

# *Stratham Open Space Initiative*

*Land as a Legacy*

**Workbook for Landowners**



**Town of Stratham Ad-Hoc Subcommittee  
of the Conservation Commission**

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## **1. Introduction & Contact Information**





# TOWN OF STRATHAM

INCORPORATED 1716

10 BUNKER HILL AVENUE • STRATHAM, NH 03885

TOWN CLERK/TAX COLLECTOR (603) 772-4741

SELECTMEN'S OFFICE/ADMINISTRATION (603) 772-7391

FAX (603) 775-0517

Dear Stratham Landowner:

The Conservation Bond Ad Hoc Subcommittee is pleased to provide you with this notebook filled with information and resources relevant to land conservation in Stratham. Our Subcommittee produced some of the information, while other sections are reprinted by permission or purchased from outside sources. We encourage you to read the basic, introductory material provided in sections 1 - 5. If you wish to learn more, you can review the supplemental materials provided in sections 6 - 13. Section 11 is a "Help List" that includes contact information for qualified experts in the field of land conservation (attorneys, appraisers, etc.)

The Ad Hoc Subcommittee strives to simplify and streamline the process for landowners as much as possible. We take full responsibility for completing all the administrative "legwork" such as soliciting bids and contracts from attorneys, appraisers and surveyors, and working with those folks daily to coordinate every step of the process as well as communication with you and your representative(s). We also pay for all easement transaction costs, except for half of the appraisal cost (and of course your own personal legal representation.) However, you will be reimbursed for your half of the cost of the appraisal should we close on an agreement.

Deciding whether or not to sell a conservation easement on your land can involve estate planning, tax planning, financial planning, family discussions, family goals, and legacy considerations. You might even find yourself discussing the process with other people who have already completed a conservation easement on their land. We are available to help educate landowners as best we can, though we also strongly encourage you to seek your own professional advice as well. Please consider taking the time to meet with some of our Subcommittee members so we can explain things on a personal level, and answer your questions as they arise.

If you think you would like to pursue a conservation easement sale further, please fill out the landowner information worksheet provided in section 5, and return it to any subcommittee member, or the Town Office (address shown above). All inquiries will be held in strictest confidence. Once we hear from you we will assign two or three subcommittee members to be your personal contact people, and these same individuals will work with you throughout the process. *You are not committed to any sale until an appraisal is completed and you sign a sales agreement stating that you agree to the appraised price.*

We sincerely appreciate your interest in land conservation. Please do not hesitate to call or email one of us directly with any questions or to set up an appointment.

Sincerely,

Conservation Bond Ad Hoc Subcommittee



### **Members of the Conservation Bond Ad Hoc Subcommittee:**

Nathan Merrill (Chairman)	778-3040	<a href="mailto:njmerrill@comcast.net">njmerrill@comcast.net</a>
Roger Stephenson (Vice Chair)	778-7970	<a href="mailto:r-stephenson@comcast.net">r-stephenson@comcast.net</a>
Caroline Robinson (Secretary)	772-6646	<a href="mailto:caroline@jamberries.com">caroline@jamberries.com</a>
Brad Jones (Cons. Comm. Rep.)	772-6922	<a href="mailto:cindyasj@rcn.com">cindyasj@rcn.com</a>
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Tammy Hathaway	778-3912	<a href="mailto:tamglennjohn@aol.com">tamglennjohn@aol.com</a>
Denis Dillon	772-2074	<a href="mailto:denis.dillon@mclane.com">denis.dillon@mclane.com</a>

### **Town Office Contact:**

Paul Deschaine, Town Administrator	772-7391	<a href="mailto:strathamta@comcast.net">strathamta@comcast.net</a>
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### **Member Information:**

**Nathan Merrill** is a Stratham native who owns and operates Stuart Farm, LLC with his family. The Stuart Farm was one of the first in New Hampshire to be conserved, through the state's Agricultural Conservation Program, in 1980. In addition to dairy farming, Nate has also worked in the past for the Upper Valley Land Trust in Hanover, NH, where he served as Farmland Conservation Project Manager. He worked to successfully conserve over 1,000 acres of farmland in the upper Connecticut River valley of New Hampshire and Vermont. He has served on the Ad Hoc Subcommittee since its inception because of his working knowledge of conservation easement transactions, and because without his farm's conservation easement he would not be able to continue the family farm tradition today. Nate wishes to help protect more of Stratham's critical open spaces for future generations.

**Roger W. Stephenson, APR** is head of Stephenson Strategic Communications. Roger has almost 20 years of experience providing public relations counsel to senior corporate managers, heads of government agencies and non-profit executives. His expertise includes internal communications, social marketing, coalition building and grassroots organizing, developing action strategies for public campaigns, branding and fundraising strategies. Roger is an accredited member (APR) of the Public Relations Society of America. Roger served Interior Secretary Bruce Babbitt from 1995-1999. As the Interior representative to the White House Council on Environmental Quality he managed overall program and policy development for President Clinton's American Heritage River initiative. Before serving in the Clinton administrations he was National Field Director for the League of Conservation Voters. Roger and his wife Mona are both graduates of the University of New Hampshire. They have lived in Stratham with their two daughters, Jackie and Olivia, since before the turn of the century (1999).

**Caroline Robinson** grew up on Stratham Heights Road. She moved away for school in 1965, and then returned with her husband in 1992 in order to farm and raise their children on her family's farm in Stratham. Discouraged by the rapid disappearance of farmland in town, she and her father, Dr. Henry Saltonstall, became interested in conservation easements. In 1998 the family donated an easement of 94 acres to the Rockingham Land Trust. In 2000, Caroline proposed a warrant article, which passed, to initiate the deposit of all Land Use Change Tax dollars into the town Conservation Fund for the purchase of open space. In 2002, she produced the educational newsletters "*Our*

*Town*", for the \$5 million bond campaign to fund the purchase of conservation easements. Since the bond's passage, she has served on the Ad Hoc Subcommittee seeking to distribute the funds. On the state level, Caroline serves on the NH Coalition to Sustain Agriculture and on the Advisory Board of the Commissioner of Agriculture. She works as a graphic designer for agricultural publications and operates Berry Hill Farm.

**Dan McAuliffe** is a Project Engineer whose job brought him to the Seacoast area 22 years ago. He came from a small town in Massachusetts, much like Stratham, and he saw that town grow and regretfully make choices that neglected to protect the rural character and the open spaces that were such an important part of his childhood experience and development. Now as a father of 3 boys, he is inspired to try and ensure that we have the foresight to protect that quality of life in Stratham and safeguard our environment for future generations.

**Laura Lee** has lived in Stratham for five years, but has ties to the town going back more than 15 years. Laura joined the Ad Hoc Subcommittee in 2005 because she has a strong desire to raise her daughter here and hopes to help preserve Stratham as a beautiful rural town. Laura and her daughter enjoy the quality of life that Stratham currently offers and are patrons of the town's local farms. Laura works for a local bank, specializing in advanced financial and estate planning. She feels that there is a strong connection between conserving land and solving estate planning issues. Laura believes that development is not the only way for landowners to reap financial rewards from open space. She hopes to be able to help landowners and their families understand the benefits of good financial planning and how it naturally complements conservation.

**Eddie Barker**, along with her husband Gordon, own and operate a vegetable farm on Portsmouth Avenue. She has been a resident here for more than 20 years. During that time she has seen a lot of farmland and open space succumb to the pressures of development. She became a member of the Ad Hoc Subcommittee because of her passion to see open space preserved. Eddie feels that quality of life is maintained through open space. She also feels it is critical to help preserve what is left of the family farm and open land that supports the natural habitat for a wide variety of wildlife.

**Tammy Wiggin Hathaway** is a Stratham native, who has seen Stratham grow and go through many changes from its agricultural roots. She lives on Squamscott Road with three generations of family surrounded by 60 acres of Wiggin land in conservation easements. She would like to work with other landowners to help them realize the value of their open space. She is a Manager/Grower at Rolling Green Nursery in Greenland.

**Denis Dillon** is a member of the Trusts and Estates Department of the McLane law firm, and practices in the areas of taxation, estate planning, probate law, and elder law. He advises clients with respect to sophisticated tax, business, succession and estate planning, including the tax consequences of conservation easements. Dennis values community involvement, serving on the Boards of Cross Roads House, Portsmouth Sunrise Rotary Club, and Seacoast Land Trust. He's a member of Volunteer Lawyer Service of Massachusetts Justice Project, Leadership Seacoast Class of 2006, and is the recipient of the 2003 Equal Justice Tax Award for pro bono legal service. Denis lives on Patriots Road with his wife and three daughters. He hopes to share his working knowledge of the legal, estate planning, and tax issues applicable to conservation transactions with the committee and with Stratham's landowners.

## **2.     Introductory Fact Sheet for Landowners**



## **Introductory Fact Sheet for Landowners Considering Conservation**

*Prepared by:*

### **Stratham Conservation Bond Ad Hoc Committee**

Selling a conservation easement on your land:

- Leaves a lasting legacy for the benefit of all future generations in our community
- Permanently protects your land from development, mining, & subdivision
- Permanently stops developers and speculators from bugging you
- Preserves our town's agricultural heritage, and protects vital land base for future Stratham farmers
- Protects wetlands, surface waters and ground water from pollution
- Can protect scenic views enjoyed by you as well as the public
- Can be an excellent way to facilitate estate planning needs without selling your land
- Can help minimize or eliminate "estate" or "death" tax problems for your heirs
- Can be a way to diversify your assets: cash earned from the easement sale can be invested in any manner, and can provide a steady retirement income or easily divisible inheritance for your heirs.

Other important points:

- You are not selling your land: you still own the deed and have the enjoyment and use of your property. You can sell or gift your property at any time, or leave it to your heirs. The property remains in private ownership.
- Your property's market value will continue to increase over time, even with the easement in place.
- Selling a conservation easement will make your land more affordable for family members or other aspiring farmers to buy in the future, making it more financially feasible for the land to remain actively farmed.
- You will never have to attend any formal meetings. If you decide to work with the Committee, two or three members will be delegated to you. To date, all of our landowner meetings have taken place informally in their homes. Even if a deal is reached and goes to a public hearing for funding approval, your presence is not necessary. The Committee takes care of everything.
- The Conservation Bond Ad Hoc Committee has already worked to conserve six important parcels of land in Stratham, totaling 125 acres. We still have plenty of funding available to conserve hundreds more acres with willing landowners.

### **3. Frequently Asked Questions**

## **FREQUENTLY ASKED QUESTIONS ABOUT CONSERVATION EASEMENTS**

Information provided here is for general information: each property and each landowner is unique, and outside grant sources have their own requirements that may alter some of the guidelines below. We encourage you to ask questions and share your concerns: easements are complicated documents. We also encourage you to seek the advice of a trusted legal counsel knowledgeable about real estate law, if you desire.

*Will I still own title to my land and will I remain responsible for property taxes?*

Yes, and yes. The conservation easement deed will be recorded at the County Registry with your fee title. Ownership remains in private hands, so you are still responsible for property taxes. Your property's tax assessment may drop, particularly if it is not presently enrolled in current use.

*Can I sell, gift, bequeath, or otherwise transfer my land to any other party?*

Yes. The Town may seek to include in the easement a right-of-first-refusal to purchase the land at a later date if the property is selling on the open market, but even this would not apply to within-the-family transfers.

*I have a mortgage on the land I am considering conserving. Do I need to contact my lender?*

Yes. You need to notify your lender that you are considering a sale of your development rights, since it will impact the value of their collateral, and they will be required to subordinate their mortgage behind the easement. Many mortgage holders are not familiar with conservation easements, so there may be an educational component here. Lenders almost always end up approving this type of transaction.

*Is the conservation easement permanent?*

Yes.

*Can Town citizens or political bodies vote to rescind or alter conservation easements?*

No.

*Who will monitor and enforce the easement's restrictions?*

The Town Conservation Commission as well as other outside easement holders could be the primary stewards of the easement. Outside easement holders could include a qualified land trust, the Rockingham County Conservation District, and/or a State or Federal agency.

*Can choose to protect only a certain portion of my property, or can I exclude a house lot or two for my children?*

Yes, yes.



*Could you explain the timing of the conservation process?*

- 1.) Informal discussions between landowner and Ad-Hoc Committee members to discuss the landowners' and Town's goals.
- 2.) If the landowner wishes to proceed to the next step and the Committee feels the parcel is worthy of evaluating further, an Option To Purchase agreement will be drafted and signed (see explanation below for greater detail).
- 3.) The Committee will be responsible for hiring and directing a Certified General Appraiser qualified to complete conservation easement appraisals to value the parcel. The Town will pay for 50% of the cost of the appraisal, and the landowner will be responsible for the other 50%. (If the property is eventually conserved, the Town will reimburse the landowner their half of the appraisal cost.)
- 4.) The Committee and the landowner will review the appraisal report. If the landowner feels the compensation would be adequate, and the Committee decides the property is worth conserving at the agreed-upon price, the Committee will recommend to the Conservation Commission and the Selectmen that they approve funding for the project. If both boards vote affirmatively, then the Option To Purchase will be converted to a Purchase and Sales Agreement, with a fixed price. **At this point all parties are legally committed to the deal.**
- 5.) Survey and legal work will begin to close the transaction. Typically it will take between 45-90 days between the signing of the P&S and the final closing.
- 6.) The transaction legally closes: the conservation easement deed is recorded and the landowner receives compensation.
- 7.) Note: The Committee may choose to seek additional outside grant funding to "stretch" the Town's dollars for land conservation. This could take place any time between steps 3 and 5 above.

*What is an Option To Purchase agreement?*

This legal document is very similar to a Purchase & Sales Agreement, but it does not include a price tag. The document basically says "We wish to sell our development rights to the Town of Stratham, contingent upon the appraisal showing adequate value for our compensation." The document is necessary for the Committee to feel comfortable expending Town funds for appraisal costs, and it also demonstrates landowner commitment when completing grant applications for additional outside funding to supplement Town dollars.

*What is the Purchase & Sales Agreement?*

This document is similar to a P&S you would sign if you were selling your property, only in this case you are selling certain rights to your property, not the underlying fee title itself. The sale price will be agreed to and fixed at this time. The P&S will be signed by all individuals shown on the deed, the Board of Selectmen, and it will be notarized. All parties are legally bound to the transaction once this document is signed.

*Can you explain how the appraisal works?*

A Certified General Appraiser qualified to complete conservation easement appraisals will visit your property so you can meet with them personally. The property will essentially be appraised twice: first at its current market value, and then at its conserved non-developable value. The difference between the two figures would be the value of the conservation easement for which you could be compensated. The appraisal will generally take 1-3 months to complete, depending

on appraisers' schedules. The cost of the appraisal will usually run \$2,000-\$6,000, depending on the size and complexity of the property.

*What will it cost to complete the conservation easement process, and who will pay?*

The biggest costs are: 1.) appraisal 2.) survey 3.) legal: title work, closing costs, etc. 4.) contribution to stewardship fund of primary easement holder. 5.) Also, hiring a consultant to prepare outside grant applications would cost additional money.

The appraisal is the first major cost encountered, and if either the landowner or the Town is not satisfied with the values shown, then the rest of the costs will not be encountered. As previously mentioned, the landowner will be responsible for half the cost, and the Town will pay for half. If everyone agrees to the appraisal figures, and the project eventually closes successfully, then the Town will pay for the entire appraisal and all of the other costs.

The only other costs for which the landowner will be responsible would be their own legal representation (if desired) and any legal work necessary to present clear title.

*If I conserve my land am I required to allow the public access to my property?*

This is a negotiable issue that will be discussed with each interested landowner. Each property and landowner is unique, and not all parcels are well suited to public access. However, some outside grant sources require public access. Landowners need to communicate clearly to Committee members whether they wish to permanently permit (or restrict) public access on their conserved land.

*Can I allow walkers or hunters on my conserved land, while at the same time restricting access to snowmobiles, ATV's, or other motorized vehicles?*

Yes. Even if public access is a component of your easement, this access is typically only for non-motorized activities.

*Can I post my property to keep out hunters or any other individuals?*

Yes, as long as there is **not** a public access provision in your easement (see previous discussion above).

*If I donate an easement or part of the value of an easement (referred to as a "bargain sale"), am I eligible for a tax write-off?*

Yes. The appraisal will dictate the amount you can deduct on your taxes as a charitable gift. Please refer to additional information provided and consult with your financial advisor.

*Are there any other benefits to donating an easement or part of the value of an easement?*

Yes! The Town can use a donation as leverage or "match" when applying for outside grant funds. Essentially, the donor isn't only gifting the value of their easement, but they're also helping the Town stretch its funding even further by allowing us to use the donation (not just Town funds) as match when applying for grants to protect another property.

## 4. Timeline



## **Approximate Timeline for Conservation Easement/Warranty Deed Negotiations and Transactions**

### ***Town of Stratham Conservation Bond Ad Hoc Subcommittee***

#### **Exploratory Phase:**

Informal conversation(s) with landowner (and their family if desired)

- explain the process
- explain conservation easements and the major issues involved
- explain the appraisal process
- answer any questions
- provide a landowner resource notebook
- encourage landowner to seek advice of legal, estate planning, and tax advisors

Ad Hoc Subcommittee walks the property and (in non-public session) discusses the project to see if it meets our initial eligibility criteria.

If the landowner and Ad Hoc Subcommittee wish to proceed with an appraisal, we take the following steps:

#### **Appraisal Phase:**

Landowner submits the baseline information checklist from the notebook.

Ad Hoc Subcommittee completes a draft generic easement/warranty deed and option agreement, and reviews documents with landowner.

Landowner signs option agreement, which spells out payment terms for appraisal work, and how the document can be converted to a Purchase & Sales Agreement in the future.

Ad Hoc Subcommittee (in non-public session) recommends to the Conservation Commission that we expend town funds on an appraisal for the property. If they agree, we then proceed to the Selectmen (in non-public session) so they can authorize the expenditure.

Ad Hoc Subcommittee and landowner together choose a qualified, certified appraiser, and provide him/her with a map of the property and a copy of the draft easement/warranty deed.

Upon completion of the appraisal, the landowner and Ad Hoc Subcommittee both receive appraisal reports for their review. If both parties agree to a price, we enter the final steps:

#### **Closing Phase:**

The draft easement/warranty deed is reviewed and revised in greater detail, and the option agreement is converted to a Purchase & Sales Agreement with a set price. Landowner signs the agreement after final consultation with their legal and/or financial advisors.

Ad Hoc Subcommittee votes to recommend the purchase of the easement/warranty deed to the Conservation Commission (again in non-public session). If they vote to support the project, we take it to the Selectmen for a joint **public** hearing. Landowners do **not** need to be present.

If the Selectmen vote to purchase the easement/warranty deed at the agreed price and terms, they sign the P&S Agreement, making it legally binding on both parties. Ad Hoc Subcommittee notifies the landowner, and explains the closing process.

A surveyor is hired to complete a thorough survey. Town Counsel completes a title search for the property. The results of the title search are provided to the surveyor to allow them to complete their work.

Final survey Mylar is presented to the Planning Board for their signature as a courtesy. The signed Mylar will be recorded at the Registry of Deeds with the easement deed/warranty deed at closing. Town Counsel will issue title insurance for the benefit of the Town.

Town Administrator works with Town's and landowner's attorneys to orchestrate the actual legal closing, normally held at the County Registry of Deeds in Brentwood. Final tweaking and editing is completed on the legal documents, and agreed to by all parties. Major revisions of terms or lengthy delay in closing may require a new Purchase & Sales Agreement, Public Hearing and/or appraisal to occur.

Landowner(s), their attorney, Town Administrator, Town attorney, and Ad Hoc Subcommittee members attend the final closing at the Registry. Congratulations, together we've protected more land!!!

## **5. Baseline Information Checklist**

## Conservation Easement Acquisition Baseline Information Checklist

In order to assist the Ad Hoc Conservation Bond Subcommittee to the Stratham Conservation Commission, please complete this form and return it to the Subcommittee. Feel free to attach additional sheets, if needed.

Applicant Name	
Applicant Address	
Applicant Phone Number Home	
Applicant Phone Number Work	
Applicant Email	
Property Address	
Map /Lot #	
Alternate Contact Person	
Relationship to Applicant	
Alternate Contact Phone Number Home	
Alternate Contact Phone Number Home	
Alternate Contact Email	
Property Size - Please attach legal description, plan or deed	
Now in "current use"? (Yes/No)	
Easement Donation/Bargain Sale?	
Sale of development rights? (Yes/No)	
Timing (less than a year/over a year)	
Describe special features of property which make it desirable for preservation (size, adjacency to other protected property, watershed characteristics, important or unique environmental, cultural, historic or agricultural characteristics).	

Applicant Name: \_\_\_\_\_

Describe historic and present land use.	
Owner's Preservation Objectives (Please indicate most important goal)	
Do you wish to reserve some lots for future use? If so, please describe.	
Public Access Limitations (if any)	
Do other family members affect decision?  (Please provide name and relationship.)	
Mortgage Holders (if any)	1. 2.

Prepared by: \_\_\_\_\_ Date: \_\_\_\_\_

Additional Information:

Please call one of the subcommittee members when you complete this checklist.  
Feel free to call if you have questions!

## **6. Sample Documents**

## AGREEMENT FOR SALE OF CONSERVATION EASEMENT

**THIS AGREEMENT** made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between \_\_\_\_\_, married/single, of \_\_\_\_\_ Road/Street/Avenue, Stratham, County of Rockingham, and State of New Hampshire (hereinafter referred to as the "Seller"), the **TOWN OF STRATHAM**, a municipal corporation duly organized and existing in the County of Rockingham, and State of New Hampshire or its assigns (hereinafter referred to as the "Buyer").

**WHEREAS**, the Seller is the owner of a certain tract or parcel of land, containing \_\_\_\_ acres, more or less, situated on the \_\_\_\_\_ side of \_\_\_\_\_ Road/Street/Avenue, in said Stratham as described in deed of \_\_\_\_\_, dated \_\_\_\_\_ and recorded in the Rockingham County Registry of Deeds at Book \_\_\_\_\_, Page \_\_\_\_\_, referred to hereafter as the subject premises, and,

**WHEREAS**, the Buyer is desirous of purchasing on the subject premises a conservation easement under the provisions of New Hampshire RSA 477: 45-47 containing terms substantially as set forth in Exhibit A attached hereto, so as to permit said premises to remain in its present undeveloped state in perpetuity, and,

**WHEREAS**, the parties are desirous of entering into an agreement for the purchase and sale of the development rights to the subject premises, in accordance with the terms set forth below,

**NOW THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. **ESTABLISHMENT OF PURCHASE PRICE:** The parties agree that the purchase price of the development rights to the subject premises shall be established by an independent appraisal. Such appraisal shall be undertaken by the parties in the following manner:
  - A. The appraisal shall be performed by a licensed, certified real estate appraiser selected by the Buyer on or before \_\_\_\_\_, 200\_\_.
  - B. The cost of the appraisal shall be shared equally by the Buyer and the Seller in the first instance. If, upon receipt of the appraisal, the Buyer and the Seller agree upon the purchase price and the subsequent sale and conveyance of the conservation easement, the Buyer shall reimburse the Seller for the Seller's share of



such appraisal at the time of closing.

- C. The appraisal shall be based upon the conservation easement area having the approximate size of \_\_\_\_ acres. The area to be excluded from the conservation easement shall have an area of approximately \_\_\_\_ acres.
  - D. Upon completion of the appraisal, a copy will be provided to the Buyer. Each party shall have sixty (60) days from the date of the receipt of the appraisal to determine whether it wishes to proceed with the conveyance based upon the appraised value of the conservation easement.
  - E. Should the appraisal result in a prospective payment of compensation to the Seller which would be a sum less than the Seller is willing to accept for the conveyance of the development rights of her property, or should such appraisal result in compensation that is more than the Buyer is able to pay for such development rights, then there will be no further obligation upon either party and this agreement shall be deemed to be null and void.
  - F. Should the appraisal result in a figure of compensation that the parties agree is acceptable then the parties shall execute an Addendum to this Agreement reflecting the purchase price and shall continue with the purchase and sale of the conservation easement in accordance with the terms set forth in paragraph 2. below.
2. **TERMS OF PURCHASE:** The terms and conditions of the agreement to purchase the development rights to the subject premises shall be as follows:
- A. The Buyer shall pay to the Seller the purchase price established in accordance with the provisions of paragraph 1. above. At the closing the purchase price shall be paid in full less any adjustment for costs necessary to be paid to clear title to the subject premises.
  - B. The conservation easement area and the area to be excluded from the conservation easement shall be shown on a plan to be prepared for recording in the Rockingham County Registry of Deeds. The Buyer shall be solely responsible for the selection of a surveyor and all costs associated with the preparation of the easement plan. The Seller will be provided with copies of such plan.
  - C. The transfer of title shall occur upon a date to be subsequently agreed upon after completion of the easement plan but no later than \_\_\_\_\_, 200\_\_. It is the expectation of the parties that the closing

shall occur within ninety days after completion of the easement plan. The Buyer shall make every effort to close the transaction at an early date, however, the closing date being dependent upon the availability of funds that may be acquired from outside funding sources.

- D. At the time of closing, the Buyer shall be responsible for all the customary recording costs associated with or required to be paid at the time of the transfer of title.
- E. The Seller and the Buyer understand and agree that there will be no payment of a transfer tax as this transaction is exempt pursuant to the provisions of New Hampshire RSA 78-B:2.
- F. Transfer of title shall occur at the Rockingham County Registry of Deeds, or at such other place or location as may be subsequently agreed upon by the parties.
- G. The Seller and the Buyer acknowledge that as the Buyer will retain the tract or parcel to be subject to the easement in its current state, there will be no current use change tax penalty attributable to this transaction. If any such tax is required, it shall be paid by the Buyer.
- H. The Seller agrees to convey title to the Buyer by good and sufficient easement deed. The Seller shall obtain the consent of any mortgagors or other lien holders, holding liens or encumbrances on the area to be subject to the conservation easement, should the same be deemed necessary.
- I. The obligation to purchase the easement will be contingent upon a satisfactory title examination undertaken by the Buyer. The cost of any additional examinations or assessments that the Buyer may wish to have performed shall be borne solely by the Buyer.
- J. Property taxes shall be prorated to the date of transfer of title.
- K. To enable the Seller to make the conveyance contemplated herein, the Seller may, at the time of the delivery of the deed, use purchase monies, or any portion thereof, to clear the title to the subject premises of any and all encumbrances or interest to be conveyed by the Seller to the Buyer.
- L. Should the Seller be unable to convey good, clear and marketable title, subject to easements of record, then this agreement shall be null and void.

M. The parties shall agree upon the form and content of the conservation easement deed and shall agree upon the use restrictions to be incorporated in such deed, as well as such other necessary and appropriate terms and conditions. The Buyer shall prepare a draft conservation easement deed for review by the Seller.

N. The Seller acknowledges that the subject premises are their homestead property and agree to release any and all rights of homestead therein at the time of closing.

O. Additional Provisions:

3. **NO BROKER INVOLVEMENT:** The parties agree that there is no real estate commission due to any broker on this agreement or upon the subsequent sale of the development rights from the Seller to the Buyer.

4. **MISCELLANEOUS:** This agreement, executed in triplicate, is to be construed as a New Hampshire contract, is to take effect as a sealed instrument, and sets forth the entire contract between the parties. It is binding upon the parties and inures to benefit the parties, their respective heirs, devisees, executors, administrators, successors and assigns. It may be modified or amended only by a written instrument executed by the Seller and the Buyer.

**IN WITNESS WHEREOF,** the parties have executed this agreement in triplicate, and set their hands hereto, the day and date first above written.

\_\_\_\_\_  
WITNESS

**TOWN OF STRATHAM**

By: \_\_\_\_\_  
David Short, Selectman

By: \_\_\_\_\_  
Martin Wool, Selectman

By: \_\_\_\_\_  
Kirk Scamman, Selectman

**THIS IS A TRANSFER TO AN INSTRUMENTALITY OF THE STATE AND IS  
EXEMPT FROM THE NEW HAMPSHIRE REAL PROPERTY TRANSFER TAX  
PURSUANT TO RSA 78-B:2,I**

**CONSERVATION EASEMENT DEED**

\_\_\_\_\_, of Road/Street/Avenue, Stratham, New Hampshire 03885 (hereinafter referred to as the "Grantor", which word shall, unless the context clearly indicates otherwise, include the Grantor's legal representatives, successors and assigns), for consideration paid, with WARRANTY covenants, grants in perpetuity to the **TOWN OF STRATHAM**, a municipal corporation, situated in the County of Rockingham, State of New Hampshire, acting through its Conservation Commission pursuant to NH RSA 36-A:4, with a mailing address of 10 Bunkerhill Avenue, Stratham, New Hampshire 03885, (the "Town"), collectively hereinafter referred to as the "Grantee" which shall, unless the context clearly indicates otherwise, include the Grantee's successors and assigns), the Conservation Easement (herein referred to as the "Easement") hereinafter described with respect to that certain parcel/area of land (herein referred to as the "Protected Property") with any and all buildings, structures, and improvements thereon, consisting of \_\_\_\_ acres, situated off \_\_\_\_\_ Road/Street/Avenue on the \_\_\_\_\_ side of \_\_\_\_\_ Road/Street/Avenue, in the Town of Stratham, County of Rockingham, State of New Hampshire, more particularly bounded and described in Appendix "A" attached hereto and made a part hereof.

**1. PURPOSES**

The Easement hereby granted is pursuant to NH RSA 477:45-47, exclusively for the following conservation purposes:

A. As a first priority, to protect \_\_\_\_ acres of (**upland/tidal shore/productive pasture/farmland/forest land**) from future development; and

B. Next, to conserve and protect from further impact and development \_\_\_\_\_ ( ) feet of undeveloped (**road frontage/river frontage**); and

C. To protect wetlands, surface waters, and groundwater from the impacts of development; and

D. To preserve, protect and conserve open spaces, and the wildlife habitat thereon and to protect biological diversity, native flora and fauna, and the environments, habitats, and ecological processes that support them, as those values exist on the date of this instrument, and

as they may evolve in the future; and

E. To preserve scenic enjoyment for the general public through the protection from development of more than \_\_\_\_\_ hundred \_\_\_\_\_ (\_\_\_\_\_) feet of undeveloped (**road/river**) frontage;

F. The preservation of the land subject to the Easement granted hereby for outdoor recreation by and/or the education of the general public; and

G. Overall, to assure the Protected Property will be retained forever in its current developed, scenic, and existing condition and to prevent any use or fragmentation of the Protected Property that will significantly impair or interfere with its unique and significant qualities of public benefit and conservation values.

The above purposes are consistent with clearly delineated open space conservation goals and/or objectives, i.e., the following statements in Chapter 7 (Resource Conservation and Preservation) of the August, 1998 Master Plan of the Town of Stratham ("the Master Plan"): "Although Stratham's natural features still exist in abundance, past development has inevitably resulted in the loss of some resources, especially open spaces and active agricultural land. Careful attention must be given to future development so that further development so that further losses to both the natural and cultural environment are minimized and that the essential qualities that make Stratham the community it is remain intact;" and the clearly delineated open space conservation goals and/or objectives as stated in Chapter 8 (Existing and Future Land Use) of the Master Plan, which states that "[t]he protection of open space in Stratham is necessary and desirable for a variety of reasons...."; together with the published policies of the Rockingham Regional Planning District and with New Hampshire RSA Chapter 79-A which states: "It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources."

All of these purposes are consistent and in accordance with the U.S. Internal Revenue Code, Section 170(h).

The Easement hereby granted with respect to the Protected Property is as follows:

2. **USE LIMITATIONS** (Subject to the reserved rights specified in Section 3 below)

A. The Protected Property shall be maintained in perpetuity in its current condition of limited development without there being conducted thereon any industrial or commercial activities, except agriculture and forestry, including timber harvesting, as described below, and provided that the productive capacity of the Protected Property to produce forest and/or agricultural crops shall not be degraded by on-site activities.

- (i) For the purposes hereof, "agriculture" and "forestry" shall include animal husbandry, floriculture, and horticulture activities; the production of plant and

animal products for domestic or commercial purposes; the growing, stocking, cutting, and sale of Christmas trees or forest trees of any size capable of producing timber or other forest products; the construction of roads or other accessways for the purpose of removing forest products from the Protected Property; and the processing and sale of products produced on the Protected Property (such as pick-your-own fruits and vegetables and maple syrup), all as not detrimental to the purposes of this Easement.

- (ii) Agriculture shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Protected Property. Agricultural management activities shall be in accordance with the then current scientifically based practices recommended by the UNH Cooperative Extension, U.S. Natural Resources Conservation Service, or other government or private, nonprofit natural resource conservation and management agencies then active. Such management activities shall not be detrimental to the purposes of this Easement, as described in Section 1 above, nor materially impair the scenic quality of the Protected Property as viewed from public roads.
- (iii) Forestry for industrial or commercial purposes shall be performed, to the extent reasonably practicable, as hereinafter specified in accordance with the following goals, and in a manner not detrimental to the purposes of this Easement as described in Section 1 above.
  - (a) The goals are:
    - maintenance of soil productivity;
    - protection of water quality, wetlands, and riparian zones;
    - maintenance or improvement of the overall quality of forest products;
    - conservation of scenic quality;
    - protection of unique or fragile natural areas;
    - protection of unique historic and cultural features; and
    - conservation of native plant and animal species.
  - (b) Such forestry shall be performed in accordance with a written forest management plan consistent with this Easement, prepared by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee. Said plan shall have been prepared not more than ten years prior to the date any harvesting is expected to commence, or shall have been reviewed and updated as required by such a forester or other qualified person at least thirty (30) days prior to said date.
  - (c) At least thirty (30) days prior to harvesting, Grantor shall submit to Grantee a written certification, signed by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee, that such plan has been prepared in compliance with the terms of this Easement. Grantee may request the Grantor to submit the plan itself

to Grantee within ten (10) days of such request, but acknowledges that the plan's purpose is to guide forest management activities in compliance with this Easement, and that the actual activities will determine compliance therewith.

- (d) The plan shall include a statement of landowner objectives, and shall specifically address:
  - the long-term protection of those values for which this easement is granted, as described in Section 1 above;
  - the goals in Section 2.A.iii.a above; and
- (e) Timber harvesting with respect to such forestry shall be conducted in accordance with said plan and be supervised by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee.
- (f) Such forestry shall be carried out in accordance with all applicable local, state, federal, and other governmental laws and regulations, and, to the extent reasonably practicable, in accordance with then-current, generally accepted best management practices for the sites, soils, and terrain of the Protected Property. For references, see "Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire" (J.B. Cullen, 1996), and "Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire" (New Hampshire Forest Sustainability Standards Work Team, 1997), or similar successor publications.
- (g) In areas used by, or visible to, the general public, such forestry shall be carried out, to the extent reasonably practicable, in accordance with the recommendations contained in "A Guide to Logging Aesthetics: Practical Tips for Loggers, Foresters, and Landowners" (Geoffrey Jones, 1993) or similar successor publications.

B. The Protected Property shall not be subdivided.

C. No new structure or improvement, including, but not limited to, a dwelling, manufactured housing, any portion of a septic system, tennis court or swimming pool shall be constructed, placed, or introduced onto the Protected Property.

D. No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or subsurface water systems, wetlands, or natural habitat shall be allowed unless such activities:

- (i) are commonly necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of



the Protected Property; and

- (ii) do not harm state or federally recognized rare, threatened, or endangered species, such determination of harm to be based upon information from the New Hampshire Natural Heritage Inventory or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species; and
- (iii) are not detrimental to the purposes of this Easement.

Prior to commencement of any such activities, all necessary federal, state, local, and other governmental permits and approvals shall be secured.

E. No outdoor advertising structures such as signs and billboards shall be displayed on the Protected Property except as desirable or necessary in the accomplishment of the agricultural, forestry, conservation, or noncommercial outdoor recreational uses of the Protected Property, and provided such signs are not detrimental to the purposes of this Easement.

F. There shall be no mining, quarrying, excavation, or removal of rocks, minerals, gravel, sand, topsoil, or other similar materials on the Protected Property, except in connection with any improvements made pursuant to the provisions of sections 2.A., C., D., or E., above. No such rocks, minerals, gravel, sand, topsoil, or other similar materials shall be removed from the Protected Property.

G. There shall be no dumping, injection, burning, or burial of man-made materials or materials then known to be environmentally hazardous; provided, however, the storage and spreading of compost, manure and other fertilizer under sound agricultural practices, the storage of feed, and the temporary storage of trash in sound receptacles for periodic off-site disposal, are permitted.

H. No new rights-of-way, easements of ingress and egress, driveways, roads, or utility lines shall be constructed, developed or maintained into, on, over, under, or across the Protected Property, without the prior written approval of Grantee, except those of record and those specifically permitted under this Grant.

I. No use shall be made of the Protected Property and no activity thereon shall be permitted which, in the reasonable opinion of Grantee, is or may possess the potential to become inconsistent with the Purposes of this Easement.

J. There shall be no removal or disturbance of important historic, cultural or scenic elements found on the Protected Property. Said elements could include (but are not limited to) stone walls, archeological sites or trees lining a public street (except as such trees are included in the forest management plan).

K. (Typically included for pasture or farmland) In the event the \_\_\_\_\_ acres of pasture, farmland or agricultural land lies fallow for more than \_\_\_\_\_ successive year(s),

the Grantor shall cooperate with the Grantee to ensure that the land remain in an open condition (for purposes of this paragraph, meaning without trees and brush). Cooperation shall include, but be limited to allowing Grantee to arrange to have the open field(s) cleared, grazed or mowed.

3. **RESERVED RIGHTS** (examples of reserved rights are set forth below, but there may be other specific reserved rights requested by the Grantor, which would be particular to the Grantors' property)

A. Grantor reserves the right to prohibit the public use of the \_\_\_\_\_.

B. Any request for public access must be submitted to the Grantor by the Grantee in writing at least thirty days before the requested date of such access.

C. Grantor reserves the right to post against vehicles, motorized or otherwise.

D. Grantor shall permit public pedestrian access to and across the Protected Property for hunting, fishing, bird watching, hiking, cross country skiing, snow-shoeing, and similar transitory passive recreational purposes, but excluding camping.

E. Permission for public access may temporarily cease in the event of consequential vandalism to the property, but only after Grantor notifies easement holder in writing and Grantor and Grantee seek to address the vandalism cooperatively.

F. Grantee may mark public trails with signs, or if Grantor gives written permission, by other form of marking such as tags, blazing or painting.

G. Grantor reserves the right to conduct forestry management activities on the Protected Property to include cutting, thinning and planting but only for the grantor's personal use.

H. Grantor reserves the right to {prohibit/permit} hunting, fishing, hiking and access to the general public.

I. Grantor reserves the right to {prohibit/permit} access by motorized recreational vehicles.

4. **NOTIFICATION OF TRANSFER, TAXES, MAINTENANCE**

A. The Grantor agrees to notify the Grantee in writing at least 10 days before the transfer of title to the Protected Property [or any division of ownership thereof permitted hereby] to any successor in interest, along with the name(s) and address(es) of such successor(s) in interest.

B. In any deed conveying an interest in all or part of the Protected Property, Grantor shall make reference to this Conservation Easement Deed and shall indicate that the provisions

of this Conservation Easement Deed are binding upon all successors in interest in the Protected Property in perpetuity; provided, however, the provisions of this Conservation Easement Deed shall be binding on all successors in interest to the Protected Property notwithstanding the failure of any deed to the Protected Property to reference this Conservation Easement Deed.

C. The Grantee shall be under no obligation to maintain the Protected Property or pay any taxes or assessments thereon.

## **5. BENEFITS, BURDENS, AND ACCESS**

A. The burden of the Easement conveyed hereby shall run with the Protected Property and shall be enforceable against all future owners and tenants in perpetuity; the benefits of this Easement shall not be appurtenant to any particular parcel of land but shall be in gross and assignable or transferable only to the State of New Hampshire, the U.S. Government, or any subdivision of either of them, consistent with Section 170(c)(1) of the U.S. Internal Revenue Code of 1986, as amended, or to any qualified organization within the meaning of Section 170(h)(3) of said Code, which organization has among its purposes the conservation and preservation of land and water areas and agrees to and is capable of enforcing the conservation purposes of this Easement. Any such assignee or transferee shall have like power of assignment or transfer.

B. The Grantee shall have reasonable access to the Protected Property and all of its parts for such inspection as is necessary to determine compliance with and to enforce this Easement and exercise the rights conveyed hereby and fulfill the responsibilities and carry out the duties assumed by the acceptance of this Easement.

## **6. BREACH OF EASEMENT**

A. When a breach of this Easement, or conduct by anyone inconsistent with this Easement, comes to the attention of the Town, such party shall notify the Grantor in writing of such breach or conduct, delivered in hand or by certified mail, return receipt requested.

B. The Grantor shall, within thirty (30) days after receipt of such notice or after otherwise learning of such breach or conduct, undertake those actions, including restoration, which are reasonably calculated to cure swiftly said breach, or to terminate said conduct, and to repair any damage. The Grantor shall promptly notify the Grantee of its actions taken under this section.

C. If the Grantor fails to take such proper action under the preceding section, the Town shall, as appropriate to the purposes of this deed, undertake any actions that are reasonably necessary to cure such breach or to repair any damage in the Grantor's name or to terminate such conduct. The cost thereof, including the Grantee's expenses, court costs, and legal fees, shall be paid by the Grantor, provided that the Grantor is directly or primarily responsible for the breach.

D. Nothing contained in this Easement shall be construed to entitle the Grantee to bring any action against the Grantor for any injury to or change in the Protected Property

resulting from causes beyond the Grantor's control, including, but not limited to, unauthorized actions by third parties, natural disasters such as fire, flood, storm, disease, infestation and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes.

E. The Town and the Grantor reserve the right, separately or collectively, to pursue all legal remedies against any third party responsible for any actions detrimental to the conservation purposes of this Easement.

## **7. NOTICES**

All notices, requests and other communications, required to be given under this Easement shall be in writing, except as otherwise provided herein, and shall be delivered in hand or sent by certified mail, postage prepaid, return receipt requested to the appropriate address set forth above or at such other address as the Grantor or the Grantee may hereafter designate by notice given in accordance herewith. Notice shall be deemed to have been given when so delivered or so mailed.

## **8. SEVERABILITY**

If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid by a court of competent jurisdiction, by confirmation of an arbitration award or otherwise, the remainder of the provisions of this Easement or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

## **9. CONDEMNATION/EXTINGUISHMENT**

A. Whenever all or part of the Protected Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate in whole or in part the Easement conveyed hereby, the Grantor and the Grantee shall thereupon act jointly to recover the full damages resulting from such taking with all incidental or direct damages and expenses incurred by them thereby to be paid out of the damages recovered.

B. The balance of the land damages recovered (including, for purposes of this subsection, proceeds from any lawful sale of the Protected Property unencumbered by the restrictions hereunder in lieu of condemnation) shall be divided between the Grantor and the Grantee in proportion to the fair market value of their respective interests in the Protected Property on the date of execution of this Easement. For this purpose and that of any other judicial extinguishment of this Easement, in whole or in part, the Grantee's interest shall be the amount by which the fair market value of the Protected Property immediately prior to the execution of this Easement is reduced by the use limitations imposed hereby. The value of the Grantee's interest shall be determined by an appraisal prepared [for federal income tax purposes] by a qualified appraiser within two years of the date of this Easement, and submitted to the Grantee.

C. The Grantee shall use its share of the proceeds in a manner consistent with and in furtherance of one or more of the conservation purposes set forth herein.

**10. ADDITIONAL EASEMENT**

Should the Grantor determine that the expressed purposes of this Easement could better be effectuated by the conveyance of an additional easement, the Grantor may execute an additional instrument to that effect, provided that the conservation purposes of this Easement are not diminished thereby and that a public agency or qualified organization described in Section 4.A., above, accepts and records the additional easement.

**11. ARBITRATION OF DISPUTES**

A. Any dispute arising under this Easement shall be submitted to arbitration in accordance with New Hampshire RSA 542.

B. The Grantor and the Grantee shall each choose an impartial arbitrator within 30 days of written notice from either party. The arbitrators so chosen shall in turn choose a third arbitrator within 30 days of the selection of the second arbitrator.

C. The arbitrators so chosen shall forthwith set as early a hearing date as is practicable which they may postpone only for good cause shown.

D. A decision by two of the three arbitrators, made as soon as practicable after submission of the dispute, shall be binding upon the parties and shall be enforceable as part of this Easement.

**12. USE OF PROTECTED PROPERTY IN LAND USE MATTERS**

The Grantor agrees that for the purpose of determining compliance with any present or future regulation (other than those governing N.H. Current Use Assessment under RSA 79-A), bylaw, order, or ordinance (within this section referred to as "legal requirements") of the Town, the State of New Hampshire or any other governmental unit, the Protected Property shall not be taken into account in determining whether any land of the Grantor, other than the Protected Property, complies with any said legal requirements. The Protected Property shall not be taken into account to satisfy in whole or in part any of said legal requirements or any area, density, setback or other dimensional standard applicable to such land.

**13. MERGER**

The Grantor and Grantee explicitly agree that it is their express intent, forming a part of the consideration hereunder, that the provisions of the Easement set forth herein are to last in perpetuity, and that to that end no purchase or transfer of the underlying fee interest in the Protected Property by or to the Grantee or any successor or assign shall be deemed to eliminate the Easement, or any portion thereof, granted hereunder under the doctrine of "merger" or any other legal doctrine.

The Grantee, by accepting and recording this Easement, agrees to be bound by and to observe and enforce the provisions hereof and assumes the rights and responsibilities herein granted to and incumbent upon the Grantee, all in the furtherance of the conservation purposes for which this Easement is delivered.

IN WITNESS WHEREOF, the undersigned have executed or caused to be executed this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

NAME

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

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

The foregoing Conservation Easement Deed was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_ by \_\_\_\_\_, of \_\_\_\_\_, as his voluntary act and deed.

\_\_\_\_\_  
Type or Print Name:  
Justice of the Peace/Notary Public  
My Commission Expires: \_\_\_\_\_

ACCEPTED:

TOWN OF STRATHAM, NEW HAMPSHIRE  
BOARD OF SELECTMEN

By: \_\_\_\_\_  
David Short, Selectman

By: \_\_\_\_\_  
Martin Wool, Selectman

By: \_\_\_\_\_  
Kirk Scamman, Selectman

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

The foregoing Conservation Easement Deed was acknowledged before me this \_\_\_\_ day  
of \_\_\_\_\_, 200\_\_ by David Short, Martin Wool, and Kirk Scamman, duly authorized  
Selectmen of the Town of Stratham Board of Selectmen, on behalf of the Town of Stratham.

\_\_\_\_\_  
Type or Print Name:

Justice of the Peace/Notary Public

My Commission Expires: \_\_\_\_\_

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## **7. Thoughtful Planning for Landowners**

## **Help Yourself, Help Your Heirs; Thoughtful Planning for Landowners**

### **Pass Wealth to the Next Generation by Combining Estate Planning with Land Conservation**

Written cooperatively by members of Stratham's ad-hoc Committee to the Conservation Commission  
January 2006

When faced with complicated matters, people often respond in the same way; they ignore them, postpone them, or convince themselves that someone else will handle them. Two of the most complicated matters that are often ignored are financial planning and taxes. Families with small estates are often able to let these areas take care of themselves, but a handful of landowners and business owners who want to pass their assets to their children can encounter unwelcome situations if they leave these areas unattended.

Since Stratham residents have signaled a desire to preserve the open space in our town now -- and to leave Stratham as it is for future generations -- there is funding available to preserve your land. Housing development is not the only means of reaping a significant economic reward from your land.

With a small amount of thoughtful planning, landowners today can achieve a desirable outcome for everyone in the family. The illustrations below are intended to demonstrate the benefits of good financial planning for landowners and their descendants. You'll see in the following illustrations that it is possible to use the available funding as a way to accumulate a more liquid inheritance for your children and experience a reduction on taxes.

Following are three examples of a parcel of land being passed from one generation to the next with various degrees of planning. All examples assume that the landowners have two children, own open land worth \$500,000, a home worth \$250,000 (including the house lot), other liquid assets of \$250,000, and pay a full 15% capital gains tax on the easement illustrated in scenarios two and three.<sup>1</sup> These illustrations are intended to demonstrate the possible impact of different levels of financial planning. To keep the concepts simple, it is not possible to include all of the various tax and legal implications of different circumstances.

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<sup>1</sup> In order to reduce the capital gains tax, a "bargain sale" can be used which strategically combines selling and gifting an easement to create a charitable deduction which offsets the capital gains tax.

## Situation One – No Planning

- ☞ Husband and Wife jointly own all assets.
- ☞ Husband dies in 2006, Wife now has \$1,000,000 in her name.
- ☞ Wife dies in 2007, estate is not subject to estate tax<sup>2</sup>
- ☞ Children inherit the land and can maintain it or develop it. They may not agree with each other about how to manage the land; one may want to develop it for cash, the other may want to preserve it. This is a frequent scenario with multiple siblings with varying desires and often forces the subdivision and development of parcels of land.

### Result of No Planning:

Total inheritance: \$1,000,000

Inheritance is only 25% liquid, land is subject to development

Scenario	Value of Open Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Assets (house and lot, liquid assets)	Insurance (Not included in the Estate)	Total Estate	\$\$\$\$ per child	Status of inheritance
No Planning	500,000	0	500,000	0	1,000,000	500,000	250,000 land 125,000 house/lot 125,000 liquid

<sup>2</sup> In 2005 the estate tax exemption is \$1,500,000

From 2006 through 2008, the estate tax exemption is \$2,000,000

In 2009, the estate tax exemption is \$3,500,000

In 2010, the estate tax is repealed and no estate taxes will be charged

In 2011 and beyond, the estate tax exemption goes back down to \$1,000,000

## Situation Two - Adding a Conservation Easement<sup>3</sup>

- ☞ Husband and Wife jointly own all assets.
- ☞ Husband and Wife sell conservation easement on the open land for \$400,000
- ☞ Value of the open land is now \$100,000, and is still fully owned by husband and wife
- ☞ Liquid assets are now \$840,000, which can be used to diversify holdings and meet living expenses
- ☞ Husband dies in 2006, Wife now has \$940,000 in her name
- ☞ Wife dies in 2007, no estate tax is due
- ☞ Children each inherit \$295,000 in liquid assets, ½ of the family homestead AND \$50,000 in open land which is conserved, kept in the family and the children reap all future appreciation of the land.
- ☞ Should the siblings agree that one sibling would like to 'buy' the other sibling's half of the land, there is now ample liquidity to do so due to the cash proceeds from the easement sale and the reduced 'residual' value of the land.

### Result of Easement:

Total inheritance: \$940,000

Inheritance is over 60% liquid, the open land is conserved and owned by children

Scenario	Value of Open Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Assets (house and lot, liquid assets)	Insurance (Not included in the Estate)	Total Estate	\$\$\$ per child	Status of inheritance for each child
Add Easement	100,000	340,000	500,000	0	940,000	470,000	295,000 liquid 125,000 house/lot 50,000 land

<sup>3</sup> A conservation easement is best described as a legal contract in which landowners agree to sell or give away the development rights of their land. The easement is permanent. The landowners still own the land and continue to benefit from the future appreciation of the land. The land can be sold at any time for its market value which must take into consideration the lack of development rights. Easements can be made on full or partial parcels, and can be written to allow or disallow precise uses of the land. Portions of the property can be held outside of the easement to allow for future home lots for children, grandchildren, etc.

### Situation Three - Adding “Wealth Replacement” and an Easement

- ⌘ Husband and Wife jointly own all assets.
- ⌘ Husband and Wife sell conservation easement on the open land for \$400,000
- ⌘ Value of the open land is now \$100,000, and is still fully owned by husband and wife, liquid assets are now \$840,000
- ⌘ Husband and Wife purchase a \$500,000 “Survivorship” Life Insurance Policy<sup>4</sup> on both of their lives to be paid for annually with some of the proceeds from the easement.
- ⌘ Husband dies in 2006, Wife now has \$940,000 in her name
- ⌘ Wife dies in 2007, no estate tax is due
- ⌘ Children each inherit \$495,000 from the estate’s liquid assets, ½ the family homestead, AND \$50,000 in open land which is conserved, kept in the family and the children reap all future appreciation of the land.
- ⌘ Should the siblings agree that one sibling would like to ‘buy’ the other sibling’s half of the land, there is now ample liquidity to do so due to the cash proceeds from the easement sale and the reduced ‘residual’ value of the land

### Result of Easement with Wealth Replacement:

Total inheritance: \$1,440,000

Inheritance is 75% liquid, the open land is conserved and owned by children, children do not suffer any financial loss due to the sale of the easement

Scenario	Value of Open Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Assets (house lot and liquid assets)	Insurance	Total Estate	\$\$\$ per child	Status of inheritance for each child
Add Easement and Wealth Replacement Trust	100,000	340,000	500,000	500,000	1,440,000	670,000	495,000 liquid 125,000 house/lot 50,000 land

<sup>4</sup> Scenarios including an Irrevocable Life Insurance Trust are subject to at least one landowner being insurable.

## Summary

Scenario	Value of Open Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Assets (house/lot and liquid assets)	Insurance	Total Estate	\$\$\$\$ per child	Status of inheritance For each child
No Planning	500,000	0	500,000	0	1,000,000	500,000	125,000 liquid 125,000 house/lot 250,000 open land
Add Easement	100,000	340,000	500,000	0	940,000	470,000	295,000 liquid 125,000 house/lot 50,000open land
Add Easement and Wealth Replacement Trust	100,000	340,000	500,000	500,000	1,440,000	670,000	495,000 liquid 125,000 house/lot 50,000 open land

All of these examples assume that the land is needed to provide financial resources for the owners or their heirs. If the owners or heirs do not need the land to provide for their financial well-being, then easements or the land itself can be gifted to the town instead of sold. Gifting the land in its entirety or gifting easements has many desirable effects, including removing the land from the estate, thus reducing estate tax, and providing substantial charitable deductions against adjusted gross income for up to six years.

For more information on how to conserve your land by either selling or gifting an easement to the Town of Stratham contact a member of our ad-hoc subcommittee. All conversations are confidential and non-obligatory.

## **“Thoughtful Planning for Landowners”**

### **Combining Estate Planning with Land Conservation Helps Landowners Pass Wealth to the Next Generation**

When faced with complicated matters, people often respond in the same way; they ignore them, postpone them, or convince themselves that someone else will handle them. Two of the most complicated matters that are often ignored are financial planning and taxes. Families with small estates are often able to let these areas take care of themselves, but a handful of folks can encounter unwelcome situations if they leave these areas unattended: namely, landowners and business owners who want to pass their assets to their children.

But with a small amount of thoughtful planning, landowners can now achieve a desirable outcome for everyone in the family. The illustrations below are intended to demonstrate the benefits of good financial planning for landowners and their descendants. Housing development is not the only means of reaping a significant economic reward from your land. Since the townspeople in Stratham have indicated a desire to preserve the open space in our town now, and to leave Stratham as it is for future generations, there is funding available to preserve your land. You'll see in the following illustrations that it is possible to use this funding as a way to accumulate a more liquid inheritance for your children and experience a substantial reduction on taxes.

Following are four examples of a large parcel of land being passed from one generation to the next with various degrees of planning. All examples assume that the landowners have two children, own land worth \$4,000,000, have other liquid assets of \$500,000, and pay a full 15% capital gains tax on the easement illustrated in scenarios two, three and four.<sup>1</sup> These illustrations are intended to demonstrate the possible impact of different levels of financial planning. To keep the concepts simple, it is not possible to include all of the various tax and legal implications of different circumstances.

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<sup>1</sup> In order to reduce the capital gains tax, a “bargain sale” can be used which strategically combines selling and gifting an easement to create a charitable deduction which offsets the capital gains tax.



## Situation One – No Planning

- ☞ Husband and Wife jointly own all assets.
- ☞ Husband dies in 2005, Wife now has \$4,500,000 in her name.
- ☞ Wife dies in 2006, estate must pay estate tax on \$2,500,000<sup>2</sup>
- ☞ Estate tax of \$1,150,000 is due within 9 months of death.
- ☞ Only \$500,000 in liquid assets is available from the estate, so the children have to find \$650,000 to pay the estate tax or SELL SOME OF THE LAND in order to raise cash to pay the tax bill. The entire estate is subject to probate, so potential buyers will know that the tax is due. When the children put some of the land up for sale, they may have a hard time getting the best sale price and may have to sell more than they wanted to – this is called a FIRE SALE, as they are forced to take a low price because they have to pay the tax bill on time.
- ☞ Children inherit nothing liquid. They inherit the remaining \$3,350,000 (or less) in land and can maintain it or develop it, but have no control over what happens on the part of the land they sold. Further, they may not agree with each other about how to manage the land; one may want to develop it for cash, the other may want to preserve it. This is a frequent scenario with multiple siblings with varying desires – particularly with the pressure of a pending tax bill to pay - and often forces the subdivision and development of parcels of land.

### Result of No Planning:

Total inheritance: \$3,350,000 or less, due to fire sale of real estate

Inheritance is illiquid, maximum estate tax is paid, control of land is partially gone, land is subject to development

Scenario	Value of Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Liquid Assets	Insurance (Not included in the Estate)	Total Estate	Assets subject to estate tax after second death	Estate tax Due (46%)	Total Remaining	\$\$\$ per child	Status of inheritance
No Planning	4,000,000	0	500000	0	4,500,000	2,500,000	1,150,000	3,350,000	1,675,000	All land – nothing liquid

<sup>2</sup> In 2005 the estate tax exemption is \$1,500,000  
 From 2006 through 2008, the estate tax exemption is \$2,000,000  
 In 2009, the estate tax exemption is \$3,500,000  
 In 2010, the estate tax is repealed and no estate taxes will be charged  
 In 2011 and beyond, the estate tax exemption goes back down to \$1,000,000

## Situation Two - Adding a Conservation Easement<sup>3</sup>

- ☞ Husband and Wife jointly own all assets.
- ☞ Husband and Wife sell conservation easement on the land for \$3,200,000
- ☞ Value of land decreases to \$800,000, but is still fully owned by husband and wife
- ☞ Liquid assets are now \$3,220,000, which can be used to diversify holdings and meet living expenses
- ☞ Husband dies in 2005, Wife now has \$4,020,000 in her name
- ☞ Wife dies in 2006, estate must pay estate tax on \$2,020,000
- ☞ Estate tax of \$929,200 is due within 9 months of death.
- ☞ Proceeds from easement are available to pay the \$929,200 estate tax
- ☞ Children each inherit \$1,145,400 liquid assets AND \$400,000 in Land which is conserved, kept in the family and the children reap all future appreciation of the land.

### Result of Easement:

Total inheritance: \$3,090,800

Inheritance is 75% liquid, land is conserved and owned by children

Scenario	Value of Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Liquid Assets	Insurance (Not included in the Estate)	Total Estate	Assets subject to estate tax after second death	Estate tax Due (46%)	Total Remaining	\$\$\$ per child	Status of inheritance for each child
Add Easement	800,000	2,720,000	500000	0	4,020,000	2,020,000	929,200	3,090,800	1,545,400	1,145,400 liquid 400,000 land

<sup>3</sup> A conservation easement is best described as a legal contract in which landowners agree to sell or give away the development rights of their land. The easement is permanent. The landowners still own the land and continue to benefit from the future appreciation of the land. The land can be sold at any time for its market value which must take into consideration the lack of development rights. Easements can be made on full or partial parcels, and can be written to allow or disallow precise uses of the land. Portions of the property can be held outside of the easement to allow for future home lots for children, grandchildren, etc.

### Situation Three - Adding a “Wealth Replacement Trust” and an Easement

- ☞ Husband and Wife jointly own all assets.
- ☞ Husband and Wife sell conservation easement on the land for \$3,200,000
- ☞ Value of land decreases to \$800,000, but is still fully owned by husband and wife, liquid assets are now \$3,220,000
- ☞ Husband and Wife create an Irrevocable Life Insurance Trust which purchases a \$3,500,000 “Survivorship” Life Insurance Policy<sup>4</sup> on both of their lives to be paid for annually with some of the proceeds from the easement.
- ☞ Husband dies in 2005, Wife now has \$4,020,000 in her name
- ☞ Wife dies in 2006, estate must pay estate tax on \$2,020,000
- ☞ Estate tax of \$929,200 is due within 9 months of death.
- ☞ Life Insurance Proceeds pay the \$929,200 estate tax
- ☞ Children each inherit \$1,285,400 tax-free cash from the life insurance policy plus \$1,610,000 from the estate’s liquid assets AND \$400,000 in Land which is conserved, kept in the family and the children reap all future appreciation of the land.

### Result of Easement with Wealth Replacement Trust:

Total inheritance: \$6,590,800

Inheritance is nearly 90% liquid, estate tax is reduced by 20%, land is conserved and owned by children, children do not suffer any financial loss due to the sale of the easement

Scenario	Value of Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Liquid Assets	Insurance (Not included in the Estate)	Total Estate	Assets subject to estate tax after second death	Estate tax Due (46%)	Total Remaining	\$\$\$ per child	Status of inheritance for each child
Add Easement and Wealth Replacement Trust	800,000	2,720,000	500000	3,500,000	4,020,000	2,020,000	929,200	6,590,800	3,295,400	2,895,400 liquid 400,000 land

<sup>4</sup> Scenarios including an Irrevocable Life Insurance Trust are subject to at least one landowner being insurable.

### Situation Four – Adding Marital Trusts

- Husband and Wife sell conservation easement on the land for \$3,200,000
- Value of land decreases to \$800,000 but is still fully owned by husband and wife
- Husband and Wife each create a Revocable Living Trust with A-B/Credit Shelter/Marital provisions, and re-title all assets to split between each trust (i.e. Husband and Wife each own \$2,010,000 of assets in their own trusts)
- Husband and Wife create an Irrevocable Life Insurance Trust which purchases a \$3,500,000 “Survivorship” Life Insurance Policy on both of their lives to be paid for with some of the proceeds from the easement.
- Husband dies in 2005. \$1,500,000 of his estate is free of estate tax, and the remaining \$510,000 passes directly to his wife, with no estate tax.
- Wife dies in 2006. \$2,000,000 of her estate is free from estate tax. Estate must pay estate tax on \$520,000
- Estate tax of \$239,200 is due within 9 months of death.
- Life Insurance Proceeds pays the estate tax
- Children each inherit \$1,630,400 from life insurance policy, plus \$1,610,000 from the liquid part of the estate, plus \$400,000 each of land. Land is conserved, kept in the family and the children reap all future appreciation of the land.

### Result of Estate Planning, Easement and Wealth Replacement Trust:

Total inheritance: \$7,280,800

Inheritance is nearly 90% liquid, estate tax is reduced by 80%, land is conserved and owned by children, children do not suffer any financial loss due to the sale of the

Scenario	Value of Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Liquid Assets	Insurance (Not included in the Estate)	Total Estate	Assets subject to estate tax after second death	Estate tax Due (46%)	Total Remaining	\$\$\$ per child	Status of inheritance for each child
Add simple Estate Planning	800,000	2,720,000	500000	3,500,000	4,020,000	520,000	239,200	7,280,000	3,640,400	3,240,400 Liquid 400,000 Land

easement

## Summary

Scenario	Value of Land	Cash Proceeds from Easement after 15% capital Gains tax	Other Liquid Assets	Insurance (Not included in the Estate)	Total Estate	Assets subject to estate tax after second death	Estate tax Due (46%)	Total Remaining	\$\$\$ per child	Status of inheritance For each child
No Planning	4,000,000	0	500000	0	4,500,000	2,500,000	1,150,000	<b>3,350,000</b> (or less due to Fire Sale)	1,675,000	All land – nothing liquid
Add Easement	800,000	2,720,000	500000	0	4,020,000	2,020,000	929,200	<b>3,090,800</b>	1,545,400	1,145,400 liquid 400,000 land
Add Easement and Wealth Replacement Trust	800,000	2,720,000	500000	3,500,000	4,020,000	2,020,000	929,200	<b>6,590,800</b>	3,295,400	2,895,400 liquid 400,000 land
Add simple Estate Planning	800,000	2,720,000	500000	3,500,000	4,020,000	520,000	239,200	<b>7,280,000</b>	3,640,400	3,240,400 Liquid 400,000 land

All of these examples assume that the land is needed to provide financial resources for the owners or their heirs. If the owners or heirs do not need the land to provide for their financial well-being, then easements or the land itself can be gifted to the town instead of sold. Gifting the land in its entirety or gifting easements has many desirable effects, including removing the land from the estate, thus reducing estate tax, and providing substantial charitable deductions against adjusted gross income for up to six years.

For more information on how to conserve your land by either selling or gifting an easement to the Town of Stratham contact a member of our ad-hoc subcommittee. All conversations are confidential and non-obligatory.

## **8. Conservation Easement Outlines as Landowner Resources**

**ESTATE PLANNING  
AND LAND PROTECTION ISSUES  
FOR LANDOWNERS:**

**AN INTRODUCTION**

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**I. THE IMPORTANCE OF ESTATE PLANNING**

Estate planning is far more than the preparation of a simple will. This is particularly true for individuals, couples and families with real estate that is valuable to them, and who are concerned with tax issues as well as the future use, management, and stewardship of their land. With land values increasing, and the high rate and uncertainty of estate taxes, landowners need a complete and orderly estate plan, with special consideration of issues concerning their real estate. Fortunately, many tools exist to minimize the impact of the tax bite and provide for the long-term stewardship of a family's land.

The tax law signed by President Bush in June 2001 raised the exemption from federal estate taxes significantly, liberating many people from tax considerations as they plan for the orderly disposition of their estates. But relief from the impact of estate tax does not mean that families with real estate can avoid thinking about the disposition of their land if they are concerned about management and stewardship issues.

**II. BASIC ESTATE PLANNING ISSUES**

A. The **Will** is a formal legal document that provides for the disposition of property at death. In addition, the Will nominates the Executor, who has the authority and the responsibility to carry out the directions in the document. Property that passes under the Will is subject to the jurisdiction of the Probate Court.



B. A person who dies without a Will is said to die **intestate**, and the probate estate is distributed according to law established by the New Hampshire legislature. To whom it goes, and in what proportions, is determined by the application of the law to the particular family situation. The Probate Court appoints the administrator, and supervises the administration of the Estate.

C. Only property that is owned by the decedent individually at the date of death is subject to the provisions of the will. Other property "avoids probate." Property that passes at death outside of a Will or intestate succession and probate includes: property owned **jointly** with another, or held in **trust**, or as to which a **designated beneficiary** is named (i.e. life insurance proceeds, and "qualified plans" such as IRA's, 401(k) plans, pension plans and the like). If your Estate is designated as the beneficiary, or if individual(s) whom you designate as beneficiary(ies) do not survive you and the fund is therefore paid to your Estate, then it passes by the terms of the Will.

D. An important tool for lifetime purposes is a **Durable Power of Attorney**. It is a legal document by which one person (called the **Principal**) appoints another person (called the **Agent** or the **Attorney-in-Fact**) to act on his or her behalf regarding property and financial matters. It is important because it allows another to have access to the Principal's property and manage his or her affairs if the Principal cannot, because of simple unavailability, or because of incapacity or incompetence. The authority granted to the Agent is usually quite broad, and allows for continuity of management of everyday matters, such as paying bills and depositing income, as well as more unusual but anticipated matters, such as paying taxes, applying for public benefits, and selling real estate. Without a Durable Power of Attorney, a Court-established Guardianship will be required in the event of disability.

### III. **TRUSTS: Some definitions**

A. A trust is an arrangement by which one person (the "trustee") holds property for the benefit of another (the "beneficiary"). The person who creates the trust is called the "grantor", the "settlor" or the "donor".

B. A **Living (or Inter Vivos) Trust** is created during one's lifetime by a written document called a Trust Agreement, or a Declaration of Trust. Assets that have been transferred into the trust are not subject to probate administration at death. Often, an trust is accompanied by a Will which transfers or "pours over" property to the Trust at death. Quite often, the Grantor serves as the initial Trustee, and may be a beneficiary as well. A living trust can be a very flexible estate planning tool. Property that is a revocable living trust at death is still subject to estate tax.



C. A living trust can be either revocable which means it can be changed, or irrevocable, which means it cannot be changed. Generally speaking, there are fewer tax consequences to the creation and funding of revocable trusts. At some point, the terms of a revocable trust may become irrevocable, most often when the person who created the trust dies.

D. Testamentary trusts are created by Will. So long as the will may be changed, the terms of the trust can be changed. The trust comes into existence once the creator dies, the will is admitted to probate, and the probate court appoints the trustee. In New Hampshire, a testamentary trust is under the jurisdiction of the Probate Court for as long as the trust is in existence, and the trustee must file an initial inventory of Trust assets and detailed accounts with the Court on an annual basis.

#### IV. FEDERAL ESTATE AND GIFT TAX

A. The Federal wealth transfer (estate and gift) tax scheme taxes the transfer of wealth for less than full consideration. It is essentially a "unified" tax structure, and it applies to transfers during lifetime and at death. The rates are high and the estate tax is due to be paid, in cash, nine months after the date of death. There are a number of key exclusions that assist the planner:

1. The Applicable Exclusion Amount for Estate Tax, which allows the transfer at death of a certain amount of assets free of tax. The estate tax exclusion is \$ \$2,000,000 for 2006, 2007 and 2008, and will increase to \$3,500,000. Under existing law the estate tax is scheduled to be repealed in 2010, for one year only, and in 2011, current law provides that the exclusion amount is drops back to the 2001 level: \$1,000,000. The gift tax exclusion remains at \$1,000,000, however. Appendix A includes a chart showing the increases, which were enacted as part of the 2001 Tax Act.

2. The unlimited Marital Deduction, which allows unlimited gifts and transfers between spouses during lifetime and at death free of estate and gift tax. The marital deduction may not result in avoidance of the tax altogether, but only the deferral of the payment of tax which will be due upon the death of the second spouse to die.

3. For married couples, proper planning can preserve the credit of the first spouse to die through the use of a Trust (commonly called a "credit-shelter", or a "by-pass" trust), so that each spouse may utilize the exemption and (in 2006) protect \$4,000,000 from federal estate taxation. The actual mechanics of this are beyond the scope of this outline, but any planning for a married couple with significant assets should consider this

device.

a. If a couple owns valuable real estate as joint tenants with right of survivorship, at the death of the first spouse, title will pass to the survivor, and will not be taxed because of the marital deduction. To take advantage of these planning techniques, the couple may place title to real estate in the name of one spouse only, or change from joint tenants to tenants in common, so that an interest in the land goes into the credit shelter trust. If the property passes by survivorship to the surviving joint tenant, the advantage of the credit shelter will be lost.

4. The **Annual Gift Tax Exclusion** allows a person to make gifts to any number of recipients each year free of tax. The amount of the exclusion was \$10,000 for many years; as of January 2006 it increased to \$12,000. A married couple may transfer \$24,000 to each donee annually, regardless of which spouse holds title to the gifted asset ("split gifts"). Annual exclusion gifts are in addition to the amount protected by the unified credit.

5. The **Charitable Deduction**, which allows unlimited gifts to qualifying charitable organizations and institutions free of estate and gift taxes.

B. As noted above, the lifetime exclusion for gift tax is \$1,000,000, and will remain there, despite the increase in the estate tax exclusion. If an individual makes gifts during lifetime in excess of the annual exclusion, the gifts are not immediately taxable, but are credited against the available gift and estate tax credit. The use of the credit is cumulative, and once the limitation is exceeded, the gifts are subject to tax. If, for example, a person has made taxable gifts of \$150,000 during her life and died in 2006, she would have \$1,850,000 available as a credit against her estate.

C. Estate and gift tax rates are very high, so it is important to plan estates to minimize the impact of the tax. As shown on Appendix A, the top rate is scheduled to drop in future years, until 2011, when, after one year of no estate tax, the top rate jumps back to 55%, and the exemption drops to \$1,000,000.

D. The estate tax is levied against the decedent's gross estate. The gross estate includes all property that a person owns or holds an interest in at death (including life insurance proceeds and property held in a living trust). For cash, stocks and bonds, etc. valuation is a simple procedure, but for many assets, an appraisal is necessary. In addition, real estate is generally appraised at the highest and best use (i.e. fair market value, or what price a willing buyer would pay to a willing seller, and which therefore includes development potential) regardless of actual use by the decedent or intended use by the beneficiaries. Land that is enrolled in

"Current Use" for New Hampshire real property taxation is still valued at highest and best use for estate tax purposes.

1. A special rule may be available to reduce the estate tax imposed on farm, ranch or actively forested real estate. Internal Revenue Code §2032A provides a method of valuation based upon the actual use of "qualified real property" that is included in the gross estate. This is a very technical section of the Code.
2. The maximum amount by which the gross estate can be reduced by this method is \$750,000.
3. Simply stated, if at least 50 percent of the gross estate is "qualified property" used in farming, etc., and at least twenty five percent of the gross estate is real estate used in the "qualified use", and if the real estate passes to "qualified heirs" who agree to continue the "qualified use" for at least ten more years, the property may be eligible for special valuation treatment. For woodlands, this really means that there must be management plans for past and future forestry.

## **V. THE PROBLEM OF THE ILLIQUID ESTATE**

The federal estate tax is due to be paid nine months after the date of death. If the estate has cash, or readily marketable assets, the tax may be paid without difficulty. However, if the estate is illiquid, and has significant taxable assets but little cash, problems arise. The classic example is the forced sale of real estate, at less than an optimal price, to have cash available to pay the tax. Planning for the payment of the tax that may be due is as important a function for the estate planner as minimizing the potential tax impact.

A. An Example: Husband and Wife jointly own real estate worth \$1,800,000, and other assets worth \$600,000. The gross estate is thus \$2,400,000. If the second spouse to die passed away in 2005, the estate tax imposed is about \$413,000; in 2006 – 8 the tax is \$184,000.00. The credit of the first spouse to die is lost, and some of the cash or liquid assets are needed to pay the tax. If a credit shelter trust had been utilized to preserve the credit of the first spouse to die, and appropriate allocation of assets between the spouses is made, the credit of each spouse could have been utilized, and the federal estate tax is eliminated.

B. Another example: The couple again has real estate valued at \$1,800,000 but in this case has other assets of an equal amount, for a total gross estate of \$3,600,000. If everything is owned jointly, or simply passes outright to the surviving spouse, and the second to die passes away in 2005, the tax is \$977,000. If the couple had utilized a credit shelter

trust, the tax could have been reduced to \$272,000. Utilizing the credit shelter trust, if the surviving spouse dies in 2006, the tax could be reduced to less than \$50,000. Without the tax-planning trust, and if all the property had passed to the survivor, the tax in 2006 would be \$736,000.00.

## VI. POSSIBLE SOLUTIONS

Even if there are funds available to pay the tax, most families are interested in reducing the tax that might otherwise be payable. There are a number of estate planning tools and possible solutions to this problem.

A. One solution is the conservation easement. The restrictions on the use of land imposed by a conservation easement reduce the economic value of the property. While most easements allow continuing commercial use for forestry and agriculture, not all economic benefit is lost. In addition, the property is protected for its open space and natural resource protection and for outdoor recreational uses. In many cases, the actual use of property does not change after the conservation easement is granted.

B. Another way to reduce the estate tax is to give estate assets away, thus reducing size of the gross estate that will be subject to tax. Once assets are out of the estate, subsequent appreciation after the gift and prior to death will also go untaxed, leading to potentially greater tax savings. The gift tax exemption amount will remain at \$1,000,000.

C. A common technique is to take advantage of the annual exclusion. If there are a number of potential beneficiaries, i.e. children and grandchildren, substantial wealth can be transferred out of an estate. \$12,000 gifts of real estate may present logistical difficulties, as deeds are required with each transfer, and updated appraisals are necessary. This difficulty may be remedied, however, by the creation of a family trust, family limited partnership, or Limited Liability Company (LLC), and the gift of shares or interests in the trust or partnership, rather than gifts of the real estate itself.

1. There is a significant string attached: the donee's basis in the property is the donor's basis. If the donee later sells the property, a substantially higher capital gains tax could result than if the donee had inherited the property and received a stepped-up, date of death value, basis in the property. (However, the income tax may be less than estate tax, depending on the applicable tax rates.)

2. In addition, donor may not use the property as in the past, or risk inclusion for estate tax purposes of the date of death value of the property under IRC §2036, Transfers with retained life interest.



3. Lifetime gifts may be most useful if long term intention is not to sell, but to keep the property within a family.
4. If an easement or other form of permanent protection is contemplated, it should no doubt be completed before the gifting program, so that the value is reduced and larger portions of the property can be gifted, or the gifting program can be completed sooner.

D. In some instances, and with sophisticated planning, it is possible to discount the value of the property given away. Use of these techniques can "leverage" the annual exclusion gift, as well as the unified credit amount, and lead to the transfer of significant assets at a relatively low tax cost. The original owner may also be able to maintain control of the management of the property.

## VII. THE CONSERVATION EASEMENT TAX INCENTIVE

A. In 1997 a new section was added to the Internal Revenue Code that provides additional tax incentives for donating a conservation easement. Section 2031(c) excludes from estate tax up to 40% of the value of land subject to an easement. As with any section of the Code, however, there are special rules and qualifications that apply, and not every conservation easement qualifies for the additional tax relief. The Treasury Department has yet to issues regulations for this section, and interpretations of it are still evolving, so some questions about the interpretation of this section still remain.

B. The maximum amount of the exclusion is \$500,000. The actual tax savings depends on the top tax rate; for an estate taxed at the 45% level, the maximum tax savings is \$225,000.

C. Also, the amount of the exclusion will be reduced from 40% by a formula if the value of the easement does not reduce the value of the land by at least 30%.

D. Another important feature of the new law is that the executor of a landowner's estate may grant a conservation easement after the landowner dies and still qualify for reduced land valuation in the estate and the additional exclusion. This is referred to as a "post-mortem easement".

E. The law also imposes special qualifications for the new tax exclusion:

1. Easement requirements: The easement deed must preclude all but a minimum use for commercial recreational activity. Certain development rights must be specifically accounted for in the tax calculation. A historic preservation easement does not qualify for the exclusion or the post-mortem easement.

2. Ownership requirements: The easement must have been granted by the decedent or a member of the decedent's family, and the decedent must have owned the property for at least three years prior to date of death.

F. The impact of the new tax code and the availability of the exclusion and the post-mortem easement can be dramatic. However, all of the heirs must consent to the easement transaction, and potential income tax benefits are lost, so for many landowners concerned about the protection of their property, the better course of action remains an easement granted during lifetime.

## **VIII. FEDERAL INCOME TAX: The Charitable Contribution Deduction**

A. Generally, an income tax deduction for the charitable contribution of real estate is available only if the taxpayer/landowner contributes or transfers his or her entire interest in a parcel of real estate to a charitable organization. One exception to this rule is the gift of a conservation easement that meets the qualifications of the code and regulations. This means that the landowner can retain title to the land, but grant a conservation easement, in perpetuity to a qualifying organization, and generate an income tax deduction for the value of the easement.

1. The income tax code allows a deduction for the gift of a “qualified conservation contribution” for the gift of (a) “a qualified real property interest” to (b) “a qualified organization”, exclusively for (c) “conservation purposes”. Each of these terms is further defined by the regulations, and the easement must meet all of the tests to qualify for the tax deduction.

2. A “qualified real property interest” includes a conservation easement granted in perpetuity.

3. A “qualified organization” includes government agencies (Federal, state, and local) as well as certain tax-exempt non-profit organizations that are dedicated to, and have the capability to provide, long-term stewardship of the land.

4. “Conservation purpose” is specifically defined to include five categories of resources that may be protected by the easement:

- (i) Public recreation and/or education
- (ii) Significant natural habitat
- (iii) Open space for scenic enjoyment

- (iv) Open space pursuant to local government policy
- (v) Historic value

5. While an easement must provide a “public benefit” to qualify for the income tax deduction, the easement need not require public access to the property.

B. The amount of the income tax deduction available to the landowner/taxpayer is limited. Because the gift of a conservation easement is a gift of capital property, the charitable contribution deduction is usually limited to 30 per cent of the taxpayer’s adjusted gross income. Unused amounts may be carried over for a maximum of five years after the year of the gift. Therefore, the taxpayer has up to six years to take advantage of the value of the easement as a tax deduction.

C. Valuation of the Conservation Easement

1. A conservation easement is valued by a “qualified appraisal”, a term described in detail in Treasury Regulations. Not all appraisers are trained to value conservation easements in the detail required to meet the IRS standards.

2. The appraiser will conduct a detailed examination of the characteristics of the land (including the size and topography of the parcel, access, local land use regulation and market conditions) in order to value the land. The appraisal report generally values the land both before and after the easement is granted to determine the value of the easement. The appraiser should also take into account terms of the easement deed, as well as any enhancement of value to other property of the landowner or the landowner’s family.

3. Form 8283, signed by the appraiser, and by the donee organization, is filed with the donor’s return in the year of the gift.

*This Outline was prepared as an introduction to important estate planning concepts, and is subject to becoming outdated as laws change. It is not intended to address anyone's individual circumstances. Please consult with an attorney familiar with these matters, and your own tax advisor, when considering or implementing any land conservation transaction, or engaging in estate planning when land is an issue. This Outline was updated in February 2006.*

*To comply with certain U.S. Treasury Regulations, we must inform you that, unless expressly stated otherwise, any U.S. Federal tax advice contained in these materials, including attachments, is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding penalties that may be imposed by the internal revenue Service.*

**SUMMARY OF ESTATE, GIFT AND  
GENERATION-SKIPPING TRANSFER TAX**

as affected by the  
*Economic Growth and Tax Relief Reconciliation Act of 2001*

<u>Calendar Year</u>	<u>Estate Tax Exemption</u>	<u>Gift Tax Exemption</u>	<u>Generation Skipping Transfer Tax Exemption</u>	<u>Highest Estate &amp; Gift Tax Rate and GST Tax Flat Rate</u>
2002	\$1,000,000	\$1,000,000	\$1,100,000	50%
2003	\$1,000,000	\$1,000,000	\$1,100,000**	49%
2004	\$1,500,000	\$1,000,000	\$1,500,000	48%
2005	\$1,500,000	\$1,000,000	\$1,500,000	47%
2006	\$2,000,000	\$1,000,000	\$2,000,000	46%
2007	\$2,000,000	\$1,000,000	\$2,000,000	45%
2008	\$2,000,000	\$1,000,000	\$2,000,000	45%
2009	\$3,500,000	\$1,000,000	\$3,500,000	45%
2010	<b>ESTATE TAX REPEALED</b>	\$1,000,000	<b>GST TAX REPEALED</b>	35% (GIFT TAX ONLY)
2011 and thereafter Return to Current Law	\$1,000,000	\$1,000,000	\$1,100,000**  ( ** to be adjusted for inflation)	55%

**All of the provisions of the 2001 tax law expire after December 31, 2010,** which means that we return to current tax law, unless Congress makes additional changes or extends the new law beyond that date.

As of January 1, 2002, the **Gift Tax Annual Exclusion** was adjusted for inflation for the first time as a consequence of the 1997 Tax Act, and as of January 2006 is **\$12,000.00**. It will increase in \$1,000 increments as future inflation adjustments occur.

The **Conservation Easement Exclusion** is limited at \$500,000 for 2002 and thereafter.



# THE CONSERVATION EASEMENT ESTATE TAX INCENTIVE:

## IRC Sec. 2031(c)

*prepared by:*

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## INTRODUCTION

The Taxpayer Relief Act of 1997 added a new section to the Internal Revenue Code: §2031(c) – Treatment of Land Subject to a Qualified Conservation Easement. This code section creates an added an additional estate tax incentive for private land protection by allowing an exclusion from estate taxation of a portion of the value of the land subject to a “qualified conservation easement”. The law also allows the Executor of a landowner’s estate to place a conservation easement on a decedent’s land after the landowner’s death, without any direction in the Will or other estate planning documents.

Although this code section has now been in place for a number of years, as with any relatively new tax legislation, there are a number of questions that have yet to be answered with respect to particular terms and interpretations. Treasury Department Regulations have yet to be issued and are no doubt years away, and a technical correction (in 1998) and a substantive amendment (in 2001) have been enacted since the original tax bill. This outline will attempt to highlight and explain the provisions of section 2031(c), and to point out issues that are still unresolved. The reader is cautioned that the interpretation of the new law is evolving, and the materials presented are subject to becoming outdated. (Please note the date of this Outline below.)

## I. THE ESTATE TAX EXCLUSION

Section 2031(c) of the Internal Revenue Code allows an Executor to elect to exclude from estate taxation up to forty percent (40%) of the value of land subject to a “qualified conservation easement”, up to a stated limitation. The limitation was originally \$100,000 in 1998, but increased in \$100,000.00 increments and since 2002 has been capped at \$500,000.00. The effect of the exclusion is to eliminate value from an estate that would otherwise be subject to

estate taxation; the actual tax savings therefore depends on the tax bracket of the estate. (In 2006 the maximum rate is 46%, and it is scheduled to drop to 45% in 2007 and remain at that level until 2010, when the estate tax is repealed. In 2011, the estate tax is to be reinstated, with a top rate of 55% - a return to the law as it existed in 2001.)

## II. WHAT IS A "QUALIFIED CONSERVATION EASEMENT"

To take advantage of §2031(c)<sup>1</sup>, the easement must be a "qualified conservation easement". This is a term of art, and is defined in §2031(c)(8)(B) with reference to the basic, and now generally well understood, rules for the qualified conservation contribution set forth in §170(h). However, §2031(c) adds two additional requirements for an easement to qualify for the new estate tax exclusion. They are:

### A. Ownership requirements.

1. §2031(c)(8)(A)(ii): The decedent, or a member of his family, must have owned the land for at least three years prior to the decedent's death.
2. §2031(c)(8)(C): The easement must have been placed on the property by a qualifying "individual":
  - a. The Decedent.
  - b. A member of the decedent's family. Defined in §2032A(e)(2), to include (a) an ancestor of the individual; (b) the spouse of the individual; (c) a lineal descendant of the individual, of the individual's spouse, or of the individual's parents; or (d) the spouse of any lineal descendant described in (c).
  - c. The Executor of the decedent's estate. This gives rise to the availability of, and the questions about, the post-mortem easement. See Section IV below.
  - d. The Trustee of a trust the corpus of which includes the land subject to the conservation easement.
  - e. This means that the Executor of the estate of a decedent who had purchased land already subject to an easement cannot make the election and obtain the exclusion.

### B. Additional Easement Requirements.

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<sup>1</sup> All statutory references in this outline are to the Internal Revenue Code.

1. In addition to the requirements of §170(h), to qualify for treatment under §2031(c), the easement must prohibit more than a *de minimis* use for "commercial recreational activity". This provision may require the review of existing easements and the amendment of those that may contain possible offending language. Unfortunately, there is little guidance of the meaning of the term; the Congressional Conference Report indicates that the granting of hunting or fishing licenses will not cause the property to fail to qualify. On the other hand, it is likely that an easement specifically allowing a commercial golf course or cross-country ski area will not qualify under this provision.
2. Most conservation easements following the form of deed commonly used in New Hampshire preclude any commercial use for purposes other than agriculture and forestry, and thus commercial recreation is prohibited.
3. An easement which preserves historically significant land area or structure does not qualify for the estate tax election of §2031(c), even though it qualifies for an income tax deduction under §170(h).

C. The location of the property no longer matters.

The 2001 Tax Act removed a geographical limitation from the law, so for decedents dying after January 1, 2001, land anywhere in the United States, or its territories, now qualifies for the exclusion and for the post-mortem easement. Under former §2031(c)(8)(A)(i) the subject property must have been located (a) in or within 25 miles of a metropolitan area, (b) within 25 miles of a national park or wilderness, or (c) within 10 miles of an Urban National Forest.

### III. HOW THE TAX EXCLUSION WORKS

- A. To take advantage of the exclusion, the Executor of the decedent's estate must make an irrevocable election on the Federal Estate Tax Return, Form 706, which is due to be filed nine months following the date of the decedent's death (although it is possible to extend the filing date by an additional six months). The amount of the tax exclusion is the lesser of:
  1. The "Applicable Percentage" or
  2. The "Exclusion Limitation".
- B. The "applicable percentage" is:
  1. 40% of the value of the land subject to the qualified conservation easement. As the law is written, this is 40% of the restricted value of the land.

**Example 1:** Woody Woodlot died in 2005, owning acreage he bought many years ago, and on which he granted a conservation easement in 1992. As of the date of Woody's death, the appraised value of the land without the easement (as a potential residential subdivision) was \$450,000; the effect of the easement lowered the value of the land to \$200,000. Woody's executor elected to exclude the applicable percentage: 40% of \$200,000 or \$80,000.

2. The 40% is reduced by two percentage points for each percentage point by which the value of the conservation easement is less than 30 percent of the value of the land, the value of the land being determined without regard to the value of the easement and reduced by the value of any retained development right.

**Example 2.** Mary Marsh's easement reduced the value of her land from \$300,000 to \$225,000, or twenty-five percent (25%). As 25% is 5 percentage points less than 30%, the applicable percentage is reduced from 40% by 10 points to 30% -- 2 percentage points for each point the easement fails to reduce the value of the land by 30%. The exclusion is therefore \$67,500: 30% of \$225,000.

3. The law does not specify when the 30% test is made: the date of the donation of the easement, or the date of the decedent's death. But as estate tax valuation rules generally apply, and as the instructions to the Federal Estate Tax Return (Form 706) provide, the test is made as of the date of death. Thus it is necessary to conduct a full, qualified conservation easement appraisal as of the date of death.

- C. The Exclusion Limitation is a dollar amount that is the maximum that can be excluded. It increases over the next few years, as follows: For decedents dying in:

1998	the exclusion was	\$100,000.00
1999	"	\$200,000.00
2000	"	\$300,000.00
2001	"	\$400,000.00
2002 and thereafter		\$500,000.00

**Example 3:** Terry Treefarm died in July 2000. She owned property coveted by a shopping mall developer until Terry's late husband placed an easement on it in 1989. As the land is located near commercial properties, as of her date of death it is fully appraised at \$2,100,000, but the easement reduces the value to \$800,000. 40% of \$800,000 is \$320,000, but Terry's executor could exclude only the \$300,000 limit available for 2000, the year Terry died.

- D. Practically speaking, this new tax incentive is not a tax credit, but rather an exclusion from the value of the estate that is subject to taxation. Therefore the actual tax savings that will result depends on the size, and tax bracket, of the entire decedent's estate. The

maximum tax advantage from the new exclusion in 2005 is \$235,000: the \$500,000 maximum exclusion amount at the maximum 47% tax bracket. For instance, in the first example above, the maximum tax savings is \$40,000.00: the top rate was then 50%, and the excluded amount in the example was \$80,000.00.

E. Treatment of indebtedness.

§2031(c)(4) provides that the exclusion does not apply to the extent that the land is subject to debt-financed property, for "acquisition indebtedness" (i.e. a mortgage).

F. §2031(c)(5): Treatment of retained development rights.

1. The exclusion does not apply to development rights retained by the donor of the conservation easement.
2. The Executor may extinguish development rights so that the land may then qualify for the election.
3. "Development rights" are defined as those that have commercial value. It is not clear whether houselots reserved for family members run afoul of this requirement.
4. Payment of estate tax on retained development rights may be deferred for up to two years, or until the disposition of the property, whichever is earlier.
5. What appears to be a technical drafting error in the statute confuses the issue of calculating the impact of retained development rights. While it might be logical to make no adjustment for the value of retained development rights since the value of the conservation easement would already reflect any retained rights, a strict reading of the statute requires reducing the value of the land in its unrestricted condition. This has the effect of enhancing the utility of retained development rights for purposes of meeting the 30% test for the applicable percentage.

**Example 4:** Using Example 1 above, assume that Woody retained development rights valued at \$150,000. His easement value is \$250,000 (\$450,000 - \$200,000). The calculation to determine the applicable percentage is:

$$\text{Actual: } \frac{\$250,000}{\$450,000 - \$150,000} = \frac{\$250,000}{\$300,000} = 83\%$$

**Note that this calculation increases the applicable percentage beyond what would result if no adjustment is made for the value of retained development rights.**



**Therefore, the §2031(c) exclusion would be \$80,000 (40% of \$200,000), just as it was without calculating the impact of the development rights.**

G. Where land is in a partnership, corporation or trust.

1. §2031(c)(10): If title to the land is in an entity in which the decedent has an interest, the exclusion is available if at least 30% of the entity is owned by the decedent. The statute refers to another new provision of the Code, §2033A, the Family-Owned Business Exclusion, for guidance.

H. Effect on basis: Carry-over applies to extent of exclusion.

1. To the extent that the Executor takes the exclusion, the decedent's basis in the property carries over and remains the tax basis for those who inherit the property. This is a different rule that applies generally to inherited property when the new owner's tax basis is the date-of-death value of the property (often referred to as a "stepped-up" basis).
2. IRC §1014, Basis of Property Acquired From a Decedent, was amended by adding a new subparagraph (a) (4) to this effect.
3. This is a consideration if the estate or heirs anticipate selling the property, as the capital gain tax implication must be factored into the financial analysis. If the family intends to keep the property into the future, this provision will be less important.

#### **IV. THE "POST-MORTEM" CONSERVATION EASEMENT**

A. For the first time, 2031(c) allows an easement placed on property after the death of a landowner to qualify for estate tax advantage, even without direction by the landowner's Will. This is because the Executor of a decedent's estate is a qualifying "individual" under §2031(c)(8)(C)(iii). The 1998 technical correction clarified that for purposes of the federal estate tax return, the Executor may value the land as restricted by the easement, and elect to exclude a portion of this value under new §2031(c). This has the effect of providing for consistent estate tax treatment for both pre-death and post-death easements.

B. Logistics:

1. The Executor must make the election on the Federal Estate Tax return, which is due to be filed nine months after the date of death. §2031(c)(6). It is possible to obtain a six-month extension of the date to file the Return, but any estate tax that may be due must be paid by the nine-month deadline to avoid interest and possible penalties.

2. The Executor must negotiate and execute the conservation easement with the grantee prior to the filing of the estate tax return (including extensions). However, §2031(c)(5) allows a period of two years from the date of death to extinguish a retained development right, if an agreement to do so is made prior to the filing of the estate tax return.
- C. The executor may take advantage of the exclusion provided in §2031(c)(1) by imposing a qualified easement on property after the landowner's death. This will also have the effect of reducing the value of the property for determination of the gross estate, by allowing the property to be included at the restricted value (as encumbered by the easement) rather than at the unrestricted fair market value.
  1. The 1998 technical correction added new §2031(c)(9) by providing an estate tax deduction under §2055(f) for the value of the easement. No income tax deduction is available or allowed for a post-mortem easement.

**Example 5:** Fred Farmer died in 2005. He had not put an easement on his fields because he was concerned that he might have to sell some of his land to pay for nursing home care. After he died, his son Frank, who was Fred's executor, negotiated an easement on the open space with SPNHF. This land was appraised at its highest and best use as a residential subdivision at \$480,000, and as restricted by the new easement at \$180,000 (for an easement value of \$300,000). The land is valued for estate tax purposes at \$180,000. On the Estate Tax Return, the \$300,000 easement value is exempt from estate tax as a charitable contribution; and, 40% of \$180,000 (\$72,000) is excluded by the new exclusion. If Fred's estate is taxed at the 47% level, the total tax savings is \$174,840: 47% of the conservation easement value (\$141,000) plus 47% of the newly excluded amount (\$33,840).

## V. PRACTICAL PROBATE CONSIDERATIONS IN NEW HAMPSHIRE

New Hampshire probate law and practice must be considered with respect to the "post-mortem" easement, as the Executor must have the consent of a surviving spouse, and the heirs or legatees to grant an easement, and may also require the authority under the Will, to negotiate an easement and make the tax election.

- A. Landowners with a known interest in placing a conservation easement on their land, should consider including particular authorization (or direction) in the Will, or trust, to negotiate an easement, and make the tax election, without the need to seek approval of the Court.

- B. If there is any doubt whether the Will grants the Executor the requisite authority to either grant the easement or make the election under §2031(c), the Executor should seek authorization from the Probate Court.
- C. In any event, because of the Executor's fiduciary duty, the Executor must proceed with the consent of the heirs, legatees and devisees (the beneficiaries of the estate).

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*The author wishes to thank Tom Howe, Society for the Protection of New Hampshire Forests, for his assistance in the initial preparation of this Outline.*

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*This Outline was prepared to provide an overview of an introduction to a recent change in federal tax law, and is subject to becoming outdated as laws change and Regulations are issued. It is not intended to address anyone's individual circumstances. Please consult with an Attorney familiar with these concepts, as well as your own tax advisor, when considering or implementing any land conservation transaction. This outline was first prepared in May 1998, and has since been revised a number of times. The date of this revision appears on the first page – any copies of prior versions bearing a date prior to February 2006 should be discarded as obsolete.*

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## **THE CONSERVATION EASEMENT** **AS A PLANNING TOOL**

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### **I. INTRODUCTION: What is a conservation easement**

A. A **conservation easement** is a conveyance by deed of certain interests in real estate by the landowner to a qualified organization or agency that permanently restricts and proscribes commercial and industrial development and limits certain other uses of the land, including residential development, to protect open space and natural resources. Conservation, agricultural and historic preservation easements, or restrictions, are authorized by NH RSA 477: 45-47.

1. The advantages of a conservation easement to a family can include:

- a. It leaves the property in the ownership of the landowner, who may continue to live on it, sell it or pass it on to heirs, as well as to reap economic benefits through forestry and agricultural uses.
- b. It can significantly lower estate taxes—sometimes making the difference between heirs being able to keep land in the family and their needing to sell it.
- c. A conservation easement deed can be a flexible document, and can be written to meet the particular needs of the landowner's family while protecting the property's resources.
- d. It is permanent, and remains in force when the land changes hands.
- e. The donation of an easement may result in a federal income tax deduction.

B. Property with significant conservation or historic preservation values can be protected by an easement, including forestland, farms and agricultural lands, wetlands, wildlife and endangered species habitat, and scenic areas.

C. A conservation easement can be granted to:

1. A public agency, such as:

- a. Federal – US Forest Service, US Fish & Wildlife Service
- b. State – Dept. of Resources and Economic Development, NH Fish & Game
- c. Local municipality – most often through the Conservation Commission
- 2. A private nonprofit land trust, such as:
  - a. National – The Nature Conservancy, American Farmland Trust
  - b. Statewide – Society for the Protection of NH Forests, Audubon Society of NH
  - c. Regional – Monadnock Conservancy, Upper Valley Land Trust, Rockingham Land Trust
  - d. Local – Squam Lakes Conservation Society

## II. THE CONSERVATION EASEMENT AS A PLANNING TOOL

- A. A conservation easement will be a tool for family real estate where the property includes significant acreage that can be protected as open space, significant natural resource value or endangered species habitat, significant scenic values, working forest land, or other attribute the protection of which will provide a “public benefit”, as will be discussed in greater detail in this outline. It may be a tool for cottages with adjoining undeveloped land (even as small as an acre or two), but is generally *not* an appropriate tool for small lakeshore lots, or other properties without excess acreage.
- B. The conservation easement provides open space and natural resource protection, and generally prohibits commercial uses except for forestry and agriculture.
- C. The economic value of the land may bear no relation to the “value” of the land to the family: The cottage and land along the Lake is still the “rustic camp”, and not considered an asset valued at its potential “retail” market price, to those who have used and loved it for three generations; the working forest or farm might have greater economic value as a commercial development.
- D. The economic value of the land may cause estate and wealth transfer tax problems to the matriarch and patriarch. The classic problem has been the “forced” sale of the family property to pay the estate tax. The conservation easement can reduce the economic value of the property and not affect the way the property is actually used by family members.
- E. By eliminating the right to further subdivide or to commercially develop the property, the grant of a conservation easement may eliminate temptations and reduce possible sources of friction among members of future generations.

- F. From a tax standpoint, the gift (or bargain sale) of an easement can result in a significant income tax charitable contribution deduction, and lead to significant estate tax savings. These issues are discussed in greater detail later in this outline.

### **III. CONSERVATION EASEMENT APPRAISALS**

- A. A conservation easement is valued by a “qualified appraisal”, a term described in detail in Treasury Regulation 1.170A-13(c). Not all appraisers are trained to value conservation easements in the detail required to meet the IRS standards.
- B. The appraiser will conduct a detailed examination of the characteristics of the land (including the size and topography of the parcel, access, local land use regulation and market conditions) in order to value the land.
- C. The appraisal report generally values the land both before and after the easement is granted to determine the value of the easement.
- D. The appraiser should also take into account terms of the easement deed, as well as any enhancement of value to other property of the landowner or the landowner’s family.
- E. IRS Form 8283, signed by the appraiser, and by the donee organization, is filed with the donor’s income tax return for the year of the gift.

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### **IV. NEW HAMPSHIRE LOCAL PROPERTY TAXES**

- A. If the real estate is enrolled in *current use* at the time an easement is granted, there will be little, if any, additional local property tax relief, as the current use rates would apply to the land restricted by the easement.
- B. Parcels that may not qualify for current use may qualify for favorable property tax under RSA 79-B. This section allows a “conservation restriction assessment” for parcels subject to permanent conservation restrictions that are less than 10 acres, the current use minimum.

### **V. INCOME TAX RULES FOR A GIFT OF A CONSERVATION EASEMENT**

- A. Generally, an income tax deduction for the charitable contribution of real estate is available only if the taxpayer/landowner contributes or transfers his or her entire interest in a parcel of real estate (IRC §170(f)(3)). One exception to this rule is the gift of a conservation easement that meets the qualifications of the Code and Treasury Regulations.

1. IRC §170(h) allows a charitable contribution deduction for the gift of a “**qualified conservation contribution**”, which is defined as the gift of:
  - a. “**a qualified real property interest**” to
  - b. “**a qualified organization**”, exclusively for
  - c. “**conservation purposes**”.
  - d. The gift must be in perpetuity. IRC §170(h)(5)(A)
2. Treasury Department Regulations 1.170 A-14 define and describe each of these three requirements in detail.
  - a. A “qualified real property interest” includes a conservation easement as allowed by and defined in RSA 477:45, granted *in perpetuity*.
  - b. “Conservation purpose” is specifically defined to include five categories of resources that may be protected by the easement:
    - (i) Public recreation and/or education
    - (ii) Significant natural habitat
    - (iii) Open space for scenic enjoyment
    - (iv) Open space pursuant to local government policy
    - (v) Historic value
  - c. While an easement must provide a *public benefit*, it need not require public access to the property to qualify.
  - d. A “qualified organization” includes government agencies such as those identified above, as well as certain tax-exempt non-profit organizations that are dedicated to, and have the capability to provide long-term stewardship of the land.
3. The amount of the income tax deduction available to the landowner/taxpayer is limited. Because the gift of a conservation easement is a gift of capital property, the charitable contribution deduction is usually limited to 30 per cent of the taxpayer’s adjusted gross income. Unused amounts may be carried over for a maximum of five years after the year of the gift. Therefore, the taxpayer has up to six years to take advantage of the value of the easement as a tax deduction.

## VI. FEDERAL ESTATE AND GIFT TAX CONSIDERATIONS

- A. The Federal wealth transfer (estate and gift) tax scheme taxes the transfer of wealth for less than full consideration. It is an essentially a "unified" tax structure, and it applies to transfers during lifetime and at death. The rates are high and the estate tax is due to be

paid, in cash, nine months after the date of death. There are a number of key exclusions that assist the planner:

1. The **Applicable Exclusion Amount for Estate Tax**, which allows the transfer at death of a certain amount of assets free of tax. The estate tax exclusion increased to \$2,000,000 for decedents dying in 2006, 2007 and 2008, and will increase to \$3,500,000 for 2009. In 2010 the estate tax is scheduled to be repealed, for one year only. In 2011, under current law the exclusion amount is scheduled to return to \$1,000,000. The gift tax exclusion remains at \$1,000,000, however. Appendix A includes a chart showing the increases, which were enacted as part of the 2001 Tax Act.
  2. The **unlimited Marital Deduction**, which allows unlimited gifts and transfers between spouses during lifetime and at death free of estate and gift tax. The marital deduction may not result in avoidance of the tax altogether, but only the deferral of the payment of tax that will be due upon the death of the second spouse to die.
  3. For married couples, proper planning can preserve the credit of the first spouse to die through the use of a Trust (commonly called a "credit-shelter", or a "by-pass" trust), so that (in 2006 - 2008) \$4,000,000 may be protected from federal estate taxation – the total of the exclusion for each spouse. The actual mechanics of this are beyond the scope of this outline, but any planning for a married couple with significant assets should consider this device.
    - a. If a couple owns valuable real estate as joint tenants with right of survivorship, title to the parcel may have to be placed in the name of one only, or changed to a tenancy in common, so that an interest in the land goes into the credit shelter trust. If the property passes by survivorship to the surviving joint tenant, the advantage of the credit shelter will be lost.
  4. The **Annual Gift Tax Exclusion** allows a person to make gifts to any number of recipients each year free of tax. The amount of the exclusion has been \$10,000 for many years; as of January 2002 it increased to \$11,000, and in January 2006 increased again to \$12,000. A married couple may transfer \$24,000 to each donee (recipient of the gift) annually, regardless of which spouse holds title to the gifted asset ("split gifts"). Annual exclusion gifts are in addition to the amount protected by the unified credit.
  5. The **Charitable Deduction**, which allows unlimited gifts to qualifying charitable organizations and institutions free of estate and gift taxes.
- B. As noted above, the lifetime exclusion for gift tax is \$1,000,000, and will remain there, despite the increase in the estate tax exclusion. If an individual makes gifts during lifetime in excess of the annual exclusion, the gifts are not immediately taxable, but are credited against the available gift and estate tax credit. The use of the credit is cumulative, and once the limitation is exceeded, the gifts are subject to tax. If, for



example, a person has made taxable gifts of \$450,000 during her life and died in 2006, she would have \$1,550,000 available as a credit against her estate.

- C. Estate and gift tax rates are very high, so it is important to plan estates to minimize the impact of the tax. The tax rate is "graduated" and increases to a maximum of 46% for decedents dying in 2006. As shown on Appendix A, the top rate is scheduled to drop in future years, until 2011, when, after one year of no estate tax, the top rate jumps back up to 55%, and the exemption drops back down to \$1,000,000.
- D. The estate tax is levied against the decedent's gross estate. The gross estate includes all property that a person owns or holds an interest in at death (including life insurance proceeds and property held in a living trust). For cash, stocks and bonds, etc. valuation is a simple procedure, but for many assets, an appraisal is necessary. In addition, real estate is generally appraised at the highest and best use (i.e. fair market value, or what price a willing buyer would pay to a willing seller, and which therefore includes development potential) regardless of actual use by the decedent or intended use by the beneficiaries. Land that is enrolled in "Current Use" for New Hampshire real property taxation is still valued at highest and best use for estate tax purposes.
  - 1. A special rule may be available to reduce the estate tax imposed on farm, ranch or actively forested real estate. Internal Revenue Code §2032A provides a method of valuation based upon the actual use of "qualified real property" that is included in the gross estate. This is a very technical section of the Code.
  - 2. The maximum amount by which the gross estate can be reduced by this method is \$750,000.
  - 3. Simply stated, if at least fifty percent of the gross estate is "qualified property" used in farming, etc., and at least twenty five percent of the gross estate is real estate used in the "qualified use", and if the real estate passes to "qualified heirs" who agree to continue the "qualified use" for at least ten more years, the property may be eligible for special valuation treatment. For woodlands, this really means that there must be management plans for past and future forestry.

## **VII. THE PROBLEM OF THE ILLIQUID ESTATE**

The federal estate tax is due to be paid nine months after the date of death. If the estate has cash, or readily marketable assets, the tax may be paid without difficulty. However, if the estate is illiquid, and has significant taxable assets but little cash, problems arise. The classic example is the forced sale of real estate, at less than an optimal price, to have cash available to pay the tax. Planning for the payment of the tax that may be due is as important a function for the estate planner as minimizing the potential tax impact.

- A. An Example: Husband and Wife jointly own real estate worth \$1,800,000, and other assets worth \$600,000. The gross estate is thus \$2,400,000. If the

second spouse to die passed away in 2005, the estate tax imposed is about \$413,000; in 2006 – 8 the tax is \$184,000.00. The credit of the first spouse to die is lost, and some of the cash or liquid assets are needed to pay the tax. If a credit shelter trust had been utilized to preserve the credit of the first spouse to die, and appropriate allocation of assets between the spouses is made, the credit of each spouse could have been utilized, and the utilized, and the federal estate tax is eliminated.

B. Another example: The couple again has real estate valued at \$1,800,000 but in this case has other assets of an equal amount, for a total gross estate of \$3,600,000. If everything is owned jointly, or simply passes outright to the surviving spouse, and the second to die passes away in 2005, the tax is \$977,000. If the couple had utilized a credit shelter trust, the tax could have been reduced to \$272,000. Utilizing the credit shelter trust, if the surviving spouse dies in 2006, the tax could be reduced to less than \$50,000. Without the tax-planning trust, and if all the property had passed to the survivor, the tax in 2006 would be \$736,000.00.

## VIII. POSSIBLE SOLUTIONS

Even if there are funds available to pay the tax, most families are interested in reducing the tax that might otherwise be payable. There are a number of estate planning tools and possible solutions to this problem.

- A. One solution is the **conservation easement**. The restrictions on the use of land imposed by a conservation easement reduce the economic value of the property. While most easements allow continuing commercial use for forestry and agriculture, not all economic benefit is lost. In addition, the property is protected for its open space and natural resource protection and for outdoor recreational uses. In many cases, the actual use of property does not change after the conservation easement is granted.
- B. Another way to reduce the estate tax is to give estate assets away, thus reducing size of the gross estate that will be subject to tax. Once assets are out of the estate, subsequent appreciation after the gift and prior to death will also go untaxed, leading to potentially greater tax savings. The gift tax exemption amount will remain at \$1,000,000.
- C. A common technique is to take advantage of the annual exclusion. If there are a number of potential beneficiaries, i.e. children and grandchildren, substantial wealth can be transferred out of an estate. \$12,000 gifts of real estate may present logistical difficulties, as deeds are required with each transfer, and updated appraisals are necessary. This difficulty may be remedied, however, by the creation of a family trust, family limited partnership, or Limited Liability Company (LLC), and the gift of shares or interests in the trust or partnership, rather than gifts of the real estate itself. (The Internal Revenue Service is scrutinizing these transactions closely, and in a number of contested cases recently the taxpayer has lost.)

1. There is a significant string attached: the donee's basis in the property is the donor's basis. If the donee later sells the property, a substantially higher capital gains tax could result than if the donee had inherited the property and received a stepped-up, date of death value, basis in the property. (However, the income tax may be less than estate tax, depending on the applicable tax rates.)
  2. In addition, donor may not use the property as in the past, or risk inclusion for estate tax purposes of the date of death value of the property under IRC §2036, Transfers with retained life interest.
  3. Lifetime gifts may be most useful if long-term intention is not to sell, but to keep the property within a family.
  4. If an easement or other form of permanent protection is contemplated, it should no doubt be completed before the gifting program, so that the value is reduced and larger portions of the property can be gifted, or the gifting program can be completed sooner.
- D. In some instances, and with sophisticated planning, it is possible to discount the value of the property given away. Use of these techniques can "leverage" the annual exclusion gift, as well as the unified credit amount, and lead to the transfer of significant assets at a relatively low tax cost. The original owner may also be able to maintain control of the management of the property.

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**IX. IRC. §2031(c): THE CONSERVATION EASEMENT TAX INCENTIVE AND POST-MORTEM EASEMENT**

- A. The 1997 Taxpayer Relief Act added a new section to the Internal Revenue Code that provides additional tax incentives for donating a conservation easement. New section 2031(c) excludes from estate tax up to 40% of the value of land subject to an easement. As with any section of the Code, however, there are special rules and qualifications that apply, and not every conservation easement qualifies for the additional tax relief. Also, because the law is new, the Treasury Department has not yet issued regulations, interpretations of it are evolving, and Congress may make additional technical amendments.
- B. The maximum amount of the exclusion is \$500,000. (The exclusion began at \$100,000 in 1998, and has increased by \$100,000 each year.) The actual tax savings depends on the top tax rate; for an estate taxed at the 50% level, the maximum tax savings is \$250,000.
- C. Also, the amount of the exclusion will be reduced from 40% by a formula if the value of the easement does not reduce the value of the land by at least 30%.



- D. Another important feature of the new law is that the executor of a landowner's estate may grant a conservation easement after the landowner dies and still qualify for reduced land valuation in the estate and the additional exclusion. This is referred to as a "post-mortem easement".
- E. The law also imposes special qualifications for the new tax exclusion:
  - 1. Easement requirements: The easement deed must preclude all but a minimum use for commercial recreational activity. Certain development rights must be specifically accounted for in the tax calculation. A historic preservation easement does not qualify for the exclusion or the post-mortem easement.
  - 2. Ownership requirements: The easement must have been granted by the decedent or a member of the decedent's family, and the decedent must have owned the property for at least three years prior to date of death.
- F. The impact of the new tax code and the availability of the exclusion and the post-mortem easement can be dramatic. However, all of the heirs must consent to the easement transaction, and potential income tax benefits are lost, so for many landowners concerned about the protection of their property, the better course of action remains an easement granted during lifetime.

*This Outline was prepared as an introduction to important tax, property law, and estate planning concepts, and is subject to becoming outdated as the law changes. It is not intended to address anyone's individual circumstances. Please consult with an attorney familiar with these matters, and your own tax advisor, when considering or implementing any land conservation transaction, or engaging in estate planning when land is an important asset and planning consideration.*

*February 2006*

# SUMMARY OF ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAX

as affected by the  
**Economic Growth and Tax Relief Reconciliation Act of 2001**

Calendar Year	Estate Tax Exemption	Gift Tax Exemption	Generation Skipping Transfer Tax Exemption	Highest Estate & Gift Tax Rate and GST Tax Flat Rate
2002	\$1,000,000	\$1,000,000	\$1,100,000	50%
2003	\$1,000,000	\$1,000,000	\$1,100,000**	49%
2004	\$1,500,000	\$1,000,000	\$1,500,000	48%
2005	\$1,500,000	\$1,000,000	\$1,500,000	47%
2006	\$2,000,000	\$1,000,000	\$2,000,000	46%
2007	\$2,000,000	\$1,000,000	\$2,000,000	45%
2008	\$2,000,000	\$1,000,000	\$2,000,000	45%
2009	\$3,500,000	\$1,000,000	\$3,500,000	45%
2010	<b>ESTATE TAX REPEALED</b>	\$1,000,000	<b>GST TAX REPEALED</b>	35% (GIFT TAX ONLY)
2011 and thereafter Return to 2001 Law	\$1,000,000	\$1,000,000	\$1,100,000**  ( ** to be adjusted for inflation)	55%

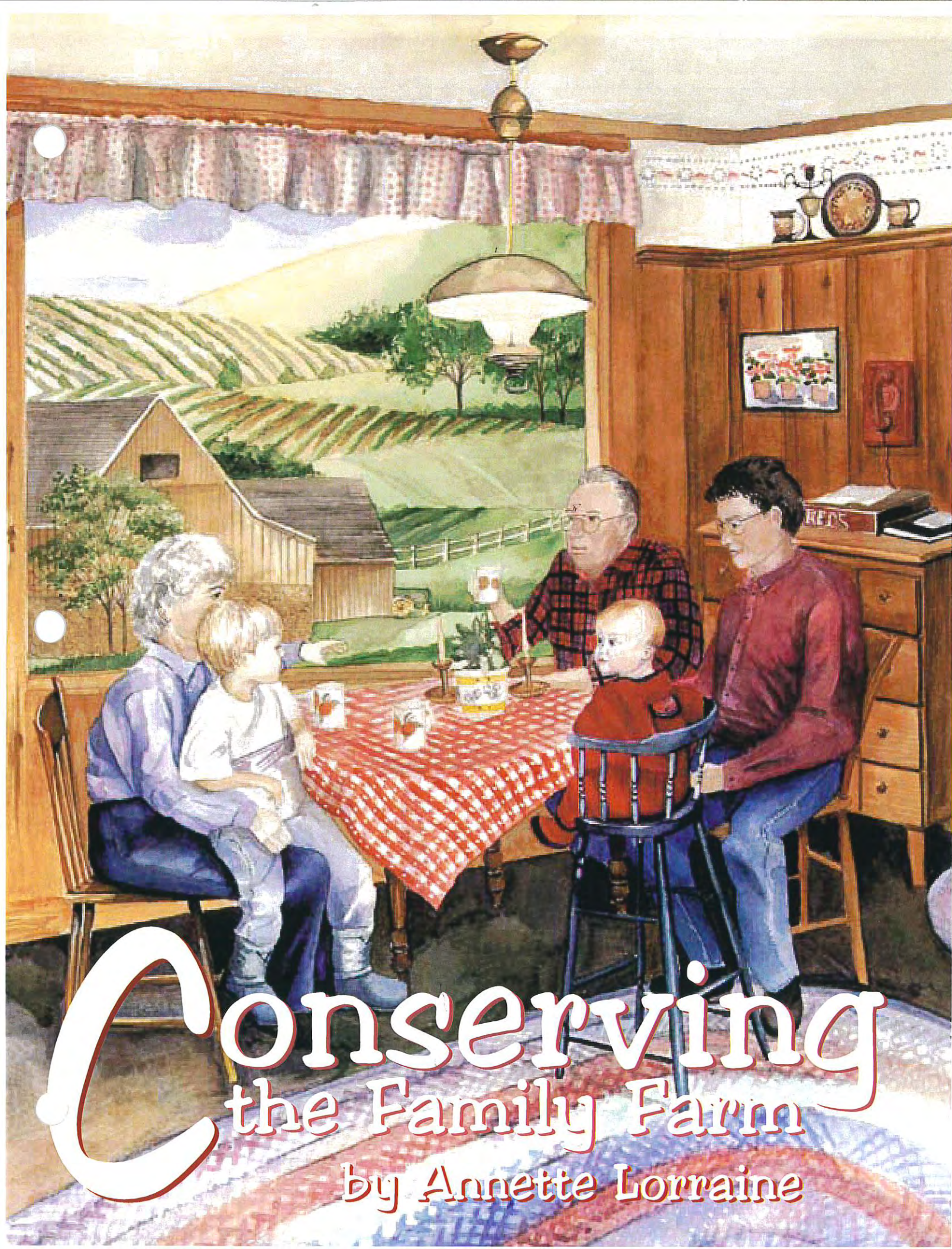
**All of the provisions of the 2001 tax law expire after December 31, 2010**, which means that we return to current tax law, unless Congress makes additional changes or extends the new law beyond that date.

As of January 1, 2006, the **Gift Tax Annual Exclusion** has been adjusted for inflation for the second time as a consequence of the 1997 Tax Act, and is now **\$12,000.00**. It will increase in \$1,000 increments as future inflation adjustments occur.

The **Conservation Easement Exclusion** is limited at \$500,000 for 2002 and thereafter.

## **9.     Conserving the Family Farm**





# Conserving the Family Farm

by Annette Lorraine



The NH Coalition for Sustaining Agriculture is an informal network of organizations and individuals dedicated to enhancing the social, economic and environmental sustainability of agriculture in New Hampshire. The Coalition brings together members of the farm community and the non-farming public with agricultural conservation and community development professionals to implement a shared vision:

*Agriculture is a valued and vital part of New Hampshire's economy, environment and communities. A dynamic agriculture makes New Hampshire a better place to live, work and visit. The future of agriculture in New Hampshire depends on profitable farms that can nurture families and be passed on to future generations.*

The Coalition recognizes that keeping good agricultural land available and affordable is essential if farming is to stay viable in New Hampshire. This guide provides information and educational resources about land conservation to specifically address the needs of working farm families.

It was written in the winter of 2002. Readers should be aware that laws and grant programs will change over time. The guide summarizes main ideas, and offers details only as examples, in order that readers might be aware of common issues and be able to locate resources providing up-to-date information.

The purpose of this guide is to help farm families identify *questions* to discuss with their agricultural, legal, financial and conservation advisors. All landowners considering a conservation easement on their farms should take advantage of professional expertise early in the process.

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# Conserving The Family Farm

A Guide to  
Conservation Easements  
for Farmers,  
other Agricultural Professionals,  
Landowners  
and Conservationists

by  
Annette Lorraine

February, 2002

The New Hampshire Coalition  
for Sustaining Agriculture



UNIVERSITY of NEW HAMPSHIRE  
COOPERATIVE EXTENSION

# Conserving The Family Farm

**A Guide to Decision-Making for Farmers,  
other Agricultural Professionals,  
Landowners and Conservationists**

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## Introduction

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### *What is a conservation easement?*

A conservation easement is a legal agreement that permanently restricts most development on a parcel of land. The agreement is between a landowner and a certain type of entity such as a land trust, a private non-profit conservation organization that specializes in land conservation that holds the restrictions and has the legal right to enforce the agreement. People enter into conservation easements to forever protect and enhance conservation resources such as agricultural soils, active farms, tracts of woodlands, water quality, trails, scenic areas or wildlife habitat.

Conservation easements can provide for and encourage agricultural and forestry activities. Besides future development, conservation easements can restrict other activities that would be potentially harmful to the land's conservation resources, such as stripping topsoil or waste disposal. Conservation easements can provide financial advantages to landowners and be a tool to facilitate business, tax and estate planning. Conservation easements leave land under private ownership and management. The decision to enter into a conservation easement is always voluntary. More detailed descriptions of the legal requirements of conservation easements, the organizations that can hold them (referred to as "land trusts" here for simplicity), financial consequences, and sample easement provisions are described in more detail in this guide.



### *Why do landowners donate or sell conservation easements?*

Farmers who enter into conservation easements have worked hard, invested and depended a great deal on their land, and have a strong desire to see sustainable management continue beyond their ownership. In witnessing the changes in the New Hampshire farm landscape over the last few decades, they are all too aware that, following subdivision, "asphalt is the last crop."<sup>1</sup> Farmers, who are good stewards of their land and want to see that stewardship continue, have two choices: either enter into a conservation easement, or roll the dice and place their hope in the good intentions of all their heirs and future buyers. Farmers who convey conservation easements exercise their property rights to leave a legacy, a legacy that ensures a more affordable, wholesome and beautiful asset for their heirs and successors as well as the entire community.

The decision to enter into a conservation easement is based on a combination of unique personal circumstances. But besides living their personal ethics, most farmers recognize other benefits:

- Landowners can be paid for placing a conservation easement on their land.





- Some landowners are able to donate an easement without being paid and then may be able to use a federal income tax deduction.
- Some landowners are partially paid, and may be able to use the amount of the discount they give as a federal income tax deduction. This is called a "bargain sale."
- Land can be an expensive asset, but it isn't always liquid. It can't easily be converted to cash without selling it outright. Payment for a conservation easement gives liquidity to the land, allowing the landowner to receive income for part of the value of the property, the development value, while continuing to own the land and see it continue in agricultural stewardship. Farmers have used conservation easement sale income to pay off debt, purchase additional land, diversify the farm operation, build a retirement fund, subsidize a sale so the land is affordable to the next generation, or provide an inheritance to children who don't want to continue to farm.
- Conservation easements may lower the value of the land, which can work to the advantage of some landowners for tax purposes. This could include reducing the size of the taxable estate, or their own or their heirs' taxable basis.
- Lowering the value of the land can also help when it's time for a landowner to sell, or a farm business to split assets. A lower value can help make the land more affordable for a business partner or a young farmer who could never afford to buy the land otherwise.
- In New Hampshire, a landowner of a permanently conserved parcel of land may apply to have the "current use" property tax assessment rate, without being enrolled in the state current use assessment program.
- Parcels of land that abut conserved land often have a higher value since the land will be guaranteed scenic views and fewer neighbors. Some farmers retain abutting land without a conservation easement, knowing it will increase in value with conserved land nearby.

The decision whether to sell a conservation easement or donate one is based on a combination of factors such as the landowner's need and the availability of funds. Landowners should consult with their tax advisors as well as a local land trust familiar with New Hampshire grant programs and fundraising to make this determination. The sources of funds used for paying farmers for conservation easements are scarce and competitive and the processes for a sale are often lengthy. Generally, if a farmer has such a strong income such that she or he can use a tax deduction in the full amount of the conservation easement (for more detail on tax benefits, see p. 7), then that landowner should consider donating a conservation easement. Often payments for conservation easements are combined with a partial donation by the landowner selling at a price less than fair market value. This "bargain sale" situation can be a win-win for a landowner who ends up netting the same profit by paying less federal income tax, as well as the land trust that doesn't have to raise funds for the entire value of the conservation easement.



### ***Is a conservation easement appropriate for every farm?***

Conservation easements aren't always the right tool for the job. They don't suit everyone, or fit all circumstances. Likewise, conservation easements aren't a cure for all New Hampshire's agricultural challenges, but conservation easements play an important role within the larger framework of social, market, political and environmental forces that shape agriculture in New Hampshire. On an individual basis, conservation easements may not be appropriate for farmers in the following situations:

- Some landowners may be uncomfortable with the idea of permanent restrictions on their land.
- When a farmer doesn't own 100% interest in his or her land, the other interest holders may object to entering into a conservation easement. These other interest holders might be co-owners or business partners, or even a past owner who might have kept a right to buy the property back with a "right of first refusal."
- When land is too highly mortgaged or the farm has substantial losses, a mortgage-holder may not accept a conservation easement that reduces the value of the land. It may make more financial sense to first fix the problems causing the losses, or even sell the land at its highest value.
- Sometimes the value of a conservation easement isn't high enough to meet the landowner's needs. (The value of a conservation easement is the difference in value between the land with and without restrictions as determined by an appraisal.)
- Sometimes there is stiff competition for conservation grant funding, thus not every project will be funded.
- If potential grant payments turn out to be too low so a donation or partial donation ("bargain sale") of a conservation easement is the only alternative, some landowners can't use the tax benefits associated with a tax deduction.
- Some landowners are unwilling to seek the help of professionals for legal, tax or estate planning advice.
- Sometimes grant programs intended to pay landowners for conservation easements have no funds.
- Some landowners are uncomfortable knowing a conservation organization like a land trust or governmental entity will make regular monitoring visits to their land.

### ***What do conservation easements mean to the larger community?***

Undeveloped open space brings a quality of life to New Hampshire residents that is beyond value. Farms bring unique benefits to a community by providing expansive scenic views, corridors for wildlife, groundwater recharge areas, fresh local food

products, as well as opportunities for recreation and education. And there are tangible, measurable benefits as well. "Fiscal impact studies," or "cost of community services" studies in various New Hampshire communities consistently document the value to towns in hard dollars of retaining undeveloped agricultural and forested lands.<sup>2</sup> These studies show property taxes on farms, at the current use rate, not only pay for the farms themselves, but create a surplus to help pay for the losses created by residential service demands. Farms don't require the same extent of police, fire, road maintenance and educational services as residences. Farms are more similar to commercial and industrial uses in this regard.

Nevertheless, farmland is disappearing all across the country at an astounding rate, and New Hampshire is no different. Despite the benefits of farms, the market economy doesn't pay for the many indirect values that farms provide. While conservation easements can't solve the shortfalls of the market economy, they can offer a one-time influx of funds to a farm operation and ensure that farm's land will always be available for agricultural activities within a community.

### ***How does a conservation easement affect a farm operation?***



If the conservation easement was written to be farm-friendly, the farm operation can continue without much noticeable difference. The land trust staff will contact the landowner periodically and send a monitor out to walk the conserved land. Naturally it is preferable if the lines of communication between the farmer and the land trust stay open so neither make unintentioned errors. For example, if the farmer prefers the land trust monitor to wear disinfected rubber boots because of potential biohazard concerns, the farmer should feel free to make that known. Land trust staff do their best to be responsive to farmers' requests and concerns and to answer questions promptly about conservation easement terms.

Once a conservation easement is placed on farmland, the owners as well as any operators, managers or lessees need to be aware of the terms. Many conservation easements ask the landowner to give prior notice or obtain prior written approval from the land trust for certain activities that have high impacts on soil productivity, such as building new structures or changing water courses. They may also require the landowner to have a forestry plan or farm soil management plan in place. Since each conservation easement document is unique, the impacts on a farm operation are determined by its own conservation easement.



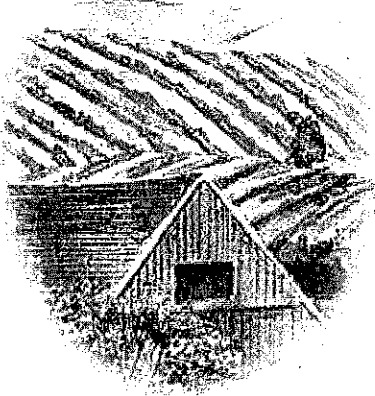
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## ***Financial Implications for Farm Businesses***

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**C**onservation easement transactions have an effect on a farmer's business, tax and estate planning. Farmland is often a farm family's most valuable asset. Conservation easements will alter that value. Although land trusts may pay a farmer, using that income will present its own challenges, especially when the farmer intends to foster long-term farm viability, continued family ownership, or an eventual transfer of the farm.

Conservation easements may affect a farm's business ability to borrow money in the future. Conservation easements will interrelate with estate planning techniques including wills, trusts, closely held businesses and corporations. Every farm family will find it essential to obtain advice personal to their situation from an objective tax professional and their banker when considering a conservation easement.



### ***Valuation***

**T**he value of a conservation easement is determined by a professional appraisal. The appraiser first determines the value of the land as it is, as well its potentially highest and best use (the "before" value) and then assess what the value would be if the land were subject to a certain conservation easement (the "after" value). The difference between the two values equals the fair market value of the conservation easement or "development rights." The appraiser must be an objective professional qualified to appraise development rights according to standards set out by the Internal Revenue Code and regulations.

To adequately do the job, the appraiser needs to have in hand all the proposed details of the conservation easement transaction, namely, all the conservation easement terms, the specific parcels and configuration of land the conservation easement will cover, as well as any other related agreements such as an Option to Purchase at Agricultural Value (see p. 22). The appraiser must also appraise the land and development rights using comparables close to the date of the appraisal. The appraiser can't speculate hypothetically on what could happen in the future, or use any subdivision proposals other than what the current local zoning regulations would allow. This type of appraisal is more expensive than a typical fair-market-value appraisal, and takes time to schedule and complete. Land trusts will have lists of appraisers experienced in this type of appraisal, and can tell you whether there is funding to help cover the costs.

### *Payments to Landowners*

When a landowner needs to sell a conservation easement, a land trust may try to find the funds to pay the fair market value of the easement. Most land trusts aren't endowed well enough to have those funds readily available, and so must accumulate the funds from grants, fundraising, or a combination of the two. Land trust staff are experienced in seeking and obtaining funds, so they evaluate land projects in terms of grants available at the moment as well as the fundraising potential of a project.

Making the decision to sell a conservation easement, and then actually doing it, can be a lengthy and complex process. In deciding whether it's a good option for everyone with an ownership interest, a farm family needs to decide how the income will be spent and seek independent professional advice as to the consequences to the: farm business, taxes, heirs, estate plan, or to the transfer of the farm. Simultaneously, a land trust can advise on available funding, the pros and cons of the available funding program's easement requirements, and the process. With successful completion of a conservation project the landowners will be paid. If planned well, they will be in a position to manage the resulting income for the benefit of their farm, rather than pay excess taxes.<sup>3</sup>

### *Donations*

When landowners find themselves in a sound financial position and higher tax bracket, they may prefer receiving a significant tax deduction instead of income. In these cases, landowners who want to conserve their land can donate a conservation easement as a charitable gift. Assuming it meets the requirements of the Internal Revenue Code (see p. 12), they can claim a tax deduction in the amount of the appraised fair market value of their development rights. If, because of income limitations they can't claim the entire deduction in the tax year they sign the conservation easement, the IRS allows a "carry-over" of up to five additional years.

A landowner would reach this decision after consulting with a tax advisor, and a land trust can assist with the donation process. The process of donating a conservation easement is quicker and more streamlined than the process for being paid. It is still a legal real estate transaction and so may take several weeks or months to complete. Your local land trust can explain the process and timing. Landowners can help expedite the process by providing maps, previous title work, answering questions and making decisions about the optional terms within a conservation easement. With the closing, the landowner can claim a tax deduction for the tax year the conservation easement was signed. If, due to income limitations the entire tax deduction can't be used that year, the landowner can carry the remainder over until the next year, or for an additional five years. The tax deduction is claimed on a simple one-page IRS Form 8283 submitted with the landowner's tax return. The appraiser



signs the form to confirm the value and the land trust signs the form to confirm the gift of conservation easement was made.

It is worth noting that many landowners choose to donate conservation easements even when they can't use a tax deduction and can't be paid. While this isn't an option for most farmer-owned businesses, some landowners feel strongly enough about conserving their land that they do it with no financial incentive. Conservation easements can always be donated or bargain-sold by landowners through their will or trust. This allows landowners complete flexibility in their land management during their lifetime, but ensures their land will be conserved on their death. Landowners considering an easement through their will should talk with a legal professional as well as a prospective land trust so adequate arrangements can be made in the estate planning documents.

### ***Bargain Sales***

When a landowner decides to sell a conservation easement, but either can't be paid the full fair market value due to fundraising limitations, or doesn't need to be paid full fair market value, this presents a prime opportunity for a bargain sale. The "bargain" refers to the discount the landowner gives to the land trust purchasing the conservation easement. The landowner can claim the amount of the discount, the difference between fair market value as appraised and the amount the landowner is actually being paid, as a charitable contribution and use it as a tax deduction.

The process will run much the same as the process for payment for a conservation easement, but in the end, the landowner will both receive a payment as well as submit a form to the IRS for a tax deduction. A tax professional can run the numbers and advise how beneficial a bargain sale tax deduction will be. It may turn out the tax deduction can offset the tax bill resulting from the income the landowner is paid for the conservation easement, netting the landowner an after-tax profit essentially the same as if he or she had been paid full fair market value.

### ***Tax Effects***

Conservation easements affect income and land valuation, and affect a landowner's federal and property tax obligations. With the right planning, conservation easements can benefit landowners and their heirs with lower taxes. Because the tax consequences are so intertwined with business and estate planning, a farm family should seek professional assistance early in the process of considering a conservation easement.

#### **Property Taxes**

Conservation easement restrictions on land will lower its value which, in turn, may affect the land's property tax assessment. The







appraisal determines this new value of a conserved property (see p. 5). If a landowner shares the appraisal and signed conservation easement with the town, the town assessing officials may use this information to re-assess the land. Or, more commonly, landowners and town officials in New Hampshire rely on the state's current use property tax assessment rates. New Hampshire law allows a landowner of permanently conserved land to apply to have the "current use" assessment rate, without being enrolled in the state current use assessment program.<sup>4</sup> To apply, the landowner completes a one-page form called a "Conservation Restriction Assessment Application" or PA-60, and submits it to the town, which processes it like a current use application.

### Income Taxes

Conservation easements can affect a landowner's federal income taxes in two ways. First, if a landowner is paid, that "gain" is a taxable income. Second, if a landowner donates or bargain-sells an easement, the landowner is entitled to a federal income tax deduction.

Prior to being paid for a conservation easement, a landowner will want to seek professional tax advice because there are ways to lower the potential tax bill. One option to offset income taxes is by a bargain sale that results in a tax deduction. Another option might be for the land trust to pay the landowner by installment payments – so the payment and resulting income is spread out over more than one tax year, allowing some landowners to remain in a lower tax bracket. Or, a tax professional might recommend a change in the way the farm business is owned, for instance, to a partnership or S-corporation. If a farm is looking at buying more land, the farm business may be able to combine that purchase with a sale of a conservation easement in the form of a "like-kind exchange" and avoid paying income tax altogether. These are just some examples for reducing income taxes, the savings from which will more than cover the cost of early professional advice.

Donations of conservation easements or bargain sales are considered "charitable gifts" by the tax code, which enable a landowner to claim a tax deduction. However, tax law places limitations on the maximum tax deduction a landowner may take in each tax year, based on the landowner's income. Generally, for a gift concerning land or conservation easements, the amount a landowner can deduct in one year is limited to 30% of his or her adjusted gross income. If the entire deduction can't be used in one year, the remaining deduction can be carried over for up to an additional five years after the year of the original gift. In some cases, landowners can elect to claim a deduction worth up to 50% of their adjusted gross income, but the tax code limits the amount of the tax deduction to the amount of the property's "basis" (usually the price originally paid for it, minus improvements). The 50% election isn't helpful when a property has gained in value over the years, but a taxpayer who recently purchased the land, or who is seriously ill or expecting a large immediate drop in income may find the 50% election helpful. Again, a tax professional can run the numbers and steer a landowner efficiently through the maze of tax regulations.

## Estate Taxes

Conservation easements can be helpful in lowering the value of the land, therefore lowering the value of the property, part of the "estate" on which estate taxes are based. Federal estate taxes are the taxes heirs might have to pay based on the value of property owned by the person who died. Farmers who want to leave valuable land to their children need to do estate planning to lower or eliminate the need for their children to pay estate taxes. Otherwise, some farm families find children who inherit valuable land must sell off land to pay the estate tax.

At this writing, Congress has enacted a tax law that seeks to phase out the federal estate tax. In 2002, \$1 million of an estate's value is exempt from estate tax. The exemption amount increases to \$1.5 million in 2004-2005 until the entire estate tax is eliminated in 2010. However, the new tax law is set to expire after 2010. Unless Congress votes to continue it, the estate tax will be reinstated in 2011 with a \$1 million exemption at the year 2000 tax rates (considered high compared to the previous ten years). So, although some farm families may think the value of their estates aren't high enough to have to worry about estate taxes, they still need to consider how fast land values can rise, combined with the good chance the tax law may change drastically by the time they die.

Conservation easements may help in another way with estate taxes, assuming estate taxes aren't phased out completely. Heirs who inherit permanently conserved land may receive an additional exclusion from the estate tax of up to \$500,000 beyond the value of the conservation easement itself.<sup>5</sup>

## Ancillary, or extra costs of easement transactions

There are costs related to conservation easement transactions. In donated conservation easements, these are often borne or partially borne by the landowner. Circumstances vary depending on an individual land trust's protocol. Sometimes certain costs must be covered by landowners in the interest of preserving their tax deduction and the land trust's non-profit status.

When paying for conservation easements on working farms, land trusts may try to cover most of the ancillary costs through grants or fundraising. The exception would be for professional business, tax or estate planning advice, which should be paid by the farmer in order to assure objective advice individualized to that farm's situation. When landowners do find themselves footing the bill for any costs related to conservation easements, they may be able to claim the amounts as "miscellaneous itemized deductions" on their tax return.

Here are some costs one could anticipate in a conservation easement transaction and the parties responsible for covering those costs.

- **Appraisal** - This expense is sometimes borne by the land trust and reimbursed through grant funding, assuming the grant applications are successful. Some land trusts are unable to afford this with a large volume of potential projects and ask the landowner







to pay for or split the cost. Sometimes a landowner commissions and pays for the appraisal in the interest of getting a dollar value early in the process in order to have more specific discussions with professional advisors and the land trust. Alternatively, the parties can approach the town conservation commission or other potential donors in the region and request a tax-deductible donation to the land trust to cover the cost. In donated transactions, the landowner should bear the cost of the appraisal if he or she is making the donation for a federal income tax deduction. Appraisals for development rights can run from a low of \$1,800 to over \$5,000 depending on the complexity of the situation. Since appraisals need to be done early in the process, it isn't always possible to get grant funds to cover them. Such a significant investment signals a strong commitment from both parties to seriously explore the possibility of the purchase and sale of a conservation easement.

- **Land Trust Operation** - These expenses to a land trust can include staff time negotiating and drafting the conservation easement, applying for grants, and facilitating what can be a lengthy process. It can also include the land trust's stewardship endowment, the account a land trust sets aside in reserve for future enforcement. A land trust usually tries to get the grants or fundraising used to pay for the conservation easement to also cover its transaction costs. With donated easements, payment policies will vary by land trust.
- **Title Searches, Surveys, Environmental Site Assessments** - The land trust will want to make sure title (the record of the chain of ownership) is clear, the boundaries to the property are clear, and there is no hazardous waste on the property. A land trust may try to get grants or fundraising used for the transaction to cover these costs. With a donated conservation easement, these procedures may be handled by a land trust in-house. In either case, a landowner should check with the local land trust to see if these items are required, and if so, who is expected to pay for them.
- **Clearing Title** - If the land trust's search of land records at the county registry of deeds shows a problem with the title to the farm, the landowner will need to fix the problem. For example, a farmer might pay off a mortgage but forget to have the mortgage release form recorded. The landowner would need to find the release, or if it was lost, approach the former mortgage holder for a new release and signature and have it recorded. Another example is when a property is transferred by a deed but the deed was written in the wrong way. A landowner may need to get a corrective deed written, signed and recorded. If there are outstanding liens on the property, or boundary disputes, or an on-going lawsuit involving the land, a landowner will need to make arrangements to solve those problems before a land trust can pay for or accept a conservation easement.



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## Legal Background to Conservation Easements

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### *Where do conservation easements fit within the law?*

Conservation easements are a legal tool evolved from basic real estate legal principles. In the United States, a landowner doesn't just own a parcel of land, a landowner also owns a "bundle of rights" associated with that land. For example, one of those rights may be the right to use water on the land. So a landowner may grant a neighbor the right to put in a well and use some of the water. The original landowner still owns the land, but granted one of the water rights away from the bundle. In the same way, a landowner may deed away the rights to subdivide and develop land to a land trust by signing a conservation easement. But unlike a neighbor, a land trust can't use those rights to actually subdivide and develop. The landowner still owns the land, manages and pays property taxes, but has deeded away the right to turn it into a condominium complex or other non-agricultural development.

Conservation easements fall under two sets of laws, state and federal. In New Hampshire, legislation that enabled conservation easements can be found in NH RSA Section 477:45-47. Federal law concerning conservation easements is mostly found within the Internal Revenue Code at Section 170(h). This is one reason that all transactions involving conservation easements intertwine with federal tax and estate planning. (See pp. 31-35 in the Appendix for all relevant statutes.)

Within real property law and the "bundle of rights" concept, a conservation easement is technically an "equitable servitude" on the land. It is not a right-of-way as the term "easement" usually suggests. Another term commonly used with conservation easements is "development rights" which refers to the property interest (within the bundle of rights) landowners convey when they enter into conservation easements.

In the context of the type of conservation easements described in this guide, development rights can't be traded or put to use by the holder in the future. In other words, a land trust can't turn around and build on the conserved property or sell the development rights to someone else to build upon. Through a conservation easement, the development rights are permanently terminated.

While the New Hampshire statutes and federal income tax code allow conservation easements, no landowner is obligated to enter into one. Once a landowner does enter into a conservation easement, it's recorded in the county registry of deeds. Then the conservation easement terms "run with the land," meaning all present and future owners of that parcel must abide by those terms. The property is still owned and managed by the landowner, property taxes are the responsibility of the landowner, and the landowner



can keep, sell, mortgage, place in a trust or leave to heirs as in any other type of ownership.

### ***What are the legal requirements for conservation easements?***

New Hampshire RSA Section 477:45-47 describes the state's requirements for conservation easements. Internal Revenue Code Section 170(h) and its accompanying treasury regulations<sup>6</sup> set the federal requirements. Land trusts use the federal requirements as the minimum standard for conservation easements because: the federal requirements are more specific, New Hampshire's requirements are compatible, and following the federal requirements is the only way a landowner can take advantage of federal tax benefits. When a conservation easement satisfies federal requirements, it's called a "qualified" conservation easement. When this guide refers to conservation easements, it refers to qualified easements that satisfy both the Internal Revenue Code and New Hampshire laws.

The Internal Revenue Code requires a conservation easement must be conveyed to a "qualified conservation organization exclusively for conservation purposes." Those conservation purposes must be protected "in perpetuity." Tax advisors and land conservation professionals should read and be familiar with the actual text of the Internal Revenue Code and accompanying regulations and revenue rulings.<sup>7</sup> A summary of these requirements follows.

#### **What kind of organization can hold a conservation easement?**

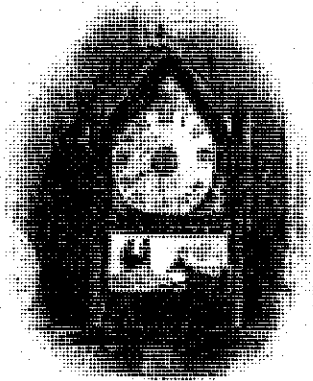
The Internal Revenue Code requires conservation easements be conveyed to a "qualified organization." A qualified organization can be a public charity, usually a 501(c)(3) non-profit, which has "a commitment to protect the conservation purposes" as well as "the resources to enforce the restrictions."<sup>8</sup> These organizations are commonly called "land trusts" or sometimes "land conservancies" or "preservation trusts." The term "trust" used in the "land trust" context is different than the form of "trust" used for estate planning purposes. A "qualified organization" according to the Internal Revenue Code may also be a town, a state, the United States, or any of their agencies. Some types of non-profit organizations other than 501(c)(3)'s may also qualify to hold conservation easements as described in the Internal Revenue Code, but not private foundations.

This guide refers to any conservation easement holder as a "land trust." Although a town or governmental agency may be a holder, it must abide by the same requirements as a land trust. A reader can mentally substitute another qualified holder in place of "land trust" although the latter term is used throughout this guide for the sake of simplicity.

#### **What are the required "conservation purposes"?**

The Internal Revenue Code requires conservation easements must be done exclusively for "conservation purposes."





Conservation purposes can be recreation, education, natural habitat protection or open space protection. "Open space protection" may be protection of farmland or forestland, but the tax code requires *either*

- scenic enjoyment for the general public, *or*
- furtherance of a clearly delineated governmental policy with direct significant public benefit, *or*
- the preservation of a historically important land area.

New Hampshire has governmental policies which are persuasive in showing farmland and open space protection offer direct significant public benefit.<sup>9</sup>

Further, the tax code requires a conservation easement must actually protect those conservation purposes. For example, a conservation easement would not qualify as protecting farmland if it allowed the topsoil to be stripped and sold. A conservation easement likewise wouldn't qualify if mineral or timber interests were separated from the property's ownership, so someone could surface mine or liquidate the timber.

#### **Are conservation easements really forever?**

The Internal Revenue Code requires conservation purposes be protected "in perpetuity." This means a conservation easement must last forever, or realistically, as long as our current legal system survives. There are some contractual agreements regarding land management that conserve natural resources for a term of years and then expire. Those types of agreements don't qualify under the Internal Revenue Code and aren't considered "conservation easements" as described in this guide. To qualify, a conservation easement must clearly state that it's perpetual, and the landowner and land trust must take steps to ensure its perpetuity.

#### ***Could a foreclosure on a prior existing mortgage extinguish a conservation easement?***

To meet the perpetuity requirement of the tax code, landowners must have any prior existing mortgage or lien holders subordinate those interests to fall into second place, behind the conservation easement. That way, in the event of a foreclosure, the conservation easement will remain with the property, rather than being extinguished. Before signing off on the "Mortgage Subordination" (a brief document that is recorded in the Registry of Deeds) mortgage holders will want to know that sufficient security remains in the value of the conserved land, and may want to see a development rights appraisal.

#### ***Can a conservation easement ever be released or extinguished?***

A land trust or any other conservation easement holder can't voluntarily release or lessen the restrictions. Generally, conservation easements are forever. There are, however, a few possibilities for a conservation easement to be involuntarily released or eliminated, although governmental entities, land trusts and landowners need to anticipate and try to prevent them.



*First*, a conservation easement can be eliminated or lessened by the power of eminent domain. For example, if the federal government needed to put a new interstate highway through a conserved farm, it could try to exercise that power, although these attempts sometimes fail for various reasons. If it did happen on conserved land, it would have to pay the landowner for the land, as well as pay the conservation easement holder for the compromised conservation easement terms.

*Second*, the federal government can reverse real estate transactions involving donations that happen within a relatively short time of a landowner becoming chiefly dependent on Medicaid for nursing home costs.

*Last*, there is an argument that sufficient "impossibilities" or "changed circumstances" can upend a conservation easement. These would be happenings out of the landowner's control, which completely and permanently change the conserved ecosystem so the conservation easement's purposes are thwarted. An example of this might be a flooding river that completely washes away a conserved parcel of bottomland.

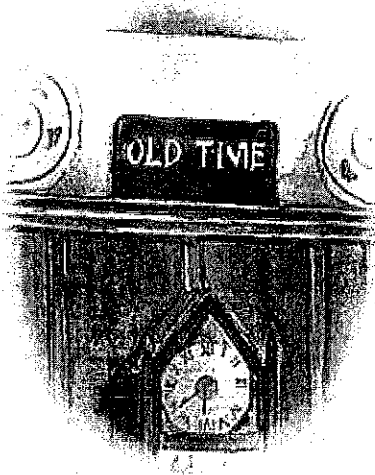
#### ***How is a conservation easement enforced?***

The perpetuity of a conservation easement is only as strong as its enforcement. An organization qualified by the tax code is required to "have the resources to enforce the restrictions." Most land trusts address this concern by following the standards and practices recommended by the Land Trust Alliance, a professional organization that advises land trusts nationwide. If a land trust falls down on the job, most conservation easements provide a back-up mechanism in which the easement can be transferred to another land trust. Any land trust or other organization qualified to hold easements by the tax code must be prepared for the difficult, and sometimes adversarial, job of enforcing the conservation easement's terms forever.

Every land trust needs an adequately funded reserve of money specifically earmarked to pay for monitoring and enforcement of all conservation easements it oversees. Monitoring means agents of the land trust periodically visit the conserved lands to discern whether or not the terms of the easement are being met. Enforcement means upholding the terms of the easement if a landowner is in violation. Some land trusts have separate monitoring and enforcement funds, others combine them into a single "stewardship endowment."

A conservation easement usually sets out a procedure for enforcement so the landowner and land trust are clear from the start about how to resolve a violation or dispute. If a land trust suspects a landowner has violated terms of an easement, it must usually contact the landowner by written notice and attempt to work out the situation in a non-adversarial way. Some conservation easements provide the opportunity for





binding arbitration. Mediation is also always an option to try to find a mutually agreeable resolution.

If negotiations are unsuccessful, the land trust has the right to bring a court action against the landowner to enforce the conservation easement terms. In extreme and immediate situations, a conservation easement holder may go to court and apply for a temporary injunction to halt an ongoing violation, for example if strip mining were occurring or asphalt was being poured on a conserved field.

***What if a conservation easement holding organization goes out of business?***

If a land trust or any holder of a conservation easement were in danger of losing its non-profit status or disappearing for some reason, it may transfer its interest in the conservation easement to another qualified organization. If that doesn't happen, courts are empowered by a doctrine known as *cy pres*, to assign the conservation easement to a similar organization that will uphold the original purposes. Land trusts and governmental agencies sometimes co-hold conservation easements to back each other up and share in financial and decision-making responsibilities. The NH Attorney General can also determine that its office has the power to enforce any conservation easement within the state because it's in the public interest.

***Who prepares conservation easement documents?***

Conservation easements can be lengthy; documents running 10 to 15 pages are common. They are set up like a deed, since they convey a partial interest in real property, and are recorded in the County Registry of Deeds. An attorney familiar with conservation easements should draft, or at least carefully review, any proposed conservation easement. Land trusts usually offer model or "boiler-plate" forms, but because each parcel of land, farm and farm family is different, every conservation easement will be customized. Most land trusts either have an attorney on staff or one on call who helps with the drafting. It isn't recommended for someone inexperienced in drafting easements to simply copy or adapt someone else's form of conservation easement. The intricacies of real property law and contract drafting (especially when it comes to legal descriptions of the property) are too important to risk making errors. Errors can be potentially fatal to the conservation easement's viability, the landowner's tax benefits, or could cause other unintended title problems for the landowner or landowner's family.<sup>10</sup>



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## *Land Management Implications of Conservation Easements on Farms*

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This guide's focus is on agricultural lands and conservation easements customized to accommodate farm activities. The definition of "agriculture" in New Hampshire<sup>11</sup> includes forestry activities, so managed woodland is addressed as well as farmland. Complicated issues arise with agricultural conservation easements, such as how to handle farm labor housing needs, or farm diversification requiring new structures such as farm stands or food processing facilities. Some of these structures and activities, including the traffic they might bring or waste they might produce, may seem contrary to the idea of "open space." Yet they may be indispensable to farm operations that need to evolve to stay strong.

### *How are agricultural needs incorporated?*

Farms need flexibility, so a permanent conservation easement on a farm needs to accommodate many types of potential agricultural uses. Farmers shouldn't take for granted that all conservation easement language will take farming into consideration. The various land trusts that draft conservation easements don't always understand farming practices or farm needs. Also, land trusts may also have their own goals in which the preservation of farming takes second place to, say, wildlife habitat protection.

Landowners and their advisors should take care early in the process to carefully read any conservation easements presented by a land trust to determine if the conservation easement terms are sufficiently farm-friendly. If not, landowners should ask how negotiable are the terms of the proposed conservation easement. Land trusts and grant funders for conservation easements may or may not be flexible about all or some terms.

### **Farm Management Provisions**

The prevailing thought is that land trusts should steer clear of involvement in farm economics or management decisions concerning day to day operations, as opposed to general restrictions on land use. Nevertheless, the line between land management and farm management sometimes blurs. Here are some examples of how conservation easements may address some aspects of farm management:

- Some conservation easements, particularly those funded with USDA Farm Protection Program funds (see Appendix, p. 37), may require all agricultural activities comply with a conservation plan prepared by the local Natural Resource Conservation Service (NRCS) staff according to the sites and soils of the property. The conservation easement won't quote the plan itself since it's subject to change, but the land trust will continually need copies of the

landowner's plans as they are amended through the years, and may check with the local NRCS staff periodically about compliance.

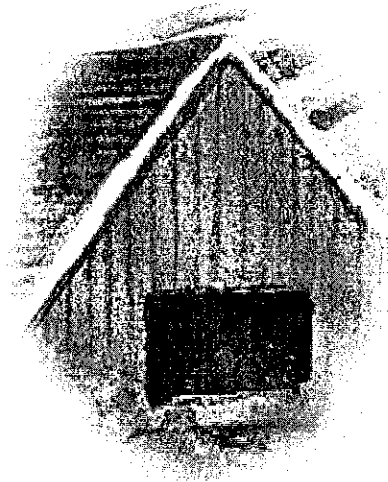
- In some situations where soil conservation is a primary purpose of a conservation easement, a land trust may have concerns about sod or in-ground nursery operations since the extraction of sod or root balls removes topsoil from the property.
- Some conservation easements with multiple purposes such as protecting water quality or wildlife will want "riparian buffer" provisions around waterways that restrict some parts of farm operations (such as grazing or the spraying of herbicides) within a certain distance of a brook or river.
- Some organizations and landowners are investigating ways to restrict some farm operations to organic methods. At this writing, no land trust in New Hampshire has used organic provisions because these terms would be difficult to define and problematic for a land trust to monitor and enforce.

### Agricultural Structures

When thinking of agricultural structures, one might typically think of barns and milking parlors. However, the statutory definition of "agriculture" in New Hampshire is broad.<sup>12</sup> Among more typical dairy, orchard or vegetable operations, it also includes breeding and raising horses, bees, fur-bearing animals, fresh water fish, yaks, operations incidental to farming operations such as transportation of farm supplies, transportation of farm workers, marketing farm products and roadside stands. Some conservation easements allow for any structure on conserved land "provided the structure is used exclusively for agricultural purposes." In this case, conservation easements would allow not only barns and greenhouses, but also sugar houses, horse riding arenas, farm stands, mushroom bunkers, concrete fish farm tanks, delivery truck garages, retail shops and other structures. The parties to a conservation easement will want to carefully consider whether or not these possibilities are appropriate or desirable for their particular situation and conservation purposes.

In easement drafting, caution should be exercised in attempting to classify farm structures allowed or prohibited (such as allowing structures for vegetable growing but not for livestock) because the nature and type of farming is almost certain to change in ways we can't predict. For example, it could be a mistake to broadly rule out all "food processing facilities" when it may turn out that the least adverse impacts to the land and best economic future might someday be in specialized farmstead cheese operations.

To allow flexibility while mitigating some impacts of the unintended structures above, a conservation easement could be written to limit any structures to a particular area. Or the conservation easement could provide the foundation footprints of all structures when combined, cover no more than a certain percentage of the farm's area or number of acres. The heights of the structures also could be limited.







### **Other Businesses and Structures Unrelated to Agriculture**

There are other activities that a farm family member or business may want to conduct on conserved land, although they may not directly relate to agriculture. Further, some activities may require structures. In this case a landowner should review a draft easement to see whether any commercial enterprises or structures besides agricultural types are allowed. The structures listed below would not typically be allowed in conservation easements common in New Hampshire today, unless negotiated beforehand. If the land trust and landowners reach an agreement allowing for these or other uses, the provisions should be drafted carefully. If conservation purposes of a conservation easement are compromised too much, the conservation easement may not qualify under the state statute or federal tax code. Some structures or activities landowners might think about for the future follows:

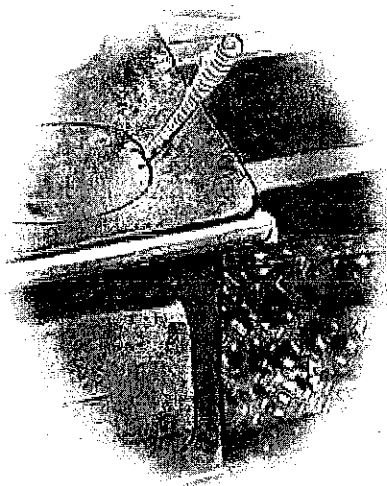
- Farmers may become interested in alternative energy production such as dams or windmills.
- Farms diversifying into the hospitality business may want the ability to have gazebos, fountains or a stage on some part of the property.
- Farm conservation easements may allow for commercial recreation in limited ways, providing, for example, the ability to build a warming hut for cross-country skiers, tent platforms, or a dock.
- Farms may already have, or want to have, commercial communications devices such as a satellite dish, a ham radio tower or antennas, either free-standing or attached to an existing silo.

Conservation easements written for farms by an agency with the State of Massachusetts address these non-agricultural structures and activity decisions with a type of permit process based on basic criteria and their land trust's staff discretion. The ability to have this type of permit process and the criteria for decision-making would need to be written into the conservation easement.

### **Residences and Farm Labor Housing**

A farmer needs a residence and sometimes additional housing for extended family or farm labor. Including residences on conservation land is problematic to land trusts and landowners for several reasons:

- Residences constitute development which inherently conflicts with undeveloped open space conservation goals,
- Residences create a higher potential for conservation easement stewardship problems with potential needs for expansion, excavation of replacement septic system or utilities, additions of in-law apartments, garages, swimming pools, car storage, etc.,
- Conservation easements limit subdivision, so all future owners must deal with that infrastructure on conservation land in perpetuity, and
- Farm lenders may consider the infrastructure a liability when a future farm operation no longer needs it.



Two basic ways of handing an existing residence or potential residence for farm family members are:

- to include and lock it in with the conservation land, or
- to delineate it so it can be excluded and eventually cut out from the conservation area.

To exclude a residence including sufficient space for a yard, typical residential outbuildings, septic field and possibly replacement septic field, the area needs to be delineated and described so it can be distinguished from the conservation land both on the ground and in the conservation easement. This is not a legal subdivision, merely drawing a line for conservation easement purposes. Parties will want to check local zoning laws to form a delineation that can be used for future subdivision purposes, as well as provide a contingency in case zoning law changes in the future, so the residential area can be legally subdivided from the conservation land in the future if needed.

The ability to have future farm labor housing is handled much the same way as farm residences, but it's usually not subdivided away from the conserved land and is often limited to a certain size or distinct area. Having farm labor housing non-subdividable keeps it available for farm labor or as farm rental income to continually support a farm operation rather than becoming one-time house lots for sale.

Reserving non-subdividable farm labor housing can present practical problems for a farm because (a) some town ordinances require every residence have its own subdivided lot, and (b) some types of housing lenders like USDA Rural Development want to see a house on its own subdivided lot in case of foreclosure.

Sometimes landowners want to reserve a site for a future residence "just in case," even though they aren't sure if they will ever really need it. One option could be to delineate it so it is excluded and cut from the conservation area, similar to the process described with an existing residence. With this option, the parties would want to make it comply with local zoning law, as well as make sure the area is truly buildable (e.g., septic system, water and driveway access).

A second option for a future residence is to "float it," to reserve in the conservation easement a conditional right for the landowner to subdivide and build a residence on a certain number of acres. Then, at some future time when the landowner needs to build and fulfills the conditions set out in the conservation easement (e.g., presents a survey of the acreage as previously agreed), then the holding organization signs a release of that particular area and records it in the Registry of Deeds.

At that point, the residential area becomes exempt from the terms of the conservation easement. This second option is preferable when it's too early to know if a specific site will work. Further, building areas carefully delineated in the first option become





self-fulfilling prophecies, but, if a potential residential area stays conserved until such time it's needed and released (as in the second option), it stands a chance of remaining conserved.

Some landowners already own a parcel of land separately deeded from the land being conserved, and this parcel may not be crucial to the farm operation. It may have the farm residence on it, or be a potential site for a future residence. To provide the most flexibility to the farmer, it may be most efficient to just leave this separate parcel out of the conservation transaction. The parties will just want to double check that both the landowner's deeds as well as the town, count it a distinct parcel, separate from the conserved land parcel.

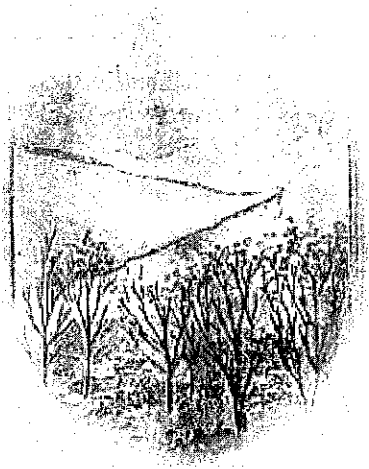
### **Special Considerations for Managed Forests**

Many farms own forested lands as well as farm fields and pastures. Typically, conservation easements in New Hampshire provide flexibility in how forested lands are managed. At a minimum, the land trust will usually want to know the management is well planned and complies with state regulations. It's common for a conservation easement to require the landowner, prior to any timber harvesting, to provide the land trust with a forest management plan. The plan should meet certain minimum standards, such as preparation or review by a licensed forester, clear goals, mapped and described tree stands and harvesting plan. The conservation easement may also define clear-cutting or liquidation cuts and restrict them, or allow some exceptions such as clearing agricultural fields, providing limited open areas for wildlife, or conducting even-aged management. Usually the trigger for having a written plan is the landowner's desire to conduct commercial timber harvesting, but not maple sugaring or firewood collection for on-site use.

### ***What other provisions might be included?***

Conservation easements may have a variety of restrictions, as well as exceptions to those restrictions. It is important to read any proposed conservation easement as a whole. It will require bouncing back and forth between conservation easement sections before the entire picture materializes. Here are some other examples of provisions in a conservation easement:

- **No commercial uses except agriculture:** Some conservation easements may prohibit all commercial uses except agriculture, or agriculturally-related businesses. The parties may want to ask if there are some non-agricultural activities that may have little to no adverse impacts on the conservation values being protected, that could help a farm diversify while still retaining farming as the primary activity. Some examples could include non-motorized recreational activities like cross-country skiing enterprises, hosting weddings, concerts and similar events, allowing movie filming, conducting educational workshops or summer camps. If included



in a conservation easement, the drafting should be careful to ensure commercial uses don't compromise the conservation purposes and cause the conservation easement not to qualify under the Internal Revenue Code's definition (see p. 12) or the Internal Revenue Code's estate tax provision (see p. 9).

- **Obligation to allow public access:** Public access provisions are usually optional. They are a valuable way for a landowner to make a significant gift to the community, as well as to ensure future owners continue a long-standing New Hampshire tradition. Some grant funding organizations, most notably the NH Land and Community Investment Heritage Program (LCHIP) and the NH Department of Fish and Game, may require the landowner provide access to the conserved land to the public for non-motorized recreational activities. Most public access provisions aren't absolute rights and the farmer can restrict public access in areas where crops are growing or livestock fenced. There can also be a safety zone when hunting is involved. Landowners are usually well protected from legal liability of being sued by an injured member of the public according to New Hampshire law. A summary of relevant New Hampshire statutes regarding landowner liability may be found in the Appendix.<sup>13</sup>
- **Riparian buffers:** When a property has a waterway such as a brook, wetland or river, the easement may provide for a "riparian buffer." This is usually an area between 50 to 150 feet wide (or more) that runs alongside the waterway. Land use activities within the riparian buffer area are limited so a forested buffer is maintained, vegetation isn't cut, livestock don't graze, and herbicides or pesticides aren't sprayed within that area. The values of riparian buffers are compelling,<sup>14</sup> but some farm operations need to make use of their water resources. Sometimes conservation easement holders need to be aware of a farm's needs for irrigation, watering animals or erosion control mechanisms. Sometimes limited clearings for livestock can be allowed for access to water, although NRCS staff may be able to assist farmers with suggestions for alternative watering devices such as ponds and non-electric pumps.
- **Back-up land trust:** Sometimes a conservation easement lists a back-up holder to the primary land trust that holds and enforces the easement. A grant funder may require a back-up, or the land trust may feel it is a good idea. This back-up holder provision can be called an "Executory Interest" or "Contingent Right." It provides that in the event the primary land trust stewarding the conservation easement goes out of business, tries to amend or release the conservation easement without authorization, or doesn't enforce the conservation easement, the back-up holder can step in and enforce the provisions.
- **Archaeological resources:** When a property offers archaeological research opportunities, a provision can be put into the easement that allows for excavation under limited circumstances (such as under the supervision of a qualified archaeologist for scientific or educational purposes).





- **Historic preservation:** Historic preservation easements are similar to conservation easements, and provide similar benefits, but are designed to protect the architectural, historical, and visual or scenic values of buildings, sites, structures and their settings. Like conservation easements, they allow a historic property to remain in active and productive use. Most historic properties aren't converted to museums, but instead keep fulfilling the human needs of daily life. Sometimes a landowner will enter into a conservation easement to protect the landscape, while also granting a historic preservation easement to protect the integrity of historic buildings or settings. These different easements can be held by the same land trust, or by separate organizations.

### *What special provisions are there for future farm affordability?*

The land conservation community used to think the lower value caused by a conservation easement alone would keep a farm affordable for future buyers. While this may be true in some cases, some conserved land values are proving otherwise. Some farm areas of New England are becoming highly desirable as large rural "country estates" for non-farmers. Some buyers are paying a premium for scenic farmland for this purpose. While these buyers may keep the land open, undeveloped and scenic, they price it out of the market for most full-time farmers.

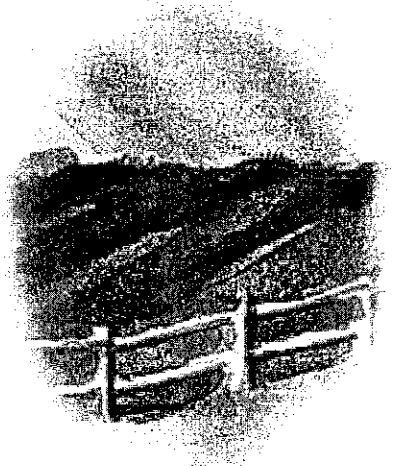
In response, land trusts and grant funders have been exploring ways to keep conserved land affordable for full-time farmers. One option is a "Right of First Refusal" and another is an "Option to Buy at Agricultural Value" currently used in Massachusetts. Both these documents are uncommon in New Hampshire, but may become more desirable as "country estates" drive up the cost of conserved farmland.

#### **Rights of First Refusal**

This legal device gives the conservation easement holder the future right to purchase the already-conserved land at the same price offered by any potential buyer. Like the conservation easement, this would be a perpetual right so the land trust would always have "first dibs" on buying the conserved property. Exceptions are made for sales to family members, family entities, or estate planning bequests. Exercising its Right of First Refusal is a potentially expensive way for a land trust to operate so its use is rare, but it does offer an element of control otherwise unavailable.

#### **Options to Purchase at Agricultural Value**

The agricultural easement program in Massachusetts uses "Options to Purchase at Agricultural Value" in combination with their conservation easements. Similar to a Right of First Refusal, this perpetual option gives the land trust the right to intercept any potential sale and to purchase the land itself, but at a price that is the land's *agricultural value*. Massachusetts reports that so far, this



tool has been highly effective in keeping conserved farmland affordable for full-time farmers. This is because potential country estate-type buyers don't want to invest in conserved land as a country estate knowing they won't recoup their investment or build equity since the land trust has the absolute right to eventually repurchase it at a very low price.

Those who have serious concerns about keeping farmland affordable for the next generation of full-time farmers may find this option useful. It will also cause the difference in value between conserved and unconserved land to be greater, resulting in a higher payment to the landowner who initially sells the development rights.



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## ***Conservation Easement Opportunities Currently Available to NH Farmers***

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### ***Working with a Land Trust***

A land trust is a private non-profit organization that protects natural resources, often by holding conservation easements. Land trust staff can meet with farmers, discuss the family's desires and concerns, and suggest land conservation options that could help meet the farm's goals. Land trusts are knowledgeable about a wide range of strategies for conserving land and natural resources that go beyond conservation easements. They also keep current on which grant programs and foundations are available to fund conservation transactions within their region, and how those grant processes work. They can facilitate the process of purchasing a conservation easement, and help guide the landowner to other helpful resources.

Land trusts can also give pointers or assist community groups in fundraising efforts. However, no matter how professional and knowledgeable land trust staff are, they still solely represent their land trust employer. Landowners should always retain their own tax and legal counsel for professional tax, business and estate planning advice and advocacy personal to their situation.

At this writing there are more than 40 land trust conservation organizations operating in New Hampshire. Some are statewide, some are national, but the majority are regional, meaning they have a specialized geographic coverage like a certain watershed or grouping of towns. A few have specialized resource protection goals, like birds or wildflowers. They vary in staffing, experience and endowments, but all have access to each other as members of a NH coalition, as well as access to the Land Trust Alliance, a national professional organization that provides educational resources to land trusts. Some land trust areas of coverage overlap, but they rarely compete. Landowners searching for the best "deal" will find all land trusts in New Hampshire have equal access to the same funding sources and carry the same cost requirements. They all communicate and respect each other's programs. The Appendix includes a map that shows "New Hampshire Land Trusts Geographic Coverage."

### ***Grant Programs***

There are grant programs that can help pay for conservation easements. A land trust can describe the various options. Grant programs require a landowner work with a land trust or other governmental entity so there will be a conservation easement holder. Also, a land trust can usually facilitate the funding process. The process



can take a long time. Between the time the landowner seeks professional advice, makes a grant application deadline, and works towards a closing, it's common for the process to take a year or longer.

**Beginning the grant application process:** The grant process requires an application, which is sometimes in two parts, an initial eligibility application and then a full grant application. Grant applications can be time-consuming. A land trust that agrees to write and submit a grant application is making a considerable investment into the potential conservation project. At a minimum, grant applications require a variety of information, plus maps and photographs. Land trusts sometimes ask a landowner to sign a Purchase and Sale Contract with the land trust for the conservation easement payment. This ensures the landowner won't put the land trust to a lot of work over several months, only to sell the property or abruptly halt the process for no reason. It also ensures the landowner the land trust will continue working to find grant funds for the farm.

**Drafting a conservation easement and having the land appraised:** At some point the grant process will require an appraisal to determine the value of the conservation easement. For an appraisal to be completed, the landowner and land trust need to decide on the terms of the conservation easement, such as whether to include or exclude housing, have an obligation to provide public access, or an option for the land trust to purchase the property at agricultural value. These all affect the value paid to the landowner. Further, the land trust and farm family will be more comfortable if they are clear from the beginning about the terms of the easement.

**Completing the grant application process if approved:** When a grant is approved, the second phase of work begins. The land trust will commission a title search of the farm's deeds and land records. Eventually the land trust and possibly grant funder will want a policy of title insurance covering the conservation easement. The land trust may need a survey of the property's boundaries if one isn't already available. The land trust may also have an environmental site assessment done to make sure the land has no hazardous waste problems. The land trust will compile its own records about the property called a "baseline documentation report" that describes, maps and photographs the land, its boundaries and buildings.

The landowner gets a chance to review and sign the baseline documentation to acknowledge whether it is an accurate description of the farm. The federal tax code also requires the landowner reviews and signs the baseline documentation. There may be other work involved in collecting NRCS conservation plans, or forest management plans, or letters of support from towns.

**Closing on the conservation easement:** When the landowner and land trust have completed all the grant requirements, the land trust collects the funding and writes a check to the landowner. In return, the landowner signs the conservation easement and the conservation acquisition process is complete. Then the "stewardship" phase

begins in which the land trust and farm family coordinate to make sure the conservation easement terms are remembered. The land trust will make periodic contacts with the landowner and monitoring visits to the conserved land. The landowner should feel free to contact the land trust with any questions, or to give notice or seek approvals for activities if required by the terms of the conservation easement.

### *Other Funding Sources*

**G**rant programs currently available in New Hampshire are listed and described in the appendix to this guide. A single grant program rarely funds the job alone. They usually require leverage — obtaining funding from one or more additional sources. Leverage allows grant funds to stretch, and also demonstrates the conservation project is important to the greater community. Sometimes land trusts forgo grants altogether. They may be unavailable or underfunded, or the requirements of available grant programs just don't fit with a certain project's needs. To accomplish any land conservation in New Hampshire, land trusts have learned to be creative and to seek funds from different sources.

#### **Foundation Awards**

Private foundations are set up to give money away, assuming a cause fits its charitable goals. In New Hampshire, the NH Charitable Foundation has a variety of advised funds, some of which may apply to land conservation circumstances. There are also regional and national foundations that may make awards, again according to their particular goals. There are reference books and CD-ROMs that describe a variety of private foundations, their specific criteria, region they serve, likes and dislikes, as well as typical award amounts. Private foundation grants usually would not cover the entire expense of a purchase of a conservation easement, but can help.

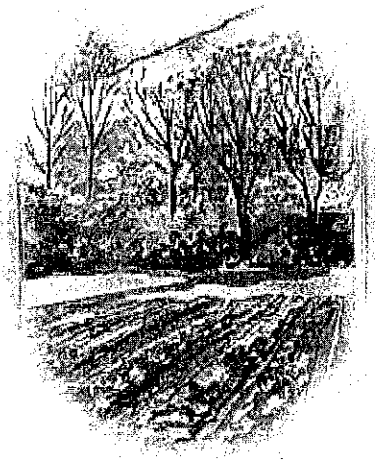
#### **Town Funding**

Many New Hampshire towns are seeing the value of open space. Their citizens are voting to fund accounts earmarked for land conservation. Funding can come from Current Use program penalties, special charges imposed on developers, or a percentage of property taxes. Bonds can fund special projects. There might be occasions when town-owned land could be traded for other land or development rights. Municipal funding can be an important resource by showing a combination of public and private support for a project. This gives a higher level of credibility to the project in the eyes of the public and other grant funders.

#### **Private Fundraising**

Sometimes fundraising is the only way a project will happen, although usually it's paired up with one or more grants. Land trusts can raise funds, or contract with a professional, but often choose to train and empower a local community group of citizens to facilitate





the effort. Local citizens can better identify likely donors, and are more sensitive and effective as volunteers in making personal appeals about local needs and vision. Fundraising can be as simple as getting one donor to contribute a significant sum, or it can involve a "pyramid" structure of, for example, 80% of the needed funds coming from 20% of donors, and 20% of the funds coming from small donations, suppers, and coin drops. The contributions that residents and businesses freely make to land trusts or governmental agencies towards land conservation are tax-deductible charitable contributions.

### *Other Land Conservation Techniques*

Conservation easements alone don't always fulfill every landowner's financial or conservation goals. Landowners can describe their goals to a land trust professional, and the land trust may be able to offer alternatives or variations to conservation easements. Some may not require lengthy or complex grant processes. For example, if a farmer wants to buy a parcel of land, but it's too expensive, the land trust may find what they refer to as a "conservation buyer" who has sufficient financial resources to buy the land, donate a conservation easement and utilize the federal income tax deduction. Then that conservation buyer can turn around and sell the conserved land to the farm business at the affordable conservation value. Land trusts may also be able to refer landowners to other helpful resources such as Land Link, an organization that matches retiring farmers with young farmers looking to buy farmland.

Hundreds of landowners in New Hampshire have protected thousands of acres. Many of these acres will remain in private ownership, continuing as working farms and forests. How farmland will look in New Hampshire one hundred years from now is being decided day-to-day, by individual farm families studying their options, and making informed and ground-breaking decisions.





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## Footnotes

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<sup>1</sup> Lenzner, Robert, "Asphalt is always the last crop". *Forbes*, June 15, 1998, pp. 186-188.

<sup>2</sup> Auger, Philip A., "Does Open Space Pay?" Durham, NH: UNH Cooperative Extension, 1996. Resource Systems Group, Colin High, ed. *Economic Impact of Open Space in New Hampshire*. White River Jct., VT: prepared for the Society for the Protection of New Hampshire Forests, 1999. For information on how to do a study, see American Farmland Trust, USDA Natural Resources Conservation Service Fact Sheet: *Cost of Community Services Studies*, The Farmland Information Center, Northampton, MA or [www.farmlandinfo.org](http://www.farmlandinfo.org).

<sup>3</sup> "When Forever is a Long, Long Time: 8 Questions to Ask Before You Sell Your Development Rights", *Financial Partner*, Farm Credit Financial Partners, Inc., Springfield, MA, Summer 2001, p.3.

<sup>4</sup> NH RSA § 79-B.

<sup>5</sup> Internal Revenue Code § 2031(c). Note: this section of the tax code provides that to qualify for these additional estate tax benefits, a conservation easement may have to meet slightly more stringent requirements than stated in IRC § 170(h).

<sup>6</sup> Internal Revenue Code § 170 (h) and Treasury Regulation § 1.170A-14.

<sup>7</sup> These can be found in: Small, Stephen J., *The Federal Tax Law of Conservation Easements*, Land Trust Exchange (1989).

<sup>8</sup> *Id.*

<sup>9</sup> See NH RSA § 79-A(1) (statement of public interest to encourage the preservation open space), § 477: 45-47 (defines conservation easements), 227-M (formation of NH Land and Community Heritage Investment Program).

<sup>10</sup> See Dana, Andrew C., "The Silent Partner in Conservation Easements: Drafting for the Courts". *The Back Forty* Vol. 8, No. 1, Jan/Feb 1999.

<sup>11</sup> NH RSA 21:34-a(a)(11) and (b)(4) (trees and lumbering fall under definition of farming).

<sup>12</sup> NH RSA 21:34-a (definition of farming).

<sup>13</sup> NH RSA 508:14 and 212:34.

<sup>14</sup> Susan C. Peterson & Kenneth D. Kimball, Appalachian Mountain Club, *A Citizen's Guide to Conserving Riparian Forests*, prepared for River Network, Portland, Oregon ([rivernet@igc.apc.org](mailto:rivernet@igc.apc.org)), May, 1995; Vicki Chase, Laura Deming, Francesca Ltawiec, *Buffers for Wetlands and Surface Waters: A Guidebook for New Hampshire Municipalities*, Audubon Society of NH and NH Office of State Planning, November 1995, revised May, 1997; *Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources*, U.S.D.A. Forest Resources Management, Northeastern Area, Radnor, Pennsylvania, U.S. Government Printing Office: 1992-606-177; *Buffer Strips for Riparian Zone Management*, US Army Corps of Engineers, Waltham, Massachusetts, January, 1991; *Living with the River* series, Connecticut River Joint Commissions, Charleston, NH, November 1998.

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## Resources

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### Organizations

#### American Farmland Trust

Farmland Information Center

Herrick Mill

One Short Street, Northampton, MA 01060

(413) 586-4593, website: [www.farmlandinfo.org](http://www.farmlandinfo.org).

*A clearinghouse for information about farmland protection and stewardship. The FIC has an electronic library and a technical assistance service.*

#### Center for Land Conservation Assistance

Director: Dorothy Tripp Taylor

54 Portsmouth Street, Concord, NH 03301

(603) 717-7045, e-mail: [dtaylor@spnhf.org](mailto:dtaylor@spnhf.org).

*New program (at this writing) designed to offer training, support and technical assistance to NH land conservation organizations.*

#### Center for Sustainable Agriculture

University of Vermont

and State Agricultural College

590 Main St., Burlington, VT 05405-0059

(802) 656-5459, website: [www.uvm.edu/~susagctr](http://www.uvm.edu/~susagctr).

*Education, outreach to farmers and other citizens about farms; Land Link referral program.*

#### Land Trust Alliance

1331 H St., NW, Suite 400, Washington DC 20005

(202) 638-4725, website: [www.lta.org](http://www.lta.org).

*Can provide list and contact information for all land trusts working in New Hampshire; offers publications and education on conservation options.*

#### NH Division of Historical Resources

NH Department. of Cultural Resources

19 Pillsbury St., PO Box 2043, Concord, NH

03302-2043

(603) 271-3483 or 3558,

e-mail: [preservation@nhdhr.state.nh.us](mailto:preservation@nhdhr.state.nh.us)

website: [www.state.NH.US/nhdhr](http://www.state.NH.US/nhdhr)

*Can offer guidance and referrals regarding historic resources protection.*

#### UNH Cooperative Extension

Program Leader, Agricultural Resources

Taylor Hall, University of New Hampshire

Durham, NH 03824

(603) 862-2033

website: [ceinfo.unh.edu](http://ceinfo.unh.edu)

*Provides NH citizens with research-based education and information, enhancing their ability to make informed decisions that strengthen youth, families, and communities, sustain natural resources and improve the economy.*

### Publications

Barrett, Thomas S., and Stefan Nagel, *Model Conservation Easement and Historic Preservation Easement*. The Land Trust Alliance, 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org). (1997).

Bick, Dr. Steven and Haney, Dr. Harry L., *The Landowner's Guide to Conservation Easements*, An explanation of conservation easements, income, estate tax aspects, designing easements, and a process for informed decision-making. American Farm Bureau Federation, Kendall/Hunt Publishing Company, (800) 228-0810 or (847) 685-8742.

Cosgrove, Jeremiah P. and Freedgood, Julia, *Your Land is Your Legacy: A Guide to Planning for the Future of Your Farm*, American Farmland Trust, Washington, DC (1999). An easy to read book on estate planning and farm transfer issues and how they may relate to conservation options. AFT, 1200 18th St., NW, Suite 800, Washington, DC, 20036, (800) 370-4879 or (202) 331-7300 or website: [www.farmland.org](http://www.farmland.org).

The Land Trust Alliance, *Appraising Easements: Guidelines for Valuation of Land Conservation and Historic Preservation Easements*, Third Edition. Provides public officials, assessors, planners, attorneys and those interested in open space conservation an updated volume on how property protected by a land conservation



or historic preservation easement should be valued for tax and other purposes. 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org).

Land Trust Alliance, *The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs*. 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org).

Land Trust Alliance. *Working Forest Conservation Easements*. Designed to help individuals and organizations craft conservation easements to protect the many values of working forestland. Presents sample easement language and contains recommended tools for guiding forest management. 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org).

New England Small Farm Institute, *Farmland Transfer and Protection in New England: A guide for entering and exiting farmers*. A description of strategies to both transfer farms as well as options for protecting the farmland, including worksheets and sample documents. PO Box 937, Belchertown, MA 01007, (413) 323-4531 or e-mail: [nesfi@igc.org](mailto:nesfi@igc.org).

Small, Stephen J., *The Federal Tax Law of Conservation Easements*, A detailed explanation of the Internal Revenue Code sections relating to conservation easements designed for tax and land conservation professionals; includes relevant treasury regulations IRS Letter Rulings and Revenue Rulings. Land Trust Alliance, 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org).

Small, Stephen J., *Preserving Family Lands: Essential Tax Strategies for the Landowner (Books 1 and 2)*, Deals mostly with income and estate tax consequences of conservation easement donations and related conservation and land transfer procedures. Landowner Planning Center, Boston, MA (1997) and (1998). (617) 357-1644. Also available from the Land Trust Alliance 1331 H St., NW, Suite 400, Washington DC 20005-4711, (202) 638-4725 or website: [www.lta.org](http://www.lta.org).

Smith, Leslie J., *Historic Preservation Easements: A Historic Preservation Tool with Federal Tax Benefits*, U.S. Department. of Interior, National Park Service, Washington, DC (1997).

## Articles

Anderson, Judy and Cosgrove, Jerry, "Agricultural Easements: Allowing a Working Landscape to Work", *Land Trust Alliance Exchange*, Fall, 1998, p. 9.

Cosgrove, Jeremiah P., "Farms: Preserving the Land, Preserving the Business", *Land Trust Alliance Exchange*, Summer, 1996, p. 5.

Dana, Andrew C., "The Silent Partner in Conservation Easements: Drafting for the Courts", *The Back Forty* Vol. 8, No. 1, Jan/Feb 1999.

Lenzner, Robert, "Asphalt is Always the Last Crop", *Forbes*, June 15, 1998, pp. 186-188.

"When Forever is a Long, Long Time: 8 Questions to Ask Before You Sell Your Development Rights", *Financial Partner*, Farm Credit Financial Partners, Inc., Springfield, MA, Summer 2001, p.3. (reproduced here, pp. 40-43).

**See Footnotes (p. 28) for resources regarding Open Space Economic Impacts and Riparian Buffers.**

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# NH Statutes

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Full texts of the relevant NH state statutes are included below, but may also be accessed through the internet from the state website, [www.state.nh.us/links](http://www.state.nh.us/links) and further from <http://sudoc.nhsl.lib.nh.us/rsa/>.

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## Conservation Easements

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### CHAPTER 79-B CONSERVATION RESTRICTION

#### Section 79-B:3 Assessment of Open Space Land Subject to Conservation Restriction

I. Except as provided in this chapter, the selectmen or assessing officials shall assess restricted land for general property tax purposes at values based upon permanent restrictions, and in no case greater than those determined to be the fair market value for open space land determined by the board. Should RSA 79-A no longer be in effect, the basis for restricted land assessment shall be upon the permanent restrictions on the land.

II. This section shall not apply to developed land.

Source. 1990, 13:1. 1991, 62:5, eff. July 5, 1991.

### CHAPTER 477 CONVEYANCES OF REALTY AND INTERESTS THEREIN

#### Conservation and Preservation Restrictions

#### Section 477:45 Definitions

I. 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, 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 retaining or maintaining such land or water area, including improvements thereon, predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space or forest use, or in any other use or condition consistent with the protection of environmental quality.

II. A preservation 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 structure or site historically significant for its architecture, archaeology or associations, 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 structure or site or in any order of taking, which right, limitation or obligation is appropriate to the preservation or restoration of such structure or site.

III. "Agricultural preservation restriction" means the restraint placed on the development rights of agricultural land 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 land which is appropriate to retaining land or water areas predominantly in their agricultural use, to prohibit or limit construction or placement of buildings except those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; excavation, dredging or removal of loam, sod, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's future agricultural potential; or other acts or uses detrimental to such retention of the land for agricultural use.

Source. 1973, 391:1. 1979, 301:4, eff. Aug. 21, 1979.

#### Section 477:46 Restrictions Enforceable

No conservation restriction held by any governmental body or by a charitable, educational or other corporation, association, trust or other entity whose purposes include conservation of land or water areas or of a particular such area, no preservation restriction held by any governmental body or by a charitable, educational or other corporation, association, trust or other entity whose purposes include preservation of structures or sites of historical significance or of a particular such structure or site and no agricultural

preservation restriction held by any governmental body or charitable corporation, trust or other entity whose purposes include preservation of land or water areas predominantly in their agricultural state shall be unenforceable against any owner of the restricted land or structure on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any entity with like purposes. This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable.

Any doctrine of law which might otherwise cause the termination of such a restriction shall not be affected by the provisions of this subdivision.

Source. 1973, 391:1. 1979, 301:5, eff. Aug. 21, 1979.

#### **Section 477:47 Interests in Real Estate**

Conservation, preservation and agricultural preservation restrictions are interests in real estate and a document creating such a restriction shall be deemed a conveyance of real estate for purposes of RSA 477:3 and 3-A relating to execution and recording. Such a restriction may be enforced by an action at law or by injunction or other proceeding in equity. No grantee or contingent grantee interest in such a restriction shall be created by any document unless it bears the notarized signature of the grantee or contingent grantee.

Source. 1973, 391:1. 1979, 301:6. 1992, 138:4, eff. Jan. 1, 1993.

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## ***The New Definition of Farming***

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Chapter 21 is the place to look in New Hampshire law for definitions of terms used elsewhere in the statutes. The following Section 21:34-a is the new definition of farming created by action of the legislature in 1999. The intent of the legislature was to modernize the definition of farming and agriculture to more accurately reflect the scope of agriculture as practiced today. This new definition specifically describes many more activities which are now considered farming. It also expands farming to include practices related to farming, and specifies when a farm roadside stand becomes a commercial enterprise rather than part of a farm.

### **CHAPTER 21 STATUTORY CONSTRUCTION**

#### **Section 21:34-a Farm, Agriculture, Farming**

I. The word "farm" means any land, buildings, or structures on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants, or employees located on such land.

Structures shall include all farm outbuildings used in the care of livestock, and in the production and storage of fruit, vegetables, or nursery stock; in the production of maple syrup; greenhouses for the production of annual or perennial plants; and any other structures used in operations named in paragraph II of this section.

II. The words "agriculture" and "farming" mean all operations of a farm, including:

- (a)(1) The cultivation, conservation, and tillage of the soil.
- (2) The use of and spreading of commercial fertilizer, lime, wood ash, sawdust, compost, animal manure, septage, and, where permitted by municipal and state rules and regulations, other lawful soil amendments.
- (3) The use of and application of agricultural chemicals.
- (4) The raising and sale of livestock, which shall include, but not be limited to, dairy cows and the production of milk, beef animals, swine, sheep, goats, as well as domesticated strains of buffalo or bison, llamas, alpacas, emus, ostriches, yaks, elk (*Cervus elephus canadensis*), fallow deer (*Dama dama*), red deer (*Cervus elephus*), and reindeer (*Rangifer tarandus*).
- (5) The breeding, boarding, raising, training, riding instruction, and selling of equines.

- (6) The commercial raising, harvesting, and sale of fresh water fish or other aquaculture products.
  - (7) The raising, breeding, or sale of poultry or game birds.
  - (8) The raising of bees.
  - (9) The raising, breeding, or sale of domesticated strains of furbearing animals.
  - (10) The production of greenhouse crops.
  - (11) The production, cultivation, growing, harvesting, and sale of any agricultural, floricultural, forestry, or horticultural crops including, but not limited to, berries, herbs, honey, maple syrup, fruit, vegetables, tree fruit, flowers, seeds, grasses, nursery stock, sod, trees and tree products, Christmas trees grown as part of a commercial Christmas tree operation, trees grown for short rotation tree fiber, or any other plant that can be legally grown and harvested extensively for profit or subsistence.
- (b) Any practice on the farm incident to, or in conjunction with such farming operations, including, but not necessarily restricted to:
- (1) Preparation for market, delivery to storage or to market, or to carriers for transportation to market of any products or materials from the farm.
  - (2) The transportation to the farm of supplies and materials.
  - (3) The transportation of farm workers.
  - (4) Forestry or lumbering operations.
  - (5) The marketing or selling at wholesale or retail, on-site and off-site, where permitted by local regulations, any products from the farm.
  - (6) Irrigation of growing crops from private water supplies or public water supplies where not prohibited by state or local rule or regulation.

III. A farm roadside stand shall remain an agricultural operation and not be considered commercial, provided that at least 35 percent of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owner.

IV. Practices on the farm shall include technologies recommended from time to time by the university of New Hampshire cooperative extension, the New Hampshire department of agriculture, markets, and food, and appropriate agencies of the United States Department of Agriculture.

Source. 1961, 140:1. 1977, 95:1. 1979, 60:1. 1985, 6:1, eff. May 31, 1985. 1997, 250:1, eff. Aug. 18, 1997. 1999, 191:2, eff. Sept. 4, 1999.

## **Liability of Landowners**

### **NH Landowner Liability Protection Laws Regarding Public Access**

Sometimes grant programs that pay for a conservation easement will require participating landowners to provide the public with access to the conserved property for low-impact recreational uses such as hunting, fishing, hiking or skiing. Temporary exceptions are often made for land that has livestock or soils being tilled or cropped. The tradition allowing the public to roam freely over private land has roots that run deep in New England history and beyond. New Hampshire's current use property tax valuation program offers extra tax benefits to landowners who do not post their land. However, landowners sometimes hesitate to provide this traditional public access because they may feel vulnerable to personal injury lawsuits.

In response to concerns over the possibility of a lawsuit against a landowner, the State of New Hampshire has enacted laws to protect landowners from legal claims of members of the public who injure themselves on the land. These are referred to as "landowner liability protection laws" and can be found at NH RSA Section 508:14 and RSA Section 212:34. These also protect the landowner from possible liability found in more populous states under the doctrine of "attractive nuisance" (for example, liability for not fencing in a pond that attracts children to swim).

These laws provide that a landowner "owes no duty of care" to any member of the public who enters the land to participate in or watch recreational activities, except that the landowner must avoid intentionally or maliciously causing injury or damage. A landowner owes the public no duty to inspect the land for hazardous conditions, or to give warnings of hazardous conditions, or to keep the property safe. However, if there is a known dangerous condition, a landowner cannot intentionally or maliciously fail to guard or warn against it. For example, if a landowner knows of a deep, abandoned well, the landowner should fill it or gate it or warn people in some way to keep them from falling in.

These liability protection laws are subject to some exceptions. For instance, they do not protect landowners who collect fees from recreational users. Likewise, they may not offer protection from injuries by guests or workers visiting the land at the specific request of the landowner.

In the unlikely event a recreational user brings a lawsuit against a landowner despite these strong laws in the landowner's favor, the landowner's homeowner's insurance carrier may provide the costs of defense. Homeowner's insurance also generally covers additional land not necessarily attached to the home, such as woodlots. Farm businesses also often carry liability insurance that may also cover the defense costs.

## **CHAPTER 508                      LIMITATION OF ACTIONS**

### **Section 508:14                  Landowner Liability Limited**

I. An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

II. An owner of land who permits another person to gather the produce of the land under pick-your-own or cut-your-own arrangements, provided said person is not an employee of the landowner and notwithstanding that the person picking or cutting the produce may make remuneration for the produce to the landowner, shall not be liable for personal injury or property damage to any person in the absence of willful, wanton, or reckless conduct by such owner.

Source. 975, 231:1. 19

## **CHAPTER 212 PROPAGATION OF FISH AND GAME**

### **Liability of Landowners**

#### **Section 212:34 Duty of Care**

I. An owner, lessee or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, trapping, camping, water sports, winter sports or OHRVs as defined in RSA 215-A, hiking, sightseeing, or removal of fuelwood, or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph III hereof.

II. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, hike, use OHRVs as defined in RSA 215-A, sightsee upon, or remove fuelwood from, such premises, or use said premises for water sports, or winter sports does not thereby:

- (a) Extend any assurance that the premises are safe for such purpose, or
- (b) Constitute the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed, or
- (c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted except as provided in paragraph III hereof.

III. This section does not limit the liability which otherwise exists:

- (a) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or
- (b) For injury suffered in any case where permission to hunt, fish, trap, camp, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted for a consideration other than the consideration, if any, paid to said landowner by the state; or



- (c) The injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted, to third persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

Source. 1961, 201:1. 1969, 77:1-3. 1973, 560:4. 1977, 208:1. 1981, 146:5, VI, eff. Jan. 1, 1982; 538:7, 13, eff. June 30, 1981.

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## ***Current Use Taxation***

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### **CHAPTER 79-A            CURRENT USE TAXATION**

#### **Section 79-A:1           Declaration of Public Interest**

It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources. It is further declared to be in the public interest to prevent the loss of open space due to property taxation at values incompatible with open space usage. Open space land imposes few if any costs on local government and is therefore an economic benefit to its citizens. The means for encouraging preservation of open space authorized by this chapter is the assessment of land value for property taxation on the basis of current use. It is the intent of this chapter to encourage but not to require management practices on open space lands under current use assessment.

Source. 1973, 372:1. 1991, 281:2, eff. Aug. 17, 1991. 1996, 176:2, eff. Aug. 2, 1996.  
79, 439:1. 1981, 293:2. 1985, 193:2, eff. July 30, 1985.

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## ***Land and Community Heritage Investment Program (LCHIP)***

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### **CHAPTER 227-M COMMUNITY HERITAGE INVESTMENT PROGRAM**

( Index only. For full text, see [www.state.nh.us/government/laws/html](http://www.state.nh.us/government/laws/html) )

Section 227-M:1 Purpose.

Section 227-M:2 Definitions.

Section 227-M:3 Land and Community Heritage Investment Program Established.

Section 227-M:4 New Hampshire Land and Community Heritage Authority Established; Board of Directors.

Section 227-M:5 Powers and Duties of the Authority.

Section 227-M:6 Executive Director.

Section 227-M:7 Trust Fund Established; Administration.

Section 227-M:8 Program Administration; Eligible Applicants; Matching Funds.

Section 227-M:9 Acquisition, Restoration, and Protection Criteria and Guidelines.

Section 227-M:10 Management.

Section 227-M:11 Stewardship.

Section 227-M:12 Monitoring Endowment.

Section 227-M:13 Road Expansion.

Section 227-M:14 Public Trust.

Section 227-M:15 Public Access; Liability.

Section 227-M:16 Recapture.

Section 227-M:17 Receipt of Grant Recorded in Registry of Deeds.

To update from the posted 1998 version, use the "List of Sections Affected" for each year for subsequent legislative changes.

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# **Fact Sheet**

## **Conservation Easements on NH Farmland**

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*Please Note: information as of January, 2002; programs are subject to change*

### **What is a conservation easement?**

A conservation easement is a legal contract between a landowner and a land trust or governmental agency that places permanent restrictions on the uses of a parcel of land. The contract is recorded in the land records and is binding upon all future owners of that land. Conservation easements are geared toward enhancing forestry or agricultural uses, wildlife habitat, water quality and the rural or historic landscape, while restricting subdivision, development, mining, dumping or other uses incompatible with the contract's land protection purposes.

### **Why would a farmer convey a conservation easement?**

Farmers who have worked hard to be good stewards of their land often have a strong desire to see that good stewardship continue past their ownership. Landowners can either (a) donate a conservation easement as a charitable gift and receive a federal income tax deduction to help off-set their federal tax liabilities for up to six years; (b) sell a conservation easement for cash, assuming there are payment programs available; or (c) sell a conservation easement at a discount (commonly called a "bargain sale") which offers both a payment and a tax deduction.

### **How can conservation easements help farmers?**

Farm families often combine conservation easement transactions with farm transfers to make farmland more affordable for family members or younger farmers, or use the income to strengthen the farm business to acquire additional land, to diversify the farm operation, to help build a retirement income, to pay off debt, or to provide an inheritance to non-farming children. Conservation easements also lower the value of land, which could help reduce estate tax liability for heirs, or enable the land to be assessed for property tax purposes at the current use rate without being enrolled in the current use valuation program. Farmland conservation is also a benefit to the farmer's local community whose members will forever enjoy the farm's scenic and agricultural resources without the costs of heavy residential service demands.

### **How is a conservation easement valued?**

The value of a conservation easement is determined by an appraiser experienced in conservation easements and familiar with local land values. Local land trusts will have a list of referrals.

### **Who determines the terms of the conservation easement?**

The provisions of a conservation easement are determined by the land trust holding the easement, the grant program(s) that pay for the easement, as well as standards found in the U.S. Internal Revenue Code. Farmers will want to pay particular attention to terms that deal with agricultural structures, farm labor housing, flexibility to change agricultural practices, possibilities for diversification into activities incidental to farming, house sites, natural resource protection areas, and public access.

### **Where should a farmer go to learn more?**

Farmers interested in conservation possibilities should contact their local land trust. Referrals for New Hampshire can be obtained from the Center for Land Conservation Assistance (CLCA) in Concord, NH (at this writing: 603-224-9945) or from the Land Trust Alliance in Washington, D.C. ([www.lta.org](http://www.lta.org) or 202-638-4725). Farmers should also be prepared to seek professional business, tax and estate planning assistance to learn more about their options and potential consequences particular to their family and financial situations.

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# ***Funding Opportunities in New Hampshire for Purchase of Conservation Easements***

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*Please Note: information as of January, 2002; programs are subject to change*

## **Specific Grant Programs**

### **Land and Community Heritage Investment Program (LCHIP)**

LCHIP

10 Dixon Avenue

Concord, NH 03301

tel: (603) 224-4113

fax: (603) 224-5112

e-mail: [info@lchip.org](mailto:info@lchip.org)

website: [www.lchip.org](http://www.lchip.org)

Program formed by the NH state legislature under RSA Section 227-M to "... conserve and preserve this state's most important natural, cultural, and historical resources ..." LCHIP provides grants to towns or non-profits for either acquisition of land or conservation easements. LCHIP requires 50% of the total project budget to be leveraged through sources other than LCHIP, with at least half of that 50% by cash.

### **Farm Protection Program (FPP), United States Department of Agriculture (USDA) through the Natural Resources Conservation Service (NRCS)**

USDA-NRCS FPP Program

State Conservationist (Richard Babcock)

Federal Building

2 Madbury Road

Durham, NH 03824-2043

tel: (603) 868-7581

fax: (603) 868-5301

e-mail: [rbabcock@nh.nrcs.usda.gov](mailto:rbabcock@nh.nrcs.usda.gov)

website: [www.nh.nrcs.usda.gov](http://www.nh.nrcs.usda.gov) (click on Farmland Protection Program; also provides links to national FPP site)

The FPP program offers grants to governmental entities and some non-governmental organizations to acquire conservation easements in prime, unique or other productive soil. Funding depends on yearly federal appropriations to individual states. FPP will fund no more than 50% of the conservation easement purchase price; bargain sale discounts do not qualify as leverage.

### **NH Department of Environmental Services (DES)**

**Water Supply Land Conservation Grant Program**

NH DES

Drinking Water Source Protection Program

Sherry Godlewski, Program Coordinator

PO Box 95

Concord, NH 03302-0095

tel: (603) 271-0688

e-mail: [sgodlewski@des.state.nh.us](mailto:sgodlewski@des.state.nh.us)

The NH DES Water Supply Land Conservation Grant Program makes grants to municipal or non-profit water suppliers (but not land trusts) for the purchase of land or conservation easements within source water protection areas for existing or planned public drinking water sources. The DES program requires 75% of the project be leveraged from other funding sources. Society for Protection of New Hampshire Forests, under contract with DES, can also provide informational assistance to interested applicants and landowners.

**NH Department of Transportation (DOT)  
Transportation Enhancement Act (TEA-21)**

NH DOT  
1 Hazen Drive  
Concord, NH 03301  
tel: (603) 271-3734

TEA-21 grants ultimately come to the state Agency of Transportation from federal Agency of Transportation funds. They are intended to enhance transportation-related quality of life activities, including providing more aesthetic, pleasant and improved interaction for transportation system users and adjacent residents: scenic conservation easements are one out of many possibilities for these funds. TEA-21 requires at least 20% of the project be leveraged from other sources.

**NH Division of Parks & Recreation**

**Land and Water Conservation Fund (LWCF)**  
Division of Parks & Recreation -LWCF Program  
Office of Recreation  
172 Pembroke Road  
PO Box 1856  
Concord, NH 03302  
tel: (603) 271-3556  
website: [www.nhparks.state.nh.us](http://www.nhparks.state.nh.us)

The LWCF program's funding comes from federal Land and Water Conservation funds. Information about status of federal funding can be found at the Americans for our Heritage & Recreation's website: [www.ahrinfo.org](http://www.ahrinfo.org). When funded, money comes to the NH Division of Parks & Recreation. Grants are available only to public entities like municipalities, counties or school districts. Grants are for the purpose of enhancing or providing for more outdoor recreational opportunities in NH, including acquisition of land or permanent conservation easements. Land and Water Conservation funds require at least 50% of the project acquisition costs be leveraged from other sources; incidental costs cannot be included in grant budget.

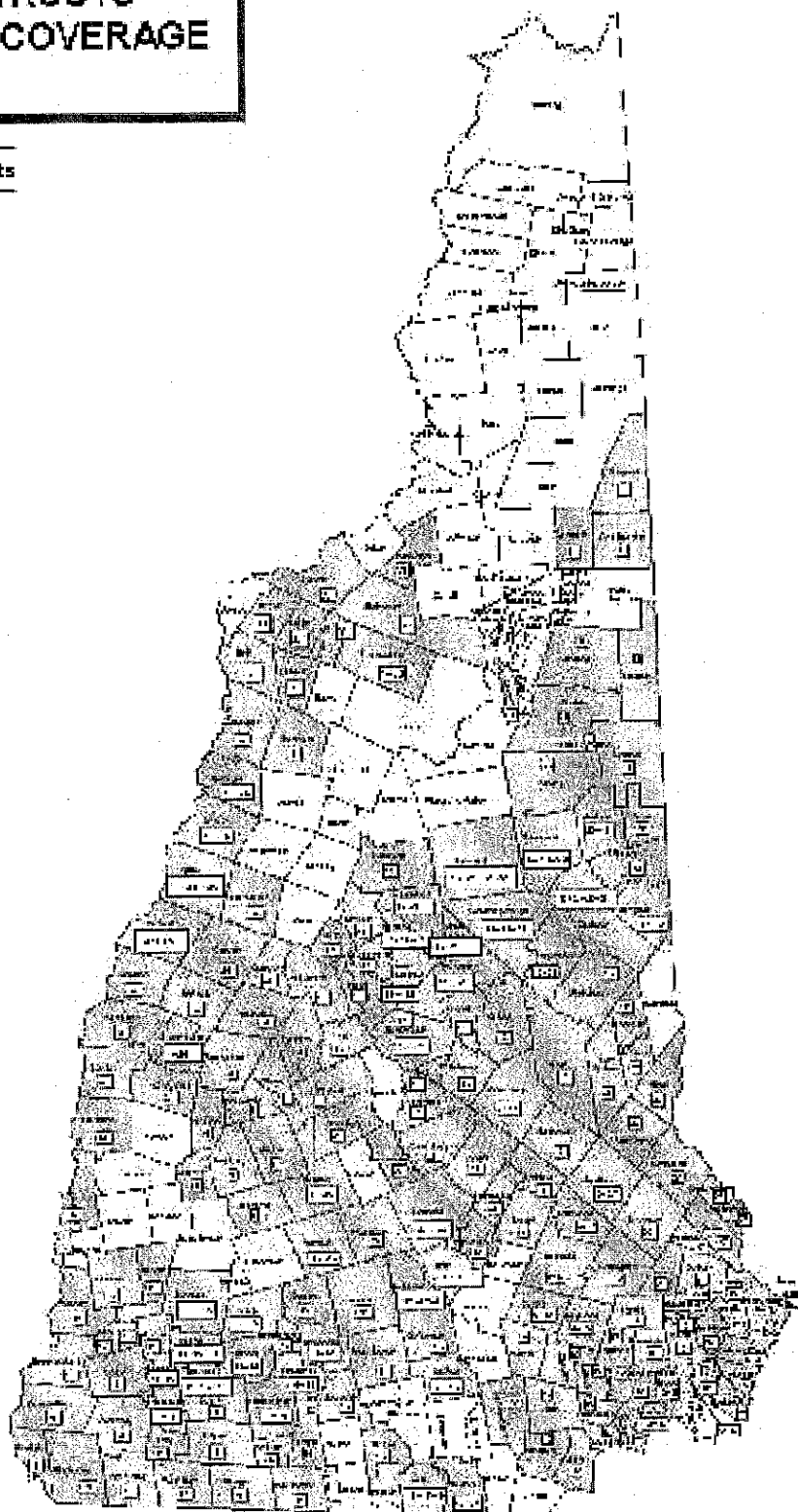

UNIVERSITY OF NEW HAMPSHIRE  
COOPERATIVE EXTENSION

Kenneth Hughes, Jr., Managing  
Director, Box 9000, F.D.  
The Johns Hopkins University  
School of Applied Behavior Analysis,  
Johns Hopkins University Center  
for Developmental Disabilities,  
Room 706, Chase 2, Baltimore, MD 21205-  
5080; e-mail: kph@jhu.edu

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Information not available

APPROVED FOR RELEASE BY NSA  
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## ***When Forever is a Long, Long Time: 8 Questions to Ask Before You Sell Your Development Rights***

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At one time or another, many Northeast farmers have contemplated the sale of development rights for their land. Perhaps they have even talked about this idea in a conversation with a neighbor over a cup of coffee, with family members over dinner, or with a financial adviser when mapping out the future.

But moving from "contemplating" the sale of development rights to actually "selling" them often means working through a long, complex process. Along the way, you will probably interact with state and county governments, private land trusts, attorneys, financial advisers and neighbors. And you'll learn all about legal concepts such as "conservation easement," "ag preservation," "restricted land" and "perpetuity."

In short, making the decision to sell — or not to sell — a farm's development rights is not easy.

While it is clear that farmers love their land as much as they dislike the spread of condominiums and mini-malls across their rural landscape, the debate over whether they should restrict the future use of their land is a lot less clear.

Bill Zweigbaum, a business consultant with First Pioneer Farm Credit in Claverack, N.Y., has worked with many ag business owners on development rights issues. Bill says, "The first and foremost reason why Rural America and agribusinesses sell development rights to their land is for the preservation of agriculture and the safekeeping of their scenic landscapes."

Zweigbaum adds that it is also about individual farmers making personal, business, financial and tax management decisions that are right for their family and their livelihood. After all, it is a permanent decision that determines how a family can use its land now \* and how future generations will be able to use it decades ahead.

To help you through this complex issue, this article offers eight important questions that each landowner should ask before signing on the dotted line.

### **1. Who will make the decision?**

Selling development rights is a permanent decision. That's why every decision maker in your business needs to be 100 percent sure that the decision to sell is the right one. Consensus is critical.

According to Tunis Sweetman, a dairy farmer in Warwick, N.Y. who sold his development rights in 1998, "This process is very time consuming and can last two years or more. So be sure to bring in all family members who will be involved in the decision early. That way, you'll have no surprises."

### **2. Why do you want to sell?**

Bill Zweigbaum advises that a good rule of thumb to follow when contemplating any "business-changing" transaction is to keep your long-term goals in mind. "Be absolutely clear why you are selling your rights," he says. Here are some common reasons why landowners sell development rights:

- *Money.* Many landowners want an influx of cash to retire debt, diversify enterprises, purchase buildings and equipment or buy land to expand the farm operation or secure rented land.
- *Family.* Some family members want to farm and others don't. Rather than sell the farm for its full market value and split the proceeds, some families sell development rights to provide equity for off-farm members while allowing on-farm members to control the land and continue to farm.
- *Preservation.* Owners of agricultural land relinquish development rights to keep their land forever green. If this sounds like you, also consider how the restriction will encumber future generations and, if you think your children's children will feel the same as you do about the land.

- *Retirement.* Selling development rights can provide retirement income \* with options. That is, your proceeds from the development rights sale may afford you the luxury of reducing the price of some land to your children and gifting the remainder to them. Or it may allow you to sell the land at an affordable price to a young farmer who could never afford to buy the land at its market value.
- *Increased value of unrestricted land.* Some farmers retain a parcel of their best land, knowing that selling the development rights on land that abuts this parcel will increase its market value.

### 3. Do you understand the easement?

A conservation easement is a legally binding agreement between you (the seller) and the buyer (e.g., a governmental agency or private trust) restricting the future use of the land. When you finally sign on the dotted line, you are agreeing to restrict the future use of your property and its natural resources (i.e., farmland, woodland, water, wetlands, and/or wildlife habitats) according to the terms of the agreement. You are also legally binding all future owners of the land to these same restrictions.

So take your time. Since an easement is a complicated, legal document, it's a good idea to hire an attorney to protect your interests. Be absolutely clear about what is spelled out in the contract, including what uses of your land will be permitted and what uses will be prohibited. Negotiate terms that are important to you.

### 4. Should you keep some of the farm unrestricted?

Determine if you want to restrict your entire property or keep some parcels unrestricted to leave yourself options for future use. George Malia, an appraiser with First Pioneer Farm Credit in Enfield, Conn. and Riverhead, N.Y. and the former director of Connecticut's farmland preservation program, says, "You may want to keep a 20-acre parcel unrestricted so future generations can build their homes on the land. Or you may want to subdivide the parcel as approved building lots for sale when property values are higher. Or you may want land to fall back on for sale in the tough times."

### 5. How much cash will you have after taxes?

Liz Bayne, senior tax specialist with Yankee Farm Credit in White River Junction, Vt., advises farmers to look beyond their land's gross restricted value. "Think instead about the cash amount you will actually put in your pocket after paying taxes, legal fees, etc.," she says.

For example, if your land has been in your family for generations, you could be hit with a capital gains bill for up to 20 percent of the gain. Plus you may have state capital gains taxes and legal expenses and your lender may seek partial payment of your real estate loan since your collateral value is now reduced.

Liz adds, "It's a smart idea to talk to your tax expert once you know the restricted value of your land. A tax expert will prepare an estimated tax return for you so you'll see the potential tax impact of the sale. The expert will also offer management ideas to help minimize the impact."

### 6. Are you operating profitably?

Loan officers absolutely shudder when they hear of landowners selling development rights to pay off mounting losses. Loan professionals don't like to see people trying to fix a problem at the expense of their most valuable asset.

Instead, landowners should first fix the problems causing their losses. If they can't, then selling the farm at its greatest value may make sense. This may be appropriate when the only other option available is to exhaust cash resources by paying off creditors. Such a move might leave the landowner vulnerable. Subsequent events might force the landowner to sell the land at a lower value some day in the future.

### 7. Can you manage this change comfortably?

Steve Weir, branch manager of First Pioneer's Riverhead, N.Y. office, says that agricultural landowners are expert real estate economists who know how to reap the best appreciation and value from their land.

"When selling development rights," he says, "a landowner should be equally comfortable managing a different asset."

For example, if converting the proceeds from the sale of development rights into cash, stocks or bonds, landowners will want to be as comfortable managing cash or investments as they are managing their real estate.

Steve advises customers to give as much of their time and energy to managing new ventures as they did managing their real estate. "This is important to maintaining overall returns," he adds.

**8. Will your investment make more money than the appreciation of land?**

Steve Weir also says that farmers should be confident that their new investments with the net proceeds from the sale will be equal to or greater than the appreciation of the rights without the deal. For example, if you use your proceeds from the sale to invest in the stock market, you want to be reasonably certain that your money will appreciate at least at the same rate as your development rights would have. "Spend time on this financial analysis," Steve advises. "It is the key to the sale of development rights."

## Dairy Farmer Makes His Dream of Land Ownership a Reality

Tunis Sweetman, Sweetman's Dairy Farm, Warwick, N.Y.

Tunis Sweetman dreamed of becoming a dairy farmer. But he didn't own land. So he and his family rented land, and built a profitable business. After 10 years, the Sweetmans wanted to establish a home farm, but the price of land was skyrocketing in his area. Warwick, N.Y. is typical of many other communities, prime territory for the sale of development rights. It is a very fertile valley in New York's Orange County, just 90 minutes northwest of New York City, where selling land to development was generally more profitable than farming it.

Sounds daunting. Right?

It was. The Sweetmans even considered relocating to the Midwest. But they wanted to stay because their business was already profitable plus their family lived close by. About that time the owner of a 108-acre farm that Tunis was renting wanted to sell. This was in 1996.

Tunis asked the owner (along with her attorney and accountant) if she would keep the land off the market while he pursued a PDR (purchase of development rights). He said that if he could buy the land and immediately sell its development rights to the state, he'd be able to afford to buy at the market value.

She agreed and Tunis went to work. At the time, neither the State of New York nor his local county had a program in place, but Tunis had a goal in mind. He worked tirelessly with the New York State Department of Agriculture and Markets and aggressively lobbied Orange County town and county leaders for their support.

As soon as New York finalized the state program in late 1996, the Sweetmans immediately applied for the sale. He negotiated terms of his easement, including a 15-acre farm complex for the family home, barn and future free stall and farm labor houses. The easement also included the right to make improvements and examine the boundaries of the farmstead every five years.

The Sweetman application was approved on the first review by the state in June 1998.

A complicated, but coordinated closing. The closing was actually three closings in one. Tunis purchased the farm from the landowner. He immediately sold the development rights for the entire 108 acres to the state. And he closed on a Farm Credit real estate loan.

The owner set the market value price at a little over \$700,000. Tunis received development rights value from New York State of approximately \$325,000, or almost 50 percent of the land's market value. With savings, a Farm Credit mortgage and the development rights proceeds, the Sweetmans completed the deal.

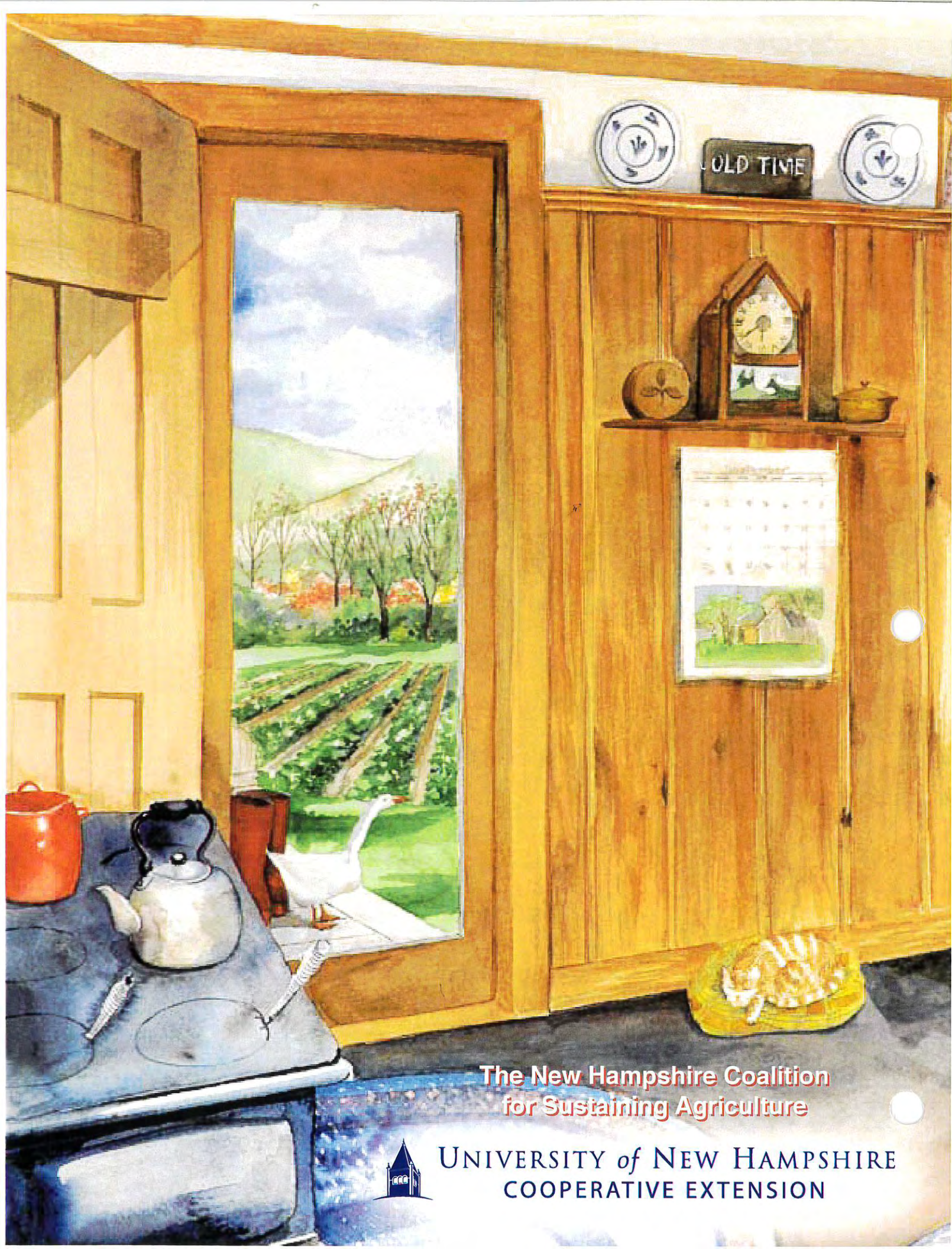
This article appeared in the summer 2001 issue of *Financial Partner* magazine, Northeast Farm Credit's magazine that is mailed to more than 17,000 customers, prospects and friends throughout New England, New York and New Jersey.

Primary author: Karen Murphy, assistant vice president of marketing communications, Farm Credit Financial Partners, Inc., Agawam, Mass.

Contributors: Liz Bayne, senior tax specialist, Yankee Farm Credit, White River Junction, Vt.; Dave Bensley, appraiser, Farm Credit of Western New York, Batavia, N.Y.; George Malla, appraiser, First Pioneer Farm Credit, Enfield, Conn.; Greg Melnik, loan officer, First Pioneer Farm Credit, Enfield, Conn.; Matt Minor, loan officer, Farm Credit of Western New York, Batavia, N.Y.; George Richardson, CPA, Austin Associates, P.A., Auburn, Maine; Steve Weir, branch manager, First Pioneer Farm Credit, Riverhead, N.Y.; Bill Zweigbaum, business consultant, First Pioneer Farm Credit, Claverack, N.Y.

Scope: The goal of *Financial Partner* magazine is to provide useful tips and helpful information that make a positive impact on the way our readers do business. In this cover story, we offered eight important questions that farmers should answer before considering the sale of their development rights. We caution readers that selling development rights is about making personal, business, financial and tax management decisions that are right for their family and their livelihood. We do not take a stand on either side of this issue. We do, however, remind farmers that selling their development rights is a permanent decision, one that every decision maker in a business must be 100 percent certain is the right one for their business and their family — now and for decades ahead.





The New Hampshire Coalition  
for Sustaining Agriculture



UNIVERSITY of NEW HAMPSHIRE  
COOPERATIVE EXTENSION

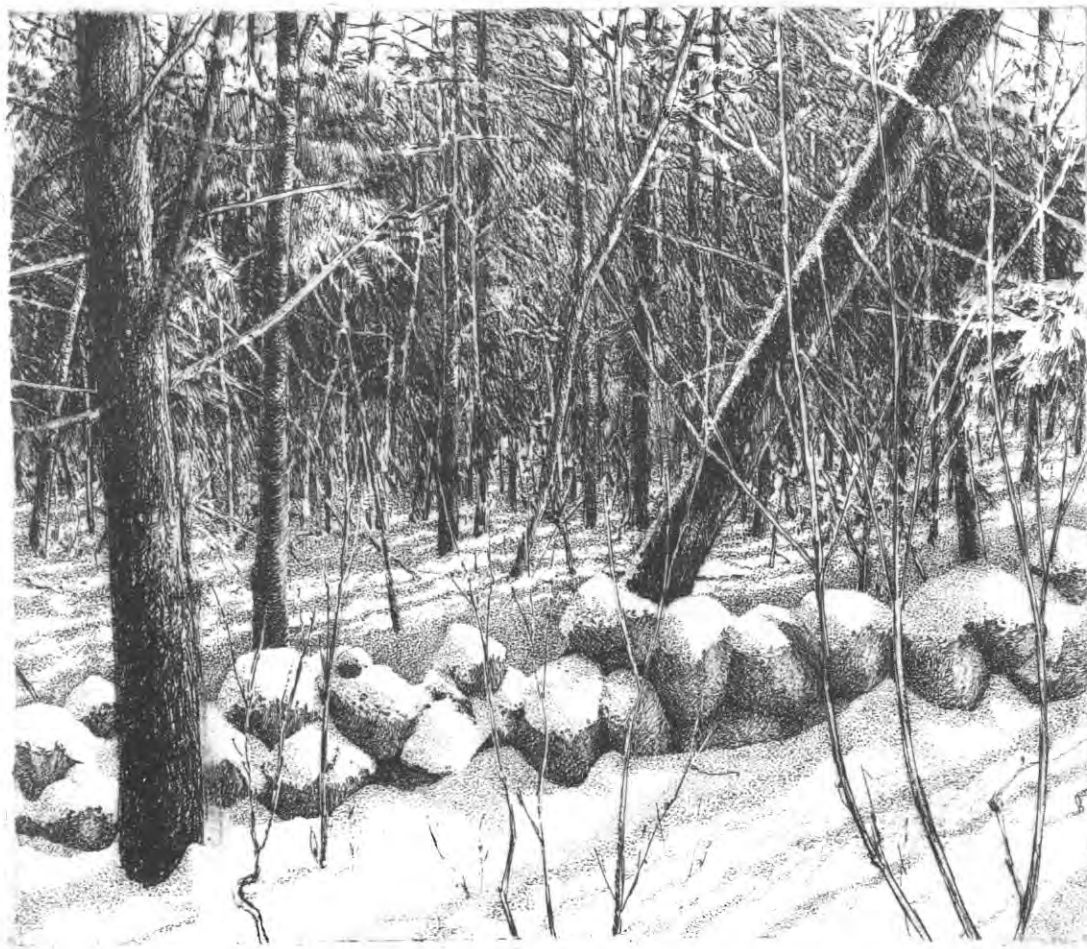


## **10.     Conserving Your Land**

(On file with Stratham Planning Office)

# Conserving Your Land

Options for New Hampshire Landowners



by Brenda Lind  
Center for Land Conservation Assistance  
Revised 2005

## 11. Help List



## Land Conservation Help List for Southeastern New Hampshire

### Qualified Appraisers" who Serve the Area

#### M H Beecy

##### Appraisal Services

Marsha Beecy  
PO Box 6366  
Manchester, NH 03108-  
6366  
622-5106

#### Freneau Appraisal

Joseph Freneau  
David Raused  
11 Stark Street  
Manchester, NH 03101  
622-8826

#### Gowdy & Farrell, Inc.

Marc Gowdy  
100 Main Street, Suite 140  
PO Box 1880  
Dover, NH 03821-1880  
742-0083

#### ath Appraisal Services

Scot Heath  
14 Everett Street  
Manchester, NH 03104  
634-4356

#### George Lamprey

PO Box 1306  
Meredith, NH 03253  
279-7833

#### McManus & Nault Appraisal Company

Kevin McManus  
Peter Nault  
722 Route 3A, Suite 6  
Bow, NH 03304  
230-9788

#### Donald H. Pecora Real Estate

Gilman Street  
Dover, NH 03820-2504  
828-1191

#### Rockingham Appraisal Service

Michael Daigneault  
20 Water Street  
Exeter, NH 03883  
772-5510

#### Spring Appraisal Company

Donald Spring  
PO Box 3914  
Concord, NH 03301-3914  
226-2579

#### The Stanhope Group, LLC

Peter Knight  
500 Market Street, Unit 1C  
Portsmouth NH 03801  
431-4141  
11 N Mast Street  
Goffstown, NH 0045  
497-4141

### Potential Easement Holders

#### Audubon Society of NH

Joanna Magoon  
3 Silk Farm Road  
Concord, NH 03301  
224-9909

#### BEAR-PAW

Dan Kern  
PO Box 19  
Deerfield, NH 03037  
463-9400

#### Rockingham County Conservation District

Mary Currier  
118 North Road  
Brentwood, NH 03833-6614  
679-2790

#### Rockingham Land Trust

Brian Hart  
8 Center Street, Fl 2  
Exeter, NH 03833  
778-6088

#### Seacoast Land Trust

Danna Truslow  
PO Box 4183  
Portsmouth, NH 03802-4183  
433-0963

#### Society for the Protection of NH Forests

Mike Speltz  
54 Portsmouth Street  
Concord, NH 03301  
224-9945

#### Strafford County Conservation District

Bambi Miller  
259 County Farm Road  
Dover, NH 03820  
749-3037

#### Strafford Rivers Conservancy

Anna Boudreau  
PO Box 623  
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## **12. Ad Hoc Subcommittee Town Reports**



### **Report of the Conservation Bond Ad Hoc Subcommittee**

This is a particularly exciting time for the Ad Hoc Subcommittee. We have protected more land in 2005 than in all past years combined, and we are working with a fresh group of landowners who recently began the process with us. Even though at this time specific negotiations are at a private stage, we can report that we are actively working with more landowners at once than ever before, and if we successfully reach purchase agreements we will be protecting significantly more land in 2006. To review the year just past, our easement acquisitions included:

- Thirty-six acres of scenic farmland and forestland located on Squamscott Road: Part of “Bay View Farm” owned by Flossie Wiggin, Robin Reed, and Tammy Hathaway, this unique parcel includes a beautiful view-shed from a heavily traveled public road, and significant frontage along the tidal section of Jewell Hill Brook. The Wiggin family had already protected their farmland on the other side of the road with a New Hampshire Land Conservation Investment Program grant. Preservation of this parcel brings the total of conserved lands in the immediate neighborhood to over 300 acres! The majority of this land is active farmland located along busy roads and tidal waterways. We can take great pride in the fact that this entire section of town will remain largely undeveloped in the future.
- Thirty-one acre blueberry farm located on Portsmouth Avenue: Long-time Stratham residents Bob and Irma Goodrich agreed to conserve their property. The “Saltbox Farm” (so-called for its historic saltbox-style home) includes diverse wildlife habitat, forestland, wetlands, blueberry bushes, and fertile cropland. Two ponds provide irrigation water for growing crops. Permanent protection of this scenic and productive farm will keep another key slice of Stratham’s agricultural history intact and viable for future generations of retail farmers... All located on Stratham’s busiest road at the gateway into town from Greenland.
- 4.5 acres of secluded forestland located on the Squamscott River. This gem of a property offers beautiful scenery, water views across to permanently protected lands in Exeter, and deeded non-motorized public access. While this property is smaller than we would normally consider, its unique river frontage, public access, and the landowners’ generous agreement to donate 50% of the easement value make it a wise investment in Stratham’s future.

The Ad Hoc Subcommittee sincerely appreciates the positive relationships we have had with numerous Stratham landowners, as well as invaluable help from our Town Administrator Paul Deschaine, and Town Planner Chuck Grassie. It is also important to point out that having the conservation bond behind us gives us serious credibility with landowners, and enables us to move more quickly if necessary to save a vital piece of land from development.

The Ad Hoc Subcommittee would like to thank recently “retired” members Mark Sykas and Ray Wenninger for their dedicated service. Both of these individuals worked tirelessly on behalf of Stratham’s citizens, and particularly on behalf of “our” landowners.

Respectfully Submitted,

Nathan Merrill, Chairman

## **Report of the Open Space Bond Ad Hoc Subcommittee**

The Ad Hoc Subcommittee successfully completed three separate conservation easements in 2004. These were all relatively small properties, so we did not need to tap into the \$5 million conservation bond approved by 88% of Stratham voters in 2002.

- Twenty-six acres of mostly farmland on Bunker Hill Avenue are now permanently protected, with matching funds provided by the federal government's Farm and Ranchland Protection Program.
- Fifteen acres of farmland and forestland on Union Road in an aquifer protection zone were protected, with matching funds provided through New Hampshire's Department of Environmental Services.
- Eleven acres of prime farmland and scenic pastures located along Winnicutt Road are also now permanently protected.

The Ad Hoc Subcommittee sincerely appreciates the working relationships we developed with these landowners, and particularly their patience as we worked through our first round of conservation projects.

We are pleased to report that two additional easements are close to completion at this time. One of these has not yet had a public hearing, but we can report that we are under agreement with landowners on Squamscott Road. This important property includes 36 acres to be protected, including a large field, woodlands, and important tidal wetlands along Jewell Hill Brook. This easement fits nicely in an area with three additional large blocks of land that are already protected from future development.

We have been able to conserve several important parcels of land in a judicious and fiscally prudent manner. Our full \$5 million bond is still available to be tapped for larger parcels. Members of the Subcommittee are working on numerous new properties, and we are looking forward to moving these forward.

The Ad Hoc Subcommittee would like to thank departing members John Hutton, III and Wes Barton for their dedicated service. Both of these individuals brought valuable experience to the table. We particularly appreciate Mr. Hutton's willingness to chair our fledgling committee from the beginning, with his experience as a past chairman of the Planning Board.

Respectfully Submitted,

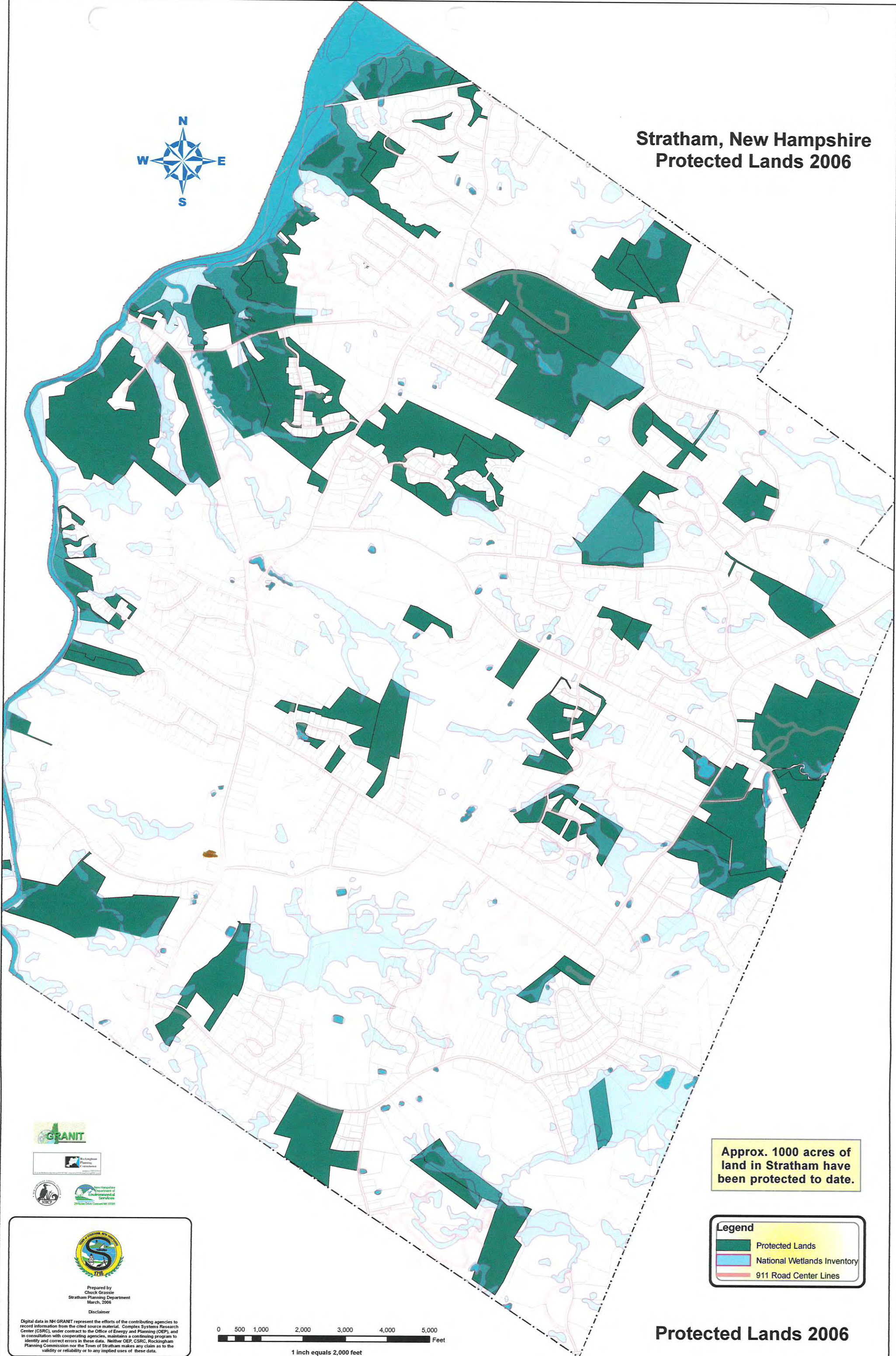
Nathan Merrill, Chairman

### **13. Map of Conserved Land in Stratham**





# Stratham, New Hampshire Protected Lands 2006



Approx. 1000 acres of  
land in Stratham have  
been protected to date.

Legend

Protected Lands

National Wetlands Inventory

911 Road Center Lines

## Protected Lands 2006



Prepared by  
Chuck Grassie  
Stratham Planning Department  
March, 2006

### Disclaimer

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