gift is complex or the applicant needs guidance in drafting an acceptable document. Regardless of whether the applicant files a draft or executed conservation restriction, all required attachments must be submitted for review.

The Division of Conservation Services, as part of its records retention program and in conjunction with the Massachusetts State Archivist, will retain the grantee's baseline data in the State Archives at no cost. Grantees need only submit duplicate originals of the documents and photograph negatives with the application. The documents will be permanently preserved in the State Archives, 220 Morrissey Boulevard, Boston, MA 02125, and will be available for viewing or recovery as needed.

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**MUNICIPAL CERTIFICATION**

(We) the undersigned Conservation Commission of \_\_\_\_\_ (the certifier/holder) hereby certify that the proposed conservation restriction is in the public interest in that it (describe public benefit):

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APPENDIX C

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
DIVISION OF CONSERVATION SERVICES  
251 Causeway Street  
Boston, MA 02114-2150  
(617) 626-1012

DATE: \_\_\_\_\_  
MUNICIPALITY: \_\_\_\_\_

**CONSERVATION RESTRICTION FIELD INSPECTION**

1. MUNICIPALITY: \_\_\_\_\_  
2. GRANTOR: \_\_\_\_\_ GRANTEE: \_\_\_\_\_

3. NEW SITE: \_\_\_\_\_ ADDITION TO SITE: \_\_\_\_\_ TOTAL ACRES: \_\_\_\_\_ TERM: \_\_\_\_\_

4. ARE BUILDINGS INCLUDED?  YES  NO  
If yes, estimate value, condition, and existing or proposed use. (include photographs and negatives)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

5. PRESENT AND PAST USE OF SUBJECT PROPERTY AND ADJACENT LANDS:  
(please include USGS topographical maps showing subject and adjacent public lands, if any)  
\_\_\_\_\_  
\_\_\_\_\_

6. BRIEF DESCRIPTION OF PROPERTY INCLUDING NATURAL RESOURCES AND ANY UNIQUE FEATURES:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

a. Are prohibited activities sufficient to protect the resource values?  Yes  No  
b. Are retained uses compatible with the preservation or protection of the natural resources?  
 Yes  No (if answers to 6a or 6b are no, please explain in 8 below)

7. ARE PUBLIC ACTIVITIES PERMITTED?  Yes  No  
If yes, please explain NATURE and SCOPE: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. COMMENTS AND RECOMMENDATIONS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

INSPECTOR \_\_\_\_\_ DATE: \_\_\_\_\_  
ACCOMPANIED BY: \_\_\_\_\_

## APPENDIX D

### PLANS, POLICIES, PROGRAMS, AND LANDS HELPFUL IN DEMONSTRATING STATE AND LOCAL PUBLIC BENEFIT

1. Municipal Open Space and Recreation Plans
2. Regional Open Space Plans (Regional Planning Authorities)
3. Statewide Comprehensive Outdoor Recreation Plan
  - \* State Trail System
  - \* Scenic Rivers Program
  - \* Unique Geological Inventory
  - \* Bay Circuit Program
4. Massachusetts Natural Heritage Inventory of Rare and Endangered Botanical and Zoological Species Habitat and National Endangered Species Act
5. Areas of Critical Environmental Concern - designated areas
6. Coastal Zone Management Plan - Significant Resource Areas
  - \* Barrier Beaches
  - \* Primary Dunes
  - \* Sandy Beaches
  - \* Saltwater Marshes
  - \* Shellfish Beds
  - \* Salt Ponds
  - \* Estuaries
  - \* Coastal Embayments
  - \* Anadromous Fish Runs
  - \* Erosion Areas
  - \* Designated Ports
  - \* Accretion Areas
  - \* View Points
  - \* Historic Sites (also on Massachusetts Historical Commission inventory)
  - \* Recreational Beaches
  - \* Boat Ramps, Marinas
7. Massachusetts Historical Commission
  - \* Massachusetts Historical Sites
  - \* National Historic Register Sites (P.L. 89-665), eligible for inclusion
  - \* Known Cultural and Archeological Sites
8. Scenic roads, Chapter 40, §15C
9. Scenic Mountains, Chapter 131, §39A
10. Historic Districts
11. Flood Disaster Protection Act of 1973, land within flood lines. See also P.L. 566 Small Watershed Projects.
12. USDA Soil Conservation Service (SCS) - various inventories of potential reservoir sites
13. Massachusetts Water Resources Commission - inventory of regionally important wetlands, (identified in Massachusetts Water Supply Statement May 2, 1978, 353 pp.)
14. National Natural Landmarks (i.e. Gay Head Cliffs, Lynnfield Marsh)
15. Town well-fields (existing and proven reserves and reservoirs)
16. Agricultural land - SCS identified prime, Massachusetts unique
17. Wetlands Restrictions Program

- \* Chapter 131, §40
- \* Chapter 130, §105
- \* Restricted areas and areas to be restricted

18. Executive Orders
  - \* #181 Barrier Beaches
  - \* #193 Agricultural lands
19. Department of Environmental Protection Great Pond Inventory
20. Department of Environmental Management Scenic Landscape Inventory, 1982
21. Department of Environmental Protection Water Quality Plans or Programs, various
22. Wildlife corridor connections, additions to, or buffers for, other protected land
23. Trail and greenway connections
24. Preservation of scenic views, particularly along designated Scenic Roads or Rivers
25. Preservation of pond, ocean, and waterway frontage
26. Preservation of meadows, forests and dunes
27. Provision of Public Access or passive recreational opportunities

**APPENDIX E**

Recommendations to Increase the Reliability of Grantees as Conservation Restriction Managers<sup>6</sup>

1. Conservation Restriction programs should have written criteria for what constitutes a satisfactory restriction.
2. Background data assembled should be adequate to support proper monitoring and legal enforcement action.
3. Organizations and agencies holding conservation restrictions should make every reasonable effort to ensure that they will have a reliable source of funds for monitoring and enforcement actions, including court cases.
4. Properties protected by conservation restrictions should be checked at least annually.
5. Careful records should be kept of inspections and of all contacts with landowners.
6. Monitoring programs should be designed and managed so that violations will be detected early before elimination of the violation becomes a practical impossibility.
7. Organizations and agencies holding conservation restrictions should keep track of changes in ownership of restriction - protected properties.
8. Organizations and agencies holding conservation restrictions should frequently remind landowners about the terms of conservation restrictions, especially after a property changes hands.
9. Organizations and agencies holding conservation restrictions should establish careful procedures for reviewing possible amendments to ensure that any permitted amendment does not impair the conservation values of the restriction.
10. In the case of donated conservation restrictions for which tax deductions have been taken, donees should seek competent appraisal advise to satisfy themselves that a permitted amendment will not add value to the property.
11. Organizations and agencies holding restrictions should maintain careful written records of all discussions and correspondence relating to an amendment in case of questions later.
12. Termination should be viewed as an absolute last resort and only done after exhaustive consideration has demonstrated overriding public need for the termination.
13. ~~In any situation where the primary grantee's long term commitment and/or financial resources for monitoring and enforcement are open to reasonable question, the landowner and primary grantee should make every reasonable effort to find a suitable back-up grantee.~~

(Appendix F)

**Executive Office of Energy and Environmental Affairs / Division of Conservation Services  
GIS Data Entry Form**

Selp-Help, Urban Self-Help, SURF, Land & Water Conservation Fund Projects  
and Conservation Restrictions

1. Contact Person: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Project Type (select one):

<sup>6</sup> Land Trust Ex \_\_\_\_\_

change, December, 1985

- Self-Help
- Urban Self-Help
- SURF
- Land & Water Conservation Fund

(tel ephone \_\_\_\_\_)

3. Municipality: \_\_\_\_\_ Project Number \_\_\_\_\_

4. a. Fee Owner: \_\_\_\_\_  
(Holder of the Deed)

b. Manager (if different from Owner): \_\_\_\_\_

5. \*Conservation Restriction held by: \_\_\_\_\_

*\*Complete only if land is encumbered by a Chapter 184 section 31-33 Conservation Restriction.*

*Check the box corresponding to how the restriction was obtained:*

- Gifted
- Exacted by Regulation
- Purchased

*Number of reserved lots within the restriction, if any:* \_\_\_\_\_

6. Assessor's Information \_\_\_\_\_  
(map) \_\_\_\_\_ (Block) \_\_\_\_\_ (lot)

7. Registry Information \_\_\_\_\_  
(name) \_\_\_\_\_  
(book) \_\_\_\_\_ (page) \_\_\_\_\_ (plan) \_\_\_\_\_ (page)

8. Acreage: \_\_\_\_\_

9. Primary Use: (select one)

- Conservation
- Recreation
- Both Conservation and Recreation
- Water Supply Protection
- Agriculture
- Historic/Cultural
- Other (please explain)

Public Access:

- Public
- Public, residents only
- None
- Other (please explain)

The applicant must provide to the Executive Office of Energy and Environmental Affairs materials that will allow MassGIS to accurately represent the site in the state's open space data layer. These materials include:

1. A copy of a USGS topological map with the site accurately drawn on it.  
The name and date of the USGS topo quad must be noted on this map.
2. A copy of the site plan and/or a survey plan if available (required for exacted conservation restrictions).

MassGIS will attempt to add the site to the open space data layer using these materials but may request additional material from the grantee if the materials provided are not at an appropriate scale or are not sufficiently clear to support conversion to digital data that conform to MassGIS data standards.

Topographical maps can be purchased at many book stores, or can be printed from the web site TopoZone.com. Please call MassGIS at 617.626.1076 with any questions or for assistance with this form.