**Some thoughts on creating a Conservation Restriction on private property\***

**I. Goals of any Conservation Restriction**

**II. Initial Stage - is it a good idea**

**III. Second Stage - the to-do list**

**IV. Third Stage - Draft CR and Draft Baseline**

**V. Final State - once the corrections return from Boston**

**Accompanying Documents**

**Cave Hill Draft CR in living color**

**Massachusetts Liability Act Updated (Recreational Use Shields Owners from Liability by Irene Del Bono.)**

**How to Organize Baseline Documentation**

**I. The Goals of any Conservation Restriction**

1. First, what is the difference between RGT owning a property and RGT holding a CR on a property?

The best explanation I have heard came from Angelo Teachout who completed a practicum for his Sustainability Science masters degree with RGT in June 2015. He said that, when RGT owns a property. it owns a physical piece of land - has to manage it, take care of it. When RGT holds a CR, it owns a Responsibility - an obligation. Someone else owns and manages the land; RGT is responsible for making sure the conservation value of the land it maintained. Since RGT maintains a legal responsibility to enforce a CR, if necessary and if all discussions fail, they may have to turn to a court of law to help legally enforce a CR.

2. What does the actual CR document look like?

There is a companion document "Cave Hill Draft CR in color." It will help if you can open that document while you are reading this one. The only parts of the CR that can be changed are Sections 1 and 2 - almost all the rest is standard legal requirements. (If that seems too burdensome, remember that CRs are "in perpetuity" i.e. they continue when the land is inherited or sold - and that requires pages of careful wording.) There is also a CR template on the state website - spend time downloading all the relevant documents from that site - including both the main text and the publications: http://www.mass.gov/eea (then go to Recreation and Conservation, then Land Use and Management, then Land Protection).

Section I. Purposes. The "Purposes" in Section 1 are the most critical part of the CR. It describes why the property deserves protection and, years from now, when there is a dispute about some behavior/activity, the judge will use the Purposes to determine what behaviors/activities are allowed and what are inconsistent/contradictory with those Purposes. Properties deserve protection due to their special/unique geologic, ecological, biological (flora/fauna, species), or cultural features, or any combination of these features.

Note: never base list one of the Purposes as protecting any one species, especially an Endangered Species - that species may be removed from the list (either none left, or now more common) and thus the Purpose of the CR no longer exists and the owner could argue (successfully) that the CR be declared null and void.

Section 2. A. Prohibited Uses. The "Prohibited Uses" defines a list of rather specific behaviors/activities that cannot happen.

Section 2. B. Reserved Rights. It is important to realize that the next section, "Reserved Rights" sometimes cancels all or part of the Prohibited Uses. Making it even more important to write as clearly as possible.

3. What are the criteria for perfect Sections 1 and 2 A & B (Purpose; Prohibited; Reserved)? Actually there is an answer: balance and coherence

(a) Balance (both owner's rights and RGT's responsibilities):

Intrude no further into owners use and enjoyment of property than the protection of the conservation value requires.

Stick to issues that

 will make substantial difference to conservation values of property

 that can be monitored efficiently

that RGT intends to enforce.

Why? less burdensome to everyone and there is less opportunity for conflict

(b) Coherence (Between Purposes and Prohibited and Reserved Uses)

The Prohibited Uses and Reserved Uses **must** match the Purpose of the CR (consistent all through document)

Prohibited Uses - think through thoroughly.

IF it is too detailed you may:

alienate the owner (it is the owner's land after all) and potentially discourage others from considering protecting their land

find that the technology has changed and your details are obsolete

have made it hard for future RGT Board members to monitor the CR

Focus on the Purpose (value of the property) - make sure all prohibited uses are consistent. The goal is that neither the owner nor the poor Board member who wasn't born when this CR was written do not find themselves in foolish and expensive arguments over petty/irrelevant issues.

Reserved Rights of the Owner/Grantee: only allowed to do those activities/behaviors that are consistent with and do not jeopardize the conservation values of the property (back to Purposes)

Note that Leverett has taken the lead in writing language in both of these sections that refer to known or possible Native American stone structures. (These are highlighted in the accompanying Cave Hill Draft CR in living color.") It is hoped that the Board will continue to honor this path.

It is still important to look at all the materials provided by the state (link above) to make sure there are no new sections or wording that you should be using.

**II. Initial stage - Is this a good idea?** The answer is very specific for each property. In fact, there are 3 probably-simultaneous questions that need to be asked. (The sequence will vary with each property.)

1. Is the property (or part of the property) worth protecting?

What basic information is needed?

ownership (deed from MA Registry of Deeds online, download and read looking especially for any paragraphs beginning with words lie "subject to" and for any reference to a survey.)

location (in relation to other protected lands, special habitats, historic/current land use, etc.)

inventories/knowledge/understanding of flora, fauna, habitats (wetlands, vernal pools, etc.), and geologic/cultural features

If the answer is no - just forget the whole thing OR put the new file aside because changes in the ownership of neighboring land - an opportunity to conserve a larger area - or newly identified habitat values might change this property's status.

2. Does it seem that the owner(s) are willing to consider protection?

Does the owner have a reasonably complete understanding of choices? These include:

retain or develop, under present ownership, the whole property (or sell to developer)

retain or develop part of it while protecting rest of it

protect all or part of it with CR

protect all or part of it by transferring ownership to an appropriate organization

use other options - life estate, will, etc.

Note: often owners put only part of their property in the CR. They always save out their house, outbuildings, well, septic system, and any area they plan to add buildings or want for some purposes. This area is called the "building envelope." (Make sure that area is large enough to meet any zoning requirements - check especially about wetlands and related issues. Sometimes, when there is no building, part of the property by the road is kept out so that the owner (or children) can build a home in the future.

Does the owner have a reasonably complete understanding of advantages?

possible financial benefit through

IRS and possible state tax credit if the owner donates the CR (or sells at less than full value) AND if the owner's income is large enough to benefit from deducting a gift

Real estate tax reduction for CR part of land (if the property is not already getting reduced rate through Chapter 61)

Reduction in initial value of the property for inheritance purposes (and continued reduction in real estate taxes for future owner)

Satisfaction of knowing land will not be developed (do not underestimate the importance of this)

Does owner have a reasonably complete understanding of disadvantages?

Restrictions on use of land under CR (no structures, no ATVs or other motorized vehicles except when used to maintain farm, forest, or trails)

Possible concern for future buyers (can also be advantage)

Does the owner understand the Massachusetts law regarding liability (for the land owner and the land trust)? It states:

Recreational Use Statute: Pursuant to M.G.L. c.21, s.17c, neither the Grantor nor the Grantee is liable to any member of the public for injuries to person or property sustained by such person while on the Property in the absence of willful, wanton, or reckless conduct.

Also see the accompanying one page Massachusetts Liability Act Updated (Recreational Use Shields Owners from Liability by Irene Del Bono.)

(Note: It is my understanding that "recreational use" means there is no charge for the use of the land. If there is a charge, it is my understanding that this statue does not apply.)

Does owner have a lawyer and financial advisor? RGT folks CANNOT give legal/tax advice. It is a conflict of interest and also very hard to keep up with changes in tax laws. Refer owner and the owner's lawyer (who should be someone familiar with CRs) to Massachusetts Land Trust Coalition website (www.massland.org) and UMass Extension materials (website hard to use, contact Paul Catanzaro: cat@umext.umass.edu).

If no interest - forget or at least put on hold

3. Is RGT willing to consider this property?

Note #1: When discussing the potential CR with Board members individually and at a Board meeting, it helps to frame the discussion around the Purposes of the CR and any special Restricted Uses or Reserved Uses that might be unique to this property. (Read the first section of these notes) It will make the transition to working through the CR much easier.

Does the property meet the goals of RGT (by location, habitat, etc.)

Does the property meet RGT's criteria for a property worthy of consideration (including the burden of creating the CR and doing the annual monitoring)

Note #2: The Board MUST discuss and authorize the (at least) 2 Board members to pursue the CR. The Board will vote again later on the final agreement - and will be kept informed of the progress at every meeting, but making the initial commitment to pursue the CR is essential.

Note #3: The Baseline data requires a listing of all interactions with the land owner AND with the Board. Start maintaining that file NOW (trust me). In fact, stop reading these notes and turn to the accompanying "How to Organize Baseline Documentation" so that you will not waste your time as you go along.

Does the Board feel that, while the CR is interesting, it is not appropriate for RGT? If so, what organizations could be contacted (by RGT or the owner or both)?

**III. Second stage - the To-do List**

Note: the information listed below is not just for the CR, it can be used as part of the Baseline Documentation. That means, you need to set up folders to identify each kind of information, to label them properly and to keep notes on questions you have or information you are not sure about - it really will save time. (See the How to Organize Baseline Documentation mentioned earlier.)

1. More information

Review the deed - looking at all liens (a legal claim against the property - appears in the electronic Mass Land Records on the bottom of the deed's "Details." Liens include mortgages, taxes due) Also look for any access rights, etc. - usually at the end of the deed description. (In the final stage RGT will pay for a title search, but you - or someone on the Board with those skills, needs to check if there are problems NOW.)

Where exactly is this property?

While the deed is helpful, it can be VERY confusing. In a perfect world, you will find a reference to a survey - either at the Registry of Deeds (Plan Book) or in someplace you can chase it down.

Use the assessor's map - not totally accurate, but will help. It is also possible that the Assessors' files include surveys or other information - sit down with the Assessor and go over the information they have.

If possible, have the owner walk the boundary with you and your gps unit or app. Record a waypoint at every marking (iron pin, stake and stone, even those bizarre drill holes)

BUT, do not assume the owner is correct. We have had owners show RGT the wrong piece of land or land that extended well beyond the actual boundary. But still go out with the owner.

If there is no survey, you and the Board need to decide whether one is needed. This will depend in part on the owner's knowledge (or your hard work) in finding a reasonable number of corner markers or blazed trees - either by the owner or a reliable neighbor. If the property abuts other protected land, the exact boundary might not be as important. (If this is CPA-funded CR knowing the exact acreage is required.)

Find out as much as you can about the history of the land. You can do this in part by following deeds backwards, but also have the owner write the history (will use in the baseline documentation) or takes notes during a conversation and have the owner check your work.

Collect all the neighboring deeds. Use the assessor's maps to identify the abutting properties and use the assessor's list to determine the most recent owner. (As I write this, the somewhat recent source is the paper files on the table in the Leverett town hall- and the file drawers in the assessor's office, but the computerized version will soon be available online.) When you are using Mass. Land Records on line, download deeds as pdf files. Make sure to check for (and include in your folder) ALL surveys (found in the Plan Books.)

Compile all relevant maps: zoning, aquifer protection zones, MA Natural Heritage Biomap 2, Historic Districts - anything that might be relevant. (For example, the aquifer zone status determines the required acreage of the "building envelope.") Spend time at the MassGIS website and town hall searching for good stuff.

Prepare a master map of the property with the various overlays listed above. If you don't have the mapping software/skill to do this, have someone else on the Board (or associated with the Board) do it.

Note: During this process, you will be taking photographs - of every corner, of special habitats or events or whatever. Name each jpeg file and file it so that it will be easy for you to use them in the baseline and so that you can make a copy which you (or whoever is the photographer(s) sign as part of the baseline process.

Technology note.

Photos: I use a photo app on my smart phone that records the lat/long, compass angle, date/time, and allows me to type in a title in the field. If you plan to use such an app, learn to use it before you start this process AND be aware that your phone memory evaporates in front of you. Carry a back-up memory pack.

GPS: I use a garmin GPS unit, but might be able to get by with a smart phone gps app that I use sometimes on trails. Certainly it would work in the initial stages, but you need to talk with your map techie to see if it provides enough information for the real maps. Again, these are very memory-expensive apps.

2. More interaction with the owner and neighbors

Get help from the owner(s) and neighbors (if the owner agrees - see notes below) collecting any of the above information

Make sure the land owners understand the costs associated with the process. For example, if the CR is a gift (or partial gift i.e. selling below market value) and the owner plans to submit that information to the IRS or Massachusetts Dept. of Revenue, the value of the land before and after the CR has to be appraised. Since this is a benefit to the landowner, it is almost always the land owner's responsibility. Note: there are sometimes small grants to provide landowners with funding for the transfer costs. Check around to see if these are available.

3. More interaction with the Board

It is the policy of the Board that at least 2 members of the Board should be involved in any land project (owned or CR). Make sure there is a second Board member involved in every step of the process.

The Board needs to be well-informed. There should be an update at every meeting and, when possible, each Board member should visit the property. During the discussion, use the "Purpose" and the "Prohibited Uses and Reserved Rights" to frame the discussion. (See the first section of the document.)

4. Building support beyond the Board.

Note: the timing of this process will depend on the circumstances. If the owner does not want lots of questions from neighbors or to be called by real estate folks, that has to be honored and the "building support" effort would need to be delayed. There might be other reasons to be cautious.

Don't do any of this until you are pretty sure the CR is going to happen i.e. make sure the owner (s) and the Board are both very supportive.

Neighbors - as soon as it is possible begin explaining what is going on to the neighbors. Your call as to whether this is one by one or all at once - or a combination. Traditionally, neighbors are concerned about change - a trail that will bring strangers, a change of land use, a prohibition about driving their ATV across this property. It is important to be prepared (maps really help) and to listen to see if there are ways to respond to their concerns.

Conservation Commission - this group has to sign off on the CR - really saying that they are aware of it and that it meets their open-space goals. In fact, there is often a more substantive discussion. Again, your call about whether to wait to meet with the group or to talk with each member so they will understand the property/issues.

Select Board - this group also has to sign off. Like the ConCom and the neighbors, they don't like surprises. Keeping them informed individually - rather than having it part of a public meeting - is surely wise.

Note on why the community might object (in addition to those listed above):

CR reduces the value of the land (if it is not already in Chapter 61) i.e. less tax revenue to the town. Note that if part of the property is put in the building envelope, taxes may not go down - especially if a new house is being built. Try to be well-informed about tax issues.

CR means that the property cannot be developed (assuming it actually could become house lots). That means less tax revenue - but WAY MORE important: there will be no children to send to the elementary school. (Do not underestimate the importance of this.) This issue is much more important than the well-documented fact that a home with children in school costs the town more than they get in taxes from that house and lot.

State - the last signature on the CR is that of the Secretary of Energy and Environmental Affairs. Before that signature, the Division of Conservation Services in the Office of Energy and Environmental Affairs has to have reviewed the CR twice: once in draft form and once with all the other signatures in place. It then goes to the department lawyers for a final check and to the desk of the Secretary for the final signature.

 It can't be a bad idea to inform the Conservation Services staff of the impending CR asking any general questions or at least finding out the timeline - that is especially important information if the land owner hopes to close before the end of the calendar year in order to get tax benefits.

**IV. Third stage - Draft CR and Draft Baseline**

Note: Most of the CR language is pre-determined by the state

1. Is the CR balanced and coherent? (See first page of these notes)

2. Does the Baseline adequately describe the property? If not identify what is needed and how to get it. (And get it.)

3. Does the owner agree with the wording of the both the CR and Baseline drafts? Note that the owner has to sign both documents, so any problems need to be solved now.

4. Does the Board agree with the substance of the drafts? Again, the Board has to vote their approval of the CR and if there are issues/concerns, they need to be resolved now.

5. Send the draft and the accompanying 5-page form to Boston (to the Division of Conservation Services in the Office of Energy and Environmental Affairs). The cover letter should, if possible, indicate previous conversations and stress that this CR follows the same pattern as previous CRs (list those CRs by book and page and, if you know it, the Division's code number for each of these properties). If possible get a sense of when you will get it returned (assume one month, might be 6 months)

6. While the CR is in the pile, finish the Baseline so it is ready to be signed by the owner and the Board representative.

**V. Final Stage** **- once the corrections have arrived from Boston** (there are ALWAYS corrections - some grammatical, possibly some substantive). Pay attention to the Division's code number for this CR and use in all future communication with them.

1. Review these corrections carefully - have more than one reader check to make sure nothing is missed. If there are substantive issues, discuss with the Board how to address them. If appropriate include the owner in these discussions, but the corrections are rarely related to the owner and so are sometimes just confusing. You cannot go ahead with signatures until the text is agreed upon (owner, Board and state). If you have questions about the new wording, contact the state to have them approve.

2. Present the final CR to the Board and owner(s) for their approval. Board has to vote to accept it and authorize someone (usually designating either or the co-chairs) to sign the final document.

3. Ask the ConCom to put this on their agenda (in Leverett they only meet once a month). Make sure they get an abstract with all the information they need - or perhaps send everyone the whole thing but that seems cruel. At the very least provide a map of the property, a second map of the property with nearby protected properties, an abstract of the Purposes and Uses to every member and the ConCom agent. Have at least two RGT Board members and ideally the owner(s) at the meeting. If you have done your work with the ConCom ahead of time, this should not be a major confrontation.

Note: All ConCom members present who vote in favor of it, must sign. It does not have to be notarized. Take an extra copy of the signature page along in case somebody makes a mistake and they need to do it over. (It this is a CPA-funded CR, the rules here change slightly since ConCom may be signing also as the owner - see end of this document.)

4. Ask the Select Board to put this on their agenda (has to be scheduled after ConCom signs). Again, the same materials that were sent to the ConCom and an available copies of the whole CR. Ask the Selectboard Clerk what else they need. Again, if you have done your homework, this should not be a major confrontation. Bring at least two members of the Board - one of whom can sign for the Board (co-chair or someone authorized by the Board) and the owner. Bring both the CR AND the Baseline and ask the clerk to notarize all signatures. (There are also notarized signatures by the Baseline preparer(s) and the photographer(s). Those can be done at the same time or in the office the day before so as not to take up so much public meeting time.)

Note #1: The Select Board signature page begins with the motion they vote on in order to sign the document. It also has the place at the bottom for notarizing the signatures. Bring at least one extra copy of the short maps/abstract so that the reporter or anyone at the meeting knows what is going on.

Ideally, you can make copies on the town xerox machine before you leave so that the town clerk has a copy of all signed pages, you have an extra copy and you have the original notarized signatures to send to Boston.

Note #2. What follows is totally boring, but it is the legal reason why the select board has to sign off on the CR and might help you explain this requirement to the Board should they ask:

CHAPTER 184. GENERAL PROVISIONS RELATIVE TO REAL PROPERTY

This is the section that seems to me to be the most important and gives the logic. (the actual requirement that it be approved is in Section 31 toward the end of the first long paragraph (which I believe is actually one sentence.)

Chapter 184: Section 32. Effect, enforcement, acquisition, and release of restrictions

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

5. Send the original copy (with all the signatures) to Boston with an appropriate cover letter. (I have always sent an email as well saying that it is on the way. However, those that I dealt with have retired. I have no idea the appropriate protocol for the future.) I also sent it priority, registered mail so I could track its progress and receive proof of delivery.

It may take a few weeks to get the document signed and returned.

In preparation for taking the deed to Greenfield, plan on having $75 (or whatever the going rate is) in cash. Ideally, this can be a small but festive event. A lot of folks have worked very hard to make this happen.

Once the deed is registered, use whatever RGT events are appropriate, also announcements in the Leverett newsletter, RGT website, annual meeting, fund-raising letter to celebrate. A public walk on the property led by the land owner is great.

6. Final favor to ask. Please look back over these notes - make changes, comments, whatever will be helpful for the next poor souls who find themselves working on a CR. Special thanks to Angelo Teachout for his help in developing and editing this document.

Mary Alice Wilson, September 13, 2015

\* Note about private vs. public CRs. While many of the same steps in these notes on private CRs apply to the process of holding CRs on public property, there are significant differences. The public property CRs are usually purchased with CPA funding and therefore owned by the town (usually the ConCom) with the understanding that RGT will hold the CR. The preparation of the CR is therefore much more public because it is an extension of building support for the purchase of the property at town meeting. However, much of the process and the understanding of how to negotiate windy corners is exactly the same. As is the preparation of the vi data. Perhaps the most significant difference is knowing all the deadlines and requirements of the CPA process and meeting those - and answering all questions from CPA members with accurate and timely information. (And preparing materials for meetings that are clear and address questions you anticipate.) Also, when the town owns the land either the ConCom or the Select Board signs as "property owners" - with all the required notarization etc.