E09. Building Envelopes in Conservation Easements: Drafting for Perpetuity

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Land Trust Alliance
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BUILDING ENVELOPES IN CONSERVATION EASEMENTS: DRAFTING FOR PERPETUITY

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I. Federal Income Tax Charitable Deduction Perpetuity Requirement Overview[1]

In general, a taxpayer may claim a federal income tax deduction for charitable contributions. See *I.R.C. § 170(a)(1)*. In order for a taxpayer to receive a charitable deduction for the contribution of a conservation easement, the donated interest must be a "qualified conservation contribution" and must meet all of the requirements of I.R.C. § 170(h). Under I.R.C. § 170(h)(1), a "qualified conservation contribution" is a:

- Qualified real property interest,
- Donated to a qualified organization,
- Exclusively for conservation purposes.

For a conservation easement to be a qualified real property interest, it must place a restriction, in perpetuity, on the use of the property. See *I.R.C. § 170(h)(2)*. The requirements for a qualified organization are set forth in I.R.C. § 170(h)(3).

I.R.C. § 170(h)(4) defines the permitted conservation purposes, including: the preservation of land areas for outdoor recreation; the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; the preservation of open space where preservation is for the scenic enjoyment of the general public; or the preservation of an historically important land area or a certified historic structure. In order to be exclusively for conservation purposes, the conservation purposes of the easement must be protected in perpetuity. See *I.R.C. § 170(h)(5)*.

A conservation easement should be carefully drafted to suit both the conservation purpose of the property and the desires of the donor. Although a conservation easement significantly limits the allowable use of the property, the donor may retain certain rights and allow certain

[1] State Law may have different requirements, and therefore, it is important to address state law as well.

uses on the property. However, any interest in the property retained by the donor must be subject to legally enforceable restrictions that will prevent use that is inconsistent with the purpose of the conservation easement. See *Treas. Reg. § 1.170A-14(g)(1)*.

Generally, a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. *Treas. Reg. § 1.170A-14(e)(2)*.

When taxpayers donate conservation easements to claim a federal income tax deduction, the perpetuity requirement is subject to scrutiny by the Internal Revenue Service (IRS). I.R.C. §§ 170(h)(2)(C) and 170(h)(5) both require perpetuity, but are separate and distinct requirements. See *Belk v. Commissioner, 774 F.3d 221 (4th Cir. 2014)(Belk III), affirming 140 T.C. No. 1 (U.S.T.C. 2013)(Belk I) and T.C. Memo. 2013-154 (U.S.T.C. 2013)(Belk II)*. I.R.C. § 170(h)(2)(C) requires the donated land interest to be subject to a use restriction in perpetuity, while I.R.C. § 170(h)(5) requires the easement's conservation purposes to be protected in perpetuity.

A. "Floating Easements" – Perpetuity Under I.R.C. § 170(h)(2)(C)

A floating easement is a conservation easement that by its terms allows the real property that is subject to the easement to be modified after the conveyance of the easement. Until recently, it was clear under the Belk line of cases that this type of easement would fail to be deductible under the theory that there was no qualified real property interest. However, the recent Fifth Circuit case of Bosque Canyon has opened-up a window for a "floating easement" to sometimes be deemed a qualified real property interest. *Bosque Canyon Ranch II, LP, et al v. Cir, No. 16-60068 (5th Cir. 2017*) (*Bosque Canyon II*). *See T.C. Memo 2015-130 (U.S.T.C. 2015) (Bosque Canyon I)*.

Belk

According to Belk and its progeny, the perpetuity requirement of I.R.C. § 170(h)(2)(C) relates to the real property subject to the use restriction. For a conservation easement to be a qualified real property interest, the easement must place a use on a specific parcel in perpetuity. See *I.R.C. § 170(h)(1)*. A perpetual use restriction lasts forever and is placed on an identifiable and specific piece of property. See *Belk III*. In Belk, the donor conveyed a conservation easement on a parcel of land that was used as a golf course. However, the language of the easement allowed the donors to substitute contiguous land outside of the property that was encumbered by the conservation easement for land included within the conservation easement area, subject to the grantee's approval based on specific criteria intended to protect the conservation purposes of the easement. The IRS challenged the

deduction based on the substitution provision and valuation. The Tax Court agreed with the IRS, holding that this "floating easement" did not place a use restriction on the land in perpetuity under I.R.C. § 170(h)(2)(C) because it allowed the donors to change the real estate that was protected by the conservation easement. In its holding, the Tax Court distinguished the "granted in perpetuity" provision of I.R.C. § 170(h)(2)(C) from the "protected in perpetuity" provision in I.R.C. § 170(h)(5).

The Tax Court reached a similar conclusion in Balsam Mt. Invs., LLC v. Commissioner, where the donated conservation easement reserved the donor's right to change up to 5% of the boundary lines of the area subject to the conservation easement. See *Balsam Mt. Invs., LLC v. Comm'r, T.C. Memo 2015-43 (U.S.T.C. 2015)*. Although the donor's reserved right was limited by restrictions, the Tax Court determined that the land subject to the conservation easement was not an identifiable, specific piece of property protected by the conservation easement because the donor could change the area of land encumbered by the conservation easement. See *Balsam (quoting Belk)*. Therefore, the donor's contribution was not a qualified real property interest because there was no use restriction in perpetuity as required by I.R.C. § 170(h) (2)(C), and the donor was not entitled to a federal income tax deduction.

Bosque Canyon

In Bosque Canyon, the Fifth Circuit, while asserting that its decision did not conflict with Belk, added a level of nuance to the evaluation of "floating easements" which adds a welcome dose of flexibility to the analysis, but also leaves the status of the law murky. The Fifth Circuit's approach to easement boundary adjustments in Bosque Canyon is much less rigid than the Fourth Circuit's approach in Belk and allows the court to look at the facts and circumstances of a specific easement boundary modification clause in determining whether an easement constitutes a qualified real estate interest. However, the distinctions made between the facts in Bosque Canyon and those in Belk are not altogether compelling and the Bosque Canyon case would certainly have been much stronger had it simply departed from the ruling in Belk.

In Bosque Canyon I, the Tax Court, citing Belk, denied a $15.9 million tax deduction and held that a conservation easement that permitted modification of the boundaries of the property encumbered by the conservation easement was not a qualified real property interest. However, on appeal, the Fifth Circuit Court of Appeals found that the conservation easement was a qualified real property interest and that the possibility of modification of property that was within the conservation easement did not violate the perpetuity requirement of I.R.C. §170(h)(2)(C).

The conservation easements at issue in Bosque Canyon together encumbered over 3000 acres of contiguous property. Within the outer perimeter of the conservation easement property (the "Ranch") there were 47 five-acre home site areas ("homesites") that were carve outs from the conservation easement. As described by the dissent, the conservation easements initially attached to one particular slice of cheese. The 47 homesites were like holes in the slice of cheese and were not part of the land protected by the conservation easements. The conservation easements allowed the landowner to adjust the location of the homesites and thereby change the boundary of the land that was excluded from the easement, which also would result in changing the land that was initially protected by the easement. No modification was permitted which would impact any property outside of the outer perimeter of the Ranch and all adjustments to the footprint of the homesites required the approval of the holder of the conservation easements.

The Fifth Circuit found this situation distinguishable from Belk largely based on the following findings (a) the boundaries of the homesites (the excluded property) could be changed only within the perimeter boundary of the Ranch, (b) the homesites could not be enlarged above 5 acres and thus the total acres under easement would not change, and (c) no modifications could be made without the holder's consent which was to be based on a "reasonable judgment" standard. The fact that the boundaries of the homesites could only be adjusted within the exterior boundaries of the easement was found to be a significant distinction from Belk where the property that could be encumbered upon modification could be "entirely different and remote" from the property originally encumbered. *See Bosque Canyon II.* The Bosque Canyon II court was also not troubled, as the Belk court was, by the possibility that modifications could result in changes to the appraised value of the donation. The Bosque Canyon II court concluded that the unencumbered homesites had roughly the same per acre value as the rest of the property that was encumbered by the conservation easements.

Citing rulings in *Commissioner v. Simmons,* 646 F.3d 6, 9-11(D.C. Cir. 2011) and *Kaufman v. Shulman, 687 F.3d. 21, 27-28 (1st Cir. 2012)*, the Bosque Canyon II court held that conservation easements should be modifiable to promote the underlying conservation interests. The court stated, "The need for flexibility to address changing or unforeseen conditions on or under property subject to a conservation easement clearly benefit all parties, and ultimately the flora and fauna that are their true beneficiaries." Finally, on the issue of perpetuity, the Bosque Canyon II court held that the standard of review for conservation easements is not the usual strict construction of intentionally adopted tax loopholes, but instead was the ordinary standard of statutory construction.

The Bosque Canyon II decision includes a vigorous and well-reasoned dissent that finds the majority's attempt to distinguish Belk based on the limits on modification within the larger

footprint of the easement property unpersuasive and finds that the standard of review applied to be "impermissibly lax". *See Bosque Canyon II*.

B. Location of Building Envelopes - Perpetuity of Conservation Purpose Under § 170(h)(5)[2]

The perpetuity requirement set forth in I.R.C. § 170(h)(5) relates to the enforcement and protection of the conservation purposes. Treasury Regulations explain that the "exclusive for conservation purposes" requirement is not meant to prohibit uses of the property that do not impair significant conservation interests. See *Glass v. Comm'r, 471 F.3d 698 (2006) (quoting Treas. Reg. § 1.170A-14(e)(1).*

If the location of a building envelope is not fixed at the time of the conveyance, the IRS may take the position that a charitable deduction should be denied based on a failure to protect the conservation purpose in perpetuity.[3] And the IRS has stated in past sessions at LTA Rally that the location of building envelopes must be specified in the conservation easement. However, the Treasury Regulations, certain court cases and private letter rulings have addressed this issue of fixing the location of a building envelope in a more lenient manner.

Treas. Reg. § 1.170A-14(a) provides that a qualified conservation contribution is the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. To be eligible for a deduction, the conservation purpose must be protected in perpetuity. Two examples in Treas. Reg. § 1.170A-14(f) illustrate the difference between impermissible "checkerboard" development and permissible clustered development in the context of a scenic easement.

Example 3. H owns Greenacre, a 900–acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. All of Greenacre is clearly visible from a nearby national park. Because of the strict enforcement of an applicable zoning plan, the highest and best use of Greenacre is as a subdivision of 40–acre tracts. H wishes to donate a scenic easement on Greenacre to a qualifying conservation organization, but H would like to reserve the right to subdivide Greenacre into 90–acre parcels with no more than one single-family home allowable on each parcel. Random building on the property, even as little as one home for

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[2] See Land Trust Alliance Forum:
Post on Feb 24, 2017 by Leslie Ratley-Beach, https://learningcenter.lta.org/groups/ask-an-expert/forum_messages/8680; Post on Jan 29, 2016 by Leslie Ratley-Beach, https://learningcenter.lta.org/groups/ask-an-expert/forum_messages/6989; Post on Oct 7, 2011 by Leslie Ratley Beach, https://learningcenter.lta.org/groups/ask-an-expert/forum_messages/2160.

[3] See Treas. Reg. § 1.170A-14(f), Example 3, "Random building on the property…would destroy the scenic character of the view. Accordingly, no deduction would be allowable."

each 90 acres, would destroy the scenic character of the view. Accordingly, no deduction would be allowable under this section.

Example 4. Assume the same facts as in example (3), except that not all of Greenacre is visible from the park and the deed of easement allows for limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park and subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park. The donor and the donee have already identified sites where limited cluster development would not be visible from the park or would not impair the view. Owners of homes in the clusters will not have any rights with respect to the surrounding Greenacre property that are not also available to the general public. Accordingly, the donation qualifies for a deduction under this section.

Example 3 is an example of “checkerboard” development, where the buildings would be scattered across the property. As the example describes, this undermines the scenic purposes of the easement because the scattered placement of homes would be viewable from the nearby park. In contrast, in Example 4, the development is clustered to areas that will not impair the view. In this case, the clustered development would be permissible. These examples address the pattern of the location of the building envelopes – checkerboard v. clustered – but do not provide us with definitive guidance on whether the precise location of the building envelopes must be fixed.

Glass

In Glass, the IRS denied the taxpayers a deduction for their contribution of two conservation easements on the grounds that the easements were not “exclusively for conservation purposes.” The taxpayers challenged the Commissioner’s decision, and the Tax Court concluded that the conservation easements were “exclusively for conservation purposes.” The United States Court of Appeals for the 6th Circuit affirmed. The purpose of the conservation easements at issue were “to ensure that the scenic and natural resource values of the property will be retained forever” and to “prevent the use or development… which conflicts with…these values.” The Court held that the grantor’s retained rights were carefully limited to ensure that the plant and wildlife habitats on the encumbered property would remain protected in perpetuity. For example, the grantors retained the right to construct and maintain a shed, boathouse, or deck, but in a manner and location that minimizes interference with the plant and wildlife habitats protected by the conservation easement.

Additionally, the conservation easements allowed the donor to "retain all rights…which are not prohibited by or inconsistent" with the stated conservation purpose, and granted the donee the necessary rights to prevent the donor and future landowners from using the property in a manner inconsistent with the conservation purposes. The donee could enter the property, monitor the landowner's use for compliance, and take corrective action to require the landowner to restore the property as needed.

The Court emphasized the carefully crafted provisions that granted limited rights to the grantor and the necessary rights to the grantee to monitor and enforce the conservation purposes of the easements. Therefore, the Court affirmed the decision of the Tax Court, holding that the conservation easements were deductible "qualified conservation contributions."

Butler

In Butler v. Comm'r, the Tax Court considered four conservation easements that permitted construction on the property. See *Butler v. Comm'r T.C. Memo 2012-72 (2012)*. The first easement covered 393 acres and significantly restricted the donor's use of the property, but reserved 11 building sites, the location of which was specifically designated in the baseline report. Each building site consisted of two acres and allowed one single-family residence, garage, and barn or multi-purpose outbuilding, and each building site could be sold as a separate lot. The easement also allowed the donor to reconfigure the building sites, subject to donee approval. The second easement encumbered 12.7 acres and allowed one two-acre residential building site with the same permitted uses as the first easement.

Easements three and four collectively covered 4,230 acres and reserved the right to divide the land into 15 parcels, provided no parcel is less than 200 acres. The future owners of each parcel had the right to build a single-family residence, nonresidential buildings, and additional residential buildings within a 5-acre building envelope. Future owners of a subdivided portion greater than 500 acres retained the right to build two residential buildings, a lodge, and three guest houses within a 15-acre headquarters site. The locations of the subdivided parcels and building sites was not specified in the conservation easements but was subject to the donee's approval.

The Court held that the donation of each of the conservation easements was a deductible charitable contribution. Important factors in this case include the relatively small building sites compared with the size of the entire property and the donee's overarching rights to enforce the conservation purposes. The easements grant the donee the right to enter the property, monitor for compliance, and require the donor/landowner to restore the land if there is a use that interferes with the conservation purposes of the easements. The Court also

placed importance on the fact that the donee actually exercises these rights and regularly monitors the donated properties.

The opinion did not address the failure in the third and fourth conservation easements to designate the location of the building sites in the conservation easements or the baseline reports. The Court did not discuss whether the conservation easements failed the perpetuity requirement of either I.R.C. § 170(h)(2)(C) or § 170(h)(5) because the building sites were not designated.

Although private letter rulings (PLRs) cannot be relied upon by other tax payers, several PLRs exist which directly address floating building envelopes. *See https://www.irs.gov/newsroom/ understanding-irs-guidance-a-brief-primer*

PLR 9603018 (1996)

This letter ruling involved a conservation easement where the conservation purpose was open space for the scenic enjoyment of the general public. In the conservation easement, the donors reserved the rights to construct an additional residence and associated improvements within a designated "Area C" which was not visible from the roadway. The donors also reserved up to 5 new residences in "limited building sites" within specifically designated building envelopes (which do not require donee approval to build). The conservation easement also permitted the donor to relocate building envelopes and to construct structures outside the specified areas (with donee approval). This ruling cites IRC § 170(h)(4)(A)(iii) which provides that a deduction will not be allowed for the preservation of open space if the terms of the easement permit a degree of intrusion or future development that would interfere with the [conservation purpose]. The ruling also cites Treas. Reg. § 1.170A-14(f), example 3, which states that a deduction for the donation of a scenic easement would not be allowed if the donor reserves the right to subdivide and construct homes on the parcels (because it undermines the scenic character of the view). However, Treas. Reg. § 1.170A-14(f), example 4, states that the deduction would be allowed if the donor and donee have already identified sites where limited cluster development would not be visible from relevant locations or impair the view.

The IRS determined that the fact pattern in this ruling is similar to example 4 above, where limited residential development is clustered in a predetermined area that does not harm the scenic view. The IRS concluded in the ruling that the easement is a qualified conservation contribution and is deductible.

PLR 9632003 (1996)

In this letter ruling, the donor reserved the rights to:

(i) use a “Ranch Area” for commercial uses and educational activities and to construct structures related to those activities without donee approval;
(ii) a building envelope for one residence in “Area III” without donee approval; and
(iii) relocate the building envelope, but only with donee approval.

This ruling states that the conservation easement provides an adequate means by which the conservation purposes will be protected. “The reserved rights…must have a low level of impact and intrusion on the property,” and the grantee has the right to inspect the property to ensure that the landowner’s use is not inconsistent with the conservation purposes. The ruling also mentions that the donee should consider effects to water quality, the need for additional road construction, and the extent to which the proposed activity would otherwise impair the conservation values. The IRS concluded that the easement is a qualified conservation contribution and is deductible.

PLR 200403044 (2004)

The proposed conservation easement addressed in this ruling is intended to protect relatively natural habitat. The easement permits building sites that are not yet identified, but the location of which are subject to the approval of the donee.

To determine whether the easement is deductible, the IRS looks to the perpetuity requirement in I.R.C. § 170(h)(5)(A) which provides that a contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity. The ruling also cites Treas. Reg. § 1.170A-14(g)(1) which provides that any interest retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions that will prevent use of the donor's retained interest that is inconsistent with the conservation purposes of the donation. See *S. Rep. No. 96-1007*, at 13 (1980), 1980-2 C.B. 599, 605. The ruling also looks to Treas. Reg. § 1.170A-14(e)(2), which provides that a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests.

The IRS then analyzes Treas. Reg. § 1.170A-14(f) example 3 which discusses that a deduction for the donation of a scenic easement would not be allowable if the donor reserved the right to subdivide and construct single family homes on parcels as large as 90 acres where random building on the property would destroy the scenic character of the view. The

IRS t then cites to example 4 that indicates that a deduction would be allowable if the donor and donee had already identified sites where limited cluster development would not be visible from relevant locations or impair the view.

The IRS concludes that the proposed building sites are not so significant that they would negatively impact the natural habitat purpose of the conservation easement because they are limited in number and their location is subject to the donee's approval. The ruling finds that the proposed conservation easement is more similar to example 4 even though the donor and donee have not agreed to the location of the building sites in advance. The fact that the donee must ensure that the location of any proposed building site is consistent with the wildlife habitat purposes of the Easement is sufficient.

II. Additional Case Law Relating to Structures and Improvements

Goldmuntz v. Town of Chilmark, 38 Mass.App.Ct. 696 (1995)

The Court determined that an in-ground swimming pool is not a permitted "improvement of the existing dwelling" or an "accessory structure" to the existing dwelling, but is instead a prohibited structure. The conservation purpose of the conservation easement is to retain the property's natural, scenic and open condition, and the pool is inconsistent with this purpose.

Chatham Conservation Foundation, Inc. v. Farber, 56 Mass.App.Ct. 584 (2002)

The issue before the Court was whether the construction of a proposed elevated walkway was prohibited by the conservation easement's restriction on "structures" or if it was a permitted "reasonable repair or improvement?" The request to build an elevated walkway was to replace an existing walkway. The Court determined: "The restriction must be construed beneficially, according to the apparent purpose or advantage…it was intended to promote." The Court found that the right to build the walkway is incidental to the landowner's right to access the property, but remanded the case to the lower court to determine if the elevated walkway is reasonable in consideration of the conservation purpose (or if the walkway should be less elaborate).

Windham Land Trust v. Jeffords, et. al., 967 A.2d 690 (ME 2009)

Landowners purchased land subject to a conservation easement and wanted to use the land for commercial purposes like music festivals, hiking, hay rides, sleigh rides, etc. to gain a profit. Whether the conservation easement prohibited money-earning activities was unclear, but the easement purpose was to prevent non-residential use, non-recreational use, or development that would conflict with the natural, scenic condition and to preserve and

protect the natural, open space…while not limiting the Grantor's power to utilize the property for residential recreational purposes. The terms "commercial use," "non-residential use," and "residential recreation purposes" are not defined in the conservation easement.

The Court held that the conservation easement unambiguously prohibited the planned commercial activities and that the large number of potential recreational users was an overburdening of the conservation easement.

PBBM-Rose Hill, Ltd. v. Commissioner, No. 26096-14 (U.S.T.C. 2016)(Sept. 9, 2016 Bench Opinion)(Unpublished)

The IRS challenged the deductibility of a conservation easement on multiple grounds. The Court agreed with the IRS, disallowing the deduction. The easement reserved the rights to build tennis courts, two houses, and a variety of other structures. The Court found that the extent of the reserved rights to build on the property were a problem for deductibility. However, the Court declined to base its decision on this argument because there were more salient reasons to disallow deductibility.

Weston Forest & Trail Ass'n v. Fishman, 66 Mass.App.Ct. 654 (2005)

Although the conservation easement prohibited the "construction or placing of any buildings…or other structures on or above the ground," the landowner built a barn in a restricted area. She argued that the easement language was ambiguous and could be interpreted to allow her to build anywhere on the property. The Court rejected this argument, considering the intent of the parties as manifested by the words used in the easement language. The restriction must be construed beneficially to the purpose of the easement. The purpose of the conservation easement was for the "preservation of [the property] in its predominantly natural and undeveloped condition." In light of the conservation easement's purpose, the Court held that there was no ambiguity in the conservation restriction, especially because the language explicitly bans construction. Although the easement reserved the right to prune, clear, and burn as needed for the raising of livestock or other agricultural activities, the Court held that this does not permit building a barn for these activities. Therefore, the Court affirmed the lower court's judgment, directing the landowner to remove the barn.

III. Tips for Drafting Building Envelope Provisions

1. Carefully draft the language of the conservation easement to ensure that the reserved rights of the landowner and that the permitted uses do not undermine the

conservation purposes of the conservation easement. All identified conservation purposes must be protected.

2. Location, number and size of building envelopes must be designed to protect all conservation purposes (i.e. cluster development in scenic easement).
3. Clearly provide for right to enter the property to monitor and enforce.
4. Prohibit all activity that is inconsistent with the conservation purposes.
5. Require holder approval of any adjustments to existing building envelopes. Adjustments should include only property already within the easement. (*But see Bosque Canyon II*).
6. Require holder notification/approval of final plans (including site plan) before initiation of construction.
7. Courts will look to plain words and customary meanings of words. Use terms that are capable of being understood 100 years from now that a "reasonable person" would understand.
8. Don't rely on "savings clause" to comply with IRS requirements. Specific provisions prevail over a savings clause. See *Belk v. Commissioner, 774 F.3d 221 (4th Cir. 2014).*
9. Define terms wherever possible.
10. Know the property and do not set unrealistic expectations (i.e., do not provide for building in NE corner if only buildable portion is in NW corner).
11. If subdivision is permissible, require a recorded document at the time of subdivision that sets the allocation of floating building envelopes that are not yet fixed to subdivided parcels.
12. Leaving the building envelope area out of the conservation easement altogether is often an option. Pros and Cons of this option:
    a. No monitoring responsibility if excluded.
    b. Will not jeopardize conservation purpose if excluded.
    c. Exclusion eliminates the building envelope location challenge.
    d. If building envelopes cannot be finally located at the time of the conservation easement, carving out may result in the wrong property being excluded (*see Bosque Canyon*).
    e. Risk of leaving the conservation easement property with no economic viability if no structures are available for support (i.e. ranch, agriculture).
    f. Adjacent unrestricted development may harm conservation values of easement property.
13. When possible, identify the location of the building envelope in the conservation easement.
    a. A surveyed legal description of the building envelope is the gold standard and the best option where financially viable and location is certain.
    b. GPS coordinates of the corners of a building envelope is another good option.

c. Lines drawn on a properly scaled map with sufficient detail to allow ground location attached to the conservation easement will suffice but should be the last option.

14. When the precise location of the building envelope has not been determined, avoid leaving the location of the building envelope completely undecided. Provide that buildings cannot be placed in a manner that would be harmful to conservation purpose/values and always provide for final approval of the land trust. Options include:
    a. Identify a specific area of the land within which the building envelope must be located, i.e. a larger building area of 10 acres, within which a 2-acre building envelope must be located.
    b. Identify multiple potential building envelopes, but specify that the landowner must choose only a specified number and the rest of the potential sites will be extinguished.
    c. Identify portions of the property where the building envelopes cannot be located (i.e. special natural areas or wetlands), and require that the final location of any building envelope is subject to land trust approval.
15. Require landowner to provide final survey of building envelope upon completion of construction and supplement Baseline with final building envelope locations.
16. Be specific regarding types of buildings permitted and uses of buildings, where applicable.
17. Where possible, specify the location of driveways, utilities, etc. necessary to serve the future building envelope.
18. Avoid unnecessary restrictions that are not necessary for the conservation purposes of the easement.
19. Avoid non-essential restrictions that are difficult to monitor and enforce (i.e. does building height matter? Building materials? Does the exact size of the building footprint matter? If not, do not limit these).
20. Avoid unnecessary specificity in relatively harmless improvements (i.e. dog run example).
21. Carefully consider whether commercial uses are or are not prohibited. This can be difficult to monitor. Use for sale of ecosystem credits – is this a commercial use? Does it interfere with conservation purpose?
22. Include a statement that permission to build does not mean that building permits or land use permits can be obtained.

IV. Questions for Landowners Prior to Drafting

1. What are landowner's long term goals/vision for the property - aesthetic, conservation, economic, recreational?

2. What are the landowner's priority of uses?
3. How is the property currently used?
4. What structures currently exist on the property?
5. What infrastructure currently exists on the property? i.e. roads, wells, ditches, irrigation system, anything else that needs to be maintained?
6. What are the landowner's concerns about the conservation easement?
7. Review property resources and conservation purposes with landowner.
8. Review all possible restrictions with the landowner that are required to protect the conservation purpose and get the landowner's feedback on each.
9. What other family members may be using the property and what are their goals?
10. Do any third parties have rights to the property? i.e. grazing or farming lease, hunting or fishing license, access rights, etc.
11. What are the property's sources of income? i.e. agriculture, hunting lease, fishing lease, weddings, etc.
12. What is most valued by the landowner about the property?
13. What is landowner's motivation for the conservation easement?
14. What are landowner's existing plans for development; including any specific ideas, drawings, etc. for future structures and locations?
15. Ownership structure?
16. What land adjacent or nearby is owned by the landowner?

V. Sample Provisions

1. Building Envelope. Grantor has designated a building envelope consisting of ___ acres in size in the general location depicted on **Exhibit B** (the "**Building Envelope**"). Grantor may construct, place, replace or enlarge Residential and Non-Residential Improvements within the Building Envelope subject to the following limitations:

    (i) **[State maximum number of improvements.]**
    (ii) **[State maximum square footage for each improvement and cumulative.]**
    (iii) **[State maximum height.]**
    (iv) **[Other building restrictions.]**
    (v) The construction of new Residential Improvements and new Non-Residential Improvements within the Building Envelope shall not cause adverse environmental impacts to the Conservation Values on portions of the Property located outside the Building Envelope.

2. Building Envelope. Grantor may designate a building envelope ("**Building Envelope**") of no more than ___ acres in size, only within the ____ acre building area Grantor has

designated in the location depicted on **Exhibit B** (the "**Building Area**"). Prior to construction of either the first new Residential Improvement or the first new Non-Residential Improvement within the Building Envelope, Grantor shall present Grantee with a plan showing the proposed boundaries of the Building Envelope within the Building Area. Grantee shall review the proposed location of the Building Envelope to ensure that it is located wholly within the Building Area. Upon acknowledgement that the boundaries of the proposed Building Envelope are located wholly within the Building Area, Grantor and Grantee shall record in the property records of the county or counties in which the Property is located Notice of Building Envelope Designation in a form similar to the form attached hereto as **Exhibit X**, which shall also include a revised **Exhibit B**, which revision shall establish the boundaries of the Building Envelope. Any such revision shall be binding on any lender whose mortgage or deed of trust is subject to the terms of this Deed. After a properly executed Notice of Building Envelope Designation is recorded, new Residential Improvements or new Non-Residential Improvements may be built within the Building Envelope subject to the following limitations:

(i) **[State maximum number of improvements.]**

(ii) **[State maximum square footage for each improvement and cumulative.]**

(iii) **[State maximum height.]**

(iv) **[Other building restrictions.]**

(v) The construction of new Residential Improvements and new Non-Residential Improvements within the Building Envelope shall not cause adverse environmental impacts to the Conservation Values on portions of the Property located outside the Building Envelope.

3. Building Envelope. Grantor may designate a building envelope ("**Building Envelope**") of no more than ___ acres in size, within one (1) of four (4) locations depicted on **Exhibit B** as "A," "B," "C" and "D." Grantor shall inform Grantee in writing of Grantor's choice of locations for the Building Envelope. Grantor and Grantee shall then execute and record in the property records of the county or counties in which the Property is located a Notice of Building Envelope Designation in a form similar to the form attached hereto as **Exhibit X**, which shall also include a revised **Exhibit B**, which revision shall establish the boundaries of the Building Envelope. Any such revision shall be binding on any lender whose mortgage or deed of trust is subject to the terms of this Deed. After a properly executed Notice of Building Envelope Designation is recorded, new Residential Improvements or new Non-Residential Improvements may be built within the Building Envelope subject to the following limitations:

(i) **[State maximum number of improvements.]**

(ii) **[State maximum square footage for each improvement and cumulative.]**

(iii) **[State maximum height.]**

(iv) **[Other building restrictions.]**

(v) The construction of new Residential Improvements and new Non-Residential Improvements within the Building Envelope shall not cause adverse environmental impacts to the Conservation Values on portions of the Property located outside the Building Envelope.

4. Structures Permitted in Main Ranch House Building Area. Within the Main Ranch House Building Area, the Grantor may construct, maintain, repair, enlarge and/or replace one (1) single-family residence (which may be converted into a bed and breakfast or other similar short-term overnight accommodations), improvements and uses accessory thereto, including a greenhouse, windmills, access drives and related improvements, fish ponds, landscape structures, gardens, a guest house, garages, a barn, a meeting venue, livestock pens, accessory structures and recreational structures including without limitation, a garage, a small barn, indoor and outdoor tennis courts, tower and swimming pools. No such structure shall exceed 50 feet in height. At the time of construction of any such improvements, Grantor shall notify Grantee so it can update its records. Grantor and Grantee acknowledge that Grantor has constructed certain of the structures permitted in the Main Ranch House Building Area, as listed on the attached **Exhibit C**.

5. Permitted/Prohibited Improvements and Activities. Grantor has designated one (1) building area (the "Building Area") which is five (5) acres in size and a driveway serving the Building Area (the "Driveway") both of which are depicted on Exhibit B. The Building Area and the Driveway are also legally described on Exhibit C, attached hereto and incorporated herein by reference. The remainder of the Property is designated as an open area (the "Open Area"). That portion of the Property within the Building Area shall be used only for non-commercial agricultural uses or single-family residential uses, including accessory uses (as described below); the remainder of the Property shall be used for preservation of open and scenic views and wildlife habitat, for non-commercial agricultural uses, as described herein, for passive recreational uses, for outdoor, environmental, and other educational purposes, and for nature appreciation, or the other uses permitted herein. Any activity on or use of the Property that would significantly impair or interfere with the Conservation Values or is inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following improvements and activities are permitted or prohibited, as expressly provided herein:

(a) Subdivision. Any partition, division, subdivision or de facto subdivision of title to the Property, whether by physical or legal process, is prohibited.

(b) Improvements Permitted in the Building Area. Within the Building Area, Grantor may construct, maintain, repair, enlarge and/or replace one (1) single-family house, one (1) guest house, one (1) garage, one (1) barn (which may include an indoor riding area), livestock pens located adjacent to the barn, accessory structures, and one (1) outdoor riding area (which shall not include lighting or spectator seating); provided, however, that the square footage of enclosed Floor Area within the Building Area shall not exceed a cumulative maximum of 50,000 square feet. No such structure shall exceed 35 feet in height. The structures shall not be constructed of shiny or reflective materials (however this does not preclude the use of glass, flat finished metal and flat finished painted metal), and shall be constructed using natural materials such as wood, log or stone, or using brick, stucco or masonry. It is preferred that colors that blend with the surroundings be used. Within six (6) months of substantial completion of the construction or placement of any improvement within the eastern 100 feet of the Building Area (as depicted on Exhibit B), Grantor shall provide screening of such improvement from the view shed of Roundup Road by planting trees of a native species such as ponderosa pine or douglas fir in a manner that will screen at least 50% of the view of such improvement from Roundup Road. Prior to planting such trees, Grantor shall consult with Grantee to ensure that the foregoing requirements can be met by the proposed plantings. Prior to commencing construction of any such improvements Grantor shall provide notice to Grantee. Notwithstanding any provision of this Easement to the contrary, boarding of horses in compliance with Brown County regulations is permitted within permitted structures within the Building Area; provided, however, that such boarded horses shall not exceed a maximum of twelve (12) at any point in time. Such horses are permitted within the Open Area only to the extent permitted by Section 3(h) hereof. “Floor Area” as used herein shall mean all residential or non-residential finished or unfinished space, covered and enclosed within two or more walls, but does not include residential covered or uncovered decks or patios or residential basements (including walk outs). At the time of construction of any such improvements, Grantor shall notify Grantee so it can update its records.

(c) Improvements Permitted in the Open Area. No buildings, structures or improvements shall be constructed in the Open Area except fencing, as described herein, and up to three (3) loafing sheds. The loafing sheds must be located in draws, oak brush groves or other areas screened from view of Roundup Road, and not in exposed areas of the Property. The loafing sheds shall be no larger than twenty-four

(24) feet in length, twelve (12) feet in width and have an eight (8)-foot eave height, and shall be constructed of non-reflective materials that blend with the natural surroundings, and if painted, shall be painted using non-reflective paint and colors, such as earth-tones, that blend with the surroundings. White paint shall not be used.

(d) Other Buildings and Structures Prohibited. The construction or reconstruction of any building or other structure or improvement, except those permitted herein, is prohibited.

APPENDIX A

Relocation of Building Envelope in the Event of Sea Level Rise to designated Relocation Areas with Court Approval

Modification or Relocation of Compound Area. The parties acknowledge that the Grantor's reserved right to maintain and use structures and related infrastructure within the Compound Area is critical to the Grantor's ability to provide environmental and conservation educational and research opportunities as contemplated in the defined Purpose of this Conservation Easement.

The parties also acknowledge that the dynamic nature of the Protected Property (as a coastal barrier island) subject to rising ocean levels, littoral drift, extreme weather events, and/or other forces of nature may, at some point in the future, make the Grantor's exercise of its reserved right to continued use of the Compound Area impossible or impracticable.

If the Grantor's reserved right to use the Compound Area as contemplated by this Conservation Easement becomes impossible or impracticable due to such natural forces and causes, the boundaries of the Compound Area may need to be adjusted or relocated from that configuration shown in the attached Exhibit B and in the Report. In case of such impossibility or impracticability of continued use of the Compound Area caused by natural forces, the Grantor and the Grantee shall cooperate with one another to seek a court order from a court with competent jurisdiction approving the adjustment of the Compound Area boundary or relocation of the Compound Area within one of the delineated areas depicted on the attached Exhibit "D" (the "Compound Area Relocation Envelopes"). The Grantor and the Grantee shall identify to the court an area within one of the Compound Area Relocation Envelopes that the Grantor may use in the same manner as this Conservation Easement permits the Compound Area to be used (such selected area is the "Relocated Compound Area"), subject to the following conditions:

(i) in no event will the Grantor and Grantee seek court approval for a Relocated Compound Area which would result in an increase or in a decrease (without Grantor's approval) in the size of the Compound Area;

(ii) in no event will the Grantor and the Grantee seek court approval for a Relocated Compound Area which would result in any adverse impact upon the Conservation Values of the Protected Property, as determined by the Grantee (subject to court approval);

(iii) the original Compound Area and the Relocated Compound Area will both remain within the Protected Property and subject to this Conservation Easement;

(iv) all of the Grantor's reserved rights in the Compound Area shall be transferred to the Relocated Compound Area (and shall no longer apply to the Compound Area);

(v) the Grantee makes no representation or warranty regarding the suitability of the Compound Area Relocation Envelopes for improvements, including, but not limited to zoning restrictions, permissibility of utilities or waste disposal apparatuses such as septic systems or the existence of natural features such as sinkholes, wetlands or other physical conditions; and

(vi) Grantor shall restore, replant and revegetate with appropriate vegetation the Relocated Compound Area generally consistent with the structures, plantings and vegetation in the original Compound Area.