Alternative Strategies for Ensuring Stewardship Capability

Technical Assistance Grant Report
from Jefferson Land Trust
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Project Name	Alternative Strategies for Ensuring Stewardship Capability
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Date Report Prepared	December 10, 2012
Report Goal:	To identify strategies for collecting stewardship funds, the context for which they are used, and their conformance with Washington State law and practice.

1. Project Staff

The project was implemented by Sarah Spaeth, Executive Director and Erik Kingfisher, Stewardship Director of the Jefferson Land Trust staff.

Other team members included Owen Fairbank, Conservation Projects Committee chair and former board president, Joanne Tyler and Kathryn Lamka, two current board members.

2. Project Methodology

At the outset we extended our knowledge of the subject by reviewing the literature we found online. The resources found on www.conservationtools.org created by the Pennsylvania Land Trust Association were especially helpful. In particular, we consulted:

An Introduction to Stewardship Funding Arrangements (October 10, 2012);
Model Preliminary Agreement Regarding Conservation Easement Donation and Commentary (August 7, 2012);
Model Stewardship Funding Covenant and Commentary (August 14, 2012);
Pledges and Donation Agreements (July 31, 2012);
Stewardship Funding Arrangements (brochure for landowners); and
Legal Considerations for Stewardship Funding Arrangements (August 14, 2012)

We have relied on their extensive work, and a review of Washington State's 2011 Private Transfer Fee Obligation Act[1], to provide a framework for our survey of Washington land trusts and our investigation of what may be legal in Washington. We also reviewed the relevant chapter in Story Clark's book, *A Field Guide to Conservation Finance* and the recently finalized Federal Home Financing Administration (FHFA) regulation which restricts Fannie Mae, Freddie Mac and Federal Home Loan Banks from dealing with mortgages on properties encumbered by certain private transfer fee covenants[2].

A major task of the project was to survey a sample of Washington land trusts to determine their methods of collecting stewardship funds, the contexts in which these methods are used, and their experiences with them. While we proposed a survey of 5-10 Washington land trusts, we in fact surveyed 15, including Jefferson Land Trust. The participating land trusts were selected to provide a variety of both organizational capacity and geographic diversity.

[1] RCW64.60.005 (Washington legislative findings, adopted in 2011)
[2] 12 C.F.R. Part 1228

The survey (see page 10) was conducted via telephone interviews during July and August by Sarah Spaeth, Joanne Tyler, Owen Fairbank, and Kathryn Lamka. The aggregated responses can be found in D. Attachments: Summary of Survey Responses, page 13.

We obtained a legal review of *Model Stewardship Funding Covenant and Commentary* to determine whether the guide could be used as is in Washington, or whether modifications were necessary to ensure compatibility with Washington State regulations. While the review (see page 26) reflects this legal input, we emphasize that before implementing the suggestions herein, or using any of the templates provided, users should obtain their own legal counsel.

3. Menu of Options

We provide a menu of options and relevant templates for use by Washington land trusts (See D. Attachments: Templates on page 16). Using options presented in the Pennsylvania guides listed above, we compared and contrasted practices being used by Washington land trusts to fund their stewardship efforts. The examples offered in the Pennsylvania guides offer innovative alternatives that Washington land trusts may want to consider. Only the Model has been reviewed by legal counsel for use in Washington. Again, the users should obtain their own legal counsel.

Below is a summary of our major survey findings along with a discussion of the options presented in the Pennsylvania guides.

a) Sources of payment(s)

1) The current landowner

The current landowner is the most logical and most common source of stewardship funds. While the landowner is a logical and practical source of funds, it is often the case that the amount collected falls short of what will be required to monitor and defend Conservation Easement s (CEs) well into the future, usually because that amount is not affordable to the landowner.

Landowners fall into two categories: those who sell a CE to a land trust, which often uses grant funding to make the purchase, and those who choose to donate a CE. Survey respondents varied in the ease and success with which they have been able to collect stewardship funds depending on which group of landowners they are dealing with. Land trusts often feel awkward in requesting stewardship funds from a landowner who has donated a CE. However, one land trust noted that they were much more successful in collecting stewardship funds from donors of CEs than from owners from whom they had purchased CEs. Therefore, on purchased CEs, they began collecting stewardship funds as a fee included in a purchase/sale agreement. This takes the form of a professional fee. While this arrangement doesn't enhance the ability to receive grant reimbursement for stewardship funds, it does help to ensure the collection of those funds from the landowner.

Sometimes landowners who sell a CE face capital gains taxes on the sale and can thus benefit from voluntarily donating a portion of the sale price back to the land trust as a tax-deductible gift.

2) Other Sources

Other sources identified in our survey vary according to the individual context in which the land trust operates, and include:

a) Project partners, such as local government or tribes
b) Board-authorized transfers from the operating budget
c) Special funds (created by donors) used to help land-rich, cash-poor landowners
d) Fundraising for specific stewardship needs from the community and foundations
e) Foundation/government grants. One land trust looks for discrete projects on the protected properties (using "framing language") for foundation funding; some mitigation grants cover stewardship
f) Homeowner's Association (where applicable)
g) Neighbors who have a desire to see the land protected

b) Timing of Payment(s)

Most land trusts surveyed attempt to collect stewardship funds at the time the CE is conveyed. This has the virtue of having cash in hand, and not relying on future payments that may not be paid.

The Pennsylvania Land Trust Association, in its guide, *An Introduction to Stewardship Funding Arrangements*, points out that land trusts often can both collect an amount that more closely reflects stewardship funding needs into the future, and at the same time, ease the burden on the landowner, by using various means of stretching payments over time. Uncoupling payment of stewardship funds from the date of the CE can provide a very different picture of available solutions.

Although many land trusts surveyed do have some experience with deferred payments, they have relied primarily on up-front contributions.

c) Schedule and Methods of payment

The Pennsylvania Land Trust Association provides a menu of options in the *Model Stewardship Funding Covenant and Commentary*. For each option, the guide provides the relevant considerations and sample variations. The options include:

1) Deferred payment

Single payment

Periodic installment payments, the frequency, number and timing of which, can be tailored in any number of ways (for the current owner)

Installment payments due upon each transfer of the eased property

2) Regular installment payments over time toward a fixed amount
3) Conveyance payments, fixed amounts intended to reimburse the land trust for expenses in explaining the easement to real estate agents and banking staff and interpreting the easement to a new owner
4) Conditional payments triggered by such events as subdivision of the land, timber harvest, construction of a new residence, or drilling for natural gas, all of which may place new and expanded demands on the easement holder
5) Transfer payments

Most land trusts we surveyed have some experience with deferred stewardship payments. These tend to be annual contributions from the current landowner, a lump sum due at a later date, or a bequest in a will. To our knowledge, land trusts in Washington have not used conveyance payments, though we did not ask that question specifically.

The Pennsylvania guide, *An Introduction to Stewardship Funding Arrangements*, notes some general considerations relevant to the various types of deferred payments. These include:

- Exceptional transfers: The owner may want the stewardship funding arrangement to provide that certain transfers are excluded, i.e., to a close family member or family trust and/or where no money changes hands.
- Inflation/Deflation: A stewardship funding arrangement that extends over any length of time should be designed to account for changes in the value of the dollar.
- Interest: It is appropriate for interest to be charged on a deferred balance, and on amounts due but unpaid.
- Premature Sale of Property: The stewardship funding arrangement should take account of the eventuality that the property is sold prior to the satisfaction of payments still due either by requiring that the remaining balance come due with the sale; or providing assurance to the easement holder that future payments will be made by the successor owners (e.g., putting the burden on the selling owner to receive an assumption of the obligation by the purchaser).

Most of the land trusts we surveyed did not incorporate these considerations into their deferred payment arrangements.

Most of the other options listed on page 4 do not require further comment here, with the exception of transfer payments. Transfer payments are those in which the easement holder receives stewardship funds when the property changes ownership. There are a number of variations for structuring transfer payments, including setting a fixed amount paid to the holder at each transfer or setting the fee as a percentage of the fair value of the property (defined as either the sales price or, if greater, the fair value imputed for purposes of assessment of real estate tax in the applicable county). If a percentage is used, sometimes that percentage is structured to change over time, depending on whether it is viewed as providing a gradual accumulation of stewardship funds, or as providing the bulk of a stewardship contribution at the initial sale with smaller additions at subsequent sales to offset the costs to the land trust of the transfer of ownership. In some cases no transfer fee is collected when no money changes hands in the transfer, such as with inheritance. The parties can also set a maximum amount that can be collected by the easement holder; in other words, once the aggregate has been collected (either through successive transfers or by an existing owner paying off the fee), there will be no more continued obligation to collect money upon future transfer of the property. The transfer fee amount can also be structured to take into account what land is actually being transferred (e.g., if the land is subdivided and lots are transferred separately). Transfer fees are not deductible as a charitable contribution.

Private transfer fees have come under increased scrutiny in recent years, and are now sharply restricted in many states, including Washington, because they are deemed to violate public policy which favors the marketability and transferability of real property free from title defects and unreasonable restraints on alienation of property[3]. In Washington, private transfer fee obligations are unenforceable against subsequent owners and such obligations do not run with the title of the property[4]. Similarly, the Federal Housing Finance Agency (FHFA) adopted regulations in 2012,

[3] RCW 64.60.005 (Washington legislative findings, adopted in 2011)
[4] RCW 64.60.020

which prohibit Fannie Mae, Freddie Mac and Federal Home Loan Banks from buying residential mortgages on properties subject to certain private transfer fee covenants.[5]

Both Washington law and the FHFA regulations define "private transfer fee" and define obligations which are excluded from the definition of "private transfer fee." If an obligation does not meet the definition of "private transfer fee" or if it falls under a specific exception to the definition of "private transfer fee", it is not subject to the restrictions imposed under the law.

Washington defines "private transfer fee" as "a fee or charge payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the real property, the purchase price, or other consideration given for the transfer."[6] The statute specifically exempts from the definition of "private transfer fee" "any fee payable, upon a transfer, to an organization qualified under section 501(c)(3) or 501(c)(4) of the internal revenue code of 1986, if the sole purpose of such organization is to support cultural, educational, charitable, recreational, conservation, or similar activities **benefiting the real property being transferred and the fee is used exclusively to fund such activities.**"[7] (emphasis added).

The FHFA regulation defines "excepted transfer fee covenant" as a "private transfer fee covenant that requires payment of a private transfer fee to a covered association **and limits the use of such transfer fees exclusively to purposes which provide a direct benefit to the real property encumbered by the private transfer fee covenant**."[8] (emphasis added).

> *Direct benefit* means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association[9] of which the owners of the burdened property are members and used primarily for their benefit. Direct benefit also includes cultural, educational, charitable, recreational, environmental, conservation or other similar activities that (1) are conducted in or protect the burdened community or adjacent or continuous property, or (2) are conducted on other property that is used primarily by residents of the burdened community. The regulation also defines "direct benefit" as follows:

The regulation specifically excludes charges "that defray actual costs of the transfer of the property" and defines "private transfer fee" as one that is payable on a continuing basis. Thus, a payment or charge secured by a covenant to pay upon the next transfer (but does not impose a continuing obligation) is not subject to the regulation.

The importance of being able to show a nexus between the transfer fee and the benefit to the property subject to the fee cannot be stressed highly enough. That nexus will be the basis for a court finding that the fee "touches and concerns" the land at issue, and thus that the fee is enforceable against successor owners of the land.[10] The better the documentation that the

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[5] 12 C.F.R. § 1228.2 (Note, this regulation does not prohibit any private transfer fees, but it may limit a property owner's ability to find buyers for the property in the future.)

[6] RCW 64.60.010(3)

[7] RCW 64.60.010(3)(h)

[8] 12 C.F.R. § 1228.1

[9] "Covered association" is defined to include 501(c)(3) and (c)(4) organizations.

[10] A covenant "touches and concerns" the land if it is connected with the use and enjoyment of the land. *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 574-76, 295 P.2d 714 (1956) (promise to pay assessment for maintenance was a running covenant). The covenant must be so related to the land as to enhance its value and confer a benefit upon it. *Id*. at 575; *see also City of Seattle v. Fender*, 42 Wn.2d 213, 218, 254 P.2d 470 (1953).

easement holder has to justify the amount of the stewardship fee and how it is used for the exclusive benefit of the property, the more likely the fee will be to survive judicial scrutiny. As noted in *Legal Considerations for Stewardship Funding Arrangements*: "A payment arrangement in which funds are *dedicated* to a purpose that has a *direct* connection to a parcel of land burdened by the covenant is more likely to be enforceable than one that does not."

One of the potential concerns with using a transfer fee as the source of stewardship funds is that if the property does not get transferred for many, many years, the easement holder may not have adequate resources to steward the property. Conversely, if the property is transferred frequently, the easement holder may collect more money than is actually needed for the direct benefit of the land,[11] which may cause problems if the easement holder ever has to defend the fee as a running covenant and as exempt from restrictions on private transfer fees. One potential solution to that problem is to cap the fee at whatever amount the easement holder can defend as needed to adequately steward the property.

A number of Washington land trusts either have written transfer fees into their newer CEs or have transfer fee policies in place. Six land trusts indicate that they have either adopted policies governing the collection of transfer fees or have written the transfer fees into their CEs. Of these six land trusts, two have policies that address one-time payments only and the remaining four have policies providing for subsequent payments. However, these have not been implemented in part due to the fact that they are in only relatively new CEs and in part due to concerns about their legality. The concern of most land trusts regarding legality remains, in spite of the exemptions described above. Other land trusts we surveyed were either unaware of the FHFA regulation or felt that their transfer policy conformed to the allowable exemptions of both Washington State law and FHFA regulation.

d) Securitization of payments

1) Unsecured Promises

If landowners agree to make one or more payments in the future, they are bound to make such payments as stipulated in writing and delivered to the holder. Such a written promise may be in a donation/pledge agreement, the conservation easement agreement, a promissory note or other document. The promise is binding if the holder has relied on the promise in accepting responsibility for the easement. However, the only remedy available to the holder if payments are not made is a court action. Even with that, however, there are issues of priority with respect to other liens on the property, and failure of the remedy if the promisor has no assets or is deceased, or the property has been sold. (See *Legal Considerations for Stewardship Funding Arrangements*.)

Understandably, land trusts are in any case highly reluctant to use civil action because of the potentially very damaging consequences to public relations. Most land trusts we surveyed use no formal securitization for deferred payments. They rely primarily on trust, or informal reminders delivered orally or in a letter and were willing to accept that they may occasionally miss a payment due.

[11] This potential problem was highlighted by the FHFA as one of the reasons for its regulation. Private Transfer Fees, 77 Fed. Reg. 15566, 15571 (Fed. Hous. Fin. Agency Mar. 16, 2012) ("unpredictability of future sale and, therefore, the magnitude of the financial burden on the encumbered properties" noted as one of the valuation issues of concern).

2) Secured Promises

The Pennsylvania guides referred to above provide tools that can be used to secure agreed-upon payments. These include:

- A mortgage on the real estate in question or security interest in other non-real estate assets.

  A mortgage recorded at the time of the conservation easement (before payment is due) is a tool with several advantages: It assures that the payment will be collected, and that the land will not be transferred without payments being brought current. The holder may subordinate to other lien holders if it chooses and agrees to, and such subordination will not affect the priority of the CE. A holder of a mortgage is also highly likely to be notified of a transfer by the title company.

  When a stewardship funding arrangement has been paid in full, the easement holder records a satisfaction clearing the mortgage from the public record, but such satisfaction has no effect on the priority of the CE.

- A Covenant Running with the Land

  The general rule that a promise is binding only upon the promisor does not apply if the covenant meets certain requirements and is found to be fair. The disadvantage of this tool is that the remedy is the same as that for an unsecured promise—namely, a civil action. There are other potential limitations and problems with this tool, namely that the promise be directly related to the land bound by the covenant in order to meet the "touches and concerns" requirement as discussed above.

  (See also the discussion of this tool in *Legal Considerations for Stewardship Funding Arrangements*.)

- Assumption of Liability

  This approach can go a long way toward assuring future payment of agreed upon stewardship obligations. The stewardship funding agreement would require that all payments come due upon transfer of the eased property unless the transferring owners obtain a legally binding assumption of their personal payment obligations from the prospective owners.

  Washington law requires a signed writing to enforce a promise by one person to assume the debt of another. Proof of assumption of a mortgage must be unequivocal, clear, and conclusive. There must be positive action on the grantee's part to assume; a mere declaration in the mortgage will not suffice.[12] Similarly, a mere declaration in the deed conveying the property that the mortgage is being assumed is not sufficient without some written acknowledgement by the grantee.

From our survey of Washington land trusts, it is evident that the use of these securitization methods is very limited. A majority of the land trusts surveyed do not use any of these methods, and rely on less formal and systematic means of ensuring future payment.

[12] Weaver v. King County, 73 Wn.2d 183, 186, 437 P.2d 698 (1968) ("The grantee of a deed is not bound by the mortgagor's covenant binding himself and his successors to pay the mortgage debt, even though the mortgage declares that the covenant runs with the land, unless the grantee has, in some way other than by mere acceptance of the deed, assumed the mortgage indebtedness").

e) Documentation of Stewardship Funding Arrangements

Although the inclusion of stewardship funding arrangements can be included in the CE, the documentation of these arrangements in a separate agreement has several advantages. With a separate document, the title company will be aware of the obligation, which is not assured if the fee obligation is in the text of the CE document, and it is less likely that any changes made to the funding arrangement will inadvertently result in changes to the CE itself. Also, it easily provides for clearing the stewardship funding agreement when all obligations have been met, leaving the original CE in place.

One of the required elements of a covenant to run with the land is notice by the new owner of the existence of the covenant. A new owner is deemed to have constructive notice of a covenant if it is in a document recorded to title. Thus, if the agreement is not recorded, there is an additional burden on the land trust to (a) know about a potential transfer of the property and (b) inform the potential new owner of the obligation.[13]

Many Washington land trusts have separate agreements that reflect the stewardship funding arrangements. In most cases, however, this agreement is in the form of a letter, usually though not always, signed by both parties, but is not recorded, and thus will not be picked up by a title company.

f) Tax Deductibility

According to *Legal Considerations for Stewardship Funding Arrangements*, "A charitable contribution must be voluntary in order to be deductible for federal tax purposes. Payments made by the original donor in satisfaction of a funding commitment to a conservation organization may be, but not necessarily are, deductible as charitable contributions for federal tax purposes."

The above guide further points out that payments made by subsequent owners are not deductible as charitable contributions. See also the Pennsylvania guide, *Pledges and Donation Agreements*.

Payments made to the easement holder as part of closing costs in the transfer of an eased property may have the effect of increasing the basis of the property and thereby reduce capital gains. However, we make no representations in this regard, and we emphasize the importance of obtaining professional tax advice in answering this question.

The Washington land trusts we surveyed are very aware of the importance of tax deductibility to the donors of stewardship funds. They therefore try to support and protect this deductibility to the extent possible. They accomplish this primarily by providing acknowledgement letters that meet IRS guidelines for tax deductibility. They are also generally mindful of the importance of not giving tax advice, and referring potential donors to tax professionals for advice on this issue.

It was noted by a land trust that structures the stewardship contribution as a professional fee, that this arrangement does not make the contribution tax deductible as a donation.

Tax consequences of any of these transactions are always subject to the owner's specific situation and no land trust should make assurances that a payment is or is not deductible.

[13] FHFA's commentary to its new regulation suggests that recording private transfer fee covenants is possibly a "best practice" that might be considered by state and federal authorities. 77 Fed. Reg. at 15568-69.

D. Attachments

1. Survey Form

Stewardship Fee Survey for Land Trusts

Name of Land Trust _____

Contact Person for Survey _____

1. Do you collect stewardship funds for each individual conservation easement or land acquisition?

   ☐ yes ☐ no ☐ most of the time

   If not, how do you cover your organization's stewardship costs?

   If so, what are your sources of funding? (check all that apply)

   ☐ Landowner contributions
   ☐ Grants
   ☐ Partner funding
   ☐ Community contributions
   ☐ Other - explain

   If yes, do you collect them at the time of the transaction (recording the easement or purchasing the property)?

   ☐ always ☐ depends on the individual project

2. Do you have experience with deferred stewardship payments?

   ☐ yes ☐ no [if no, jump to question #10]

   If yes, which of these have you used? (check all that apply)

   ☐ *Deferred contribution* due at a later date, (e.g., a one-time lump sum due upon sale of property)
   ☐ *Annual or periodic contribution* until set amount is paid

   If yes, do you charge interest?

   ☐ yes ☐ no

   ☐ *Transfer contribution:* percentage of Fair Market Value, or of sale price, at time of sale of property

   If yes, what % (or range of %)? _____

   Paid by buyer or seller? _____

   A one-time contribution, or is it due upon subsequent sales too? _____

   ☐ Fee triggered by an action affecting the property (exercising a reserved right such as subdivision, building, timber harvest, etc.)?

   Example?

3. If there are transfer contributions due upon subsequent sales, have you experienced any legal challenges to them?

   ☐ yes ☐ no

   Comments

4. How do you secure deferred payments, e.g., with an open-end mortgage, certificate of compliance, or some other tool?

   If the secured payment is secured with a mortgage, has subordination to other liens been a concern for you?

   ☐ yes ☐ no

   If yes, how have you dealt with it?

5. Is stewardship funding part of the CE or a separate document?

6. Are there tools that you prefer for deferred stewardship contributions?

7. Ones you have learned to avoid?

8. Do you have concerns about FHFA prohibitions on transfer fees that could affect present or future borrowers?

9. Do you have a relationship with title companies, development departments or other local government agencies, DNR, or anyone else to notify you of 'triggering events' such as sale of the property or exercise of reserved rights such as building, timber management activities, subdivision, etc.?

   ☐ yes ☐ no

   If yes, please elaborate

<u>General questions</u>

10. Have you involved legal counsel in setting up stewardship payments?

    ☐ yes ☐ no

    If yes, in what ways and at what point(s) in the process?

    How would you feel about our contacting them? (contact info?)

11. Do you have experience with “enforcing” stewardship payments?

☐ yes ☐ no

Would you undertake legal action if payment were challenged or not forthcoming?

☐ yes ☐ no ☐ depends

If yes, have you ever had occasion to do so?

☐ yes ☐ no

Comments

12. Do you ever structure stewardship payments to be tax-deductible for the landowner?

☐ yes ☐ no

If yes, are there important mechanisms, structures, or things to be aware of?

13. Overall, what has worked best for collecting stewardship fees or contributions? [unless covered in #5]

14. What has worked least well, and why? [unless covered in #6]

15. Would you give us a rough estimate of the range of your stewardship fees? $_____

Of your annual stewardship cost per easement? $_____

2. Summary of Survey Responses

The project team conducted phone interviews using the survey form with the following Washington conservation organizations:

1. Capital Land Trust
2. Chelan-Douglas Land Trust (CDLT)
3. Columbia Land Trust (CLT)
4. Inland Northwest Land Trust
5. Forterra
6. Jefferson Land Trust (JLT)
7. Methow Conservancy
8. Nisqually Land Trust
9. North Olympic Land Trust (NOLT)
10. PCC Farmland Trust (PCCFT)
11. San Juan Preservation Trust (SJPT)
12. Skagit Land Trust
13. The Nature Conservancy (TNC)
14. Whatcom Land Trust
15. Whidbey-Camano Land Trust (WCLT)

Aggregated Responses

1. Sources of stewardship funds

The landowner is the most common source of stewardship funds, usually concurrent with a Conservation Easement (CE).

Other sources of stewardship funds include:

- Project partners, such as local government or tribes, mitigation grants
- The Land Trust's stewardship fund or endowment
- Neighbors of protected properties
- Transfer fees (some organizations have policies calling for transfer fees, though none have had the occasion to use them yet)
- Bequests, either for a specific project, or the board decides to allocate part of a general bequest to stewardship
- Special fund to help land-rich, cash-poor landowners
- Funds are transferred from the LT's operating budget
- Fundraising
- Foundation grants
- Annual contribution from a Homeowner's Association
- Built into fundraising campaign for specific project
- Fees triggered by an action (such as subdivision or development)
- Washington Department of Fish and Wildlife Landowner Incentive Program (WDFW LIP) grants (now defunct)
- County Conservation Futures Fund may contribute a portion in some situations (requires a match)

2. **Deferred stewardship payments**

Most land trusts have some experience with deferred payments, using one of the following methods:

- Installment payments on a schedule
- Lump sum due later
- Specific bequest in a will

3. **Transfer contributions on subsequent sales**

- Some expressed concerns about a potential legal challenge
- LTs that have transfer fee policies seem to have those policies apply to subsequent sales, but they have not yet had occasion to collect even the first time

4. **Securitization of deferred payments**

- Those who have informal agreements have them in writing; others include the payment agreement in the CE

5. **Is stewardship funding part of the CE or a separate agreement**

- A "professional fees" charge in the Purchase and Sale Agreement
- A separate letter of intent
- Written into CE
- A separate pledge agreement
- An agreement letter, not recorded

6. **Preferred tools for deferred stewardship contributions**

- Pledge agreement
- Use of database to track stewardship contributions
- Pledge is written to be tax deductible

7. **Tools to avoid [none noted]**

8. **Concerns about FHFA prohibitions**

- Most interviewed were unaware
- Some felt it didn't apply or felt their LT's policy conformed to the allowable exceptions

9. **Relationship with title companies, etc.**

- Count on good relations with landowners and/or with title companies
- Check county records at least annually
- Expect title companies to read CE and notify the LT
- Good relationship with the county, who have notes in their records
- Several had not considered the problem

10. **Legal counsel involvement in setting up stewardship payments**

- A number of LTs have attorneys on the board and/or advising on every CE anyway
- A couple of land trusts used attorneys in setting up transfer fee language for CEs

11. Experience enforcing stewardship payments

- LTs that do have relevant experience have not sought to enforce
- A threatening reminder letter is the most extreme action reported (which worked once)
- Some accept the write-off, others might consider legal action if enough money were involved, though there is concern about maintaining a positive long-term relationship with landowners

12. Structure stewardship payments to be tax-deductible for the landowner

- Most do this, especially when payment is received at the time the CE is put in place
- Transfer fees are not tax deductible
- Most avoid giving tax advice
- Pledges are generally written so as to be deductible

13. What works best

- Pledge form
- One-time donation at closing of the CE
- Good communication with landowners

14. What doesn't work so well

- The time delay in receiving transfer fees can be difficult for LT operations
- It is difficult to include asking for stewardship contribution when a CE is already being donated
- Installments less effective; suggest that any deferred plan include a down payment
- **No one had significant experience with transfer fees, so little good information is available**

15. Range of stewardship fees

- $2K - $400K
- 20% of purchase price
- 2-4 % of purchase price]

16. Cost of annual monitoring

- Figures given range from ~$300 to $7200 per CE per year, but many land trusts were unable to provide this specific information

3. Templates

We provide these templates for your edification, however prior to using them, we suggest you consult your own legal counsel.

a) Letter of Intent

Courtesy of the Inland Northwest Land Trust--

This tool is a comprehensive letter to the landowner describing the process of establishing a conservation easement, in this case specifically on forest land, and setting forth the understanding with regard to stewardship fund contribution.

When customizing the document for your own land trust, insert your legal land trust name in the first place it is mentioned and thereafter with any abbreviation you use for your land trust name (e.g., Jefferson Land Trust [JLT]). Where we have indicated [abbrev], you can insert your entire name or the abbreviation.

Letter of Intent

Please sign and return by XXXXXXX

Date

Landowner
Address
City etc.

Dear *Landowner*,

[your land trust name]([abbrev]) is delighted to have the opportunity to help you protect your _____ property from unwanted development with a conservation easement. As you know better than anyone, as a working forest, your property provides wildlife habitat, a healthy forest, and scenic views. By protecting your property from development and preserving its open space you will be preserving these attributes that have been enjoyed by your family and the general public for almost a hundred years.

This Letter of Intent does not create a binding obligation for you to contribute or for [abbrev] to accept an easement; it simply governs how you and [abbrev] will proceed. This letter outlines the conservation easement process. Exhibit A outlines the conservation easement itself. Please read this letter, review it with your advisors, and call me if you have questions. If this letter is acceptable, please sign it and return it to [abbrev]. [abbrev] will not move forward with your Conservation Easement until we have a signed Letter of Intent indicating you wish to proceed.

[abbrev] is prepared to make completing this easement a top priority for [YEAR].

Property. The property intended for a conservation easement is approximately _____ acres on the ____where____ commonly known as ___address____, _____ County, ___state___, Tax Parcel No. _____. Exhibit B shows the approximate boundaries of the property.

Easement.

- Please review the easement outline attached to this letter as Exhibit A. The terms remain negotiable until you and [abbrev] sign the final easement. This draft outline represents my understanding of what you and [abbrev] tentatively agreed on, as well as standard [abbrev] provisions.
- After I have reviewed the title insurance commitment (*see below*) and discussed any concerns or changes you may have with the easement outline, I will draft a full conservation easement for you and your advisors to review.
- After you and [abbrev] agree on the final terms of the Conservation Easement, both parties will sign the document in front of a notary and [abbrev] will record it in the _____ County public records.

Title Insurance. Easement donors have to provide a title insurance policy insuring [abbrev]'s interest in the land. You will need to order a *preliminary commitment for title insurance* from a local title insurance company of your choice so that [abbrev] can confirm ownership, check encumbrances and other

interests. This preliminary commitment should show [abbrev] as insured for the amount of $50,000. Tell the title company you want *copies of all exception documents sent to you and to [abbrev]*.

You will need to review the title work carefully and let the title company and me know if you see any errors.

At or before closing, you may need to provide other documents to the title company in order for them to issue a policy. [abbrev] will need copies of those documents as well.

Mortgage Subordination. If there is a mortgage, deed of trust, other lien and/or land sale contract encumbering the property, [abbrev] must have the property released from that lien at closing or have the holders subordinate their interests to [abbrev]'s easement.

Mineral Rights. If the title commitment reveals that any other parties have an interest in the minerals underlying your property, you will need to acquire the mineral rights or get a determination of remoteness from a licensed geologist. You and I can discuss these steps if and when this issue arises.

Survey. In order to establish and enforce an easement, [abbrev] has to be able to find the property boundaries on the ground. [abbrev] requires the actual property boundaries be marked and the property corners monumented. [abbrev] requires that all corners (i.e., all points at which the boundary line changes direction) are marked with a monument. If you can show us the existing corner monuments and boundaries, you will not need to order a new survey.

Marking Boundaries. [abbrev] requires that the boundaries be flagged with surveyors tape. If the corners are established and survey documentation (showing the bearing and distance between the corner monuments) can be found, [abbrev] will flag the boundaries while completing the baseline documentation. However, if we cannot locate all corner monuments or there is no record of survey documenting the location of the monuments, you will need to hire a surveyor to locate, establish or re-establish the corner monuments and boundaries of the property.

If you would like, [abbrev] will place easement signs at no cost to you on the fence posts along residential lots and also place easement signs along roads, trails or other common points of access along the other boundaries.

Baseline Resource Report/Questionnaire(s). [abbrev] will visit the property and document the property's natural resources and physical condition with maps, photographs, GPS points, and narrative descriptions and compile this into a "baseline resource report." The Internal Revenue Service requires this form of documentation for donated easements.

This report will substantiate the conservation purpose(s) of the easement and is a tool [abbrev] will use for its monitoring visits to identify any changes in the land over time and, if needed, in any dispute or enforcement action. The baseline resource report is prepared at no cost to you.

When I get ready to prepare the baseline resource report I will send you some short forms to fill out. You will need to:

- **Complete a general baseline questionnaire.** This is to capture anything you know about the property's conservation values and natural attributes.

Letter of Intent

- **Complete an environmental screening questionnaire.** This is to gather your knowledge of any hazardous materials and the like on the property.

- **Provide us with a forest management plan**. Commercial timber harvesting must be supervised by a professional forester and conducted in accordance with a forest management plan that has been approved in advance by [abbrev]. If you do not have a forest management plan to submit for approval now, the easement will require you to create a plan and submit it for consideration by [abbrev] prior to any commercial harvesting.

- **Provide us with copies of any reports** you have about the property, such as environmental assessments or cultural resources surveys.

- **Review and sign the baseline resource report** at or before closing. (You will receive a copy for your records.)

Physical Access. [abbrev] staff will need access to the property to post signs and take photographs, capture GPS waypoint data and gather information to prepare the baseline resource report. I will call ahead to schedule this work.

Stewardship Fund Contribution. In accepting a conservation easement, [abbrev] takes on the perpetual responsibility of monitoring and enforcing the easement so as to ensure permanent protection for the land's conservation values. [abbrev] has established a Stewardship Fund to ensure the costs of monitoring and enforcement are covered in perpetuity. Each easement accepted by the land trust creates an additional obligation to the Stewardship Fund. [abbrev] has reviewed your proposed easement and determined the amount needed to meet this obligation is $_____. [abbrev] will need a plan in place to fund the stewardship obligation before accepting the easement.

The conservation easement will also include a $5,000 subdivision fee, indexed for inflation, if and when you or your successors decide to split the easement. This additional subdivision fee won't become due if the reserved right to divide the easement is never exercised.

Legal and Tax Advice. **[abbrev] does not provide tax, legal, real estate or other professional services or advice and cannot guarantee landowners that tax benefits will be available in their particular case.** You should consult with your tax advisor and/or attorney before granting a conservation easement and before engaging the services of an appraiser. **Establishing the tax and legal consequences of donating a conservation easement is the responsibility of you and your professional advisor(s).** You will be responsible for paying your own attorney's and other professional advisors' fees.

Appraisal. [abbrev] does not require that you get an appraisal in order for [abbrev] to accept an easement. However, you will need an appraisal in order to claim any potential income or gift/estate tax benefits. To qualify as a charitable contribution, the project must meet the requirements of Internal Revenue Code §170, the accompanying Treasury Department regulations and other federal requirements.

If you wish to determine the value of the easement for tax purposes, it is the responsibility of the landowner and/or his professional advisors to retain a qualified appraiser. The cost of appraisals can vary widely depending on the property in question. The appraisal should be done no more than 60 days

before the easement is granted, nor later than the due date for the federal tax return for the year the grant occurred.

If you do have the easement appraised, [abbrev] will request a copy of that appraisal. If you do determine that you are qualified to claim a charitable contribution deduction, you will need [abbrev] to sign an IRS Form 8283 acknowledging receipt of that contribution.

Consent of Trust Beneficiaries. If requested by the title company and/or [abbrev]'s legal counsel, [abbrev] may need you to ask the beneficiaries of your trust, if you have one, to sign a form consenting to the conservation easement.

Confidentiality. [abbrev] maintains in confidence all of our discussions. [abbrev] will disclose them to our staff, consultants, and Board of Directors only as necessary to evaluate this transaction. All of those people will keep information about your property confidential.

Letter of Intent Term. [abbrev] understands that you want to close this transaction by the end of _____. [abbrev] is hoping to close this transaction much sooner.

In order to facilitate closing this transaction in a timely manner, [abbrev] will need to receive a signed copy of this letter by XXXX. Once signed, this Letter of Intent will be in effect until you and [abbrev] agree in writing to terminate it, the date on which a conservation easement is signed, or XXXXXXX whichever comes first.

Communications. If you have any questions about the terms of your easement or the easement process, or if you would like to request any changes to this Letter of Intent before you sign it, please contact me at [phone] or [email].

By ensuring that your property will continue to exist as open space and wildlife habitat in perpetuity, you will be leaving a lasting legacy for generations to come. You will also be furthering [abbrev]'s mission – to preserve and protect the natural lands, waters, and working farms and forests of the [your land trust name]. I look forward to working with you to achieve your commendable goals.

Sincerely,

_____ _____

[NAME Date]

[Your land trust name]

Letter of Intent
AGREED AND ACCEPTED:

_____ _____

Landowner Date

_____ _____

Landowner Date

Letter of Intent
EXHIBIT A

Outline of Proposed _____ Conservation Easement

Landowner: _____

Property: _address_____, _____ County, State
Tax Parcel No. _____
(Approximately _____acres ____location_____)

Land Trust: [your land trust name] ("[abbrev]")

Overview/Conservation Purposes:
The Conservation Purposes of this Grant and Easement are to assure that the Protected Property will be retained forever in its relatively natural and primarily undeveloped condition, to protect the Conservation Values, and to prevent any use of the Protected Property that would impair or interfere with the Conservation Values. Grantor intends that this Grant and Easement will confine the use of the Protected Property to such activities as are consistent with the Conservation Purposes of this Grant and Easement.

Summary of Easement Terms:

Easement allows:
[Sample permitted uses:]

- *[_____single family dwelling(s) plus attendant improvements, located _____;]*
- *[Existing [permitted] dwelling(s) may be repaired*
- *[Existing gravel driveway & parking area may be maintained & repaired;]*
- *[Siting, construction and maintenance of utilities (w/prior notice to [abbrev]) (but limited to utilities serving the dwelling on Property and attendant improvements and/or utilities located within existing utility easements or highway right-of-way);]*
- *[Farming or ranching operations, to the extent they don't interfere with the Conservation Purposes of the easement (if stock is grazed, it must be fenced off from riverbank and wetlands)]*
- *[Harvesting dead timber for personal use;]*
- *[Timber harvesting (must comply with [abbrev]-approved forest management plan and be supervised by a professional forester);]*
- Sale, gift or bequest of Property (subject to the easement) to others; and
- Landowner to retain exclusive use and control of access to the Property.

Easement restrictions:

- No subdivision;
- No residential, commercial, timber, industrial or mining activities except as expressly allowed above;
- *[No construction of new roads];*
- No signs or billboards, *[except_____];*
- No collection or storage of trash or any unsightly material;
- *[No grazing of livestock in any wetland areas or waterways, or within _____ feet any wetland areas or waterways;]*
- *[No draining, filling or ditching of springs or wetlands;]*

Letter of Intent

- *[No watercourse alteration; no damming, dredging or diking of springs or wetlands]*
- No more than *de minimis* use for commercial recreational activities.

Easement requires written notice to [abbrev] prior to:

- *[Expansion, reconstruction or replacement of permitted road(s);]*
- *[Permitted harvesting of live timber; and]*
- Transfer of title.

Miscellaneous Easement Provisions:

- The easement will be perpetual, recorded in the County land records, and any subsequent owner of the Property will take title subject to the terms of the easement.
- The easement will include other standard "boilerplate" language contained in [abbrev]'s _____ *[STATE]* model conservation easement form.

Monitoring and Enforcement:

[abbrev] will monitor the easement regularly (typically annually) to ensure that the terms of the easement are being upheld.

b) Professional Services Fee Language

Courtesy of Whidbey-Camano Land Trust--

Whidbey-Camano Land Trust uses this in cases where funds are raised to purchase a CE. It functions as a professional service fee. The following paragraph is included in the Closing and Escrow section in the Purchase and Sale Agreement (the amount varies depending on the property and other factors)

Sample Agreement Outline—

1 Agreement
2 Purchase Price and Payment
3 Earnest Money
4 Title and Conveyance
5 Condition of Property
6 Buyer's Inspection
7 Buyer's Financing
8 Closing and Escrow
- 8.1 Closing
- 8.2 Conditions Precedent to Closing
- 8.3 Delivery by Seller
- 8.4 Delivery by Buyer
- 8.5 Closing Costs and Expenses
- 8.6 **Professional Services Fee. Seller agrees to pay to Buyer a professional services fee at Closing in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000) ("Professional Services Fee"). The Parties acknowledge that the Professional Services Fee is solely for land conservation services and is not for brokerage or legal services.**

[NOTE: These funds come to the land trust in escrow (settlement statement) as Unrestricted Funds. The board then has to Board designate where they go (but with all Board designated funds, they can be moved again if needed). In this case, the Board would likely designate $10,000 to Unrestricted Funds because of the amount of work necessary to put this deal together (it will pay costs not covered by the grants), $5,000 to legal defense and $10,000 to Stewardship Fund.]

9 Representations and Warranties
10 Seller's Indemnification
11 Default and Remedies
12 Notices and Delivery of Documents
13 General Provisions
Exhibits

c) Model Stewardship Funding Covenant & Commentary

Courtesy of Pennsylvania Land Trust Association--

This template can be used to secure payment of deferred contributions and other conservation commitments made by present landowners and to be paid by either them or future owners. The model offers ten basic ways to structure stewardship funding arrangements.

Model Stewardship Funding Covenant and Commentary

KOSTELEC LAW OFFICE

MEMORANDUM

TO: Jefferson Land Trust
FROM: Colette Kostelec
Kostelec Law Office
P.O. Box 866
Port Townsend, WA 98368
360-379-6453 (TEL) 866-677-0468 (FAX)
colette@kostelec-law.com
DATE: November 29, 2012
RE: Alternative Stewardship Funding Options and Security

On behalf of Jefferson Land Trust, I am providing my review of the *Model Stewardship Funding Covenant and Grant of Mortgage Lien* prepared by the Pennsylvania Land Trust Association and my comments on its applicability in Washington State.

In general, I believe the *Model Stewardship Funding Covenant and Grant of Mortgage Lien ("Model")* can be used in Washington for the purpose of structuring alternative stewardship funding payments and providing some security for those obligations. One area of concern, which is not unique to Washington, is the extent to which a land trust can impose an obligation on a future owner of the eased property to pay stewardship funds. This issue arises under the following stewardship funding alternatives:

- Deferred payment extending over a number of transfers
- Regular payment on an anniversary date or transfer
- Conveyance Payment due at the time of each transfer
- Conditional Payment due upon the occurrence of some future event such as: transfer of a separate lot; subdivision into additional lots; future establishment of additional "Minimal Protection Area"; timber sales or other activity which provides compensation to Owner

In order for a covenant (such as any of these funding options) to be binding on future owners, it must be deemed to "run with the land." In Washington, there are a number of required elements for a covenant to run with the land:

1. A writing enforceable between the original parties
2. The covenant "touches and concerns" the land
3. Intent of the covenanting parties that the covenant bind successors
4. "Horizontal privity" between original covenantor and covenantee - covenant must have been made in connection with, and simultaneously with, the transfer of some interest in land between the covenanting parties (excluding the covenant itself)
5. "Vertical privity" between the covenantor or the covenantee and each of their respective successors.

Lake Arrowhead Cmty. Club, Inc. v. Looney, 112 Wn.2d 288, 294-95, 770 P.2d 1046 (1989) (covenant to pay assessments for maintenance of neighborhood facilities qualifies as appurtenant easement and survives tax foreclosure sale); *Leighton v. Leonard,* 22 Wn. App. 136, 139, 589 P.2d 279 (1978); *see also Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), discussing "equitable restrictions" which do

not require horizontal privity but do require that the party against whom the covenant is sought to be enforced has notice of the covenant.1[1] The *Model* Stewardship Funding Covenant meets requirements #1 (it is in writing), #3 (it articulates the parties intent that it run with the land – see Section 2.1 of *Model*); and for purposes of this memo I assume that there is horizontal privity (#4) between the land trust and the original covenantor and vertical privity (#5) between the original and successor covenantor and that the covenant is recorded to the property title. Therefore, the critical question is whether the covenant to pay stewardship funds sufficiently "touches and concerns" the land to impose the requirement as a running obligation upon successor property owners. The Washington Supreme Court has established an "analytical approach" to determine whether a covenant touches and concerns the land:

> "As the term [touch and concern] implies, the covenant must concern the occupation or enjoyment of the land granted or demised and the liability to perform it, and the right to take advantage of it must pass to the assignee. Conversely, if the covenant does not touch or concern the occupation or enjoyment of the land, it is the collateral and personal obligation of the grantor or lessor and does not run with the land."

1515-1519 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 203-04, 43 P.3d 1233 (2002), *quoting Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 574-75, 295 P.2d 714 (1956) ("[t]he main consideration in deciding whether covenants run with the land appears to be whether the covenant in question is so related to the land as to enhance its value and confer a benefit upon it").

Homeowners' association-type dues have been upheld in Washington as covenants that run with the land. *See Rodruck,* 48 Wn.2d at 576 (holding that covenant to pay dues to a "maintenance commission" met the "touch or concern" requirement); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 84 P.3d 295 (2004). In *Rodruck*, the court distinguished a New York case which held that a covenant to pay dues did not run with the land because the association in that case was not committed by the terms of the covenant to use the funds collected for any particular purpose or in fact to spend the money at all:

> We are not faced with the same situation. The covenant in the [deed in question in this case] clearly states the purposes for which the funds realized through assessments are to be collected and spent, and the commission is obliged thereby to spend such funds for those designated purposes.

Rodruck, 48 Wn.2d at 577-78. Thus, in terms of ensuring that stewardship fund covenants run with the land, the covenant should spell out what the purpose of the fund is and how it will be used. As discussed below, in the interest of ensuring that such covenants will not be deemed to be private transfer fees, it is also incumbent upon the land trust to document why the fees collected are needed and sufficient to perform the purpose and how that purpose provides a direct benefit to the land. To that end, especially given the uncertainty as to how many times a property may be transferred, it may be advisable to cap the fee at a certain amount (*i.e.*, once there have been sufficient transfers to accumulate the required stewardship fee, the obligation ceases).

[1] In *Hollis*, the restrictive covenants were contained on the face of the subdivision plat, but not on each individual deed; still, the court held that was sufficient to constitute a written promise and because the plat was recorded, it constituted adequate notice.

Private Transfer Fees

Washington has recently adopted restrictions on "private transfer fees."[2] These are fees paid at each transfer of the property, often to "reimburse" developers for purported investments in the property. The state legislature has deemed such fees to be in violation of the public policy favoring marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation. RCW 64.60.005. Therefore, the legislature specifically found that "a private transfer fee obligation may not run with the title to real property, touch or concern the real property, or otherwise bind subsequent owners of real property under any common law or equitable principle." *Id.*

The Washington statute provides a number of specific exceptions from the definition of "private transfer fees" including the following:

> Any fee payable, upon a transfer, to an organization qualified under section 501(c)(3) or 501(c)(4) of the internal revenue code of 1986, if the sole purpose of such organization is to support cultural, educational, charitable, recreational, **conservation**, or similar activities **benefiting the real property being transferred and the fee is used exclusively to fund such activities**.

RCW 64.60.010(3)(h) (emphasis added). Thus, it is necessary, but not sufficient, that the land trust is a conservation-oriented 501(c)(3) organization. The organization must also show that the fee collected benefits the property and is used "exclusively" to fund conservation activities on the property. This is consistent with the "touch and concern" requirement under running covenants. It is also why the language in the easement template from the National Resources Conservation Service for an easement funded by the Federal Farm & Ranch Protection Program would likely be deemed an impermissible private transfer fee. That template called for payment of "a transfer fee of ¼ of 1% of the purchase price to Grantee to be used for purposes consistent with Grantee's mission." The vagueness of the purpose of the fee would likely not meet the test that the covenant "touch and concern" the land burdened or ensure that the fee will be used exclusively for the benefit of that land.

Likewise, recent regulations adopted by the Federal Housing Finance Agency prohibit Fannie Mae, Freddie Mac and Federal Home Loan Banks from dealing in mortgages on properties encumbered by certain types of private transfer fee covenants. 12 C.F.R. Part 1228. Those regulations also contain an exception for 501(c)(3) conservation organizations if the fee is used for the "direct benefit" of the property, defined as "used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association of which the owners of the burdened property are members" and that "(1) are conducted in or protect the burdened community or adjacent or contiguous property, or (2) are conducted on other property that is used primarily by residents of the burdened community." 12 C.F.R. §1228.1.

As long as the land trust can document that the stewardship fee is calculated and assessed based on the true needs of stewarding the eased property and that the fee is used for that purpose, there should be little difficulty in defending a transfer fee as a running covenant and as excepted from the state law and federal regulation governing "private transfer fees." Some administration/ overhead component would likely be appropriate, but that component of the fee should be calculated based on a reasonable and consistent methodology. Given the uncertainty of determining the frequency of transfers of a protected property, it may be easier to defend a fee that is capped at an amount which the land trust can show is

[2] RCW 64.60.010(3) defines "private transfer fee" as follows: "a fee or charge payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the real property, the purchase price, or other consideration given for the transfer."

consistent with other assessment methodologies, for instance, when the entire stewardship fee is collected upon grant of the easement.

Mortgage Lien

The Grant of Mortgage Lien section of the *Model* is applicable in Washington to secure the stewardship fund obligations of the original owner, with the following caveats. The requisites of a mortgage in Washington are as follows:

1. Mortgagor must have an interest in the real estate to create a valid mortgage (*i.e*., mortgagor owns the property subject to the conservation easement and stewardship fund obligation);
2. There must, by necessity, be an obligation which is secured by the mortgage (in this case, the obligation to pay stewardship fees);
3. The property is described (in Section 1 of the *Model*)
4. The party bound by the mortgage signs the document (both husband and wife must sign if the property is community property);
5. The signatures must be acknowledged; and
6. The mortgage must be delivered. Delivery is presumed by recording.

2 Wash. Bar Ass'n, *Real Property Deskbook* §20.4 (4th ed. 2009). A transfer of the property does not divest the property of the mortgage or automatically release the mortgagor from liability for the underlying obligation. *Id*. at §20.12. The following are various types of transfers by the mortgagor and their effect on liability for the obligation:

1. **Transfer terminating mortgagor's liability** – a mortgagor's liability may be terminated by (a) payment of the obligation or (b) novation (*i.e*., a substitute obligation between the same parties, a new debtor or a new creditor).
2. **Transfer "subject to" mortgage** – in a transfer "subject to" the mortgage, the transferee (buyer) pays the value of the property less the amount of the debt secured by the mortgage, but does not assume any personal liability for the mortgage debt; the mortgagee (land trust) has no personal claim against the nonassuming grantee to pay the loan; the debt is satisfied from the property first; original borrower is not released from liability on the debt secured by the mortgage.
3. **Transferee assumes mortgage** – when the mortgage is assumed, the transferee pays the value of the property less the amount of the indebtedness secured by the mortgage and agrees to personally pay the mortgage debt. Proof of assumption must be unequivocal, clear, and conclusive. There must be positive action on the grantee's part to assume; a mere declaration in the mortgage will not suffice. *Weaver v. King Cnty.*, 73 Wn.2d 183, 186, 437 P.2d 698 (1968) ("[t]he grantee of a deed is not bound by the mortgagor's covenant binding himself and his successors to pay the mortgage debt, even though the mortgage declares that the covenant runs with the land, unless the grantee has, in some way other than by mere acceptance of the deed, assumed the mortgage indebtedness"). Similarly, a mere declaration in the deed conveying the property that the mortgage is being assumed is not sufficient without some written acknowledgement by the grantee. The effect of such a transfer is to change the original mortgagor's status from principal to surety (*i.e*., a person liable for another person's debt).
4. **Transferee pays full value** – a transfer in which the transferee pays full value for the property and transferor agrees to pay the mortgage when it becomes due. Rarely used.
5. **Transfer by death or by gift** – a Washington statute provides that when a property subject to a mortgage is specifically devised, the devisee shall take such property subject to such mortgage unless the will provides that the mortgage otherwise be paid (but the devisee is not personally

> liable for the underlying debt unless he or she assumes the debt). Similarly, the recipient of a gift is not personally liable on the mortgage unless that person indicates that he or she intends to assume the liability.

2 *Real Property Deskbook* §20.12. It is also advisable, given some uncertainty in the law, to have any surety (person assuming the liability for an underlying obligation) to expressly waive his or her rights under the Washington statutes requiring a creditor to first seek redress under the contract. *Id.*; RCW 19.72.100; RCW 19.72.101.

The use of a mortgage lien is appropriate when there is any unpaid stewardship fund obligation at the time of grant of the conservation easement, because it provides some security for that debt. The Model Commentary also discusses Pennsylvania's "open-end mortgage" statute as a means to secure obligations which have not yet arisen. Such mortgages are meant to ensure that the lien holder's priority dates back to the original mortgage, not to when subsequent loans are made. The closest similar provision in Washington law is probably a "future advances mortgage" which is most often used in construction financing (*i.e.*, as the bank disburses money periodically for a construction project, the priority of the bank's lien covering those later loans dates back to the original recorded mortgage). With certain exceptions, a recorded mortgage or deed of trust takes priority over subsequently recorded liens "to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory." RCW 60.04.226; *Pac. Cont'l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 379, 273 P.3d 1009 (2012) ("[f]uture advances clauses in mortgages or deeds of trust allow for collateral to serve as security for obligations the mortgagor may incur in the future"). A land trust seeking priority for its mortgage lien because of an increase in the stewardship fee as a result of future occurrences would probably rely on this statute and the law governing "future advances" in support of having such obligations date back to the original mortgage.

d) Funding Conservation Easement Stewardship (Brochure)

Courtesy of Pennsylvania Land Trust Association--

The Pennsylvania Land Trust Association prepared this sample brochure to illustrate how a land trust might communicate with owners concerning the need and options to fund the land trust's easement stewardship obligations.

Stewardship Funding Arrangements: sample brochure