Practical Pointers Series
APPROVALS, LICENSES, INTERPRETATION LETTERS AND WAIVERS

Some easements contain discretionary approval or waiver provisions that allow the land trust to approve, under certain conditions, activities that are restricted or are not specifically addressed by the easement. Most easements contain other standard approval functions, for example, approval of certain reserved rights. It is important that your land trust have a system for documenting approval requests, the review process and the decision, so that a paper trail exists for future reference. Thorough documentation, including maps, photos, diagrams or anything written that you request from the landowner to help you evaluate the approval request, should be retained with the approval letter itself and will help the land trust avoid later confusion. A sample discretionary approval letter follows. Note the attachments that are necessary to document the approval and its limitations and conditions.

Some practitioners feel these provisions help build in flexibility and may allow the land trust to address easement ambiguities, unanticipated change and minor, short-term problems or issues without using an amendment. Others feel they may encourage a proliferation of approval requests for new uses, many of which may be unacceptable. Even when considering approval of a particular reserved right, the approval letter should be specific about what is approved, where, how the action will be implemented and any further conditions or limitations, especially if the landowner requests additional related items not specifically addressed by the easement language.

In certain situations, a land trust may respond with an interpretation letter to a landowner’s query about whether particular uses or activities are allowed on easement-protected property. For example, suppose a farmer wants to give hayrides for a fee, and the easement terms do not specifically address this use. Rather than permanently amending the easement to allow or forbid this use for all future owners, the land trust could address the specific circumstance in a letter, setting limits on when, by whom and how long the use is allowed. The land trust should keep this letter in its permanent files. Some land trusts use a license for this purpose.

A discretionary waiver may also allow the land trust to address certain technical or minor easement violations that do not impair the property’s conservation values. For example, a rustic child’s tree house built on easement land where all structures are prohibited might best be addressed by a letter allowing the tree house and limiting its existence to the current owner and its current configuration.

Land trusts should evaluate their options and the risks and benefits of these approaches with experienced legal counsel. You must address any impermissible private benefit or private inurement issues and otherwise comply with applicable law. Take care to avoid creating undesirable precedents or shortcutting your amendment process in ways that could undermine your easement program.

DISCLAIMER
The Land Trust Alliance furnishes general information and materials as tools to help land trusts. The Alliance provides tools with the understanding that it is not engaged in rendering legal, accounting or other professional counsel. If you require legal advice or other expert assistance, seek the services of a competent attorney or other professional with expertise in your area of concern. The Land Trust Alliance is solely responsible for the content of this series.

Last revised 8-15-13
SAMPLE DISCRETIONARY APPROVAL LETTER
(-Holder Letterhead -)

Date
OWNER:
Address
City, State, Zip

Re: Conservation Easement Approval for Town Lot Changes

Dear :

We are writing this letter to grant our discretionary approval of changes made at the Town Lot (the “Protected Property”), which is subject to a conservation easement granted to us by PREVIOUS OWNERS on _________ and recorded in Book _____, Page ________ at the ______________ County Registry of Deeds (the “Easement”).

We recognize that a strict adherence to certain of the terms of the Easement would have been in conflict with the purpose of the easement, in that it had become impossible to control the public uses that are encouraged by the Easement, and the absence of such controls had placed in jeopardy the property’s high value as a scenic resource. To assure the accomplishment of both purposes, we hereby give our consent, retroactively to the time of completion, to the following changes on the Protected Property, which were approved by the Town by a meeting of its Selectmen on _________, and by HOLDER at a meeting of its Board of Directors dated______:

A. The installation and maintenance of a wooden post and rail fence along the northern boundary along the Road, and low wooden barriers around the newly delineated gravel parking area of not more than four thousand (4,000) square feet, as indicated in the “Sketch Plan of Proposed Park for Town, Road,” dated , by Surveyor, RLS #, and in accordance with the photographs contained in Holder’s Baseline Documentation Report dated , attached hereto and made a part of this approval, are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.

B. The installation and maintenance of the two existing wooden picnic tables east of the parking area, and the installation of additional picnic tables, benches, and small unlighted signs to enhance and control public use, after prior written notice to Holder, and an opportunity to cooperate in the text and design of signs so that they will inform the public about the conservation protection provided by Holder and Third Party; are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.

C. The leveling, grading and the addition of loam and seed to the formerly gravel area east of the parking area, as indicated in the aforementioned “Sketch Plan,” is hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations.

D. The establishment of a drainage ditch and culvert in the location indicated in the aforementioned “Sketch Plan” is hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations. In all other respects, Holder and Third Party hereby ratify and confirm the Easement, and any forbearance or delay in providing this approval shall not be construed to be a waiver of the right to enforce other terms of the Easement or any future violation of the Easement.

Sincerely,