# General Recommendations for Amendment of the Asheville Watershed Conservation Easement

1. Clearly delineate the easement area with corrected acreage using best available data
2. Define or list "consistent uses" to eliminate ambiguity
3. Tighten language pertaining to forest management and eliminate the right to commercial forestry
4. Require a property management plan prepared by the City and reviewed by CTNC
5. Update baseline and ecological documentation
6. Specify permitted recreational resources
7. Eliminate loophole giving discretion to City Council to 'override' certain restrictions
8. Specify details, timelines and responsibility for costs of monitoring and enforcement
9. Explicitly eliminate industrial uses and limit commercial uses to those listed as "consistent uses"
10. Include requirement for notification of CTNC prior to major activity

The conservation easement was recorded on December 3, 1996 in Buncombe County Deed Book: 1938 Pg. 018

# Recommended Changes to the Conservation Easement on the Asheville Watershed

May 29, 2012

Easement recorded on December 3, 1996
Buncombe County Deed Book: 1938 Pg. 018

| General Recommendation Number | Location in Document | Current Language | Recommendation | Rationale |
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| 1 - Easement area and acreage | Recitals, paragraph A (p. 1) | Acreage is listed as 17,356 + or - | Determine accurate acreage (to the extent possible) and re-state it. | Current acreage was determined using outdated technology and there is general consensus that the property is larger. Also, the number printed in the current document is obstructed by surrounding text and difficult to read. |
| 1 - Easement area and acreage | Recitals, paragraph A (p. 1) | No delineation between easement area and City-owned property intended to be excluded from the easement area. Implication is the entire property is the "Protected Property" | State acreage of the easement area relative to the total property. It should be made clear that the dams and water treatment facilities and related infrastructure below the dams are not included in the easement area if that is the intention. | Property and easement area boundaries will be delineated in new maps & descriptions (ideally a survey & legal description) and stated in the updated Easement Documentation Report, all parties must agree on and document the extent of the easement area relative to the entire property owned by the City. |
| 2 - Define Consistent Uses | Article III. Consistent Uses, first paragraph (p. 2) | "although not an exhaustive recital of consistent uses and practices..." | Consider including an "exhaustive" list of consistent/permitted uses and include them in the new deed. | Current language leaves the door open to other uses one party may deem "consistent" but not the other. |
| 3 - Forest and Land Management | Article III, subsection b (p. 3) | "Uneven-aged, selective timber harvesting may be conducted below the 3,600 foot topographic elevation, but in accordance with the following restrictions" | We recommend simplifying this section and eliminating arbitrary factors impacting management. We also recommend limiting forest management to "non-commercial forest management for purposes of protection of water quality, forest health, ecological restoration of native forest conditions and safety of the Grantor or the general public." Or state the overarching goal of all forest management is support of the purpose of the easement | The restriction preventing forest management on land above the 3,600-foot topographic elevation from management is fairly arbitrary and should be eliminated. Financial incentives for forest management should also be removed to eliminate concerns that generation of income might be an incentive for forest management. |

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| 4 - Management Plan | Article III, subsection b (p. 3) | A property/forest management plan is not required by the current easement. | We recommend requiring a property management plan that will be updated at least once every 10 years and provided for review (but not approval) by CTNC. The management plan must acknowledge the easement and the limitations it imposes on management activities. The plan should include forest management recommendations by a NC Registered Forester. Forest road construction and maintenance could be addressed within this section of the updated easement and/or in the property management plan or in a separate section in the updated easement. | Modern easements typically require professionally prepared management plans to guide management decisions that are not explicitly spelled out in the easement. This provides flexibility for land owners/managers while providing assurance to the land trust that management decisions are guided by expert advice based on current conditions with explicit goals and objectives. Granting the land trust the authority to review the plan ensures that there is an adequate plan, provides an opportunity for feedback from the land trust as well as a benchmark for current and desired conditions with information on what might be needed to achieve desired conditions. Some easements require approval of the plan by the Grantee. CTNC would be willing to include that requirement if all parties prefer that level of oversight. There should be enough flexibility in the easement and forest management plan to allow management to adjust to changing forest conditions, |
| 5 - Update Baseline and Ecological Documentation Report | Article III, section b (ii) & (iii) (p. 3) | These sentences reference ecological conditions that are not well documented (old-growth forests and habitats of state-listed or candidate endangered or threatened species). | We recommend defining terms like "old-growth" if they are used in updated language. Regardless of the use of that term or references to habitat, the ecological inventory and easement documentation report must be updated. | Monitoring for conditions like those mentioned is not feasible. Delineation between "old-growth" and mature forest can be subjective. Current data are insufficient for monitoring or enforcement of these terms. Ecological condition and easement documentation reports are now more than 16 years old and are insufficient by today's standards, especially for a property this size. CTNC is willing to work with the City to secure funding to offset the costs of updating the easement documentation report. |
| 5 - Update Baseline and Ecological Documentation Report | Article VIII Documentation and Title, paragraph A (p. 5) | Documentation Report | The revised easement should reference an updated Easement Documentation Report. | Current Easement Documentation Report is not sufficient. CTNC is willing to work with the City to secure funding to help fund creation of an updated report. |
| 6 -Recreational Resources | Article III, subsection c (p. 3) | This section deals with recreational resources permitted on the property. | Development of non-commercial, passive, outdoor recreational or educational facilities are permitted on the Protected Property subject to approval by the Grantee. | The term "recreational facilities" is not defined in the current easement. This could be exploited to permit large buildings, hard-surface courts, fields or trails for motorized recreation that would have a significant negative impact on the conservation values. Clarity and limitations are needed. |
| 7 - Eliminate Loophole | Article III, subsection d (p. 3) | "Such other uses as the Asheville City Council may determine as is necessary and in the best interests of the City of Asheville provided:" | This should be tightened or eliminated. If it remains, require approval by Grantee for any "other use". | This broad loophole creates too much uncertainty about the integrity of the easement. Furthermore, it is not clear what authority City Council might have over management decisions if the Sewer and Water Authority is governed by a third party. |
| 8 - Monitoring and Enforcement | Article VI Enforcement and Remedies (p. 4) | Enforcement and Remedies section grants landowner 30 days from date of notification by Grantee to take corrective action for breach of terms. | Grantee must have the right to seek immediate injuctive relief to stop an egregious violation of the easement or any activity that poses a significant threat to the conservation values. | Certain activities may be so destructive that a 30-day waiting period could be far too long to provide necessary protection. |

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| 8 - Monitoring and Enforcement | Article VI (p. 4) | Enforcement and Remedies section does not address costs of enforcement | Any costs incurred by Grantee in enforcing the terms of this conservation easement against the Grantor, including without limitation, any costs of restoration necessitated by Grantor's acts or omissions in violation of the terms of this conservation easement, shall be borne by Grantor. | This is standard in virtually every new easement and is necessary to protect the land trust's ability to enforce the terms of the easement against violations by the Grantee regardless of the expense. Acts beyond the Grantor's control (fire, flood, storm, etc.) are exempted either within this clause or in a separate section (often titled "Acts Beyond Grantor's Control"). |
| 8 - Monitoring and Enforcement | Article IX, paragraph E (p. 6) | Five days prior written notice required to conduct annual monitoring. | Five days prior notice (no requirement for written). NC Clean Water Management Trust Fund (CWMTF) standard easement says "...at all reasonable times and with prior notice..." with no specified time or requirement for written notice. See additional language in CWMTF easement. | Written notice in the form of email should be more than sufficient but we prefer the right to make arrangements by phone given that we have a good relationship with property managers. Maintaining records of written notice is burdensome but is currently required by the easement. If Grantee has reason to suspect a violation, we should have the right to immediate entry. Also see comments regarding 'Notice' in Article IX, paragraph I (p. 6). |
| 9 - Prohibit Industrial and Commercial Use | Article IV Prohibited Uses (p. 4) | Explicitly prohibit industrial or commercial use. | We recommend prohibiting commercial forestry (in that section) and all other commercial and industrial use of the protected property (except for production of drinking water). | This is standard language in modern easements, but these uses are not explicitly prohibited in the Asheville easement. |
| 9 - Prohibit Industrial and Commercial Use | Article IV, subsection k (p. 4) | Utility lines are prohibited except in conjunction with any consistent use. | Grant authority to Grantee to require burial of utility lines. We recommend further protection of scenic views through a prohibition on construction of towers, windmills, etc. | If utilities are absolutely necessary, burrial could minimize visual impact. Do not require it because it may cause more disturbance than elevating them. Most modern easements intended to protect scenic views prohibit towers, windmills, landing strips and landing pads, etc. Some require burrial of utility lines. |
| 10 - Notification Requirements | Article IX, paragraph I (p. 6) and perhaps others including Article III, subsection b (p. 3) | The City is not required to notify CTNC prior to conducting activities that may impact the conservation values. | Add a clause requiring prior notification prior to certain activities and CTNC consent to certain activities like forest management, etc. | Significant management activities may pose a threat to the conservation values or alter the property in a significant way. CTNC needs advance notice of many management activities so it can allocate additional staff time to evaluate the activity, assist with compliance, understand the potential impacts, and be prepared to respond to call from stakeholders who may be aware of the activity. |