

Groundswell Conservancy Policy

Name: **Discretionary Approvals, Interpretation Letters, and Discretionary Waivers**

Approval: Approved by Executive Committee June 10, 2020

Land Trust Alliance Standards and Practices 11F. Approvals and Permitted Rights. 1. Respond to landowner required notices or requests for interpretation or approvals in a timely and consistent manner, as specified in the conservation easement deed or in a written procedure 2. Establish written procedures to guide the land trust's decision-making if using discretionary approvals or if conservation easement deeds contain such clauses 3. Maintain a permanent record of all notices, approvals, denials, interpretations and the exercise of any significant permitted rights.

Conservation easement language regarding particular uses of a protected property may be ambiguous or even absent. Short of the weighty and time-consuming process of amending an easement, the easement holder needs tools to allow it to maintain the conservation values of a protected property while allowing the landowner appropriate rights to use and enjoy their property. This policy describes the three tools short of amendment that Groundswell Conservancy may use to deal with such situations. Please refer to Groundswell's policy on amending easements when considering using the tools described in this policy.

Discretionary Approval

Some easements contain a discretionary approval provision that allows the holder of the conservation easement to approve, under certain conditions, activities that are otherwise restricted or not specifically addressed by the easement. This type of provision gives the holder clear authority to address unanticipated changes and/or deal with minor short-term problems or questions without using an amendment. Having the discretionary approval provision in the easement itself indicates that the original grantor and holder agreed that the use of discretionary approval was acceptable when entering into the easement and, for donated easements, that the flexibility was considered in the appraisal. Some holders use a license to permit the specific activity and define limits. Discretionary approvals should be limited as to who, what, where, when and how approval is granted.

Interpretation Letter

A holder may write an interpretation letter in response to a landowner's question about whether particular uses or activities are allowed on an easement. Interpretation letters may be used when the easement is silent or when it is ambiguous on the specific point. For example, suppose a farmer wants to offer hayrides for a fee, but the easement terms on commercial uses and agricultural uses do not specifically address this use. Rather than permanently amend the easement to allow (or forbid) the hayride right for all future owners, the holder could address the specific question in a letter, setting limits on when, by whom, where, what and how long the use is allowed, in consideration of the conservation values and purposes of the conservation easement.

Discretionary Waiver

A holder may choose not to enforce a minor technical violation of an easement and issue a notice of waiver of violation to the landowner. For example, upon finding a rustic tree house built on

easement land where the easement prohibits all structures, a holder might allow the tree house to stay and simply advise the landowner, in writing, not to expand that use and/or remove the structure by a certain date. This approach may be used to address minor, technical, relatively short-term violations of an easement that do not impair the property's conservation values. Discretionary waivers are not intended to be broad.

Conditions under which Discretionary Approvals, Letters of Interpretation, and Discretionary Waivers may be Used

When considering the use of discretionary approvals, interpretation letters, and discretionary waivers, Groundswell Conservancy must determine that the proposed approval, interpretation, or waiver:

- Is consistent with and not detrimental to the purposes of the easement and does not significantly impair the conservation values or attributes of the property protected by the easement. This determination should include an analysis of the expected or potential effects upon the property, the impacts on conservation values and attributes identified in the easement and baseline documentation, and a review of potential alternatives.
- Does not affect the perpetual duration of the easement.
- Does not create private inurement or impermissible private benefit.
- Does not affect the qualification of the easement or the status of Groundswell Conservancy under any applicable laws, including Sections 170(h) and 501(c)(3) of the Internal Revenue Code of 1986, as amended.
- Is in accordance with applicable laws and regulations.

In addition, Groundswell should consider:

- Whether Groundswell Conservancy will be burdened with unacceptable additional monitoring or other costs.
- Additional costs that will be incurred by Groundswell Conservancy if the action is approved, the time needed for implementation of the proposed change, and the duration for the action.

Groundswell Conservancy's Stewardship Committee will review staff recommendations for discretionary approvals, interpretation letters, and discretionary waivers. Groundswell Conservancy staff will document and track all discretionary approvals, interpretation letters, or discretionary waivers. Tracking will give Groundswell Conservancy the information needed to treat conservation easements consistently.

<p>Groundswell Conservancy is accredited by the Land Trust Accreditation Commission. Policies may be updated to reflect changing accreditation standards and practices, as well as changing local organizational needs.</p>
