

RI Conservation Easement Guidance Workshop

Held on Tuesday, June 16, 2015 9:30 am to 11:30 am
Warwick Public Library, 600 Sandy Lane, Warwick, RI

~~~~~**2 AICP (1.5 law) credits offered**~~~~~

Conservation Development and Transfer of Development Rights (TDR) are effective tools for communities to preserve meaningful open space through conservation easements as land is developed. Unfortunately, several sources have found that some conservation easements have not been properly recorded. To ensure that conservation values are preserved in perpetuity, conservation easements must be carefully drafted, properly recorded, and follow prescribed procedures for maintaining the desired conservation restrictions.

In addition to a review of the topics covered in the *Rhode Island Conservation Easement Guidance Manual* (RIDEM 2009), including ownership and management of conservation parcels, developing and writing conservation easements, and monitoring and insurance considerations, information from the new companion document *Guidance on Recording Conservation Easements in Rhode Island* (RIDEM 2013) was provided. Workshop participants learned about common weaknesses in the easement process and ways to improve the recording process.

**Speakers:** Scott Millar, RIDEM; Peter D. Ruggiero, Esq., Ruggiero, Brochu & Petracca; President of Sustainable Habitats, and town solicitor.

**Audiences:** Planners, solicitors, and other municipal staff, local officials, conservation commissioners, land trusts, non-profit conservation organizations, attorneys, and other interested parties.

**Questions?** Please contact Jennifer West at [jennifer@nbnerr.org](mailto:jennifer@nbnerr.org) or 401-222-4700, x 7413.

~~~~~

Presentations & Materials

Agenda & Speaker Biographies

PowerPoint Presentation

RI Conservation Easement Guidance Manual

Recording Conservation Easements in RI

RI Conservation Easement Guidance Workshop

Tuesday, June 16, 2015; 9:30 am to 11:30 am

Warwick Public Library, 600 Sandy Lane, Warwick, RI

AGENDA

9:00 am Sign-in & Refreshments

9:30 am Welcome & Introductions

Jennifer West, Narragansett Bay Research Reserve

Scott Millar, RI Department of Environmental Management

9:40 am Overview and Context

Scott Millar, RI Department of Environmental Management

9:50 am RI Conservation Easement Guidance

Peter Ruggiero, Esq., Ruggiero, Brochu & Petracra

10:30 am Recording Conservation Easements in RI

Scott Millar, RI Department of Environmental Management

10:45 am Q&A and Discussion

11:15 am Wrap-up & Evaluations

11:30 am Adjourn



Speaker Biographies

~~~~~

### **Peter D. Ruggiero, Esq., Ruggiero, Brochu & Petracra**

Mr. Ruggiero is an attorney and partner with Ruggiero, Brochu & Petracra and the President of Sustainable Habitats, a planning and land use development consultant services company, both located Warwick, Rhode Island. He is also the solicitor for the City of Warwick, the Towns of Charlestown, and Jamestown and the assistant town solicitor in Exeter. Mr. Ruggiero is also special counsel to several fire districts and municipalities. He has been an adjunct professor in URI's Graduate Program in Community Planning and Area Development, teaching land use law and other courses. He has also served as the Director of Planning & Development for the City of Warwick, RI, the Director of Planning for the Town of North Kingstown, RI, the Regional Planner for the Central Massachusetts Regional Planning Commission in Worcester, MA, and the Planner for the City of East Providence, RI. He received a Juris Doctor from Boston University, a Master of Community Planning and Area Development from URI, and a Bachelor of Arts from Rhode Island College. Peter is a member of the RI and Massachusetts Bar Associations and is certified by the American Institute of Certified Planners (AICP).

### **Scott Millar, RI Department of Environmental Management**

Mr. Millar is the Administrator of the RI Department of Environmental Management's Sustainable Watersheds Office. He has over 30 years of environmental management and policy experience. In his current position he leads DEM's smart growth initiative. Mr. Millar's Office provides technical and financial assistance as well as training to encourage communities to use their land use authority to prevent and restore impacts to the environment. Mr. Millar has managed and edited six guidance manuals to demonstrate how innovative land use techniques can work effectively in both rural and urban settings. Mr. Millar also has over 20 years of community experience as a planning board and conservation commission chair as well as coordinating the preparation of his community's comprehensive plan. Mr. Millar graduated from the University of Rhode Island with a BS in Natural Resources Science and a MS in Wildlife Biology.

# Rhode Island Conservation Easement Guidance



# Purpose of the Manual

- ❖ Procedures for preparing, recording and enforcing conservation easements
- ❖ Ownership, monitoring, and stewardship considerations
- ❖ Examples for a conservation easement, management plan and baseline documentation

*...to guarantee that conservation parcels and their values remain protected in perpetuity.*

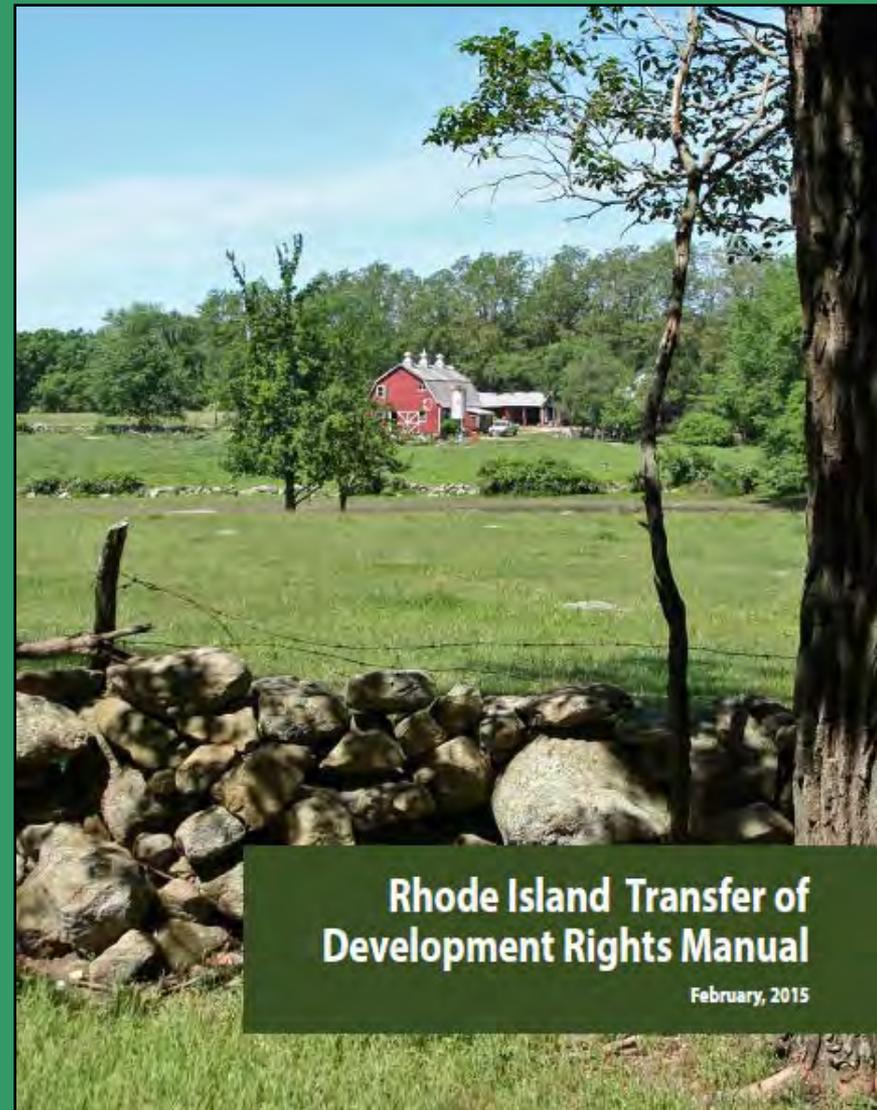
# Acknowledgements

- Jim Aukerman, Esq., *James Aukerman & Assoc., LLC; South Kingstown Land Trust*
- John Berg, *The Nature Conservancy*
- Sheila Brush, *GrowSmart RI*
- Ted Clement, Esq., *Aquidneck Island Land Trust*
- Rupert Friday, *RI Land Trust Council*
- Mary Kay, *RI Department of Environmental Management*
- John B. Murphy, Esq., *Law Offices of Morneau and Murphy*
- Kevin Nelson, *RI Statewide Planning Program*
- Lisa Primiano, *RI Department of Environmental Management*
- Scott Ruhren, *Audubon Society of Rhode Island*
- Larry Taft, *Audubon Society of Rhode Island*
- Andrew M. Teitz, Esq., *Ursillo, Teitz & Ritch, Ltd.*

## The Rhode Island Conservation Development Manual



A Ten-Step Process for Planning and Design of Creative Development Projects



## Rhode Island Transfer of Development Rights Manual

February, 2015







# Presentation Outline

- ❖ Conservation Easement Basics
- ❖ Developing, Writing and Recording a Conservation Easement
- ❖ Ownership, Monitoring and Stewardship Considerations

# What is an Easement?

- ❖ An ownership right in a property that is held by someone other than the property owner.
- ❖ Individual rights are often referred to as “sticks” in a “bundle of rights”.

# What is a Conservation Easement?

- ❖ A conservation easement is the right to prohibit or limit certain actions or uses related to a property in order to maintain and protect the property's identified unique features and natural or scenic condition.



# Legal Definition in Rhode Island

Can be divided into three segments:

1. description;
2. creation; and
3. purpose.

# What Uses and Actions can a Conservation Easement Prevent or Restrict?

- ❖ Uses on the affected property that are considered undesirable or injurious to the natural environment, community social and/or aesthetic values or other desired attributes of the property.



# Who can Accept a Conservation Easement?

- ❖ land trusts and similar non-profit organizations
- ❖ state agencies
- ❖ federal agencies
- ❖ municipalities

*Whenever possible it is highly recommended that several holders of the conservation easement be established.*

# Conservation Easement Outline

**Certain sections should be included in every conservation easement agreement.**

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

# Required and Desired Information- Supporting Documents

**Information recommended to compose a  
conservation easement agreement:**

- ❖ Certificate of title identifying the owner, the form of ownership, and any encumbrances
- ❖ Land survey
- ❖ Baseline Documentation Report
- ❖ Management Plan

# Recording the Conservation Easement

**Three exhibits that should always be recorded with every conservation easement include:**

- 1) a legal description of the real estate parcel (surveyed metes and bounds description)
- 2) Class 1 survey of the property
- 3) Property Management Plan

# Maintaining Necessary Records

- ❖ secure in the municipality's vault
- ❖ Maintain backup hardcopies off-site
- ❖ provide digital copies of all documents
- ❖ Planning Board could require developer to pay for cost of document storage in outside environments

# Who Should Own the Open Space ?

## Four Options:

1. Ownership by City or Town
2. Ownership by Non-profit Group
3. Ownership by Homeowner's Association
4. Private Ownership for Farm, Forest or Habitat Use



# How will the Easement be Monitored?

- ❖ should be clearly outlined in the property management plan.
- ❖ should provide for regular inspections by the conservation easement holder(s)

# Methods of Enforcement

- ❖ Baseline Documentation Report
- ❖ Inspection access
- ❖ Ownership of the open space
- ❖ Property Management Plan
- ❖ Permanent monuments to mark the open space boundary
- ❖ Easement endowment



# Stewardship Considerations

- ❖ The property management plan should make it clear who will be responsible for specific stewardship activities.

# Insurance Considerations

- ❖ Title Insurance
- ❖ General Liability
- ❖ Property Casualty

# Recording Conservation Easements

- No consistent process for recording
- Documents recorded are variable
- No verification of what was recorded
- Inconsistent monitoring of easements
- Community inventory outdated

# **Recommendations to Improve Conservation Easement Recording**

# Require 4 Documents For All Conservation Easements

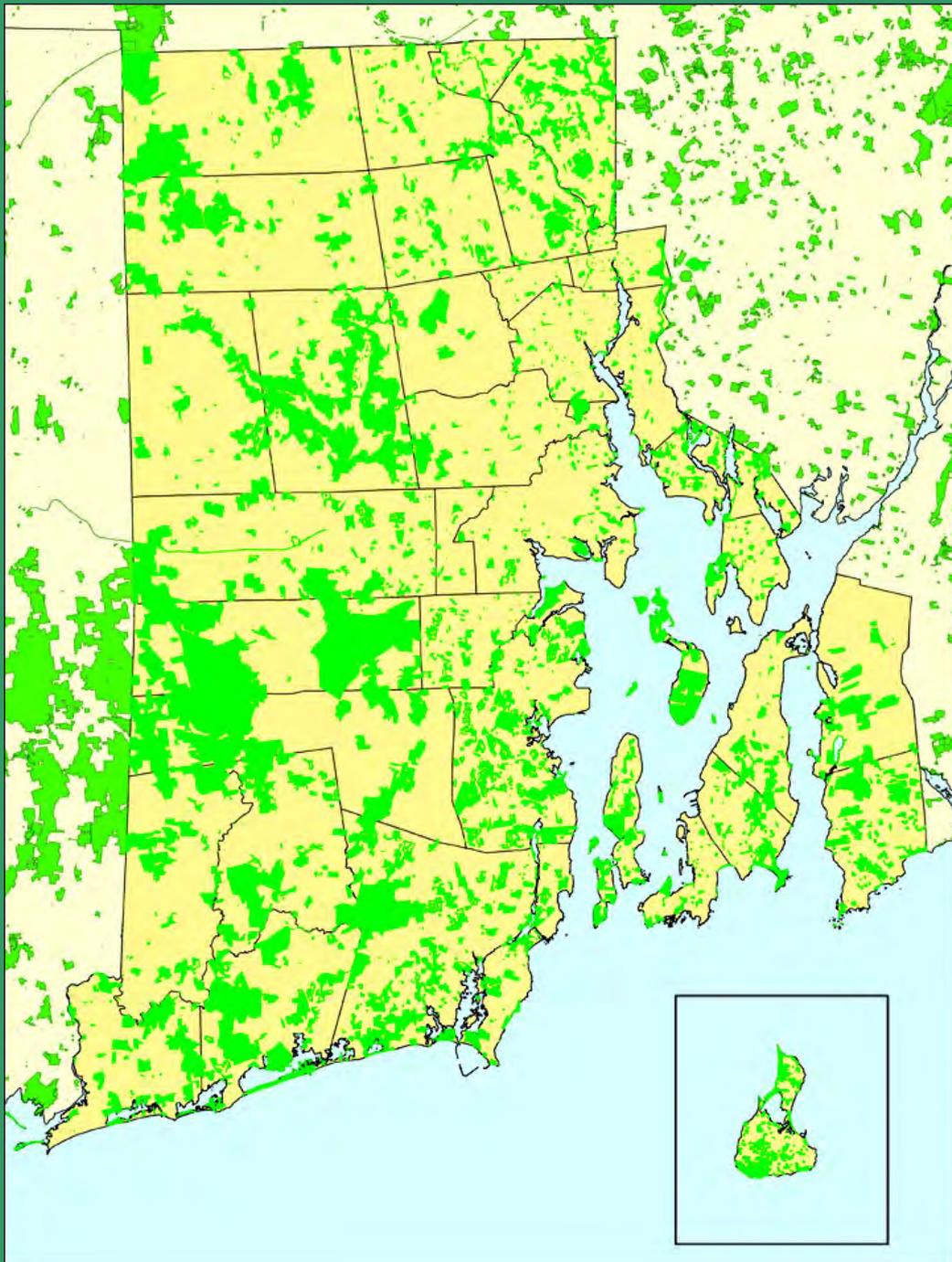
1. Legal Property Description
2. Property Survey Plan
3. Management Plan
4. Baseline Documentation Report

# Adopt Procedure for Recording Easements

- Use an easement recording checklist
- Ensure applicable review and approval
- Easement fees
- Recording verification

**Integrate easement recording  
and  
open space inventory**

# Protecting Unprotected Properties



## RI Conservation Land:

**141,682 Acres = 20% of State**

State of RI:

50,220 - Fee

25,798 - Conservation Agreement

76,026 - Total

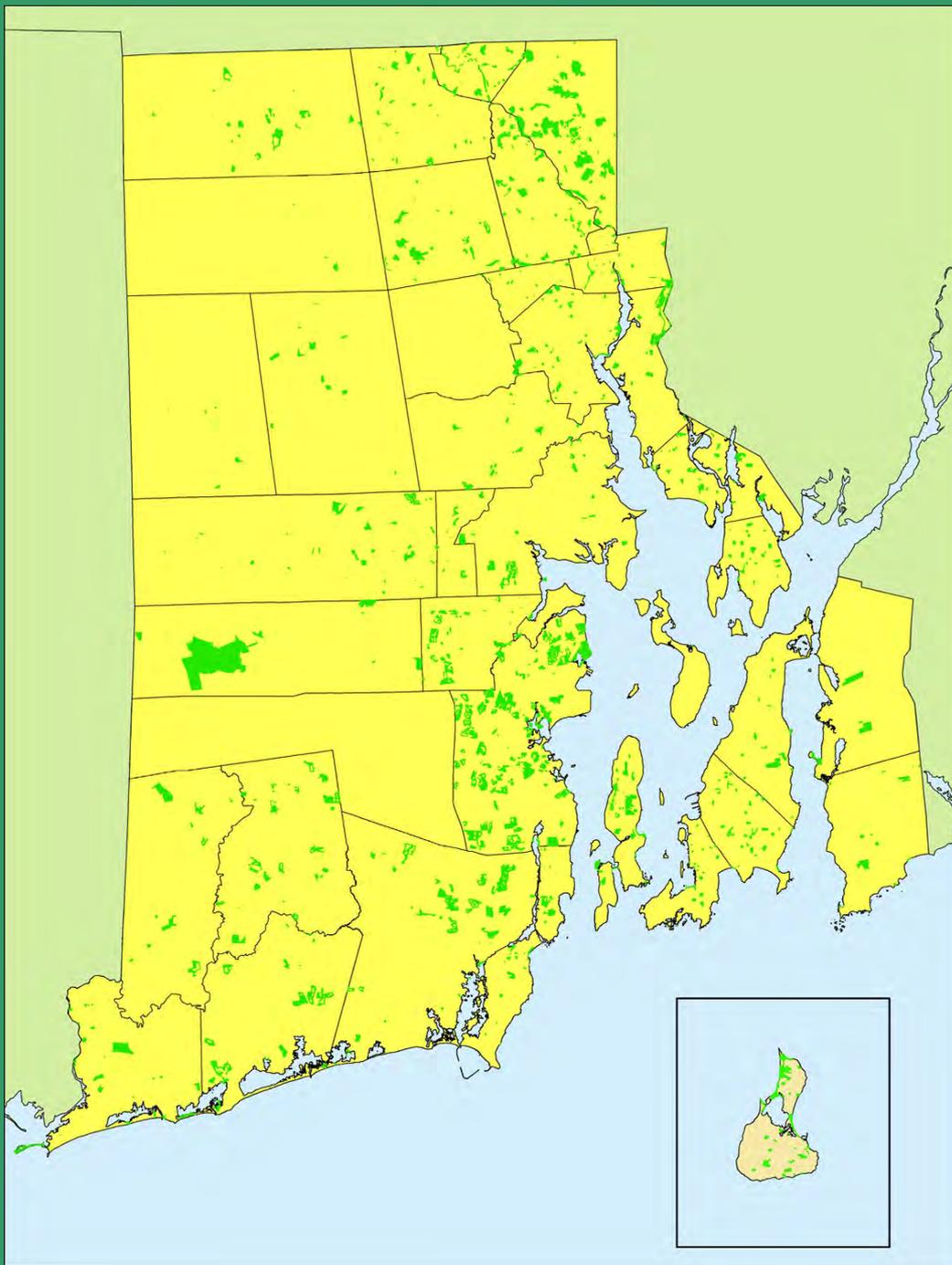
Local & NGOs:

43,476 - Fee

16,905 - Conservation Agreement

16,500 - Conservation Intent

2,240 - Deed Restriction



## Conservation Intent:

**16,500 Acres**

W. Alton Jones Campus - 2,283

Cluster Sub-Division - 4,933

Municipal Parks & Rec - 3,966

Municipal Uncommitted - 4,048

# Recommendations

- Inventory unprotected publicly owned parcels
- Establish parcel values in need of protection
- Identify conservation easement holder(s)
- Prepare management plan and baseline documentation report
- Record conservation easement

# Rhode Island Conservation Easement Guidance Manual



## Acknowledgements

This Manual was prepared by **Peter Ruggiero**, Esq., AICP, of Ruggiero, Orton and Brochu and edited by **Scott Millar**, RI Department of Environmental Management, and **Jennifer West**, Narragansett Bay National Estuarine Research Reserve (NBNERR). Funding was provided by the Rhode Island Foundation and NBNERR. The following individuals assisted in the review, comment and organization of this Manual and whose help and involvement was invaluable.

**Jim Aukerman**, Esq., James Aukerman & Assoc., LLC; South Kingstown Land Trust

**John Berg**, The Nature Conservancy

**Sheila Brush**, GrowSmart RI

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**Scott Ruhren**, Audubon Society of Rhode Island

**Larry Taft**, Audubon Society of Rhode Island

**Andrew M. Teitz**, Esq., Ursillo, Teitz & Ritch, Ltd.

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

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## INTRODUCTION

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

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

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



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

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

Specifically, the purpose of this manual is:

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

## I. CONSERVATION EASEMENT BASICS

### 1. What is an Easement?

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

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

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

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

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

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

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 863, fn 4.

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

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

## 2. What is a Conservation Easement?

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

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



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

## 2a. Legal Definition in Rhode Island

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

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

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

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

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

**(2) creation:** states that a conservation easement can be “stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of the owner of the area or in any order of taking.” This segment shows that a conservation restriction can be created through many different means, “including a conservation easement and” even a court order.

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

<sup>5</sup> Id.

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

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

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



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

## 2c. How is a Conservation Easement Obtained?

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

## 2d. Who Can Grant a Conservation Easement?

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

<sup>6</sup> See 26 U.S.C. § 170(h)(4) (West 2007).

## **2e. Who Can Accept a Conservation Easement?**

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

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

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

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

## **2g. How do Conservation Easements Benefit the Public?**

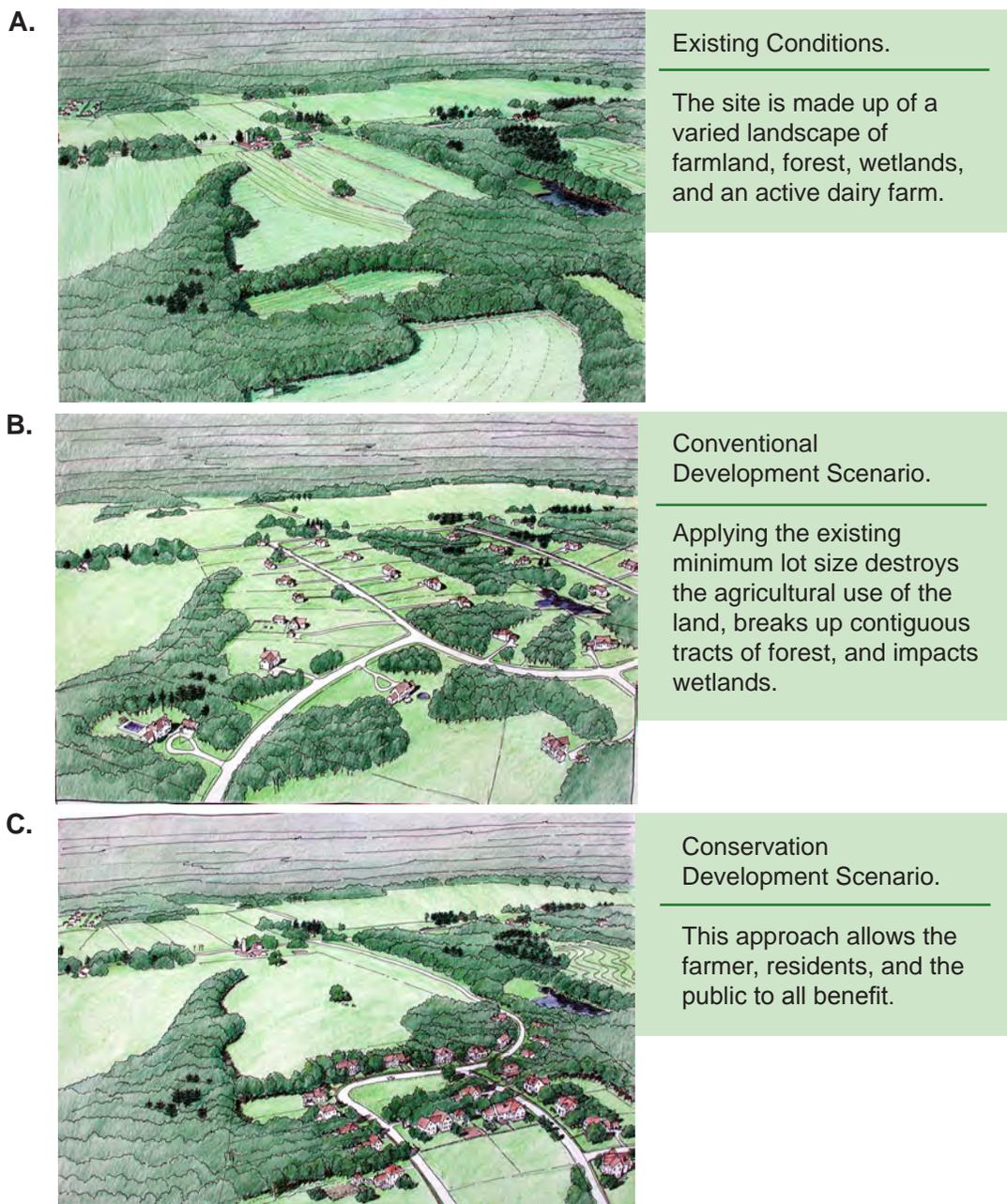
Conservation easements can benefit the public in many ways. For instance, take the hypothetical example of the Kenyon Farm conservation development in South Kingstown as described in the Conservation Development Manual (**figure 4**). The scenic vista and historic farmstead were both protected for the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

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

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

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

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



## II. DEVELOPING, WRITING AND RECORDING A CONSERVATION EASEMENT

### 1. Document Drafting Procedures

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

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

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

Those paragraphs are as follows:

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

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

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

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

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

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

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

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

Subsequent clauses should list:

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

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

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

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

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



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

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

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

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

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

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

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

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

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

**a. Inspection-Study-Monitoring**

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

**b. Mediation/Arbitration Agreement**

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

**c. Fines**

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

#### **d. Equitable Relief**

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

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

#### **11. General Provisions (Choice of Law, Severability)**

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

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

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

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

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

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

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

## **2. Required and Desired Information- Supporting Documents**

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

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

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

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

5. Other supporting documents can include:

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

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

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

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

### **3. Document Acceptance and Execution**

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

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

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

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

### **4. Recording the Conservation Easement**

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

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

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

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

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

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

## 5. Maintaining Necessary Records

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

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

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

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

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

## **6. The Document Amendment Procedure**

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

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

<sup>8</sup> See supra Fn 11 & 12.

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

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

#### 1. Who Should Hold a Conservation Easement?

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

Many commentators prefer that conservation easements be held by public entities so as to ensure better enforcement of the conservation of the property in perpetuity.<sup>9</sup> This preference is based on the belief that the crucible of the democratic electoral process will compel public officials to honor the purpose of the conservation easement<sup>10</sup> and because courts have had a tendency to enforce such easements where there is an underlying public policy at stake.<sup>11</sup> The Act also serves to support the perpetuation of conservation easements. It is also important to note that certain critical benefits and protections afforded to conservation easements by State statutes and the Internal Revenue Code only accrue when the conservation easement is held by a qualified governmental agency and qualified non-profit land trust. Some holders such as a private individuals do not qualify.

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

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

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

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

<sup>9</sup> See, Korngold, *supra* note 21.

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

<sup>11</sup> Korngold, *supra* note 21, at 476.

<sup>12</sup> See, *supra* note 34.

## 2. Who Should Own the Open Space ?

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

*These include:*

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

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



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

## Ownership Options

### Ownership by a City or Town

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

### Ownership by a Non-profit Group

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

### Ownership by a Homeowners' Association

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

### Private Ownership for Farm, Forest or Habitat Use

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

### 3. How Will the Easement be Monitored?

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

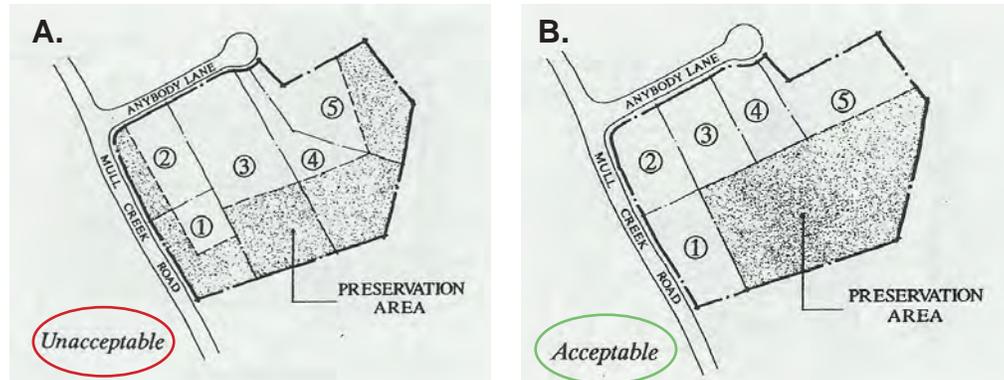
### 4. Methods of Enforcement

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

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

*For conservation developments there are some additional considerations as follows:*

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



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

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

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

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

## **5. Stewardship Considerations**

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

## **6. Insurance Considerations**

- Title Insurance, General Liability, Property Casualty

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

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

<sup>13</sup> See Korngold, *supra* note 22, at 480-82.

# Guidance on Recording Conservation Easements in Rhode Island



**Rhode Island Department of Environmental Management | 2015**

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

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## PURPOSE OF THIS GUIDANCE

The importance of easement documents has been well established in the *Rhode Island Conservation Easement Guidance Manual* (RIDEM 2009). That document provides guidance on writing easements and provides a model conservation easement. However, if there isn't an easement on a particular property, or if the easement documents were not properly recorded at the time of the transaction, the easement may later prove difficult to enforce.

This guidance seeks to assess best practices for recording conservation easements in Rhode Island in order to:

- improve the protection of open space in cluster and conservation developments;
- improve the planning process for recording conservation easements;
- help communities preserve parcels with no recorded conservation easements; and
- enhance protection of unprotected public properties.

The goal was to develop recommendations and provide guidance to be used by planners and potential easement rights holders to ensure that conservation easement documents are properly recorded and that management plans, baseline documentation reports and other supporting documents are properly filed and maintained. This guidance is not intended to be legal advice and local officials should consult with their town solicitors prior to adopting any recommendations.

## BACKGROUND

Conservation easements are commonly used to protect land acquired for recreation, conservation, and open space. They are also used in the development process to protect important features and conservation values of properties during and after development. Many communities require protected open space as part of subdivisions. Protected open space is fundamental to the Conservation Development process.

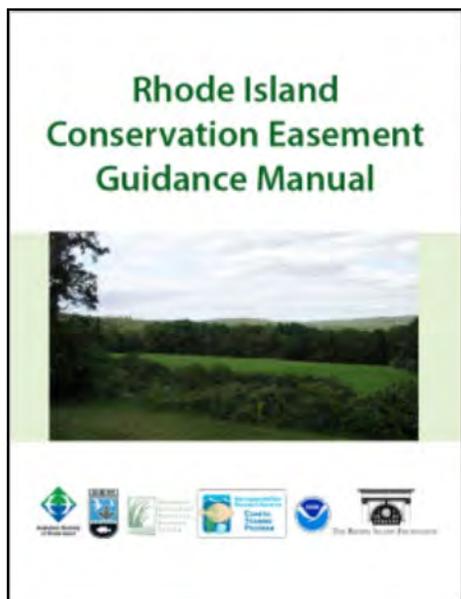
Conservation Development is a more effective way to accommodate growth while minimizing impacts to the environment and community character. Conservation

Development allows for the same number of house lots as would be allowed in a conventional development, but provides developers with the flexibility to reduce lot sizes and carefully situate lots on the site. This process results in the protection of a minimum of fifty percent of the land that could otherwise be developed as meaningful open space. For further information on Conservation Development, refer to the *Rhode Island Conservation Development Manual* (RIDEM 2003). To date 25 Rhode Island communities have either adopted Conservation Development or are considering a Conservation Development ordinance.



*Conservation Development preserves agricultural land and contiguous forest.*

Conservation easements have been used in Rhode Island for many years to ensure that specific values of undeveloped land are protected in perpetuity. However, several sources have found that some conservation easements, particularly in older cluster developments, have not been properly recorded. **To ensure that conservation values are preserved in perpetuity, a conservation easement must be carefully drafted, properly recorded and follow prescribed procedures for maintaining the desired use restrictions.** For a thorough discussion of the purpose, preparation, and execution of conservation easements see the *Rhode Island Conservation Easement Guidance Manual*.



*The cover of the RI Conservation Easement Guidance Manual.*

This document has been prepared as an adjunct to the *Rhode Island Conservation Easement Guidance Manual* in order to provide supplemental guidance focused specifically on recording and perfecting property interests of easements in Rhode Island. The fully executed conservation easement document must be recorded in the municipal land evidence records for the deed to become “perfected” or legally effective. Recording of easements is as important as the financial transfer to complete the transaction. If conservation easement documents are not recorded properly or are not recorded at all, the desired protection may not be enforceable as a real covenant. Once the conservation easement is fully executed, the original document and all exhibits must be recorded in the municipal land evidence records where the affected property is located for the easement to be effective. A conservation easement may also need to be recorded in more than one municipal land evidence record if a conserved property crosses town lines.

Failure to record the easement can leave the property without legal protection, resulting in use of the affected property or its sale and subsequent use in a manner not consistent with the easement objectives. It is a best practice for the grantee of a conservation easement (the “rights holder”) to have an attorney perform a title search and all of the closing formalities and ensure the recording of all legal documents to perfect the transaction and the easement.

For conservation developments, the municipal planning board should establish a standard operating procedure to require that the administrative officer report back to the planning board to verify that the conservation easement and all supporting documents have been properly recorded. This document provides guidance to planners and planning board members to help them develop and implement appropriate procedures to ensure that all conservation easements are properly recorded and requirements for management plans, baseline documentation reports and other supporting documents are properly filed and maintained.

## ABOUT EASEMENTS

An easement is an ownership right in a property that is held by someone other than the property owner. Easements are based on property law principles which recognize property ownership as involving a bundle of five common rights in real property or land. These rights include the right to possess land, to control land use, to exclude other users, to the quiet enjoyment of the property, and to dispose of, or sell, the property. These rights do not have to rest in one owner, but can be divided among multiple

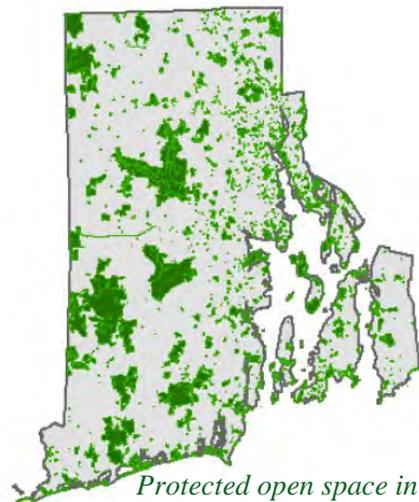
owners. The most common easements grant a “right of use”, such as utility and access easements.



*Most people are familiar with transportation and utility easements. Conservation easements also grant rights to someone other than the landowner.*

## CONSERVATION EASEMENTS

A conservation easement grants a party the right to prohibit or limit certain uses or activities on a property in order to maintain and protect natural, scenic, or other unique features of the property. There are many reasons why communities might want to obtain conservation easements on property. For example, a community may purchase, or accept a donation of, the development rights to a privately owned property in order to prevent that property from being developed. The easement would then prohibit the property owner from building on the property. Easements may also be placed on public property to ensure perpetual protection of public open spaces and to prevent the subsequent sale or transfer of the property for other uses. Conservation easements may also be established to preserve specific resources such as historic sites, historic districts, heritage landscapes, farms, forests, fields, water bodies, wetlands, and wildlife habitats that contribute significantly to community character.



*Protected open space in Rhode Island (RIGIS).*

## METHODS

A list was made of town planners, land trust officials, and conservation organizations known to be involved with protecting property by conservation easements. These individuals were contacted and asked to participate in an interview regarding best practices for recording easements. Those who agreed to be interviewed were called for an appointment, and interviews were conducted by telephone. A copy of the questions asked during the interviews is attached as Appendix A.

## SUMMARY OF FINDINGS

In general, land trusts and private non-profits whose primary purpose is land preservation have very comprehensive and thorough procedures to ensure conservation easements are written and recorded properly. The procedures used by communities that preserve land through cluster or conservation development typically are not as comprehensive and could be improved. Most communities also could identify properties that are considered by most residents to be protected open space but which, in fact, are not protected by conservation easements.

Most of the respondents were aware of RIDEM guidance on conservation easements. Several said they have made use of the guidance and/or the model easement to protect land in their communities. These responses indicate that the *Rhode Island Conservation Easement Guidance Manual* is helping communities to prepare better easement documents and protect property with easements. Responses also indicated that there are still some weaknesses in the conservation easement process. In particular, there was some confusion regarding which documents should be required to support an easement, which documents should be recorded and which documents should be filed and maintained by the town. Moreover, there was a need to ensure that the correct versions of all documents have been properly drafted, recorded, and filed. Most of the respondents indicated that they would welcome guidance in maintaining an inventory of protected properties, recording and managing easements in their communities.

## STATUS OF EASEMENTS AND RECORDING IN CLUSTER DEVELOPMENTS

Easements for cluster or conservation developments in Rhode Island are most often prepared by the developer or project proponent. Most easements are reviewed and approved by planners, rights holders, and consulting attorneys before they are recorded.



*Recording in Rhode Island is done at the office of the municipal clerk.*

Towns have varied requirements as to what an easement should contain and which documents must be recorded. Most provide some guidance on what to file. The most basic requirements are a metes and bounds description of the property and a copy of the executed easement agreement. More sophisticated communities typically also require a Class 1 survey plan. Additional documents such as rights holder documents (e.g., homeowners association bylaws), a baseline documentation report for the property, and a management plan for property maintenance in accordance with the easement requirements are also required but not recorded.

Easement recording in Rhode Island is typically done by the developer's (or rights holder's) attorney after development approval. Recording fees are paid by the attorney at the time of recording. Documents are required to be recorded in hard copy (paper or mylar). Some jurisdictions accept digital submissions pre-recording, but all Towns require

that documents submitted for recording be provided in hard copy. Most documents that have been recorded are then scanned to digital for storage and off-site backup by the Town Clerk's Office.

While all Rhode Island communities require that something be recorded, few have established clear guidelines as to exactly which documents actually need to be recorded and filed with the town. Fewer still have effective internal processes to ensure that all required documents have been recorded and filed with town. Baseline documentation reports and management plans are often not maintained as part of the land evidence records and it is important to cross reference the easement with these plans and to ensure that they are filed and managed so that they may be referenced in the future.

In towns where the system works well, the planners and rights holders (homeowners associations, conservation commissions, land trusts, non-profits) are provided with copies of the documents as recorded. This allows them to know what has been recorded and to maintain copies in their offices. Because the recording process is public, all of the towns report that recorded documents are publicly available by request to the Town Clerk. Many towns also maintain copies of recorded easements in their planning, land trust, conservation commission, public works, or parks and recreation department offices.

Easement enforcement by Rhode Island communities is primarily "complaint-driven", where the town responds to allegations that easement restrictions have been violated. Consequently, enforcement of easements in Rhode Island communities focuses primarily on encroachments, with non-conforming uses such as parking, logging, or clearing. Most of the non-profits, and some of the towns, monitor their easement properties annually. Annual monitoring typically includes a site walk, photographs of site activities, and a brief status report. Annual reports include recommendations on property maintenance and management and may recommend corrective actions to remove encroachments or end non-conforming uses of the property.

The land trusts and non-profits maintain very accurate and up-to-date inventories and maps of their landholdings. Most Rhode Island communities also maintain some form of inventory of open space that includes both public land and land under conservation easement. However, many of these inventories and maps are not up to date and some of these data sets do not include open space protected by easements, particularly open space in older cluster subdivisions. Also, there appears to be a lot of land in Rhode Island, including well known public parks and several large tracts of public land, that people believe is protected but for which there are no recorded conservation easements.



*Backyard swing sets and tree houses are common sources of encroachment.*

## WEAKNESSES IN THE EASEMENT PROCESS

Eight weaknesses were identified in the cluster/conservation development easement process in Rhode Island:

1. **There is no standardization of documents to be recorded and filed with the town.**

All communities require a description of the property and the easement document itself, but beyond that, each community's requirements appear to be different.



2. **There is no standard process to properly file and manage documents, such as the baseline documentation report and management plan, that are not recorded but are critical to support the conservation easement.**

*Town beaches may be examples of public land that people think is protected, but isn't.*

3. **There is no consistent process for recording easements and checking to see what has been recorded after the fact.** Most communities simply direct the applicant to record the subdivision plan and the easement and leave it to the applicant to decide which documents to record. Most communities do check to see that something has been recorded, but few check to see what actually was recorded.
4. **Inventories of open space and easement holdings in Rhode Island communities are spotty and often outdated.** Most Rhode Island towns have prepared maps of publicly owned open space for comprehensive planning purposes. Not all of these include property that is protected by easements or indicate public property without easement protections. Unless they are maintained regularly, many of them are simply not current. Since Comprehensive Plans are typically updated at 5 to 10 year intervals, many of these inventories are 5 to 10 years out of date.
5. **Most towns contain open space that is without any easement protection.** Many towns contain public lands that are generally assumed to be protected but for which no conservation easements are actually in place. Some of these are cherished public properties such as village and urban parks, public bathing beaches, community farms, and other publicly and privately owned properties that are important contributors to community character.
6. **Monitoring and enforcement of easement conditions are inconsistent and/or complaint-driven.** As noted above, many non-profits inspect their properties and monitor compliance with easement conditions annually. Most Rhode Island communities lack the resources to do this type of annual monitoring. As a result, community easement enforcement is either random, taking place when a town official happens to notice

something out of place, or it takes place primarily in response to abutter complaints. While responsive enforcement can be effective, it tends to focus only on encroachment and on specific activities that impact abutters. It is not a substitute for annual review to ensure compliance with all easement conditions.

7. **Small towns often don't have the resources to manage the properties they hold under easements.** Just as small communities often can't do annual inspections, many small towns lack the resources necessary to enforce easement conditions. The focus has historically been on acquiring properties and putting easements in place, not on making properties self-sustaining and ensuring long-term management. Now that communities have these parcels they are finding that they don't have the resources to maintain them or to ensure that they are effectively fulfilling the conservation uses contained in the recorded easements.
8. **Expertise and effectiveness of rights holders, especially homeowners associations, varies widely.** The character and quality of easement protections may vary significantly depending on the rights holders. Municipal and regional land trusts are typically composed of volunteers and professionals with a range of expertise in property protection. Homeowners associations, in contrast, typically consist of a diverse group of property owners who are essentially drafted into service and who may have little or no expertise or experience in protecting property under conservation easements. Homeowners associations are often ill-equipped to manage the property rights entrusted to them by easements. Non-profit rights holders and municipal land trusts report that they are frequently contacted by homeowners associations seeking to unburden themselves of the responsibility of maintaining their easements or managing property that is protected by easements. Unless there is some specific important natural or cultural resource on the property in which they are interested, most land trusts and non-profits will not take over easements from homeowners associations. If homeowners associations fail, become inactive, or simply don't care about the easements, then the easement protections are likely to fail.

## RECOMMENDATIONS TO IMPROVE THE EASEMENT RECORDING PROCESS

There are several steps that communities can take to address the weaknesses in the cluster/conservation development recording process. Communities that wish to improve the recording process should consider doing the following:

1. **Adopt a consistent list of documents that must be prepared** when the executed conservation easement agreement document is recorded. The minimum exhibits that should always be prepared for every conservation easement recorded are:

*A minimum of four documents should be prepared for every conservation easement recorded:*

- 1. Legal property description*
- 2. Property survey plan*
- 3. Management plan*
- 4. Baseline documentation report*

- a. a legal description of the real estate parcel (which should be a surveyed metes and bounds description defining the exact dimensions of the property subject to the encumbrance, or reference to a recorded plat which provides a specific description defining the exact area of the property subject to the encumbrance);
- b. a Class 1 survey of the property to delineate property boundaries, to ensure that the encumbered property does not contain any encroachments or other title issues that might result in legal proceedings, and to establish the limits of the easement within the property. The Class 1 survey should have a separate text box on the face of the plat that would group and identify all easements, how they were created, and where to find them on the plan(s). This makes it easier for a third party to identify applicable easements over time. Permanent markers should be installed to delineate the boundaries of the area to be protected by the conservation easement. **A and B must always be recorded.**
- c. a property management plan including procedures for monitoring and ensuring compliance with easement restrictions. The management plan is typically not recorded but is referenced in the recorded easement. Management plans are sometimes too large for recording and may need to be modified with the approval of the easement holder.
- d. the baseline documentation report provides a record of the conditions on the property at the time of acquisition. A written description of existing conditions at the time of acquisition is a very important tool for identifying and addressing violations of easement restrictions and can be helpful where restoration of property is required. As with the management plan, the baseline documentation report is not normally recorded, but should be referenced in the recorded easement documents. For more information about the contents of a management plan and baseline documentation report refer to the *Rhode Island Conservation Easement Guidance Manual*.

Enforcement and property management can be facilitated by requiring that the boundaries of the open space be marked on the property with permanent markers or monuments, with the monuments shown on the recorded property plan. Public understanding of the process and the easement can also be facilitated by posting signs at the entrance to the property indicating that the open space is protected in perpetuity by a conservation easement.

2. **Adopt a process for filing and long-term management of documents that are not recorded.** Two very important supporting documents, the baseline documentation report and the management plan, are not recorded along with the conservation easement. Therefore it is very important that these documents be properly cross-referenced and filed for the long-term support of the easement. If these documents can't be referenced in the future it will make it more challenging to properly enforce the conservation intent of the easement. Ideally, all permanent land evidence records should be stored in accordance

with the standards published by the *National Archives and Records Administration* (<http://www.archives.gov/>). Conformance to these standards ensures that storage facilities are structurally sound, that records are stored in climate-controlled conditions, and that all records are adequately protected from water damage, fire, vermin and pests.

3. **Adopt a consistent process for the recording of easements** during the subdivision review process. Specifically, communities should:
  - a. Provide guidance to applicants on what specific documents are required to be recorded. Appendix B provides the language establishing the procedures for recording plats and plans from 45-23-64 of the Rhode Island Land Development and Subdivision Review Enabling Act. Appendix C provides a recommended conservation easement checklist indicating what needs to be done and what information must be provided prior to recording a conservation easement for a conservation development. These may be incorporated into existing community land development and subdivision regulations.
  - b. Require submission of electronic copies of all recorded documents as well as hard copies to facilitate filing, storage and retrieval of recorded documents.
  - c. Ensure that the town planner, administrative officer, or town solicitor reviews all documents, plans, and reports and marks them as approved by initialing each page, prior to recording. This makes it easier to determine if the approved versions of documents are actually being recorded. Normally the town planner, acting in capacity as administrative officer, should initial documents for recording and sign the checklist approving those documents for recording.
  - d. The administrative officer should use the checklist in Appendix C to make sure that all required documents have been submitted by the applicant and they have been thoroughly reviewed and approved prior to the planning board issuing their final approval. The administrative officer should then bring the approved documents to the town clerk to be recorded. It would be helpful if the town clerk could note the date and location where said documents can be found (including the book and page number in the land evidence records) on the checklist. The clerk or applicant can then provide a copy of this signed checklist to the community planner/administrative officer and tax assessor for their records. This process should also be included in the community subdivision regulations.
  - e. One way to verify that all required documents were properly recorded is to have the planning board condition their final approval of the cluster or conservation development pending the recording of the conservation easement and all applicable supporting documents in the town land evidence records. The community planner or administrative officer should receive

*Subdivision approval should be conditioned on verification that all documents have been provided and properly recorded.*

verification from the municipal clerk that all required documents have been recorded. When the verification has been received that all documents have been recorded, the planner/administrative officer can notify the applicant that they have final approval of the subdivision.

4. **Integrate the easement recording and open space inventory processes.** When the conservation easement is recorded, the property officially becomes open space. Therefore the time to add the new property to the inventory of community open space is immediately after the recording. Communities need to maintain a current database of easement properties along with their inventories of all publicly and privately owned open space. For easement properties, the inventory should also indicate what rights are held and who holds those rights. Establishing procedures that require adding easements to the database at the time of recording can help communities ensure that their inventories are kept up-to-date and accurate. One approach is to assess the applicant a fee commensurate with updating the community parcel level data to include the new lots created by the subdivision; the conservation easement area can then be entered into the community open space inventory. Communities can use the fee assessed to the applicant to hire a consultant if they don't have staff in-house to update this information on a regular basis. The information could also be integrated into the community tax maps and GIS.

5. **Establish procedures for routine monitoring of all recorded easements.** Complaint response and enforcement are important parts of the easement process. However, they are not a substitute for routine monitoring and property protection procedures. Abutting property owners occasionally need to be reminded of applicable use restrictions on properties that are protected with conservation easements. Easement properties need to be monitored and periodically inspected to identify encroachments and to prevent unauthorized alterations. Monitoring and property protection procedures should be included in the conservation easement. They should be the responsibility of the rights holder; be it the community, a land trust, a conservation commission, a non-profit organization or a homeowners association. Rights holders need established procedures to inspect properties and ensure compliance with easement conditions.



*A site walk is the accepted standard for monitoring easement compliance.*

Inspections should be done during the construction of the subdivision and annually post-construction. The applicant should be required to establish an escrow account to monitor and inspect the construction process since earth moving and construction crews have the potential to violate easement restrictions. Some communities, such as Exeter, have adopted a review and inspection fee ordinance to require applicants to pay for applicable review and inspection of new development. The funds needed to hire appropriate staff to inspect easement conditions, as well as other town requirements, during construction can

be taken from this source of funds. See Appendix D for an example of review and inspection fee ordinance language that can be included in the town's subdivision regulations.

In small towns, inspection may be done by town officials such as the town planner or the conservation commission, by homeowners associations as part of the property management plan, or by local volunteers. Towns with limited resources can reduce resource demands for inspections by:

- a. Encouraging volunteers such as conservation commissions, local scout troops, or concerned citizens to undertake annual inspections for monitoring activities.
- b. Incorporating monitoring into other routine activities and other site visits. This may be as simple as visiting and inspecting conservation properties when doing site walks for nearby development proposals, checking on the easement property when responding to citizen complaints on nearby or abutting properties, or even just reviewing aerial photographs as part of other land use and zoning activities.

Inspections should include a site visit, a property walkover with photographs (as needed) and a brief written report indicating compliance status. Prompt action needs to be taken to correct unauthorized alterations and/or encroachments. Routine inspection and prompt follow-up for properties in non-compliance is important to maintaining easement credibility. The baseline documentation and annual inspection reports provide the legal basis for any claim of property alterations and/or violations of easement conditions. For a more comprehensive discussion of easement monitoring refer to *The Conservation Easement Handbook* (Byers and Ponte 2005) and the *Rhode Island Conservation Easement Guidance Manual*. Refer to Appendix E of the latter for an example of a site visit inspection checklist. The checklist provided is a generic example that should be customized to the type of easement and adjusted to reflect any unique easement conditions on specific properties, but it provides a starting point to guide local inspections.

6. **Resource needs for easement enforcement.** It is critical to take appropriate steps when the easement is prepared to help avoid the need for expensive enforcement procedures whenever possible. Measures to mitigate this include:
  - a. Draft all conservation easements to include the easement holder's right to recover all costs, including legal fees, from the landowner in case of a violation by the landowner.
  - b. Negotiate with the applicant, prior to final plan approval, and establish an escrow account to be held by the easement holder for enforcement actions.

- c. Require or encourage other rights holders to accept responsibility for monitoring and enforcement. Incorporating annual inspections and reporting provisions into management plans can help to reduce demands on community resources by placing enforcement obligations on rights holders, such as public and private conservation groups, non-profits, and homeowners associations involved with the management of the conservation properties, rather than on town officials.
- d. Leverage enforcement successes to raise the profile of the easements and encourage voluntary compliance. Periodically undertaking and publicizing one or two high profile enforcement actions can help to demonstrate to the public that the community is serious about protecting conservation easement properties. This, in turn, can deter abutters from encroaching on properties throughout the jurisdiction. The town should also develop enforcement procedures to clarify:
  - i. How violations will be documented
  - ii. Who in the community will contact the violator and negotiate a resolution
  - iii. How to respond to minor violations
  - iv. When the town solicitor should be involved
  - v. The role of the planning board

A good way to handle enforcement is do everything possible to avoid the need to enforce. Therefore every effort should be made to write the easement with very clear language that indicates the uses and activities that are prohibited within the easement area. Moreover, the town should require a very detailed baseline documentation report to clearly describe the pre-existing conditions of the easement area. It's also a good practice to establish open lines of communication with the landowners or homeowners association to avoid potential conflicts. For a more information on enforcement refer to *The Conservation Easement Handbook*.

## **PROTECTING UNPROTECTED PROPERTIES**

Interviews conducted for this guidance indicated that there are properties in many Rhode Island communities that are perceived as public properties, but are not legally protected. Typical examples include long-established local beaches, parks or playgrounds, town-owned conservation lands, and open space in cluster and conservation developments identified before the recording of easements was required as part of development.

Many of these properties are zoned as open space, but zoning alone should not be considered a reliable means of protecting conservation land over the long term as zoning can be changed. Many communities also permit public facilities in all zones. Public ownership alone also does

### ***Six steps to protecting unprotected properties:***

- 1. Identify the properties***
- 2. Check for encumbrances***
- 3. Establish protection priorities***
- 4. Set protection goals***
- 5. Identify a rights holder***
- 6. Develop, record, and file the documentation***

not guarantee that property will remain protected for conservation purposes, even if the property was originally acquired with that intent. Unprotected publicly owned land may still be developed for facilities such as fire stations, DPW garages, schools, camps, playgrounds, or playing fields. Community planners need to work with other community departments, such as parks and recreation, land trusts, and conservation commissions, to identify properties that are perceived as public (but not subject to use restrictions) in order to find ways to protect these properties.

### **STEP 1: Identify the properties**

RIDEM did an inventory to determine what parcels in Rhode Island were protected by the State, local and non-governmental organizations (NGOs). As part of this inventory many parcels were listed as conservation intent, a classification assigned to parcels where the intent was perceived to be the preservation of the parcel as open space but where no easement appeared to be recorded. This list of parcels is available through the Rhode Island Geographic Information System (RIGIS) and is named "Conservation Lands: Municipal and NGO". It is available at: <http://www.edc.uri.edu/rigis/data/data.aspx?ISO=environment>. It is an excellent place to begin developing a community list of properties that are publicly owned or in public use, but where a conservation easement has not been perfected.

### **STEP 2: Check for encumbrances**

Determine which properties are, and which are not, protected by easements or other encumbrances. The tax assessor's maps can be used to find the plat and lot number of each property. Tax assessor's data are available from the tax assessor and, for many Rhode Island towns, may be viewed online. Using the plat and lot numbers, the land evidence records can be searched to find the deeds. The deeds can then be reviewed to see which properties are, and which are not, protected by easements, title restrictions or other encumbrances. Some deeds may include specific reference to easements or expressly provide rights of access. References in a deed to the property as being "for public use", for "open space", "recreation", "conservation" and/or "wildlife habitat" can also be clear indicators of conservation intent. Some deeds may also specify "covenants and conditions" such as a "restrictive covenant" or a "declaration of restrictions" that limits future uses.

Land trust members and/or conservation commissions can provide this review service for towns as volunteers. They can be trained to look for deed restrictions and conservation easements by volunteer title search company staff or by attorneys with an interest in conservation. This will allow them to determine which properties are and which are not protected.

The Aquidneck Island Land Trust recently completed a similar process as part of an inventory of open space on the Island. While updating their inventory, they sought to establish whether each property was protected by a designation as open space or by an easement. In the process, they discovered that there were several parcels on the island that, although in public ownership and generally considered to be committed open space, were not protected by any restrictive covenants or easements. Miantonomi Park is one prominent property that was discovered in this manner to be unprotected.

### **STEP 3: Establish protection priorities**

Determine which properties merit further action in the light of available resources. Priorities may be based on property size, monetary value, natural, cultural or recreational resources and other local criteria. Protection of larger tracts of unprotected open land in public use should be a priority. Some criteria or basis for determining which parcels are appropriate for conservation versus other community needs should be in the community comprehensive plan.

### **STEP 4: Set protection goals**

Establish clear goals for the protection of each property and determine the purpose and type of protection appropriate to each property (e.g., natural resource protection, wildlife habitat, historic preservation, scenic values, public recreation or other conservation values).

### **STEP 5: Identify a rights holder**

If an easement seems to be an appropriate approach to protecting a property, then the next step is to identify an appropriate rights holder to be responsible for monitoring and enforcement of easement conditions. Rights holders do not have to be homeowners associations. Note that even properties that are already owned by a city or town may still not actually be protected. Absent any other use restrictions, it still may be possible to sell the property or to use part of it for parking, public buildings (such as schools or DPW facilities), or to meet housing goals. When the town owns the property, establishing appropriate parties to hold different interests is critical to ensuring protection. To help ensure protection of important resources in perpetuity, conservation interests should be held for the public by a land trust, conservation commission, or non-profit whose principal purpose is land protection.

### **STEP 6: Develop, record, and file the documentation**

Develop and record the easement documents described in the preceding section of this guidance manual. These should include, at a minimum, the deed or conservation easement restricting the property with the legal property description and survey plan attached. The baseline documentation report and management plan should also be prepared and filed.

One organization that has had considerable success in applying these steps to protect unprotected properties is the Aquidneck Island Land Trust (AILT). AILT volunteers and staff were able to identify a number of parcels of land that were generally thought of as public, but for which there were no institutional protections. Miantonomi Park, for example, was long considered public property, but when part of it was sold for development, the public became aware that the property was actually unprotected. Working with local officials and the public, AILT was able to call attention to the need to protect the park and to establish an easement over the remaining park property, ensuring its long term protection. AILT has demonstrated that public support for protection of parkland can provide a strong impetus to establishing protective easements, and early success in protecting these high-profile properties can motivate the community and the organization to continue and expand property protection programs.

## **SUMMARY OF RECOMMENDATIONS**

To improve the recording and verification of conservation easements, communities should:

1. Require that a legal description of the property, survey plan, management plan and baseline documentation report be prepared for all conservation easements.
2. Establish a long-term document file and management system for the baseline documentation report and management plan.
3. Amend the subdivision and land development regulations to provide requirements for applicants regarding what needs to be done prior to recording easements for cluster or conservation developments.
4. Establish a verification procedure to ensure that all applicable documents are properly recorded in the community land evidence records.
5. Integrate the conservation easement recording into the update of the community open space inventory.
6. Establish monitoring and enforcement procedures for easements.

To permanently protect public open space that is not currently encumbered by a conservation easement, communities should:

1. Develop an inventory of parcels that are publicly owned but not permanently protected by easements.
2. Establish the parcel values that need to be protected, the uses that will not impair these values, and the uses that should be prohibited.
3. Identify the appropriate conservation easement rights holder(s).
4. Prepare a management plan and baseline documentation report.
5. Prepare and record a conservation easement and associated supporting documents.

## **APPENDIX A: Community Planner Interview Questions**

### Conservation easement process subdivisions

1. Who prepares conservation easements? Developer, solicitor, other?
2. Who reviews the easements for the town?
3. At what point in the process does the easement get recorded? Have them explain the process and when the easement is recorded.
4. Who is responsible for recording the easement?
5. Does the town have a standard operating procedure requiring that the applicant, property owner, or administrative officer report back to the planning board to verify that the conservation easement and all supporting documents have been properly recorded?
6. Do exhibits (e.g., legal property description, class 1 survey, baseline documentation report, management plan) get recorded along with the easements?
7. Who in your town typically holds the rights to the easement? (e.g., Town, HOA, land trust, other)
8. Are back-up hard or electronic copies of easements kept off site?
9. Are the recorded easement documents accessible to the public?
10. Are back-up hard copies of all recorded easement documents maintained off-site?
11. Are conservation development applicants required to provide digital copies of all documents?
12. Is the applicant/developer required to pay for the cost of recording and/or for document storage?
13. Is there a process within your town to monitor and enforce if needed the mandatory provisions of conservation easements
14. Have you used the DEM conservation easement guidance model easement?

### Protecting unprotected parcels

1. Does the town have an inventory of all current conservation holdings?
2. If yes to question 1, are the parcels listed by type of protection (e.g., easement, deed restriction, not permanently protected but intended to be preserved)?

3. If no to question 1, does the town have parcels that are intended to be permanently protected but are likely missing a conservation easement? (e.g., town-owned, non-profit, private land trust parcels)
4. Do you think it would be useful to conduct an inventory of conservation holdings?
5. If yes to question 4, would guidance and training on how to do an inventory of all conservation holdings be helpful to you?

**APPENDIX B: RI General Law 45-23-64**  
**The Land Development and Subdivision Review Enabling Act**

**§ 45-23-64 Procedure – Signing and recording of plats and plans.**

- (a) All approved final plans and plats for land development and subdivision projects are signed by the appropriate planning board official with the date of approval. Plans and plats for major land developments and subdivisions are signed by the planning board chairperson or the secretary of the planning board attesting to the approval by the planning board. All minor land development or subdivision plans and plats and administrative plats are signed by the planning board chairperson or secretary or the board's designated agent.
- (b) Upon signature, all plans and plats are submitted to the administrative officer prior to recording and filing in the appropriate municipal departments. The material to be recorded for all plans and plats include all pertinent plans with notes thereon concerning all the essential aspects of the approved project design, the implementation schedule, special conditions placed on the development by the municipality, permits and agreements with state and federal reviewing agencies, and other information required by the planning board.
- (c) Other parts of the applications record for subdivisions and land development projects, including all meeting records, approved master plan and preliminary plans, site analyses, impact analyses, all legal agreements, records of the public hearing and the entire final approval set of drawings are permanently kept by the municipal departments responsible for implementation and enforcement.
- (d) The administrative officer shall notify the statewide "911" emergency authority and the local police and fire authorities servicing the new plat with the information required by each of the authorities.

## APPENDIX C: Conservation Easement Recording Checklist

Items checked below must be provided for all conservation developments prior to recording. Verification of recording is required prior to final approval.

- Legal Description of Property**
- Title Certificate**
- Property Survey**
- Boundary Monuments**
- Easement Instrument**
- Rights Holder Documents**
- Baseline Documentation Report**
- Management Plan**
- Public Access Plan, if applicable**
- Easement Fees**
  - Recording Fee \_\_\_\_\_
  - Easement Endowment Fund \_\_\_\_\_
  - Open Space Inventory \_\_\_\_\_
  - Insurance \_\_\_\_\_

**Documents Approved:**

\_\_\_\_\_  
**Town Planner** **date**

**Documents Recorded at:**

**Book:**                      **Page:**                      **Date:**

**Recording Verified by:**

\_\_\_\_\_  
**Town Clerk** **date**

The following items should be provided for all conservation developments prior to recording. Items marked with an asterisk \* should be recorded along with the property deed. All documents should be checked and approved by the responsible Town official(s).

**\*☐ Legal Description of Property**

A legal description of the real estate parcel which should be a metes and bounds description defining the exact dimensions of the property and indicating areas subject to the easement.

**\*☐ Title Certificate**

A certificate of title to identify the owner, document the form of ownership and identify any encumbrances on the parcel.

**\*☐ Property Survey**

A class 1 property survey plan prepared and stamped by a Rhode Island licensed surveyor.

**☐ Boundary Monuments**

Prior to recording the easement, permanent monuments must be installed at property boundary turning points to clearly delineate both the parcel and the easement area on the ground so they may be distinguished from adjacent properties. Signage should also be used, particularly with conservation developments, to make homeowners aware of the easement boundaries.

**\*☐ Easement Instrument**

The text of the conservation easement, reviewed and approved by the community solicitor, and executed by the property owner, the primary rights holder, and any other parties to the agreement such as the Town, land trust, or homeowners association. The conservation easement should be consistent with the model easement in the *Rhode Island Conservation Easement Guidance Manual* (RIDEM 2009). At a minimum the easement document should contain the following:

- The words “conservation easement” or “conservation restriction” in the title to invoke the definition and protections under the Rhode Island Act
- Identification of the conservation easement holder(s) and the landowner(s) who granted the easement
- The purpose for the easement and the conservation values to be preserved
- Rights reserved to the grantor, if any
- Easement holder(s) rights and duties including the preservation of the conservation values, access to premises for monitoring and inspection, and obligation to enforce the terms of the easement.
- Prohibited uses of the easement area
- Rights holders’ remedies for monitoring, inspection and enforcement of the easement
- Signatures from all parties, grantor(s) and grantee(s), to the conservation easement

### **\*☐ Rights Holder Documents**

If the rights holder is to be a Homeowners Association or any other entity that is not otherwise established prior to the execution of the easement then the documents which legally establish the entity and provide them with jurisdiction over the property should be recorded along with the easements. These documents should include a reference to the conservation easement that places an obligation on rights holders to enforce the terms of the easement. Examples may include legal documents establishing a non-profit or a homeowners association, copies of homeowners association bylaws, articles of incorporation for incorporated entities, etc.

### **☐ Baseline Documentation Report**

A report documenting existing conditions on the subject property, including text, photographs, maps, and illustrations as appropriate. The baseline documentation report establishes the state of the property at the time of recording and provides a legal basis for subsequent claims relating to property alterations. For further information and a checklist of what should be in a baseline documentation report refer to the *Rhode Island Conservation Easement Guidance Manual (RIDEM 2009)*.

### **☐ Management Plan**

A plan for the allowable uses of the easement area, what maintenance, if any, is needed to maintain the allowable uses or conservation values and who is responsible for implementing the management plan. For further information regarding management plans refer to the *Rhode Island Conservation Easement Guidance Manual (RIDEM 2009)*.

### **☐ Public Access**

If public access will be provided to the easement area:

- has adequate parking been provided for visitors?
- have rules been established for public use of the property?
- will there be hours during which the property will not be accessible to the public?
- has a sign been posted indicating that the property may be used by the public, announcing the open hours, and informing users about the rules for the use of the property?

### **\*☐ Easement Fees**

In addition to the fees communities would normally assess applicants for processing a new development project, the following fees should be considered for administrating a conservation easement:

- **Easement Endowment Fund**

A fund can be established to allow the easement holder(s) to take any reasonable and necessary action to enforce the easement. The easement must establish legal access and the frequency of inspections for the conservation holder(s) to monitor the easement area.

- **Open Space Inventory**

A fee can be assessed to allow the town to update the parcel level data to show the new lot lines from the subdivision as well as to add the conservation easement area to the community open space inventory.

- **Insurance**

It should be determined if Title Insurance, general liability or property casualty insurance is needed. For more information refer to the *Rhode Island Conservation Easement Guidance Manual* (DEM 2009)

- Document Approval**

Copies of all documents for recording, including a survey of the property, a copy of the rights-holders documentation and the easement instrument should be reviewed and approved (initialed) by applicable town officials including the, planning board, town solicitor and community planner. It's best to have all pages of these documents initialed by the planner to verify approval.

- Recording Verification**

The planning board should condition their final approval of the conservation development pending the recording of the conservation easement and all applicable supporting documents in the town land evidence records. The community planner or administrative officer should receive verification from the municipal clerk that all required documents have been recorded. The town clerk should sign a document checklist to verify that all applicable documents have been recorded with the date and a reference to the location where said documents can be found in the land evidence records. The clerk can then forward a copy of this checklist to the community planner/administrative officer for their records. When the verification has been received that all documents have been recorded, the planner/administrative officer can notify the applicant that they have final approval of their subdivision. Refer to appendix ----- for a copy of an easement verification checklist. (*This checklist will list the documents that should be recorded*)

## **APPENDIX D: Review and Inspection Fees**

### **Regulations Governing Fees and Fee Schedules**

*(from pages 31-38 of the South County Watersheds Technical Planning Assistance Project)*

#### **INTRODUCTION**

Preserving open space, promoting appropriate residential design, and creating aesthetic commercial projects are among the goals of this project. No single tool better accomplishes these objectives than the model fee structure. The fee schedule is both traditional and innovative. An administrative fee is collected to pay for newspaper publication, certified mail, and staff time. In addition, a technical review fee is separately collected to pay for the experts necessary to advise the Zoning and Planning Boards. In an era when our Precious few remaining resources have been developed, damaged, or destroyed, the fee structure outlined in this model can make a major difference. If towns adopt one model from this project, this should be the one.

This approach to build-out is both fiscally sound and aesthetically responsible. The laypersons who volunteer their time to serve on Zoning and Planning Boards are rarely experts in design components. Civil engineers, landscape architects, architects, historic preservationists, wetlands specialists, and attorneys, among others, bring a necessary expertise and professionalism to the development process.

Most importantly, boards may use this resource at no expense to the taxpayers of the town. The entire cost of technical review may be passed on to the developer. The developer, in turn, passes the cost on to his consumers, usually at a quite affordable price. For example, in the Town of Sterling, Massachusetts, the technical review fees for a civil engineer and an attorney in a subdivision of twelve detached single-family units averaged less than eight thousand dollars. The cost to consumers was less than \$750.00 per home, and this is often compensated by the higher value of better design for the subdivision.

This may be the most important ordinance for the small South County towns without full time staff assistance. It will also be of assistance to the larger towns to help alleviate the burden of professional review. The provision that the Planning Board chooses the expert may be met with resistance by the applicant/developer. An appeal of a selection of experts to the Zoning Board has been provided in this regard.

It should be noted that in some towns, charter constraints and custom may require Town Council approval of fee structure.

#### **SECTION 1. INTRODUCTION.**

**1.1 Procedural History.** On *[some date]* the Planning Board held a public hearing, pursuant to the Subdivision and Land Development Regulations, to consider proposed regulations governing fees. At the close of the public hearing, the Planning Board voted to adopt regulations governing fees and a new schedule of fees for review conducted by the Planning Board and its consultants on the various types of applications which come before it. This document, subject to revision from time to time in a manner spelled out herein, constitutes the Planning Board's rules governing the imposition of fees and its current fee schedules.

**1.2 Purpose.** These regulations and fee schedules have been adopted to produce a more equitable schedule of fees which more accurately reflects the costs of technical design and legal review of

applications to the Planning Board; to establish a review procedure in the selection of consultants; to encourage better design of residential development; and to promote more informed decision-making by the Planning Board.

## **SECTION 2. FEE STRUCTURES AND REGULATIONS.**

**2.1 General.** The Planning Board shall impose reasonable fees for the review of applications which come before it. The Planning Board may impose Administrative Fees and Project Review Fees as may be applicable to the types of applications set forth below.

**2.2 Method of Payment.** The payment of administrative fees and technical review fees shall be by certified or bank check only. Each fee shall be submitted separately.

*Bounced checks can complicate the computation of the date of submittal and lead to controversies. The bank or certified check will always be honored for payment.*

## **SECTION 3. ADMINISTRATIVE FEES.**

**3.1 Applicability.** An Administrative Fee shall be assessed to offset the expense of review by e Planning Board and its office with regard to all applications set forth in Section 3.3, below.

**3.2 Submittal.** Administrative Fees shall be submitted at the time of the submittal of the application. Any application filed without this fee shall be deemed incomplete and no review work by the Town shall commence until the fee has been paid in full.

**3.3 Schedule of Administrative Fees.** The following schedule applies to the types of applications to tile Planning Board set forth below. This schedule supersedes all previous schedules as they may have appeared in the Zoning Ordinance, the Subdivision and Land Development Regulations, and any listings which may have been compiled from time to time for the benefit of applicants.

- A. Administrative Subdivisions -\$100.00
- B. Minor land development and Minor Subdivision.
  - 1. Pre-application Meeting and Concept Review -\$100.00
  - 2. Preliminary -\$200.00 + \$20.00 per unit
  - 3. Final -\$100.00 + \$20.00 per unit
- C. Major Land Development and Major Subdivision
  - 1. Pre-application Meeting and Concept Review -\$100.00
  - 2. Conceptual Master Plan -\$200.00 + \$20.00 per unit
  - 3. Preliminary -\$200.00 + \$20.00 per unit
  - 4. Final- \$100.00 + \$20.00 per unit

*As an alternative to "per unit II fee increments. some communities may wish to use 'per acre increments.*

*Fees must relate to the actual cots of administration and review but not exceed the actual costs. R.l G.L. Section 45-23-58 governs these fees: "Local regulations adopted pursuant to this*

*chapter may provide for reasonable fees, in an amount not to exceed actual costs incurred, to be paid by the applicant for the adequate review and hearing of applications, issuance of permits and the recording of the decisions thereon." Some towns have undertaken a study of such costs before setting administrative fees and any town contemplating adopting this regulation should do so.*

**3.4 Fees for Revised Applications.** Where an Administrative Fee has been calculated by the number of lots or units proposed, and the application is revised after payment of said fee, the following rules shall apply:

- A. If the number of proposed lots or units increases after the initial submittal, the applicant shall pay a fee equivalent to the difference between the fee originally paid and the fee that would have been paid had the original submission included these additional lots or units. No review of these additional lots or units shall take place until this additional fee is paid to the Planning Board office, and failure to make this payment after requesting additional lots shall be grounds for denial of the application.
- B. If the number of proposed lots or units decreases, a refund of that portion of the application fee predicated on those lots or units shall be granted only if, in the judgment of the Planning Board, no cost associated with the review of those lots or units has been yet incurred.

**3.5 Fee Waivers.** The Planning Board may waive or reduce any Administrative Fee, if, in the opinion of the Board, unusual circumstances exist regarding the subject property or the application. Such circumstances shall include, but not be limited to, a significant public benefit being the result of the subdivision.

**3.6 Refund.** Once the review process has been commenced, the Planning Board shall not refund Administrative Fees, including the case of withdrawal of the application by the applicant, except as provided in Section 3.4.B, above.

## **SECTION 4. PROJECT REVIEW FEES.**

**4.1 Applicability.** In addition to an Administrative Fee, for all Major Subdivisions and Major Land Developments the Planning Board shall impose a Project Review Fee on those applications which require, in the judgment of the Planning Board, review by outside consultants due to the size, scale or complexity of a proposed project, the project's potential impacts, or because the Town lacks the necessary expertise to perform the review work related to the permit or approval. In hiring outside consultants, the Board may engage engineers, planners, lawyers, landscape architects, architects, or other appropriate professionals able to assist the Board and to ensure compliance with all relevant laws, ordinances, by-laws and regulations. Such assistance may include, but shall not be limited to, analyzing an application, design review of applications to determine consistency with the Town's Residential Design Manual, dated [some date], incorporated by reference in the Community Comprehensive Plan (hereinafter, the "Design Manual"); monitoring or inspecting a project or site for compliance with the Board's decisions or regulations, or inspecting a project during construction or implementation.

**4.2 Submittal.** Project Review Fees shall be submitted at the time of the submittal of the

application for deposit in an account established by the Town Treasurer (Escrow Account) application filed without this fee shall be deemed incomplete and no review work shall commence until the fee has been paid in full.

**4.3 Schedule of Project Review Fees.** The following schedule applies to the types of applications to the Planning Board set forth below. This schedule supersedes all previous schedules as they may have appeared in the Zoning Ordinance, the Subdivision and Land Development Regulations, and any listings which may have been compiled from time to time for the benefit of applicants. Where more than one type of application has been submitted for Planning Board action, only the largest of the applicable Project Review Fees shall be collected for deposit into the Escrow Account, and not the sum of those fees.

**A. Conceptual Master Plan, Subdivision or Land Development Project**

\$1,000 for the first six units or lots, plus \$100.00 per unit or lot, whichever is greater, after the first six.

*Again, technical review fees must bear a close resemblance to the actual costs of expert assistance. The legal standard requires the fee to be "roughly proportional" to the Town's costs. Where unexpended funds are returned to the payer, this should not be an issue.*

**4.4 Replenishment.** When the balance in an applicant's Escrow Account falls below twenty-five percent (25%) of the initial Project Review Fee, as imposed above, the Planning Board shall consider whether to require a supplemental Project Review Fee to cover the cost of the remaining project review.

*If the initial deposit is used, review should cease until replenishment occurs. If there is no replenishment, the project should be denied/or failure to submit necessary information lest it be constructively approved.*

**4.5 Inspection Phase.** After the granting of a Special Permit, site plan approval or Final Plan approval, the Planning Board may require a Supplemental Project Review Fee for the purpose of ensuring the availability of funds during the inspection phase of the review process.

**4.6 Handling of Project Review Fees.** The Project Review Fee is to be deposited into a special account as established by the Town Treasurer.

*Boards are advised to consult with the Town Treasurer and Town Manager or Administrator, before establishing a fee schedule. Treasurers of neighboring communities are often willing to share information.*

- A.** Outside consultants retained by the Planning Board to assist in the review of an application shall be paid from this account.
- B.** Project Review Fees shall be turned over to the Town Treasurer by the Planning Board for deposit into an Escrow Account.
- C.** A copy of the latest statement from the banking institution handling the Escrow Account shall be forwarded from the office of the Town Treasurer to the Planning Board office as

soon as it is received for timely and accurate accounting.

- D. The Town Treasurer shall prepare a report on activity in the Escrow Account on an annual basis.
  - 1. This report shall be submitted to the Planning Board and Town Council for review.
  - 2. This report shall be printed in the Annual Report for the Town
- E. An accounting of an applicant's funds held in the Escrow Account may be requested by the applicant at any time.
  - 1. The Planning Board shall respond to the request in a timely fashion.
  - 2. This accounting shall include the following information
    - a. The latest statement from the banking institution handling the account, which should include an accurate accumulated interest portion to the closing date of the statement if such statements are subdivided into individual applicants' accounts. Otherwise, a statement of principal and interest, prepared by the Planning Board office, based on the latest statement from the banking institution.
    - b. A report of all checks authorized for issuance since that last banking statement
- F. An applicant may request an estimate of bills pending from consultants for work completed, or in progress, but not yet invoiced.
- G. Excess fees in the Escrow Account, including accumulated interest, shall be returned to the applicant or the applicant's successor in interest, at the conclusion of the review process, as defined below. For the purpose of this section, any person or entity claiming to be an applicant's successor in interest shall provide the Board with documentation establishing such succession in interest.
  - 1. With the disapproval of a Plan at any stage. Subsequent reinstatement or re-application shall require redeposit of fees by the applicant
  - 2. With the approval of a Final Subdivision Plan.
  - 3. With the release of the performance bond at the end of construction of an approved Final Subdivision Plan.
  - 4. With the final inspection or the approval or disapproval on all other types of applications under the Zoning Ordinance or Subdivision and Land Development Regulations, whichever comes later.

**4.7 Appeal.** The choice of a consultant selected by the Planning Board for the review of an application may be appealed in writing to the Zoning Board sitting as the Board of Appeal by the applicant, providing such appeal is initiated within twenty (20) days of the initial selection.

- A. Two circumstances may disqualify the selected consultant. These conditions constitute the *only* grounds for an appeal.
  - 1. Conflict of interest: A consultant shall not have a financial interest in the project under review, or be in a position to financially benefit in some way from the outcome of the pending review process. Consultants must be in compliance with the Rhode Island Ethics Law.
  - 2. Lack of appropriate qualifications: A consultant shall possess the minimum required qualifications. The minimum qualifications shall consist of either an educational degree in, or related to, the field at issue or three or more years of practice in the field at issue or a related field.

*The cap on grounds for appeal prevents political fights over the sympathies of the consultant. Nonetheless, the choice of a consultant is a very visible and significant one. The professionalism of the consultant is a reflection upon the board. Boards are advised to make sure that its consultants understand that the representation of private clients before the Board is ethically unacceptable, although not illegal.*

- B.** The required time limits for action upon an application by the Planning Board shall be extended by duration of the appeal.
- C.** This appeal shall not preclude further judicial review, as an appeal of the Board of Appeal's decision.

**SECTION 5. DELINQUENT ACCOUNTS.** The following rules apply to fees owed to the Planning Board by applicants:

**5.1 Monthly Interest Charge.** All fees past due by one month from the date of invoice shall be subject to a monthly interest charge based upon an annual interest rate of eighteen percent (18%).

**5.2 Costs of Collection.** All costs of collection associate with past due accounts shall be borne by the applicant.

**5.3 Current Delinquents.** All applicants owing fees to the Planning Board at the time of any an1endment to these provisions of the regulations shall be sent the following:

- A.** A duplicate notice of the amount past due.
- B.** A copy of the applicable sections of these regulations with all amendments clearly indicated.
- C.** Notice of a 30-day grace period before the commencement of any changes in interest rates or charges.

**SECTION 6. REVISION OF FEE SCHEDULES AND REGULATIONS GOVERNING FEES.**

**6.1 Amendment.** The Planning Board may review and revise its regulations and fee schedules, from time to time, as it sees fit.

- A.** Amendments shall be preceded by a public hearing.
- B.** Any new regulations or alterations to the fee schedule shall take affect upon filing a copy of the amendments with the Town Clerk.
- C.** The Planning Board will review its regulations and fee schedule on an annual basis.