

Conserving the Family Farm

by Annette Lorraine

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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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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

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

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Introduction

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."¹ 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.² 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.



Financial Implications for Farm Businesses

Conservation 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

The 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.³

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.⁴ 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.⁵

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.

Legal Background to Conservation Easements

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 regulations⁶ 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.⁷ 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."⁸ 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.⁹

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.

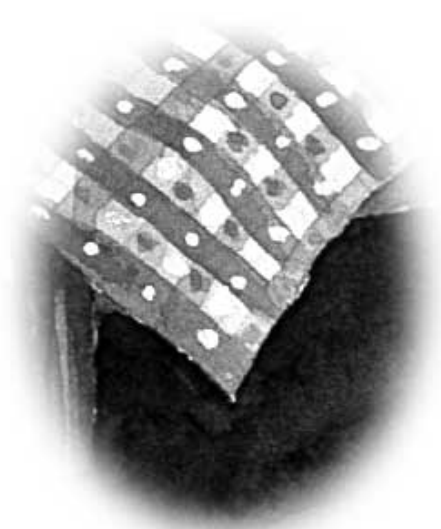
Last, there is an argument that sufficient "impossibilities" or "changed circumstances" can upend a conservation easement. These would be happenings out of the landowner's control, which completely and permanently change the conserved ecosystem so the conservation easement's purposes are thwarted. An 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.¹⁰

Land Management Implications of Conservation Easements on Farms



This guide's focus is on agricultural lands and conservation easements customized to accommodate farm activities. The definition of "agriculture" in New Hampshire¹¹ 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.¹² 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 handling 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.

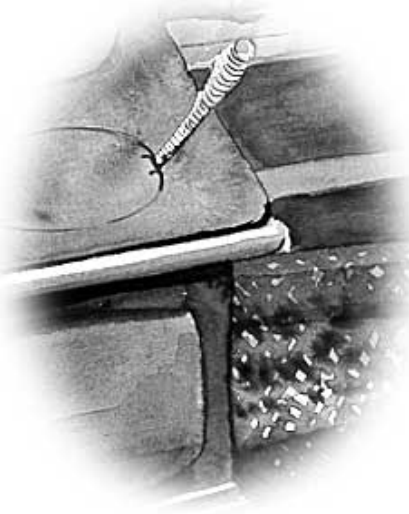
The ability to have future farm labor housing is handled much the same way as farm residences, but it's usually not subdivided away from the conserved land and is often limited to a certain size or distinct area. Having farm labor housing non-subdividable keeps it available for farm labor or as farm 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.¹³
- **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,¹⁴ 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.

Conservation Easement Opportunities Currently Available to NH Farmers

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

Grant 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.



Footnotes

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

² 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.

³ "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.

⁴ NH RSA § 79-B.

⁵ 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).

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

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

⁸ *Id.*

⁹ 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).

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

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

¹² NH RSA 21:34-a (definition of farming).

¹³ NH RSA 508:14 and 212:34.

¹⁴ 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), 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.

Resources

Organizations

American Farmland Trust

Farmland Information Center
Herrick Mill
One Short Street, Northampton, MA 01060
(413) 586-4593, website: 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.

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.

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.

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
website: 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

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. (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.

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.

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.

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.

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.

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.

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.

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.

NH Statutes

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 and further from <http://sudoc.nhsl.lib.nh.us/rsa/>.

Conservation Easements

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.

The New Definition of Farming

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.

Current Use Taxation

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.

Land and Community Heritage Investment Program (LCHIP)

CHAPTER 227-M

COMMUNITY HERITAGE INVESTMENT PROGRAM

(Index only. For full text, see 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.

Fact Sheet

Conservation Easements on NH Farmland

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 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.

Funding Opportunities in New Hampshire for Purchase of Conservation Easements

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

website: 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

website: 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

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

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. 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.

NH LAND TRUSTS GEOGRAPHIC COVERAGE



UNIVERSITY OF NEW HAMPSHIRE
COOPERATIVE EXTENSION

Statewide Coverage Land Trusts

Academy of Environmental and Earth Sciences
 Audubon Society of N.H.
 The Nature Conservancy
 New England Wildlife Heritage Society
 New Hampshire Forest Trusts
 The Trustees of the Forests of the State of New Hampshire
 The Trustees of the Forests of the State of New Hampshire
 Wildlife Land Trust

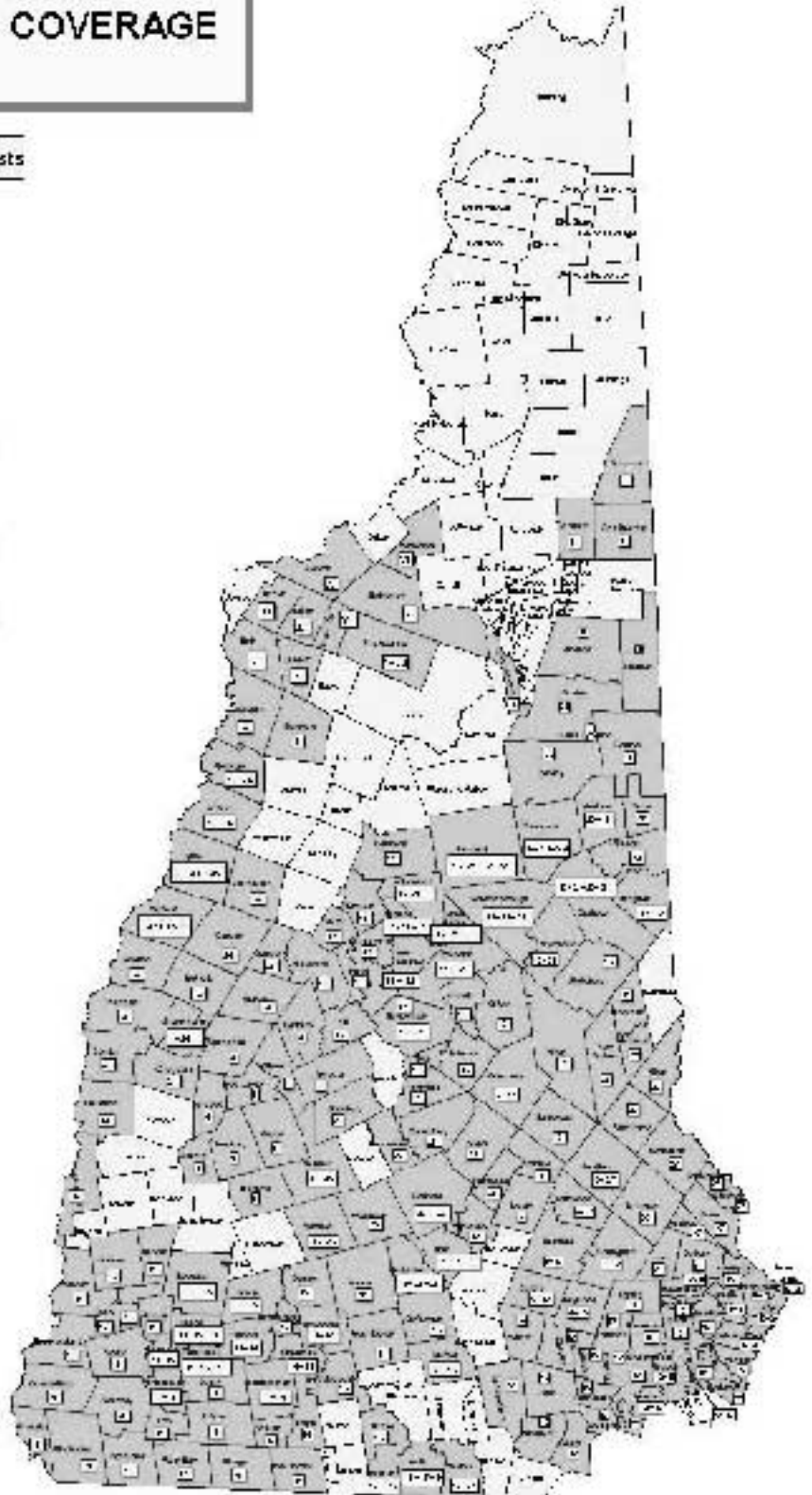
Local Land Trusts

- 1 Acorn Woodlands Land Trust
- 2 Acadia State Park Association and Acadia National Park
- 3 Adams Land Trust
- 4 Adirondack Park
- 5 Adirondack Park State Park
- 6 Adirondack Park State Park
- 7 Adirondack Park State Park
- 8 Adirondack Park State Park
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Information not available

Information not available for the following land trusts:
 Acadia National Park
 Acadia State Park Association
 Acadia State Park

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 Acadia National Park
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When Forever is a Long, Long Time: 8 Questions to Ask Before You Sell Your Development Rights

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.

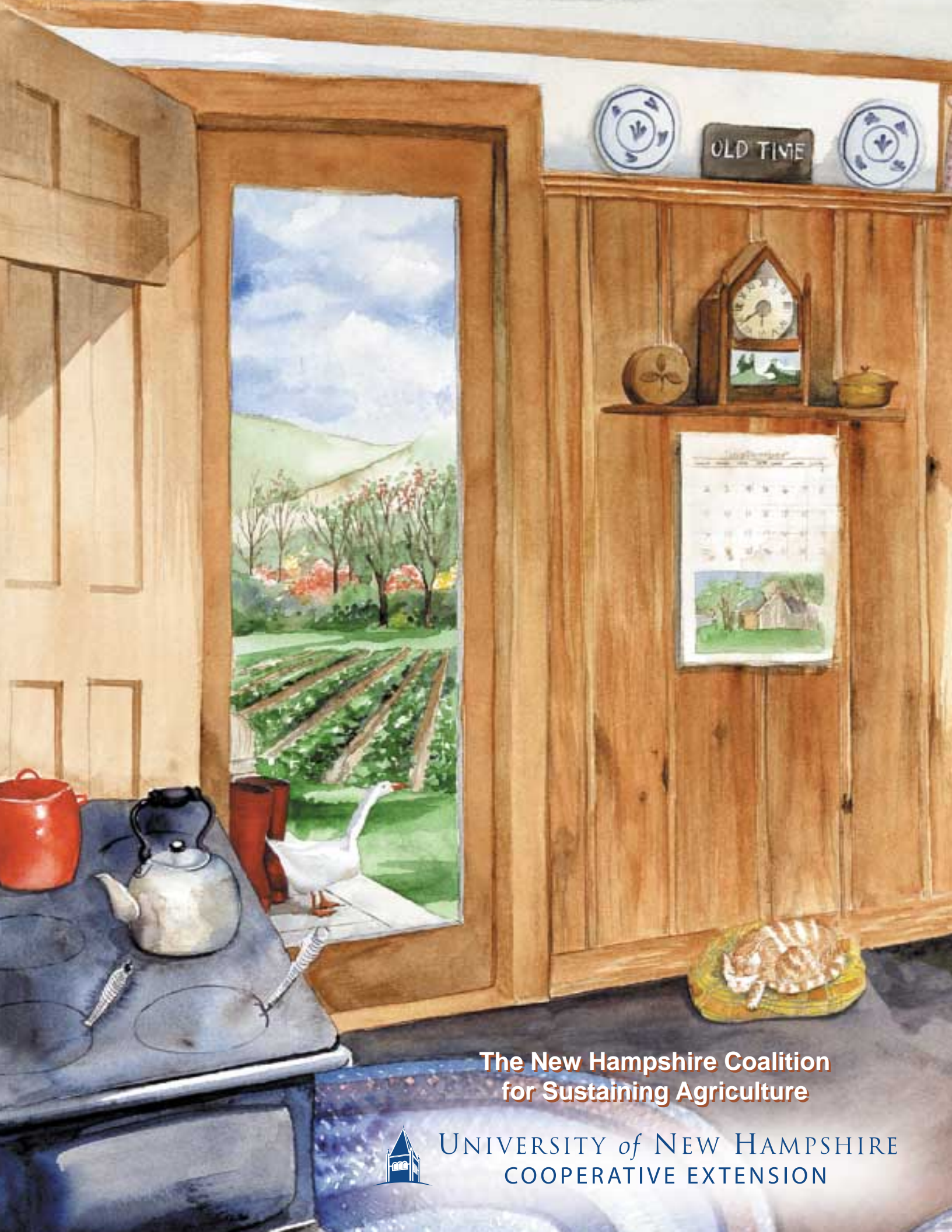
The owner set the market value price at a little over \$700,000. Tunis received development rights value from New York State of approximately \$325,000, or almost 50 percent of the land's market value. With savings, a Farm Credit mortgage and the development rights proceeds, the Sweetmans completed the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

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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**



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