

CONSERVATION RESTRICTION SAMPLER WITH COMMENTARY

The Division of Conservation Services of the Executive Office of Environmental Affairs offers this sampler as a guide to draftsmen in thinking how to do their work. Neither the DCS, the EOE, 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 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, 251 Causeway Street, 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,⁵ 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 Environmental Affairs. The draftsman of an "exacted" conservation restriction 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.

⁵The 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)

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SAMPLER

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

I. Grantor Clause:

We, [JOHN LANDOWNER and MARY LANDOWNER], husband and wife having an address at _____ ("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 say "hereinafter, together with (his, her, or its) successors in title for the time being to any or all of the Premises, referred to as the Owner" and instead of "Grantee" to say "the Holder" or "Holders" if more than one is involved. See below. 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. See below.
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.

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. EOEIA 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.]

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 following acts and uses are prohibited on the Premises:**

1. **Constructing or placing of any 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;**
6. **Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation;**
7. **Any other use of the Premises or activity which would materially impair significant 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. (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.
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 7 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 significant 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. [Use of off-road and similar vehicles, including snowmobiles.]**
- 3. [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.]**
- 4. [The maintenance of piles of limbs, brush, leaves and similar biodegradable material provided such piles are not conspicuous or otherwise interfere with the conservation objectives of this Conservation Restriction.]**
- 5. [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.]**
- 6. [Subdivision of the Premises in which case the Grantor shall make reference to this restriction in the conveyance.]**
- 7. [The placing of fences that do not interfere with the conservation purposes of this restriction.]**
- 8. [Digging or drilling of water wells.]**
- 9. [Selective cutting of trees for fire protection, unpaved trail and road maintenance, tick control, or otherwise to preserve the present condition of the Premises, including vistas.]**
- 10. [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).]**
- 11. [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 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.

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.

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.
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 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(s) 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."

or

"The Grantor(s) 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 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."
3. 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, 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, and the common law of charitable uses, and also consult with the Executive Office of 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. 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-recording under M.G.L. Ch. 184, §26 *et seq.*) until the restriction acquires the character of a Conservation Restriction approved by the Secretary of 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 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. Recently the Town of Rockport was sued by Mr. and Mrs. Robert Hooper to prevent the town from improving a trail across the Hoopers’ property, to which the town believed the public had acquired a right of access through years of purported use. The town lost. One of the arguments used by the plaintiff’s attorneys was that in approving a conservation restriction given by the Hoopers to The Trustees of Reservations that did not include any mention of public access rights, the Secretary of 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 before me the above-named [JOHN LANDOWNER and MARY LANDOWNER] and proved to me through satisfactory evidence of identification, which was (*personal knowledge of identity*) (*a current driver's license*) (*a current U.S. passport*), to be the person whose name is signed on the document and acknowledged to me that he/she signed it voluntarily for its stated purpose.

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 before me the above-named [GREENWAYS ASSOCIATION, INC.] and proved to me through satisfactory evidence of identification, which was (*personal knowledge of identity*) (*a current driver's license*) (*a current U.S. passport*), to be the person whose name is signed on the document and acknowledged to me that he/she signed it voluntarily for its stated purpose.

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 before me the above-named [BOARD OF SELECTMEN] _____ and proved to me through satisfactory evidence of identification, which was *(personal knowledge of identity) (a current driver's license) (a current U.S. passport)*, to be the person(s) whose name is signed on the document and acknowledged to me that they signed it voluntarily for its stated purpose as Selectmen of the (Town)

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 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 Environmental Affairs

COMMONWEALTH OF MASSACHUSETTS

_____, ss. _____, 20__

Then personally appeared before me the above-named _____ and proved to me through satisfactory evidence of identification, which was (*personal knowledge of identity*) (*a current driver's license*) (*a current U.S. passport*), to be the person whose name is signed on the preceding page of the document and acknowledged to me that he/she signed it voluntarily as Secretary of Environmental Affairs for the Commonwealth of Massachusetts, for its stated purpose.

Notary Public
My Commission expires:

Comments:

1. The approvals required by the local Board of Selectmen and the Secretary for 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]