



Forever Wild: Conservation Easements and Strategies for Land Protection

March 9, 2020

6:00 p.m. – 8:00 p.m.

CT Bar Association

New Britain, CT

CT Bar Institute, Inc.

CT: 2.0 CLE Credits (General)

NY: 2.0 CLE Credits (AOP)

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Forever Wild: Conservation Easements and Strategies for Land Protection (EYL200309)

Agenda

- 6:00 – 7:00 p.m. The Easement Model and the Method/Theory of Creating the Protection
Speaker: **Linda P. Francois**, Cooper Whitney & Francois
- 7:00 – 8:00 p.m. Protecting the Land/Easement from a Litigation Standpoint
Speaker: **Keith R. Ainsworth**, Law Offices of Keith R. Ainsworth, Esq. LLC

Faculty Biographies

Keith R. Ainsworth, Managing Member, The Law Offices of Keith R. Ainsworth, Esq., LLC

Keith Ainsworth has been an environmental and land use litigator of the New Haven Bar for thirty years. A member of the Connecticut Council on Environmental Quality, Keith has a broad conservation-based practice representing land trusts, non-profits, land owners and businesses in transactions and litigation throughout Connecticut before administrative agencies and state and federal courts. As a former chair of the CT Bar Association Environmental Law section and a municipal first selectman (Haddam), Keith has a perspective from several sides of the table. A graduate of Tufts with a B.S. in biology, environmental studies and English literature, Keith brings a scientific and analytical background to the law. Keith is a life member of the Madison Land Conservation Trust and served on the national leadership council of Trout Unlimited. Keith also serves as General Counsel to Vista Life Innovations, Inc., a private educational institute for adults with intellectual disabilities. Keith is also an avid outdoorsman and the author of several volumes of poetry.

Linda P. Francois, Cooper Whitney & Francois

Linda P. Francois received her undergraduate degree from the University of Connecticut as an honors scholar in 1979 and her Juris Doctor with honors from the University of Connecticut in 1982.

Her practice includes property law, closings, wills, trusts and probate, personal injury, collections, foreclosures, and evictions.

Ms. Francois' real estate practice includes a focus on natural and working lands preservation. She has represented landowners, land trusts and municipalities in land protection transactions, conservation restriction (easement) donations, bargain sales and purchases, and open space initiatives throughout Connecticut. She has been a presenter on the issues of land preservation and conservation transactions for the National Land Trust Alliance, CT Land Conservation Council, Yale Forestry School, Connecticut Farm Bureau, and Teikyo Post University, among others.

Ms. Francois is the 2008 recipient of the Working Lands Alliance Farmland Preservation Pathfinder Award, 2003 Secretary of State's Public Service Award, the 2005 Bethany Citizen of the Year Award and 1998 Bethany Conservationist of the Year Award. For over fifteen years, she has been a director and president of the Bethany Land Trust, Inc., and a director and officer of the Bethany Horsemen, Inc. riding organization

CONSERVATION EASEMENTS FOR CONNECTICUT PRACTITIONERS

CBA March 9, 2020



Linda P. Francois, Esq.
Cooper, Whitney & Francois
51 Elm Street
New Haven, CT 06510-2049
(203)865-7380 lfrancois@cooperwhitney.com

Conservation Easements – Why Are They Important?

- More and more easements out there
- Land in transition: 75% of open space owned by people 60+
- Opportunity to leave a legacy of land preservation, do something to slow climate change
- Tax Benefits



What is a Conservation Easement?

(and What is a Conservation Restriction ?)

- The Bundle of Sticks (Rights)
 - o Owner still owns, manages, insures, pays taxes
- Different than a Right of Way:
 - o Statutory – an easement in gross
 - o Perpetual “runs with the land”
 - o No merger – public trust
 - o Special deduction rules

State Enabling Legislation:

legalizes easements in gross

A rose by any other name

- 1971 C.G.S §47-42a, b & c. Makes any CE (called a "Conservation Restriction") enforceable. CR includes every “restriction, easement, covenant or condition, in any deed, will or other instrument ...whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use”.



State Laws Protecting Land Trusts:

- **C.G.S. §47-33h (2001) MARKETABLE TITLE:** excludes CE's from Marketable Record Title Act.
- **C.G.S § 47-27(b) (2002) ADVERSE POSSESSION:** bars adverse possession and prescriptive easement claims against non-profit land holding organizations.
- **C.G.S Sec. 52-557g (1971) RECREATIONAL USE STATUTE :** no duty of care or to warn if land to be used for recreational purposes at no charge.
- **C.G.S. §52-560a (2006) ENCROACHMENTS:** On LT land or CEs, court can award restoration or cost of restoration incl. management fees, atty fees, costs, equitable relief & penalty of 5x restoration cost or 5K statutory damages. Attorney General can also enforce.

Why choose the Conservation Easement tool?

- **If Fee ownership by LT : title is not restricted.**
 - o Land can be voluntarily or involuntarily sold, subject to creditors
 - o Town has other missions than land protection
- **Deed Restrictions –**
 - o Enforcement problems –
 - o who legally can enforce, can it be undone?
 - o who has the will to enforce,
 - o who will monitor,
 - o who will ensure perpetuity? Will it run with the land?
 - o Generally less detailed, unclear
 - o Deduction problem: can ruin value of conservation donation.

Benefits of Conservation Easements

- Flexible
- Attractive to Landowner –
Legacy; can live on land and use it, sell subject to easement, pass on to heirs with less estate tax, “dead hand” benefits, tax benefits during lifetime
- Attractive to Land Trust – does not have to monitor as often, or maintain
- Intervivos, testamentary, or postmortem
- Purchase \$ in some cases
- Tax Benefits for donations

Disadvantages of Conservation Easements

- Flexible – complex, differing terms
- Initial grantor satisfaction high, successors lower; less commitment to purpose, more incentive to violate; less clarity of possession
- Donor IS giving up value, limiting pool of purchasers
- Higher transaction costs, more requirements; more expensive complex appraisal, baseline documents, two attorneys to review and negotiate terms;
- **highly scrutinized and more subject to attack by the IRS than an outright gift.**

Connecticut Statutory Formalities/Issues

- Signatures, two witnesses per signature, & acknowledgements
- Recorded on land records
- Easements must be signed by grantor and grantee or they are potentially voidable

C.G.S. § 47-6b (2004)

Federal Requirements for Deductibility of Conservation Easements

- ✓ Voluminous requirements to insure perpetual;
- ✓ To a “Qualified Organization” like a 501(c)(3) Land Trust or Governmental Entity
- ✓ Qualified Appraisal – complex & strict rules
- ✓ Baseline Documentation Report
- ✓ No Goods or Services letter

Federal Requirements for deductibility: Conservation Purpose

- ✓ Section §170(h) of the IRS Code defines “conservation purposes” as
 - ✓ “Public recreation and/or education
 - ✓ Significant natural habitat
 - ✓ Preservation of open space (including farmland or forest land) that
 - is for the scenic enjoyment of the general public, or
 - is pursuant to a clearly delineated federal, state or local government conservation policy and will yield a significant public benefit
- ✓ Historic preservation

The Easement must be Perpetual

42 U.S.C. § 170A-14(a) = Required Boilerplate

- Recorded
- Mortgages subordinated
- Right to enter the property at reasonable times to inspect
- Notice to land trust of exercise of reserved rights which jeopardize the CVs...

More Boilerplate Perpetuity

- Can only be extinguished by judicial proceedings
- Proceeds must be used in a manner consistent with the conservation purposes of the original grant
- Strict adherence to extinguishment regulations
- Amendments?
- Assignment restrictions
- Prohibition on Merger

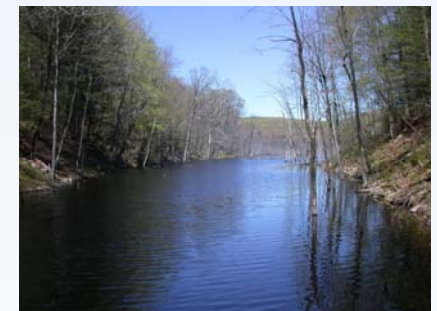
BUT: MODEL DOCUMENTS : BASE MODEL, OPTIONS, FOREVER WILD, AND COMMENTARY

<http://www.ctconservation.org/model-documents>

Baseline Documentation Report

§1.170A-14(g)(5)(i) requires documentation of the condition of the gift at the time of transfer

- Multiple purposes:
 - o tell IRS why it meets requirements and deserves public funding
 - o Tell future interpreters what you are protecting
 - o Tell the owner & future owners why its important
 - o Document the CVs & Conservation Purposes
- Must be signed by donor and land trust representative



Easement appraisals:

- Highly scrutinized
- Must be For Tax Purposes
- Before and after valuation (generally) so expensive
- Special rules on aggregating nearby parcels owned by related parties
- LT needs copy of appraisal

Donor Substantiation Letter for ALL gifts over \$250 in value!

- Contemporaneous written acknowledgment including date of gift, amount of any cash contribution, description of contribution.
- Statement whether any goods or services were provided in return for the contribution (quid pro quo)

IRS Form 8283 & Supplemental Statement

- Form 8283 – B. Qualified Conservation Contribution, Adequate description, **fully filled out.**
- Attach Required statement:
 - o Identifies CVs and “Conservation Purposes”
 - o Shows FMV before and after the gift
 - o States whether donation made to get an approval (Not Quid Pro Quo)
 - o Discloses if related person has any interest in property nearby

Says “This acknowledgment does not represent agreement with the claimed fair market value” *but IRS says LT responsible*

Form 8283 Package

- Required: Supplemental Statement, full appraisal report if worth more than 500K including carryforward years.
- Recommended: Gift letter, Baseline Report, CE

Types of Conservation Easement Transfers

- Full Donation
- Bargain Sale- Part sale, part gift
 - Basis is allocated between sale portion and gift §1011(b)
- Sale for Full Fair Market Value

General Types of Conservation Easements

- Agricultural/Working Lands
- Forever Wild
- Hybrid
 - o Ex: Zones, Ag areas, forestry, reserved building areas
See Model Options



The Conservation Values drive the drafting. A working lands easement should not be drafted like a “Forever Wild” easement

Initial Drafting Considerations

- Know THE PROPERTY
 - o What are the Conservation Values?
 - That the land trust wants to protect
 - That the IRS recognizes
 - o What rights does the landowner want to retain?
 - o Be as specific as possible, yet build in flexibility

Typical Easement Structure

- **General Format:**
 - **Recitals:** define CVs
 - **Purpose**
 - **General prohibitions:** Take everything away
 - **Landowner retained rights:** Give specifics back
 - **Land trust rights:** enforcement/ access, if any
 - **Boilerplate:** (usually IRS required) provisions

Land Trust Rights

- Enforcement of Conservation Easement (of course)
- Affirmative land trust rights:
 - o Preservation of open areas?
 - o Public access?
 - o maintenance & creation of trails?
- Approval, Discretionary Consent and Amendment standards and procedures



Amendments

- Easements are supposed to be perpetual
- IRS hates amendments *but see Pine Mountain Preserve v. Commissioner 8956-13 Dec 27 2018 provided that they were “not inconsistent with the conservation purposes of the donation,” did not prevent that easement from satisfying the granted-in-perpetuity requirement of I.R.C.*
- Impermissible Private Benefit, or Private Inurement, prohibited
- Report Amendments and modifications on land trust annual income tax form 990
- Attorney General can enforce the “public interest” in CEs §47-42c...

Amendment Procedure If No Amendment Clause

- o **Low Risk:** typos, add land, more restrictions: provide prior notice to AG.
- o **More Risk:** may effect CVs, private benefit, PR issues: AG review for “no action” letter
- o **High Risk:** partial extinguishments, cash or land tradeoffs, private benefit, contrary to intent etc. Requires review and approval by court under *cy pres* rules.

Effect of Amendment Clauses

- Amendment **allowed** by document if consistent with purpose
- **No prior AG review needed for Low and More Risk, send copy to AG after execution.**
- **High Risk amendments still require court approval.**

Advantages of Conservation Sale

- Exempt from State and Local Conveyance Taxes
CGS §12-498 (exemption 16)
- (Presumably) no real estate broker fees
- Conservation cuts exempt from subdivision requirements CGS §8-18

LT should not have to pay full price, but beware of specifics re: tax benefits, must run the numbers!

Federal Tax Benefits

- **Income Tax Deduction**
 - o Increased incentives for qualified conservation easements
 - o Deduction of value of gift up to 50% of AGI
 - o 15 year carry-forward
 - o 100% AGI for qualified farmers and ranchers
 - o Fee gifts: only 30% of AGI with 5 year carry-forward

Estate Tax Benefits

- o Value given up is out of estate
- o Additional estate tax reduction on value of retained property
 - up to 40% of land value excluded from gross estate
- o Postmortem conservation easements allowed but tricky to do, generally require pre-planning

Corporate tax incentives-minimal

- **Federal corporate tax benefits limited.** Developers limited to basis. Corporations limited to 10% taxable income with five year carry forward except 100% AGI for qualifying farmers and ranchers.
- **State corporate income tax credit.** 50% of donation of open space land to a LT or municipality. Carry forward 10 years (C.G.S. §12-217dd; P.A. 00-203)
- **Exempt from State Corporate Capital Gains Tax on conservation sale.** A corporation that sells land or an interest in land at any price to state, municipality or LT for conservation purposes is exempt from capital gain under the state corp. business tax) C.G.S. §12-217
- **SALT Legislation:** Beware new federal legislation limiting federal benefits if there are state or local benefits.

Property Tax Assessment of Easements

- *A public relations issue.*
- No change if already specially assessed under P.A. 490 at “current use value”
- C.G.S. §12-63 Rule of Valuation “The present true and actual value of all other property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof...”
- Wide discretion accorded to assessors.

**Its hard work BUT this is how
lawyers get to heaven**



Outline

CONSERVATION EASEMENTS

FOR CONNECTICUT PRACTITIONERS

CBA March 9, 2020 Linda P. Francois

- I. WHAT IS A CONSERVATION EASEMENT? (slides 1-5)**
 - a. The Bundle of Sticks**
 - b. Differences from other easements**
 - c. Enabling legislation**
 - d. Protective legislation**
 - e. Pros and Cons (slides 6-8)**
 - Fee ownership v. CE
 - Grantor and Grantee views
 - f. Easements v. Deed Restrictions**
 - g. General Benefits**
 - h. Disadvantages**
- II. Statutory Formalities/Deduction Requirements (slide 9)**
 - a. Similar deed requirements**
- III. IRS Perpetuity requirements (slides 10-13)**
- IV. Supplemental Requirements (slides 14-18)**
 - a. Baseline**
 - b. Appraisal**
 - c. F(2) "No Goods or Services" Letter**
 - d. Form 8283 & Supplemental Statement**
- V. Types of Conservation Easements (slides 19-20)**
- VI. Drafting Considerations (slides 21-23)**
- VII. Amendments (slides 24-26)**
- VIII. Financial Benefits & Tax Deductions (slides 27-31)**
 - a. State benefits**
 - b. Tax deduction figures**
 - c. Estate Tax benefits**
 - d. Corporate benefits**

The model conservation easement below, options, and related commentary have been prepared for illustrative and informational purposes only. The use of the modifier “model” in the document and associated commentary is not intended to imply that the document satisfies all legal requirements. While based on current developments in the continuing evolution of land conservation law, practice and documentation, neither the Connecticut Land Conservation Council, its funders, officers, directors, employees, contractors, agents or other representatives, nor the members of the Connecticut Model Conservation Easement Working Group guarantee the qualification of this model conservation easement document under federal, state and local law. Neither these publications nor their release are intended to impart definitive legal, accounting or tax planning advice. Because of the complexity of the subject matter and the conditions of these documents’ release, anyone intending to use or apply this sample document or the related commentary should retain the services of competent professional counsel.

Drafting Directions: Areas in the Model where information needs to be inserted, or choices between options particularly need to be made, are indicated by brackets. THE DRAFTER SHOULD DO A GLOBAL SEARCH FOR THE BEGINNING BRACKET TO MAKE SURE THAT NO SUCH AREAS ARE LEFT UNCONSIDERED AND UNEDITED.

If an X appears in a number in the Base Model or the Options, you are to insert the proper numerical listing for that paragraph as it is dependent on other drafting numbering.

Review the accompanying commentary for drafting considerations and explanations for the various component sections.

After recording, please return to:
Grantee or Grantee’s attorney]

[CONNECTICUT MODEL] CONSERVATION EASEMENT

This Grant of **CONSERVATION EASEMENT** made this [_____] day of [_____, 201__] by and between [Donor names] having an address at [_____] who with his/her/their/its successors in title to all or any portion of the Protected Property as hereinafter defined, including heirs, executors, administrators, successors and assigns, in perpetuity, are collectively referred to as “Grantor,” and [_____] [A Connecticut nonstock corporation with a business address at _____, _____][a municipal entity having a principal place of business at _____,] together with its successors and assigns, in perpetuity, hereinafter referred to as “Grantee.” Grantor and Grantee are hereinafter collectively

referred to as the “**Parties.**”

RECITALS:

A. Grantor is the owner in fee simple of certain real property in the Town of [____], County of [____], and State of Connecticut, with an address of [_____] and comprising [___#_____] acres[more or less], hereinafter called the “**Protected Property**,” which has ecological, scientific, educational and aesthetic value in its present state as a natural area which has not been subject to development or exploitation, which Protected Property is more particularly described in Schedule A attached hereto and incorporated by this reference [and delineated on a certain map entitled “[_____]” recorded as map number [_____] in the land records of the town where the Protected Property is located.]

[**ALTERNATIVE 1: WHERE LAND TRUST IS THE GRANTEE**][B. Grantee is a publicly-supported tax exempt, non-stock organization incorporated under the laws of the State of Connecticut, whose primary purpose is to preserve and conserve natural areas for aesthetic, scientific, charitable, and educational purposes. Grantee is qualified to acquire and hold conservation restrictions under the provisions of Connecticut General Statutes Section 47-42a et seq. and is a “qualified organization” under Section 170(h) of the Internal Revenue Code of 1986, as amended, and the regulations thereunder (hereinafter referred to as the “Code”). Grantee has received determination letters from the Internal Revenue Service, on file at the offices of Grantee, to the effect that Grantee is a “publicly supported” charitable organization [or, if applicable: “charitable supporting organization”] under Sections 501(c)(3) and 170(b)(1)(A)(vi) [or: 509(a)(2) or 509(a)(3)] of the Code and is not a private foundation as defined in Section 509(a) of the Code.] Donee represents that it has the commitment to protect the conservation purposes of the conservation easement and the resources to monitor and enforce the restrictions in perpetuity.

[**ALTERNATIVE 2. WHERE MUNICIPAL ENTITY IS THE GRANTEE**][B. Grantee is a governmental unit described in Section 170(b)(1)(A)(v) of the Internal Revenue Code of 1986, as amended, (hereinafter referred to as the “Code”), and is a “qualified organization” under Section 170(h) of the Code to receive qualified conservation contributions.]

C. The Protected Property possesses significant natural, [agricultural] scenic, forested, and open space Conservation Values and conservation interests (collectively “**Conservation Values**”) of great importance to Grantor and the people of [____], County of [____], and State of Connecticut as set forth below in these Recitals and as documented in the **Baseline Report**.

D. Grantor and Grantee have the common purpose of conserving the Protected Property in perpetuity by Grantor’s placing voluntary restrictions upon the use of the Protected Property and by providing for the transfer from Grantor to Grantee of affirmative rights

for its protection in perpetuity, intending the grant of such restrictions to be a “qualified conservation contribution” as that term is defined under Section 170(h)(2)(C) of the Code, **[and as a “qualified conservation easement” under Section 2031(c) of the Code,]** and so as to qualify as a “Conservation Restriction” under the Connecticut General Statutes Sections 47-42a through 47-42e. Grantor and Grantee wish to avail themselves of the provisions of those laws through the protection of those Conservation Values hereinafter described in the following Recitals.

In addition, the conservation of the Protected Property will accomplish a number of the factors that determine “significant public benefit” under Treas. Reg. Section 1.170A-14(d)(4)(iv), including but not limited to the following: (i) development of the Protected Property beyond the [limited] development permitted hereunder would lead to or contribute to the degradation of the scenic, natural, and open character of the area, [particularly in light of the fact that the region is under development pressure], (ii) by [limiting/prohibiting] development of the Protected Property and limiting its use, this conservation easement will help prevent habitat fragmentation and will increase the potential for restoring or increasing biological diversity and native plant communities, (iii) the Protected Property is an integral part of the scenic character of the local rural landscape in which it lies, and (iv) this conservation easement is consistent with public programs for conservation in the region, some of which are enumerated below.

The protection of those Conservation Values hereinafter described includes and is in fulfillment of, and consistent with, the corresponding “conservation purposes” that are required to be protected under Section 170(h)(4) of the Code.

SCENIC ENJOYMENT:

E. Preservation of the Protected Property is for the scenic enjoyment of the general public and will yield a significant public benefit in accordance with Section 170(h)(4)(A)(iii)(I) of the Code. Specifically, the Protected Property is situated on and prominently visible from **[specify view characteristics and identify public ways, public areas etc.]**

HABITAT PRESERVATION:

F. This conservation easement protects a significant “relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,” in accordance with Section 170(h)(4)(A)(ii) of the Code. Specifically, the Protected Property [is habitat for or is adjacent to habitat for] **[elaborate]**, and is within an area which Grantee has determined is of substantial **[scenic and ecological]** importance to the Town of [_____];

[specifically, the Protected Property is habitat for species of greatest conservation need and their habitat, as listed on the Connecticut Department of Energy and Environmental Protection Wildlife Division Natural Diversity Database and referenced in Connecticut’s Comprehensive Wildlife Conservation Strategy completed under the U.S. State Wildlife Grant Program and approved by the U.S. Fish and Wildlife Service, which species

have been observed on or about the property, including:] [reference, if applicable, federally listed species, state-listed endangered, threatened and special concern species, Global Status Rank, State (subnational) Status Rank and New England Regional Conservation Concern]

G. The Protected Property abuts [is adjacent to][is in close proximity to][is contiguous to] property owned by **[Grantee/Town/State of Connecticut etc.]** and as a result is part of a corridor of protection for a diversity of species and their associated habitat, including nesting and migratory birds, other woodland species and mammal, reptile and insect species.

OUTDOOR RECREATION AND EDUCATION:

H. This Conservation Easement preserves “land areas for outdoor recreation by, or for the education of, the general public” in accordance with Section 170(h)(4)(A)(i) of the Code. Specifically **[elaborate]**:

WATER QUALITY PROTECTION:

I. The Protected Property is traversed by a watercourse **[elaborate]** and its protection affords an ecologically important buffer for the protection of water quality and habitat in accordance with Section 170(h)(4)(A)(ii) of the Code.

PUBLIC POLICY:

J. The preservation of the Protected Property is pursuant to clearly delineated federal, state and local governmental conservation policies and will yield a significant public benefit in accordance with Section 170(h)(4)(A)(iii)(II) of the Code. Specifically:

(1) in 1963, the Connecticut General Assembly declared “that it is in the public interest to encourage the preservation of farmland, forest land and open space land in order to maintain a readily available source of food and farm products close to the metropolitan areas of the state, to conserve the state’s natural resources and to provide for the welfare and happiness of the inhabitants of the state...” (P.A. 490, Section 1; C.G.S. Section 12-107a); and

(2) in 1971, the Connecticut General Assembly passed Public Act 173 (C.G.S. Sections 47-42a through 47-42c which authorizes the creation and enforcement of conservation restrictions “whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural farming, forest or open space use;” and

(3) the Protected Property has been specifically designated on the Open Space Plan of the Town of [_____ as _____]; and

(4) in a letter dated _____, the Town of _____ endorsed the preservation of the

Protected Property through this conservation easement , referencing the consistency of such preservation with the [Town Plan of Conservation and Development][Open Space Plan] of the Town and the conservation and preservation goals of the Town relating particularly to **[farmland and wetlands][elaborate] [and in recognition of the importance of the Protected Property as an ecological, scenic and recreational resource];** and

(5) The U.S. State Wildlife Grant Program provides funding for the protection of species of greatest conservation need and their habitat, as listed on the Connecticut Department of Energy and Environmental Protection Wildlife Division Natural Diversity Database, which species have been observed on or about the Protected Property, including: [_____]

(6) **[Add any other public policies that relate to the specific property, such as those described in the town plan, regional plan or other public conservation policy document; for further examples see commentary.]**

NOW, THEREFORE, Grantor, for and in consideration of the facts above recited and of the mutual covenants, terms, conditions and restrictions herein contained **[if a purchased or bargain sale easement, insert consideration here]** and as an absolute and unconditional **[gift/grant]**, does hereby give, grant and convey to Grantee this conservation easement (“**Easement**”) in perpetuity over the Protected Property of the nature and character and to the extent hereinafter set forth.

1. PURPOSE. It is the purpose (“**Purpose**”) of this Easement:

A. to assure that the Protected Property will be retained forever predominantly in its natural, scenic, [agricultural,][forested,] and open space condition for the protection of the Protected Property’s Conservation Values; and

B. to protect any rare plants, animals, or plant communities on the Protected Property and to protect the ecological qualities of the Protected Property; and

C. to prevent any use of the Protected Property that will significantly impair or interfere with the Conservation Values of the Protected Property described above.

Grantor intends that this Easement will confine the use of the Protected Property to such activities as are consistent with the Purpose of this Easement. Any permitted uses reserved to Grantor must be carried out in a manner that is consistent with the Purpose of this Easement.

2. DEFINITIONS. [READ CAREFULLY AND EXCLUDE ITEMS AND PARTS OF DEFINITIONS AS REQUIRED – Add relevant definitions if any optional sections have been added to the Easement] The following definitions apply throughout this Easement. Many terms are defined within the individual paragraphs of this Easement. Defined terms are indicated as such in the body of this Easement by capitalization.

ALL TERMS ARE BROADLY WORDED AND ARE SUBJECT TO CONDITIONS, LIMITATIONS AND EXCLUSIONS AS FURTHER SET FORTH IN THIS EASEMENT.

2.X **“Baseline Report”** is defined in Paragraph 19.10.

2.X **“Best Management Practices”** unless a specific set of practices is otherwise indicated, Best Management Practices are a series of guidelines or minimum standards recommended by governmental resource management agencies, professional organizations and universities for proper farming and forestry operations and application of Pesticides, with the goal of limiting non-point pollution of water resources and other disturbances of soil, water, and vegetative resources and to protect wildlife habitats.

2.X **“Code”** is defined in the Recitals.

2.X **“Conservation Values”** are defined in the Recitals.

2.X **“Environmental Laws”** means any and all federal, state, local, or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies, or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, Hazardous Materials, worker and community right-to-know, light, noise, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building, and land use restrictions as may now or at any time hereafter be in effect.

2.X **“Grantee”** is defined in the first paragraph of this Easement and includes the initial Grantee.

2.X **“Grantor”** is defined in the first paragraph of this Easement. It shall also mean the masculine, feminine, corporate, singular or plural form of the word as needed in the context of its use.

2.X **“Hazardous Materials”** means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment.

2.X **“Invasive Species”** are: (i) non-native plants that are disruptive in a way that causes environmental or economic harm or harm to human health, and (ii) non-native insects, fungi, parasites, and other organisms that attack native species of flora and fauna or threaten the diversity and health of the forest or other natural ecological communities.

2.X **“Pesticide”** includes, but is not limited to, insecticides, fungicides,

rodenticides, biological agents and herbicides, or other potentially harmful substances or by-products thereof.

2.X “Purpose” is defined in Paragraph 1 hereof.

2.X “Qualified Natural Resource Professional” is a certified professional forester, forest ecologist, wildlife biologist, soil scientist or agricultural specialist with substantial training and expertise, and any necessary certifications, in the relevant environmental sciences.

2.X “Structure” means anything constructed or erected, the use of which requires permanent location on, above or under the ground, or attachment to something having a permanent location on, above or under the ground. This includes, but is not limited to: dwellings and buildings.

3. LIMITATIONS AND PROHIBITED USES. In order to carry out the Purpose, and subject to the Retained Rights set forth in **Paragraph 4** below and provisions elsewhere in this Easement, the following acts or uses are expressly prohibited on or in connection with the Protected Property [Provided, however, that such restrictions Limitations and Prohibited Uses shall not apply to the Reserved Residential Area, which is subject to separate provisions as set out in the paragraph related to the Reserved Residential Area]:

3.1 Subdivision. The Protected Property shall together constitute one entire and undivided parcel of land for purposes of the Connecticut General Statutes Chapter 422a notwithstanding that said Protected Property may be described as one or more parcels of land on Schedule A hereof. The Protected Property shall be granted, sold, exchanged, gifted, conveyed or transferred as a unit in order to prevent land and management fragmentation, whether or not said Protected Property is described herein or has been described in any prior deed as more than one piece or parcel of land. The Protected Property may not be divided, partitioned, or subdivided, nor conveyed, except in its current configuration as an entity or except as may be permitted in **Paragraph 4** below; provided, however, that with prior approval from Grantee, Grantor may convey any portion of the Protected Property to any organization or government entity that would qualify as an eligible assignee in accordance with this Easement. Any portion of the Protected Property conveyed pursuant to this provision shall remain subject to this Easement in all respects.

3.2 Use for Development. The Protected Property and any portion thereof shall not be included as part of the gross area of other property not subject to this Easement for the purposes of determining density or lot coverage, set-backs and frontage requirements, under otherwise applicable laws, regulations or ordinances controlling land use and building density. No development rights which have been encumbered or extinguished by the Easement shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise. Nothing herein contained shall be construed to prevent Grantor from using any of the Protected Property as property qualifying for open space, forest or farmland for tax exemption purposes under applicable statutes and laws.

3.3 Prohibited Structures and Other Improvements. There shall be no construction or placing of any building, well, septic system, tennis or other recreational court, landing strip, mobile home, swimming pool, crypt, fence or sign (other than those reasonably required by Grantor for appropriate management), asphalt or concrete pavement, parking area, billboard or other advertising display, antenna, utility pole, tower (including without limitation cell phone antenna towers), conduit, line, electric light or any other temporary or permanent Structure or facility on, under or above the Protected Property except as provided in **Paragraph 4.**

3.4 Changes in Topography and Mining. There shall be no ditching, draining, diking, filling, excavating, dredging, surface or subsurface mining or drilling, removal of topsoil, sand, gravel, rock, stone walls, minerals or other materials, nor any building of roads or change in the topography of the land in any manner except as provided in **Paragraph 4.**

3.5 Changes to Vegetation. There shall be no removal, destruction or cutting of trees, shrubs or plants, or planting of non-native species with invasive characteristics, introduction of non-native animals, grazing of domestic animals, or disturbance or change in the natural habitat except in connection with the removal or the pruning of dead, damaged, diseased, or live trees and brush that pose a threat to safety or Structures; or except as provided in Paragraph 4.

3.6 Pesticides. There shall be no use or disposal of Pesticides on the Protected Property except as provided in Paragraph 4 or as approved in writing by Grantee.

3.7 Trash. There shall be no storage, placing, filling or dumping of ashes, trash, vehicles or vehicle parts, debris, junk, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks, in, on or under the Protected Property. The preceding restriction shall not apply to the aboveground presence, use or storage on the Protected Property of small quantities of the aforementioned substances that are generally recognized to be appropriate to normal residential use.

3.8 Pollution and Alteration of Water Resources. There shall be no pollution, alteration, depletion nor extraction of surface water, natural water courses, lakes, ponds, marshes, wetlands, subsurface water or any other water bodies, nor shall there be activities conducted on the Protected Property which would be detrimental to water purity or quality, or which could alter natural water level and/or flow in or over the Protected Property, except as provided in **Paragraph 4.**

3.9 Recreational Vehicles [ADD IF APPLICABLE: and Horseback riding]. There shall be no operation of [snowmobiles], dune buggies, motorcycles, bicycles, all-terrain vehicles, hang gliders, aircraft (other than drone use by Grantee for monitoring purposes), helicopters, jet skis, motorized boats or any other types of

mechanized **[land based][motorized]** recreational vehicles except as provided in **Paragraph 4** below. **[There shall be no horseback riding.]**

[Option: if use of 26 USC 2031(c) estate tax exemption is sought (see Commentary) insert the following:][3.10 Commercial Recreational Activities. There shall be no commercial or industrial recreational activities or uses of the Protected Property other than [Agricultural Activities and][*de minimis* commercial recreational activities as defined in accordance with Section 2031(c) of the Code.]

3.X Other use. Any other use of the Protected Property which would be inconsistent with the Purpose of this Easement or that would impair the Protected Property's Conservation Values is prohibited, unless such use or activity is deemed necessary by Grantor and Grantee for the protection of the Protected Property's Conservation Values, in which case such use or activity shall be subject to the prior written approval of Grantee as provided in **Paragraph 7**.

4. GRANTOR'S RETAINED RIGHTS AND PERMITTED USES. Grantor retains the right to undertake or continue any activity or use of the Protected Property not prohibited by this Easement and not inconsistent with the Purpose of the Easement. Notwithstanding the Limitations and Prohibited Uses of **Paragraph 3**, the following activities and uses are hereby acknowledged by Grantor and Grantee to be consistent with the Purpose of this Easement, and are expressly permitted to be carried out on the Protected Property by Grantor and Grantor's guests and invitees in a manner that does not impair the Conservation Values protected by this Easement. To the extent required for compliance with 26 CFR. 1.170A-14(g)(5)(ii), and only to the extent such activity is not otherwise subject to Notice or Approval under this Easement pursuant to **Paragraph 7**, Grantor agrees to notify Grantee before exercising any right that may have an adverse impact on the conservation interests associated with the Protected Property.

4.1 Mortgage and Convey subject to Easement. Grantor retains the right to sell, give, mortgage, lease, devise or otherwise convey the Protected Property in its entirety, except as otherwise provided herein. Any such conveyance shall be subject to the terms of this Easement. Grantor shall provide written notice of any conveyance that is not a mortgage to Grantee at least thirty (30) days prior to such conveyance.

4.2 Existing Structures. Grantor retains the right to maintain such Structures as currently exist on the Protected Property, if any, **[as shown at Exhibit __ hereof] [or, in the Baseline Report] [which Structures may be repaired or replaced, but not expanded, on the same site by like Structures used for the same or similar purposes.]** Existing stone walls **[as shown at Exhibit __ hereof or in the Baseline Report]** may be maintained, replaced or repaired utilizing only dry-laid field stone construction, although the interior layers may be mortared to maintain the integrity of the wall or prevent the unauthorized removal of stones. No stones from walls, forest floor, or any other location may be removed from the Protected Property.

4.3 Outdoor Recreational Activities. Grantor retains the right to engage in

non-commercial outdoor recreational activities (“Outdoor Recreational Activities”) that do not (a) require development of, or the construction of Structures or other facilities or improvements described in **Paragraph 3.3** on the Protected Property (b) involve the recreational use of motorized vehicles **[except snowmobiles]**, (c) impair the Conservation Values protected by this Easement, (d) have a significant impact on soils or cause siltation and erosion of the Protected Property or (e) interfere with the Purpose. Such non-commercial outdoor recreational activities include, but are not limited to, camping, walking, hiking, running, fishing, **[shooting, hunting,]** cross country skiing, wildlife observation, ecological education, **[horseback riding and equestrian activities,]** snowshoeing, and similar uses **[Provided however, that horseback riding and equestrian activities may be conducted for commercial or non-commercial purposes.]** All permitted Outdoor Recreational Activities shall be limited in extent and location so as not to have a significant impact on soils or cause siltation and erosion of the Protected Property or significantly impair the Purpose of this Easement.

4.4 Signs. Grantor retains the right to place signs identifying the Protected Property and to post all or a portion of the Protected Property about permitted uses and against trespass, hunting or prohibited uses.

4.5 Habitat Enhancement. Grantor retains the right to improve wildlife habitat through the creation and placement of improvements, including but not limited to bird houses, brush piles, sunning logs, planting of specific habitat vegetation, to temporarily erect fences to exclude deer and other animals for the purpose of protecting habitat from browse, and to conduct other habitat enhancement activities with written approval of Grantee or as recommended by a Qualified Natural Resource Professional who is approved by Grantee.

4.6 Invasive Species Removal and Pesticide Use.

(a) Grantor retains the right to remove, destroy, cut or control Invasive Species or species which are a threat to the health of humans, animals or native species of flora and fauna. Grantor retains the right to use Pesticides for such purposes, including the use of Pesticides to treat non-native insects, fungi, parasites, Invasive Species and other organisms that attack native species of flora and fauna or threaten the natural ecological communities on or adjacent to the Protected Property.

(b) Any such use of Pesticides shall be conducted in a manner reasonably designed to control the identified threat with the least possible damage to non-target species; for example, by use of the narrowest spectrum, least persistent, material appropriate for the target species, and in accordance with applicable law and Best Management Practices. All Pesticides shall be used in a directed-spray manner specifically targeting pests to minimize pesticide contact with non-target plants and animals unless:

(i) applied by a licensed pesticide applicator with the prior approval of Grantee; or

(ii) applied by a licensed pesticide applicator in accordance with a written forest and/or wildlife management plan prepared by a Qualified Natural Resource

Professional, which plan must be approved in writing by Grantee; or

(iii) with the prior approval of Grantee, pursuant to recommendations regarding the Protected Property by the Connecticut Department of Energy and Environmental Protection or other duly authorized governmental authority.

4.7 Necessary Vehicles. As reasonably necessary in connection with permitted uses, management, and protection of the Protected Property, Grantor retains the right to bring on the Protected Property and operate automobiles, light trucks, off-road vehicles (but not motorcycles), farm equipment, forestry equipment, emergency and rescue vehicles, maintenance equipment, and other vehicles and equipment.

[INSERT ADDITIONAL RETAINED RIGHTS HERE – SEE ADDENDUM FOR OPTIONS]

5. GRANTEE’S RIGHTS OF ENTRY. To accomplish the Purpose of this Easement, the following rights of entry are conveyed to Grantee by this Easement:

5.1 Right of Entry for Stewardship and Monitoring Purposes. Grantee has the right to enter the Protected Property at all reasonable times and in a reasonable manner, including the use of drone aircraft, for the purposes of: (i) inspecting the Protected Property to determine if Grantor is complying with the terms of this Easement; and (ii) documenting Grantor’s compliance with this Easement and the condition of the Protected Property through photographs and other forms of visual media. Grantee will make a reasonable effort to notify Grantor prior to entry onto any area of the Protected Property, except when emergency circumstances or prevention of a threatened breach of this Easement requires immediate entry.

5.2 Signs. Grantee shall have the right to install and maintain signs on the boundary of the Protected Property in furtherance of the rights and responsibilities of Grantee under this Easement.

6. NO PUBLIC ACCESS. Nothing contained in this Easement shall give or grant to the public a right to enter upon or to use the Protected Property or any portion thereof where no such right existed in the public immediately prior to the execution of this Easement. **[See Option for Public Access]**

7. NOTICE AND APPROVAL.

7.1 Notice. Whenever notice to or approval by Grantee is required under the provisions of this Easement, or whenever Grantor intends to undertake any activity or to exercise any right that may have a material adverse effect on the Conservation Values of the Protected Property, Grantor shall notify Grantee in writing not less than ninety (90) days prior to the date Grantor intends to undertake the activity in question or exercise such right. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its effect on and consistency with the Purpose of this

Easement.

7.2 Approval. Where Grantee's approval is required by the terms of this Easement, Grantee may comment upon the proposed activities, require changes or other actions reasonably necessary to protect the Conservation Values of the Protected Property consistent with the Purpose of this Easement, and shall provide its written approval or disapproval of such activity. Such approval shall be granted or denied at the sole discretion of Grantee, but may not be unreasonably withheld where such request is consistent with the Purpose of this Easement.

7.3 Approval in Changed or Unforeseen Circumstances.

No use shall be made of the Protected Property and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purpose of this Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Easement, they are unable to foresee all potential future land uses, future technologies and future evolution of the land and other natural resources, and other future occurrences affecting the Purpose of this Easement or the Protected Property. Grantee therefore, in its sole and absolute discretion, may determine whether the following are consistent with the Purpose of this Easement: (a) proposed uses or proposed improvements not contemplated or addressed by this Easement or (b) alteration in existing uses or Structures.

Recognizing that Best Management Practices, technologies, climate and the ecological state of the region, and scientific knowledge will change over time, Grantor and Grantee agree that Grantee may grant approval for activities otherwise restricted or prohibited, or for which no provision is made in this Easement, as provided in this paragraph.

A. Grantee's approval for activities otherwise restricted or prohibited, or for which no provision is made in this Easement, may be given in limited circumstances if Grantee determines, in its sole and absolute discretion, that such approval would 1.) be consistent with the Purpose of this Easement; 2.) be in substantial conformity with the intent of the original Grantor, and 3.) result in **[a material improvement][no negative net impact]** in the protection of important Conservation Values or ecological resources on the Protected Property. The circumstances that would justify such approval include:

- (i) disease, pests, fire, storm or natural disaster;
- (ii) changes in scientific knowledge, technology,[best agricultural practices] or Best Management Practices;
- (iii) the existence of threatened or endangered species or significant natural communities on or abutting the Protected Property;
- (iv) changes in climate affecting the ecological condition of the surrounding area or ecological system; or
- (v) other unforeseen circumstances that would threaten or have an adverse impact on the Purpose of this Easement,

B. Notwithstanding the foregoing, Grantee and Grantor have no right or power to agree to any activities under this Paragraph that would:

- (i) adversely affect the perpetual duration of this Easement or Purpose of this Easement;
- (ii) result in the termination of this Easement over all or a portion of the Protected Property; or
- (iii) impair the qualification of this Easement or the status of Grantee under any applicable laws, including C.G.S. § 47-42a through 47-42e, and Sections 170(h) and 501(c)3 of the Code.

C. All requests for approval shall be in writing and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activities with the Purpose of this Easement. Grantee shall not be liable for any failure to grant approval under this paragraph.

8. COSTS AND LIABILITIES.

8.1 In General. Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Protected Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantor shall keep Grantee's interest in the Protected Property free of mechanics liens arising out of any work performed for, materials furnished to or obligations incurred by Grantor.

8.2 Taxes. Grantor agrees to pay any real estate taxes or other assessments levied on the Protected Property.

8.3 Indemnification by Grantor. Grantor acknowledges that Grantee has neither possessory rights in the Protected Property, nor any right to control, maintain, or keep up the Protected Property. Grantor agrees to release, hold harmless, indemnify and defend Grantee from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees which Grantee may suffer or incur as a result of or arising out of the condition of the Protected Property or the activities of Grantor, Grantor's invitees, licensees and lessees on the Protected Property, other than those caused by the intentional or grossly negligent acts or omissions or acts of misconduct of Grantee, and except those arising out of Grantee's workers' compensation obligations.

8.4 Indemnification by Grantee. Grantee agrees to release, hold harmless, defend and indemnify Grantor from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expense and fees which Grantor may suffer or incur as a result of or arising out of the activities of Grantee on the Protected Property, other than those caused by the intentional or negligent acts or omissions or acts of misconduct of Grantor, and except those arising of Grantor's workers' compensation

obligations.

8.5 Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Protected Property resulting from causes beyond Grantor's control, including without limitation, fire, flood, storm, earth movement, natural disease, unauthorized wrongful acts of third persons, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes; and nothing in this Easement shall require Grantor to take any action to restore the condition of the Protected Property after any act or event over which Grantor has no control. Notwithstanding the foregoing, nothing contained herein shall limit or preclude Grantor's and Grantee's rights to pursue any third party for damages to the Protected Property from vandalism, trespass, or any other violation of the terms of this Easement. In the event of violations of this Easement caused by unauthorized wrongful acts of third persons, at Grantee's option, Grantor agrees to assign its right of action to Grantee, to join in any suit, and/or to appoint Grantee its attorney-in-fact for the purposes of pursuing enforcement action.

9. GRANTEE'S REMEDIES.

9.1 In General. Grantee has the right to preserve and protect the Conservation Values of the Protected Property.

9.2 Enforcement. Grantee has the right generally to (i) prevent any activity on or use of the Protected Property by Grantor or third persons (whether or not claiming by, through, or under Grantor) that is inconsistent with the Purpose of this Easement; (ii) to require Grantor or third persons to restore such areas or features of the Protected Property that may be damaged by any inconsistent activity or use to its condition at the time of the donation; and (iii) to enforce this Easement in the case of violation of its terms by Grantor or by third persons (whether or not claiming by, through, or under Grantor) by appropriate legal proceedings.

Specifically, in the event that Grantee becomes aware of a violation of the terms of this Easement, Grantee shall give notice to Grantor, and request corrective action sufficient to abate such violations and restore the Protected Property to its previous condition prior to the violation. Grantor agrees that the Baseline Report shall be deemed to provide objective information concerning the Protected Property's conditions at the time of this grant. Failure by Grantor to discontinue or take such other corrective action as may be requested by Grantee within thirty (30) days after receipt of such notice shall entitle Grantee to bring an action at law or equity in a court of competent jurisdiction to enforce the terms of this Easement; to require the restoration for the Protected Property to its condition substantially similar to that which existed prior to the violation; to enjoin such non-compliance by ex parte temporary or permanent injunction in a court of competent jurisdiction; and/or to recover any damages arising from such noncompliance. Such damages when recovered may be applied by Grantee, in its sole discretion, to corrective action on the Protected Property. The Parties to this Easement specifically

acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity or through administrative proceedings.

9.3 Emergency Enforcement. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Property, Grantee may pursue its remedies under this Grantee's Remedies Paragraph without prior notice to Grantor or without waiting for the period for the thirty (30) day cure to expire.

9.4 Forbearance Not a Waiver. Any forbearance, failure or delay by Grantee to exercise its rights hereunder in the event of any breach of any term set forth herein by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver, laches or estoppel of its rights to do so later.

10. COSTS. Grantor acknowledges that Grantee has accepted this Easement in reliance on its entitlement to costs as set forth hereafter. By accepting a deed to the Protected Property, any successor Grantor agrees to be personally bound by the terms and conditions of this Easement, including the obligations of this paragraph.

10.1 Grantee's Entitlement to Costs of Enforcement. Recognizing that Grantee is a charitable organization with limited resources that has a duty to protect the Protected Property and property rights it holds in the public interest, Grantor agrees to reimburse Grantee for all reasonable costs incurred by Grantee in enforcing or defending this Easement or in taking reasonable measures to remedy or abate any violation hereof by Grantor, Grantor's agents, employees, lessees, guests or others for whose action the Grantor is responsible, including without limitation, costs and expenses of investigation, dispute management, negotiation, mediation and, if applicable, arbitration costs, settlement or suit and reasonable attorneys', expert's and consultant's fees, staff time, and any fees and costs of restoration, remediation or other damage correction necessitated by any such action, and including the drafting of any related new conservation protection or enhancement documents, and other payments as may be ordered by such court or arbitrator. If Grantor ultimately prevails in a judicial enforcement action, each party shall bear its own costs.

10.2 Non-Enforcement Costs. Grantor acknowledges that its general operating funds and any stewardship endowment it may have do not cover Grantee's non-monitoring costs in considering and documenting any request made to Grantee by Grantor to interpret, clarify, amend or approve requested activities. Grantee may

require Grantor to pay all reasonable costs incurred by Grantee, whether or not the request is granted, pertaining to such requests and, if applicable, of implementing any permission granted. Such costs shall include, as applicable, staff time and consulting fees for reviewing the request and evaluating its potential environmental impacts, appraisal costs to determine if such approval would result in private inurement or confer an impermissible private benefit, and any necessary boundary surveys and monumentation.

11. TITLE. Grantor covenants and represents that Grantor is the sole owner and is seized of the Protected Property in fee simple and has good right to grant and convey the this Easement; that the Protected Property is free and clear of any and all encumbrances, including but not limited to, any mortgages not subordinated to this Easement, and that Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Easement.

12. GRANTOR'S ENVIRONMENTAL WARRANTY AND HOLD HARMLESS. Grantor warrants that Grantor has no actual knowledge of any notices by any governmental authority of any violation or alleged violation of, non-compliance or alleged non-compliance with, or any liability under any Environmental Laws relating to the operations or conditions of the Protected Property. Grantor further warrants that Grantor has no actual knowledge of a release or threatened release on, at, beneath or from the Protected Property of Hazardous Materials.

Grantor hereby promises to hold harmless and indemnify Grantee against all litigation, claims, demands, penalties, and damages, including reasonable attorneys' fees, arising from or connected with the release or threatened release of any Hazardous Materials on, at, beneath or from the Protected Property by Grantor, or arising from or connected with a violation of any Environmental Laws by Grantor.

13. DURATION; PARTIES SUBJECT TO EASEMENT. The covenants agreed to and the terms, conditions, and restrictions imposed by this Easement shall not only be binding upon the Parties but also their lessees, agents, personal representatives, successors and assigns, and all other successors to Grantor and Grantee in interest and shall continue as a servitude running in perpetuity with the Protected Property. A Party's rights and obligations under this Easement shall terminate upon the transfer of the Party's interest in the Easement or Protected Property to a party assuming its obligations hereunder, except that liability for acts or omissions occurring prior to transfer shall survive such transfer, but this Easement shall not be affected by such transfer, the transferee having the rights and obligations of the transferring party.

14. SUBSEQUENT TRANSFERS. Grantor agrees that the terms, conditions, restrictions and Purpose of this Easement or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests either the fee simple title or possessory interest in the Protected Property; and Grantor further agrees to notify Grantee of any pending transfer at least thirty (30) days prior to the said transfer **[to be consistent with Paragraph 4.1]**. By acceptance of any deed or other conveyance

of the Protected Property, any successor Grantor personally accepts and agrees to comply with the covenants and obligations set forth in this Easement. The Parties recognize that Grantee has accepted this Easement in reliance on every successor Grantor's acceptance of such obligations and liabilities.

15. NO EXTINGUISHMENT BY MERGER. Grantor and Grantee agree that the terms of this Easement shall survive any merger of the fee and Easement interest in the Protected Property in view of the public interest in the enforcement of this Easement. In the event of merger, (i) Grantee as successor in title to Grantor shall observe and be bound by the obligations of Grantor and the restrictions imposed upon the Protected Property by this Easement; (ii) Grantor and Grantee shall immediately undertake such steps as are necessary under the laws of the State of Connecticut to re-instate the terms and conditions of this Easement; and (iii) Grantee as promptly as practicable shall assign Grantee's interests in this Easement of record to another holder in conformity with the requirements of this Paragraph and with the assignment provisions of this Easement. Any instrument of assignment of this Easement or the rights conveyed herein shall refer to the provisions of this Paragraph, and shall contain language necessary to continue it in force. Further, no deed, transfer, or assignment shall be effective if it will result in merger, until a like conservation easement has been granted to avoid merger. This provision survives the extinguishment of this Easement.

16. ASSIGNMENT. The parties hereto recognize and agree that the benefits of this Easement are in gross and assignable. Grantee hereby covenants and agrees that in the event it transfers or assigns this Easement, the organization receiving the interest must be a qualified organization as that term is defined in Section 170(h)(3) of the Code (or any successor section) and the regulations promulgated thereunder, which is organized and operates primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Code. Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out in perpetuity the conservation purposes which this Easement was originally intended to advance. Any attempted assignment by Grantee of the benefits of this Conservation Restriction contrary to the terms hereof shall be invalid, void, and of no effect.

17. LIMITATION ON AMENDMENTS. This Easement is intended by the Parties to protect the Conservation Values of the Protected Property in perpetuity. There may come a time when unusual and unforeseen circumstances arise which in the judgment of Grantor and Grantee merit consideration of amendment of this Easement, and Grantee determines, in its sole and absolute discretion, that such amendment is appropriate to protect or enhance fulfillment of the Purpose of this Easement in perpetuity, to correct an error or clarify an ambiguity, to add new land area to the protection of the Easement, to remove a Grantor's retained right, or to upgrade standard language and format to reflect statutory or regulatory changes, or improve enforcement and improve administration.

Such amendment must meet ALL of the following criteria, as determined by Grantee in its sole and absolute discretion:

- (a) clearly serve the public interest and be consistent with Grantee's mission,
- (b) comply with all applicable federal, state and local laws,
- (c) not jeopardize Grantee's tax-exempt status or status as a charitable organization under federal or state law,
- (d) not result in private inurement or confer an impermissible private benefit,
- (e) be consistent with the Purpose(s) of this Easement,
- (f) not be inconsistent with the charitable intent of the donor, and any direct funding source,
- (g) have a net beneficial or neutral effect on the relevant Conservation Values protected by this Easement, and
- (h) not negatively affect the enforceability of this Easement
- (i) be consistent with any amendment policy of Grantee.

The Parties may not amend this Easement in any way that could adversely affect the perpetual duration of this Easement with respect to all or any portion of the Protected Property.

Any amendment of this Easement in accordance with this Paragraph shall be executed by Grantee or by Grantee's successor in title to the benefits of this Easement and by the record owner or owners of the portion or portions of the Protected Property to which the amendment applies and recorded in the official land records of the town where the Protected Property is located. Grantee shall not be liable for any failure to grant approval under this paragraph.

18. EXTINGUISHMENT. Grantor hereby agrees that at the time of the conveyance of this Easement to Grantee, this Easement gives rise to a real property right, immediately vested in Grantee. The value of Grantee's real property right is represented by the ratio of the value of this Easement on the date of this Easement to the value of the Protected Property, without deduction for the value of the Easement, on the date of this Easement, as determined in accordance with the valuation substantiation requirements of Treas. Reg. Section 1.170A-14(h)(3) (the "Grantee's percentage interest").

For purposes of this Paragraph, the ratio of the value of this Easement to the value of the Protected Property unencumbered by this Easement shall remain constant, and Grantee's percentage interest in the fair market value of the Protected Property thereby determinable shall remain constant,

If a subsequent unexpected change in the conditions surrounding the Protected Property make impossible or impractical the continued use of the Protected Property for conservation purposes, this Easement can only be terminated or extinguished, whether with respect to all or part of the Protected Property, by judicial proceedings in a court of competent jurisdiction and in accordance with state law. Unless otherwise required by applicable law at the time, in the event of any sale of all or a portion of the Protected

Property (or any other property received in connection with an exchange or involuntary conversion of the Protected Property) after such termination or extinguishment, and prior to the payment of any costs or expenses associated with such sale, Grantee shall be entitled to receive Grantee's percentage interest in the gross proceeds of such sale, exchange, or involuntary conversion of the Protected Property in priority to the owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion, and in priority to any other lien or claim encumbering the Protected Property, as such percentage interest is determined under the provisions of this Paragraph.

The owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion shall bear the responsibility for the payment and satisfaction of any claims or liens against the Protected Property. If Grantee does not receive its percentage interest from the proceeds of such sale, exchange, or involuntary conversion, then Grantee may recover the resulting deficiency from the post-extinguishment owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion. Grantee may record a lien to secure its recovery of such deficiency. All such proceeds received by Grantee shall be used by Grantee in a manner consistent with the Purpose of this Easement.

Any extinguishment of this Easement in accordance with the provisions of this Paragraph shall be recorded in the official land records of the town where the Protected Property is located and Grantee shall, upon request, promptly and without charge, execute in recordable form and deliver to Grantor such instrument as Grantor may reasonably request for this purpose. In the event of extinguishment, the provisions of this Paragraph shall survive extinguishment.

Whenever all or any part of the Protected Property or an interest therein is taken by public authority under power of eminent domain or other act of public authority, then Grantor and Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. Prior to any reimbursement of related expenses incurred by Grantor and Grantee, Grantee shall first be entitled to receive Grantee's percentage interest from the recovered proceeds in conformity with the provisions of this Paragraph (with respect to the allocation of proceeds). The respective rights of Grantor and Grantee set forth in this subparagraph shall be in addition to, and not in limitation of, any rights they may have at common law. Grantee shall use its share of the proceeds in a manner consistent with the Purpose set forth herein.

19. GENERAL AND MISCELLANEOUS PROVISIONS.

19.1 In General. The interpretation and performance of this Easement shall be governed by the laws of the State of Connecticut. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect. The obligations imposed by this Easement upon Grantor, if more than one, shall be joint and several. Reference to any Paragraph herein shall be construed to include all subparagraphs and subsections under

the referenced Paragraph. Whenever the context so requires or admits, words in the singular number shall include the plural, and vice-versa, and any word in a given gender shall include either or both genders.

19.2 Liberal Construction. The Parties agree that any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed to effect the conservation Purpose of this Easement and the policy and purpose of Sections 47-42a through 47-42e of the Connecticut General Statutes, as amended. If any provision of this Easement is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid and perpetually enforceable shall be favored over any interpretation that would render it invalid..

19.3 Severability. If any provision of this Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions for this Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

19.4 Entire Agreement. This Easement and the schedules attached hereto set forth the entire agreement of the parties with respect to this Easement and supersede all prior discussions, negotiations, understandings, or agreements relating to this Easement, all of which are merged herein.

19.5 Re-recording. Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Easement; for such purpose, Grantor appoints Grantee its attorney-in-fact to execute, acknowledge and deliver any necessary instrument on its behalf. Without limiting the foregoing, Grantor agrees to execute any such instruments upon request.

19.6 Governmental Approvals. The conveyance of this Easement by Grantor to Grantee shall not relieve Grantor of the obligation and responsibility to obtain any and all applicable federal, state, and local governmental permits and approvals, if necessary, to exercise Grantor's retained rights and uses of the Protected Property even if consistent with the Purpose of this Easement.

19.7 Captions. The captions herein have been inserted solely for convenience of reference and are not a part of this Easement and shall have no effect upon construction or interpretation.

19.8 Counterparts. The Parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both Parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

19.9 Notices. Any notices required in this Easement shall be sent by registered or certified mail return receipt requested, or sent by receipted delivery service or acknowledged

facsimile transmission, or delivered by an official authorized to make service of process in the recipient's jurisdiction, to the following address or such address as may be hereafter specified by notice in writing:

Grantor: **[Insert Name(s)]**
[mailing and street address here]

Grantee: **[Insert Name]**
[mailing and street address here]

If no address has been designated, notice shall be provided to the address shown for the owner of the Protected Property or Grantee on the Assessor's records of the Town where the property is located.

19.10 Baseline Report. In order to establish the condition, present uses and state of improvement of the Protected Property and its Conservation Values as of the date of this Easement, Grantee and Grantor have prepared an inventory of the Protected Property's relevant features and conditions (the "Baseline Report") including maps, photographs, and other documentation, and have certified the same as an accurate representation of the condition of the Protected Property as of the date of this Easement. The Baseline Report is intended to serve as an objective information baseline for monitoring compliance with the terms of this Easement. It may be used by Grantee to establish that a change in the use or character of the Protected Property has occurred, but its existence shall not preclude the use by Grantee or Grantor of other evidence to establish the condition of the Protected Property as of the date of this Easement. Grantee shall maintain copies of the Baseline Report.

20. ECONOMIC HARDSHIP. In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. It is the intent of both Grantor and Grantee that any such changes shall not be deemed to be a circumstance justifying the amendment, termination or extinguishment of this Easement. In addition, the inability of Grantor, or Grantor's successors and assigns, to conduct or implement any or all of the uses permitted under the terms of this Easement, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment.

21. NO TAX ADVICE. Each Party hereto acknowledges and agrees that it has not received and is not relying upon tax or other advice from any other Party, and that it has and will continue to consult its own advisors. Grantee makes no representation or warranty whatsoever regarding the tax treatment to Grantor of this Easement.

22. RECITALS AND EXHIBITS INCORPORATED HEREIN. Any and all Recitals in this Easement are agreed by the Parties to be accurate, are incorporated into this Easement by reference, and shall constitute integral terms and conditions of this

_____to me personally known, who, being by me duly sworn, did depose and say that he/she is the person named in the foregoing instrument, and acknowledged said instrument to be his/her free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

Commissioner of Superior Court/
Notary Public
My commission expires:

STATE OF CONNECTICUT)
COUNTY OF _____) ss. Town of _____, 20__

On this the ____ day of _____, 20__, before me personally appeared _____, to me personally known, who, being by me duly sworn, did say that [he/she] is the _____ of _____, the corporation named in the foregoing instrument; and acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I hereunto set my hand and official seal.

Commissioner of Superior Court/
Notary Public
My commission expires:

SCHEDULE A

Description of Property Subject to the Easement

**COMMENTARY TO THE BASE MODEL OF
THE SECOND EDITION CONNECTICUT MODEL OPEN SPACE
CONSERVATION EASEMENT (2019)**

The Connecticut Land Conservation Council works with the land conservation community to develop and maintain a library of model legal documents and accompanying commentaries to assist people and organizations in completing land conservation projects.

Introduced in 2014, the First Edition Model Conservation Easement, Introduction and accompanying Commentary (“First Edition Model CE”), were the product of thorough research and scrutiny by legal professionals and other conservation practitioners (“Working Group”).^[1] Sections of the First Edition Model CE were revised in 2016, mainly in response to the Internal Revenue Service’s position on amendment clauses.^[2]

In this Second Edition, the working group has undertaken a holistic review of the document and also developed supplementary options including those for prohibited uses, grantor reserved rights, grantee rights and a forever wild [version](#). The commentary provides optional and alternative provisions as well as the reasoning behind each of the model's provisions and guidance in applying the model to particular circumstances.

Note that changes in tax laws and Internal Revenue Service interpretations and rulings are frequent. Please review the model language carefully and always consult with your attorney when drafting a conservation easement and for other guidance.

CLCC would like to thank the following members of the Second Edition Model CE Working Group for sharing their time and expertise in the development of this document and associated commentary: Ailla Wasstrom-Evans (Prue Law Group), Amy Blaymore Paterson (Executive Director CLCC and Project Coordinator), Catherine Rawson (Executive Director, Weantinoge Heritage Land Trust), Daniel P. Brown, Jr. (Granby Land Trust), Edward Faison (Senior Ecologist, Highstead Foundation), Lindsay Suhr (Land Conservation Director, Connecticut Forest and Park Association), Mary M. Ackerly (Ackerly Brown LLP), and Linda P. Francois, (Cooper, Whitney & Francois) as editor. Further assistance on the Second Edition was provided by Harry White, [Forest Ecologist](#), and Elisabeth Moore and Kathleen Doherty (Connecticut Farmland Trust, Inc.).

Use of the Model Easement, Options and Commentary

This commentary and the Model Easement and Options are intended as an aid for drafters and negotiators of conservation easements. It is intended to be informational and aspirational. It is not intended to and does not impose new obligations on land trusts and should not be cited as a reference for such purposes. Land trusts are private property owners and should and do have the same rights and privileges as other real property owners. It is not intended to be used by easement violators or other wrongdoers as a

justification for their trespasses and encroachments, violations of common law or statute, or other misdeeds.

Conservation Easements: In General

“Conservation easements” (the general American term for legal agreements that property owners make to protect the conservation interests of their land, the terms of which “run with the land” despite changes in ownership), which also may be called Qualified Conservation Contributions (IRS terminology for conservation easements that may be eligible for deductions), are, in Connecticut, called “conservation restrictions” by statute. Connecticut General Statutes (C.G. S.) § 47-42a states:

"Conservation restriction" means a limitation, whether or not stated in the form of a restriction, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.

Accordingly, whatever the document is called, its import is the same under Connecticut law. We will generally call the form “the Model”, and the document created pursuant to the Model the “Easement”. The Working Group felt that the term “Easement” was the better known term rather than “conservation restriction”. The parcel of land that is subject to the Easement is called the “Protected Property”. The Easement without options will be referred to as the Base Model.

Understanding the nature and composition of conservation easements makes them much more readable and sensible. It is said that when a party owns land it owns a bundle of rights, much like a “bundle of sticks”. One stick may be the right to walk on the property, another to build on it, another to farm it, another to have guests, etc. When a conservation easement is granted, the landowner transfers to the land trust or municipality some of those sticks (property rights). Generally throughout this Commentary, for ease of discussion, we will assume that Grantee is a land trust (a charitable organization whose mission include conservation of land or water areas).

In some cases, the land trust is given affirmative rights, such as the right to have a trail for public use on the property, or to mow the fields to keep them open. Generally though, as to the landowner, the conservation easement is a “negative” easement that prohibits the landowner from doing certain things. Also, the rights retained by the landowner may be conditioned (such as requiring that the landowner seek approval of the land trust prior to building certain structures).

What the land trust acquires is really an obligation to enforce a promise by the landowner to refrain from doing those things that the easement prohibits. The one affirmative right

that is essential to all conservation easements is the right of the land trust to enforce the easement.

A typical conservation easement held by a land trust may restrict the right to subdivide the property. This means that the landowner has relinquished the subdivision "stick." This does not mean that the land trust has been granted the right to subdivide the property. Quite the contrary. By accepting the Easement, the land trust has taken on the obligation to see that the property is not subdivided, the stick has been "broken" and the land trust holds the pieces as proof.

Types of Conservation Easements

Conservation easements vary depending upon the resource being protected. There are three basic types of such easements: 1) "forever wild" (where the landowner retains few, if any, rights to change the natural and current condition of the property), 2) hybrids with specific uses reserved to the landowner, and 3) working lands (farmland or forestland) easements. Conservation easements may be further divided to those that are donated, those that are partially donated in bargain sale transactions, and those that are purchased at their fair market values. The 2014 Model was intended for situations, whether donated or purchased, where few landowner rights were to be retained. The 2019 Revision added options for assistance in adapting its use for a hybrid easement and added a stand-alone Forever Wild easement version (more specifically targeted at minimizing the impact of humans on the Protected Property and returning a natural condition, as free from human manipulation and disturbance as possible.) The Base Model establishes one set of limitations that applies throughout the Protected Property and is most appropriate for parcels with minimal use and few or no structures. A basic option has now been added to set out a portion of the Protected Property for building (the "Reserved Residential Area"). The Model does not address fully working lands or historic preservation easements which require a variety of structures, differing protection areas and commercial uses.

A Model Agricultural Conservation Restriction for Connecticut was developed as a project of the American Farmland Trust (AFT) in 2014, in partnership with the Connecticut Farmland Trust, Inc., CLCC and several other project partners including the Connecticut Department of Agriculture. The primary purpose of that model is "to protect the agricultural soils, current and future agricultural viability, and agricultural productivity of the Protected Property in perpetuity". Only to the extent that they are not inconsistent with the primary purpose, it is also the purpose of the Model Agricultural Conservation Restriction to protect the additional Conservation Values. Thus it has a prioritized purpose, heavily weighted toward agriculture. If the parties to an easement are primarily interested in the preservation of the agricultural use or potential of a particular parcel of land, it is recommended that the drafter consider use of provisions in the Connecticut Model Agricultural Conservation Restriction, as may be amended from time to time.

THE BASE MODEL PROVISIONS:

Commentary to the 2019 Revision of the Connecticut Model Conservation Easement 3

THE INTRODUCTORY PARAGRAPH

The Model document starts by setting forth the parties with enough particularity that they will not be confused with other persons or entities. The Grantor is the owner of the property that is giving up the rights. Importantly, the term “Grantor” also includes all successors in ownership of the Protected Property. The Grantee is the recipient of those rights, or as discussed above, the enforcer of the Easement, and this term also includes successors to the Grantee if the Easement is assigned or otherwise transferred to another holder.

A title search should be completed early in the Easement negotiation process in order to determine that the stated Grantor is truly the owner of the Protected Property with full and complete right to legally convey away a legal interest in the Protected Property. Grantor’s execution and delivery of the Easement is a conveyance of an interest in real property. If there are mortgages or liens on the property, they must be released or “subordinated” (made lower in priority) to the Easement so that the Easement cannot be terminated by a foreclosure of those mortgages or liens. This is both an IRS requirement for deductibility, a Land Trust Alliance Standards and Practices requirement, land trust accreditation requirement and a sensible requirement to assure protection of the perpetual nature of the Easement.

RECITALS

The Model then moves on to the Recitals, often known as the “Whereas Clauses” or “Premises”. The Recitals set forth the facts and circumstances which explain the matters on which the transaction is based. The Recitals section performs a number of important functions. The Working Group determined to dispense with the traditional legal term “Whereas” before each clause, in order to make the document more readable.

Legal Description of Property

The initial Recitals set forth a detailed description of the Protected Property. This allows, if necessary, the “Property” to be the larger parcel of land when only a portion is to be protected. The Protected Property does not have to be the entire building lot or legal parcel. Placement of the Easement on a portion of the larger property does not constitute a subdivision.

The first Recital paragraph references the legal description of the Protected Property, which is to be attached as Schedule A. If the Easement is only on a portion of Grantor’s property, care must be taken in preparing the legal description, and a new survey may be needed.

Although the Base Model does not include minimal protection areas such as reserved residential areas, farmstead building areas, or working lands areas, establishment of

limited protection areas may be made if careful modifications are made in drafting. A Reserved Residential Area Option has been added to the Options.

Grantee's Capacity

The second set of Recitals identifies Grantee's capacity to receive the Easement. Alternative clauses identify either a governmental unit or a land trust. As previously stated, throughout this Commentary, for ease of discussion, we will assume that Grantee is a land trust.

Traditional legal principles disfavor perpetual restraints on the use of property, especially if the restraint is not in favor of an adjacent property ("easements in gross"). C.G.S. §47-42b (the easement enabling legislation) made easements perpetually enforceable if they are held by a "governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas". It is therefore essential that the Easement be held by an eligible entity.

Conservation Values Clauses

The Recitals then go on to set forth the significant conservation values (also known as conservation interests) that the Easement will protect. "Conservation Values" becomes a defined and therefore capitalized term. These clauses tell everyone who may have to interpret the document - land trust personnel, landowners, and judges - why protection of the Protected Property is important and what specifically is so important about it. This group of Recitals, which may be many paragraphs, forms the basis for the specific terms of the document (although the terms should be clear without reference to the Recitals clauses). The IRS terminology of "conservation interests" was intentionally included in the definition of Conservation Values so that term does not need to be repeated throughout the Model whenever protection of Conservation Values is addressed. Conservation Easement drafting should always start with an honest analysis of what you are trying to protect and that should be incorporated in the Recitals.

The Recitals are the place to convince people of the value of protecting this land. These should not be clauses full of generalizations without specific information about the Protected Property. The drafter should remove or qualify inapplicable Recitals and add as much detailed information about the specific significant conservation interests of the Protected Property as possible. Conservation interests which are not intended to be protected in perpetuity should not be included. The Model separates Conservation Values to be protected by the Easement into five main Recital groupings: Scenic Enjoyment, Habitat Preservation, Outdoor Recreation and Education, Water Quality Protection, and Public Policy. These groups mimic the main "Conservation Purposes" recognized by the IRS (although Water Quality Protection is a subset of the other groups). The "Conservation Purposes Test" and is set forth in Treasury Regulations §1.170A-14(d).

Only conservation purposes included in the Conservation Purposes Test are a valid basis for a deduction. This does not mean you should omit from the Recitals other reasons why the Protected Property is valuable from a conservation perspective, but in order for Grantor to appropriately claim a deduction, the Easement must promote one or more of the relevant purposes that the IRS would recognize.

The Water Quality Protection Recital section is not a separate part of the Conservation Purposes Test, but furthers all of the other Conservation Purposes. It has been set out as a separate Recital section to emphasize its importance and to make sure that water issues are not missed in the enumeration of the conservation virtues of the Protected Property. All of these Recitals have many possible variations depending on the qualities of the Protected Property. The Water Quality Protection group may include references to protection of ponds, streams, rivers, wetlands or coastal resources.

The IRS recognized Conservation Purposes are as follows:

1. The donation is for the scenic enjoyment of the general public and will yield a significant public benefit. Scenic enjoyment is defined very broadly but visual access is required. It is not enough to protect a beautiful vista if no one but the property owner can see it. There would be no public benefit. If this purpose is included in the document, the drafter must be careful to avoid retention of grantor rights which could violate this purpose (such as the right to build a stockade fence which would obstruct the view from public ways) or to place appropriate limitations on their exercise.

2. The donation is for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. Access is not mandatory when habitat is being protected. The known presence of a species of conservation need or endangered habitat should be documented in the Baseline Report for inclusion of this Conservation Purpose.

The Connecticut Department of Energy and Environmental Protection (DEEP) website contains their Wildlife Division Database which is a useful listing of species and habitats of greatest conservation need. DEEP and the U.S. Fish and Wildlife Service have policies to finance and encourage protection of these species and habitats. Protection of such species and habitats on the property supports not only this second part of the Conservation Purposes test, but also would be in furtherance of public policies under the Public Policy Purpose #4 below.

3. The donation is for the preservation of land area for outdoor recreation by, or the education of, the general public. This test is not met unless the recreation and education is for the substantial and regular use of the general public. Even if more general access is not granted to the land trust, drafters will frequently include periodic and supervised access to the property for trail walks, educational functions etc. in easements to further this purpose, to further the land trust's mission and to garner public support for the preservation of the property.

4. The donation is for the preservation of certain open space (including farmland and forest land) pursuant to a clearly delineated federal, state, or local governmental conservation policy that will yield a significant public benefit. This is the category of conservation purpose most often utilized to validate the charitable deduction of an easement.

There are many policies for preservation of conservation lands. A general policy is only the start of the inquiry; facts must be established to show that the specific property being protected falls directly within the policy and yields a public benefit. Examples of some policies specific to Connecticut are:

- Reference to Northwest "Highlands":

The Highlands Conservation Act was passed by Congress and signed into law in 2004 to “recognize the importance of the water, forest, agricultural, wildlife, recreational and cultural resources of the Highlands region, and the national significance of the Highlands region to the United States”; and further, the Highlands Conservation Act assigned responsibility to the USDA Forest Service to coordinate a study team in Connecticut to identify areas of high conservation values in the Highlands of Connecticut; and the 2006 *Connecticut Highlands Regional Study* identified the Town of Salisbury, Connecticut, as being within the Highlands region, as defined by the Highlands Conservation Act; and the Protected Property is located in an area identified in the Connecticut Highlands Regional Study as the Housatonic River Greenway, a Priority River Corridor; and

- Reference to CT state plan --

The Green Plan: Guiding Land Acquisition and Protection in Connecticut, 2016-2020, was produced by The Connecticut Department of Energy and Environmental Protection. Its Administration Priorities include(p 27) “2. Build Partnerships and Public Support for Open Space... DEEP will work with its land conservation partners to leverage resources and provide the public with comprehensive information on statewide open space... All stakeholders working together towards common conservation goals is critical to achieving the most open space objectives over the next five years. Meaningful partnership among state and federal agencies, municipalities, regional councils of government, environmental planning associations, land trusts, and private companies and landowners will effectively leverage dollars, expertise, and other resources for open space protection. Conservation-minded private landowners are some of the most important partners through which DEEP is informed of, and works alongside to protect lands for potential open space conservation.”

General policies may be cited but policies that specifically list the Protected Property as worthy of protection are optimal. Examples of such specific policies include town plans of conservation and development and open space plans. If the plans do not specifically reference the Protected Property, the parties may seek a specific certification or resolution from the relevant municipal agency that the Protected Property is “worthy of

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protection for conservation purposes” (See Internal Revenue Code Reg. §1.170A - 14(d)(4)(iii)(A)). An additional way to show that the preservation of the Protected Property fulfills a government conservation policy is to establish facts clearly placing the property within the policy.

5. The donation is for the preservation of a historically important land area or a certified historic structure. The last conservation purpose recognized by the IRS to justify a deduction is historic preservation. The Model does not include this purpose because of its limited applicability and its need for specialized drafting. There are particular IRS rules which apply to the protection of historic structures.

Under this standard, the Protected Property must be national register criteria land, or a building listed in the National Register or located in a registered historic district and certified by the Secretary of the Interior to be of historic significance to the district. Special rules may apply. Accordingly, this conservation purpose is rarely applicable. A reference to the historic nature of a property and/or its buildings would nevertheless be useful to show its importance to the community and the reason, from the perspective of the parties, for any particular restrictions protecting the historic nature of the property.

It is important to reiterate that the IRS recognized conservation purposes are not the only conservation purposes the parties may wish to recite. Other important conservation interests that are to be protected by the Easement should not be ignored even if they are not recognized by the IRS. There is no requirement that IRS recognized conservation purposes be stated in the document, only that the Easement meet them. Most practitioners, however, believe it is a wise practice for the Easement document to clearly state how the Easement, as it applies to this particular property, meets the Conservation Purposes Test. It is important to note that a deduction for the donor is **not** the purpose of any easement.

Defining Conservation Values

Of great importance in the Recitals is defining the term “Conservation Values.” As previously stated, the term Conservation Values is a term of art that is the collective term, a short-hand, for the compelling reasons Grantor and Grantee are protecting the land: its scenic, recreational and ecological resources, and its importance from a public policy perspective and to the community. Conservation Values are defined in the Recitals, and should be further documented in the Baseline Report.

Importance of Baseline Report

The Recitals and Paragraph 19.10 reference the documentation of the Conservation Values by a collection of information known as the Baseline Report. The Baseline Report is a necessary and required adjunct documentation of the Conservation Values. The IRS and best practices require that the conservation interests of the Protected Property be documented in a Baseline Report and certified by the parties.

The Baseline Report (often called the Baseline Documentation Report or Baseline) is a set of documents establishing the condition of the property at the time of the execution of the Easement; it can in the future be used to document the condition of the Protected Property for enforcement purposes and to illuminate the intent of the parties. The Baseline Report informs and emphasizes to the owner what is being protected, and creates an institutional memory of the intent of the Easement for the land trust. This document should not be, though often is, just a dry recital of the ecologically relevant facts and the location of existing structures.

It is advantageous if the Baseline Report conveys the human history that informs the preservation of the land. It may constitute the only facts available many years in the future to say why preservation of the land is important from a human perspective and what the intent of the donor was. It may be the one thing that convinces a judge faced with the current human individual landowner and an institutional land trust, of the value of continuing to uphold an ancient document.

The Baseline Report should be complete at execution of the Easement, and signed at that time, and is required to be such by the IRS and Land Trust Alliance *Standards and Practices*. Optimally, it is completed before that time, and informs the drafting of the Easement, particularly the Recitals. One reason for completing the Baseline Report early in the Easement acquisition process is that special provisions may need to be made in the Easement language to protect the conservation values identified by the Baseline Report.

One further point about the Baseline Report: the Baseline Report is seldom recorded in the land records. Indeed, it may not be in a form that is recordable. The Working Group felt the Baseline Report should not be referred to as “incorporated by reference” in the Easement. As a separate unrecorded document, it is subject to being lost over time and should be carefully and safely archived by the land trust. The Baseline Report also may become less relevant over time as the condition of the property changes. It is separate from the “four corners” of the Easement and reliance on it is subject to the argument that it should not be used to interpret the Easement; the Easement should speak for itself.

Accordingly, practitioners should not rely wholly on the Baseline Report for important information about interpretation of the Easement. The Easement should stand by itself (or with recorded maps particularly referenced in the Easement) on important issues, including the location of building areas.

The Baseline Report should not be confused with monitoring or stewardship reports. Monitoring reports are periodic (usually annual) checks on the condition of the Protected Property and inspections for Easement violations. The Baseline Report should also not be confused with Management Plans which are plans outside of the Easement, made periodically to set forth how the property owner or the land trust, if it has the necessary authorization, will manage the Protected Property on a daily and long range basis. Management Plans also apply to fee simple (land protection entity owned) properties.

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Not every Protected Property subject to an Easement has a Management Plan, but the land trust should produce monitoring reports on a regular basis as optimum documentation of the state of the Protected Property. That said, the land trust is a private property owner like any other property owner and is not under additional obligations to fend off malefactors by monitoring or boundary marking.

THE GRANTING CLAUSE

The Granting Clause is the formal clause where the transfer of property rights occurs and the consideration (e.g. purchase price) for the Easement is set forth. This clause also states the statutory authority for the transfer (the conservation easement enabling statutes C.G.S. §47-42a *et seq.*), the particular nature of the interest being conveyed, and that it is intended to be construed as a charitable use. This helps to establish that the applicability of C.G.S. §3-125, which states that the Attorney General “shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes” and that Connecticut law, C.G.S. § 47-42c, empowers the Attorney General “to enforce the public interest” in conservation easements. Thus, even when the Easement is not a gift, but is a fair market value purchase, it would be enforceable by the Attorney General, and Connecticut law would likely construe it to constitute a protected charitable use for the public benefit.

There are consequences to a conservation easement being categorized as a charitable use. The operative principle of charitable trust law is that the Grantor’s expressed and implied intent must be honored. The advantages of this status include that the Attorney General is empowered to enforce the terms of a conservation easement and the land trust may thus have an ally in protecting the property. The donor similarly has increased certainty that his or her wishes will be carried out. The disadvantage is that modification of the Easement may be difficult or prohibited, even when it would provide a conservation positive outcome and that the Grantor and Grantee agree.

For this reason, it is quite important to consider the inclusion of discretionary consent and amendment clauses in the Easement (and other documentation), as provided in the Base Model and discussed later in this Commentary. Such clauses clearly establish the intent of the donor to grant to the land trust the power to manage and change the details of the Easement consistent with the Purpose and certain requirements.

1. THE PURPOSE

The Purpose Clause is set forth in Paragraph 1 and Purpose becomes a defined term. **The Purpose is the heart of the document.** It is the standard by which all things are measured (this should not be confused with the elements of the Conservation Purposes Test recognized by the IRS, previously discussed in relation to the Recitals.) Permitted and prohibited uses are measured by the Purpose and decision-making throughout the document is limited by the Purpose. Land Trust Alliance *Standards and Practices*, charitable trust law, and land trust internal policies and procedures often refer to the

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Purpose for direction. Each property is unique and the land trust must consider the drafting of the Purpose clause with great care.

The Purpose in the Base Model incorporates multiple aims to be weighed by the land trust and the document's interpreters in their decision making. The Purpose of the Model is not prioritized, so the mission of the particular land protection entity may play a factor in how the elements of the purpose are weighed.

Careful consideration should be given to possible conflicts between the various elements of the Purpose, particularly if agriculture is included. Drafters may wish to consider prioritizing of conservation values and considerations listed in the definition of Purpose and to consider the appropriateness of use of a working lands (agriculture) conservation easement.

2: DEFINITIONS

The Purpose is followed by a Definitions section. Defined terms are capitalized throughout the document. The definitions may be referred to whenever the term is used in the document. In the Model, the definitions are broadly worded and may be limited elsewhere in the document. Though a term may include a number of uses, the particular paragraph that uses that term may substantially limit its applicability.

The Definitions section is put early in the Model so that it is easy to find and performs a Table of Contents function. Some documents have no Definitions section but contain the definitions within the primary or first paragraph referring to each term, with internal cross references whenever the term is used. Although these are valid approaches, the use of cross referencing is a frequent source of errors, since as revisions to the documents are made, cross references may be overlooked.

The Model is a hybrid of these approaches. In the Model, many definitions are included in the main or first paragraph that they relate to and the Definitions paragraph merely cross-references where the definition is located. This centralizes where cross reference checking is required and is intended to minimize the number of times flipping pages to the Definitions paragraph is needed. Wherever possible, the Model uses a defined term in the body of the document, to minimize the need for numerical cross reference checking.

3: LIMITATIONS AND PROHIBITED USES

Novice readers of conservation easements are often bewildered by their structure. There are several types of structures in use, but we have adopted the standard Connecticut practice which in turn roughly followed the Model Conservation Easement format found in the seminal The Conservation Easement Handbook – Managing Land Conservation and Historic Preservation Easement Programs(1988). Easements in Connecticut are meant to be perpetual; and are drafted in light of the practical reality that it is nearly

impossible to predict how subsequent events or peoples' or communities' actions may affect the Protected Property. The standard by which a conservation easement should be understood and enforced is whether the activity is consistent with the Purpose; if it is, the landowner may do it, if it is inconsistent, he or she may not.

Parties, however, generally would prefer things to be more particularly set out. Accordingly, because this standard is subject to wide interpretation, Paragraph 3 sets forth a broad list of prohibitions (the Limitations and Prohibited Uses) except as provided in Paragraph 4. Paragraph 4, Grantor's Reserved Rights and Permitted Uses, is therefore the most important and variable part of any Easement. Once the interaction between the Purpose, Limitations and Prohibited Uses, and Grantor's Reserved Rights and Permitted Uses, is understood, the document becomes more comprehensible.

Despite the inclusion of the "except as provided in Paragraph 4 below" qualification in the opening paragraph of Limitations and Prohibited Uses, persons unfamiliar with the structure still have difficulty grasping that the prohibitions are qualified by Grantor's Reserved Rights and Permitted Uses; accordingly, we have repeated reference to the exception generically in applicable clauses in the Limitations and Prohibited Uses section even though duplicative. Some drafters will list the specifically applicable exceptions in each prohibited use paragraph, but this makes errors of omission and inconsistency more probable.

3.1 Subdivision. This typical provision prohibits the division of the Protected Property unless conveyed to another eligible entity. Any further exceptions should be listed in the Paragraph 4 Special Subdivision Rule and a cross reference may be inserted under this paragraph.

3.2 Use for Development. This provision prohibits the stacking of development on other property due to the preservation of the Protected Property.

3.3 Prohibited Structures. This broad provision prohibits structures unless permitted in Paragraph 4.

3.4 Changes in Topography and Mining. This broad provision prohibits all manner of changes in topography (except as otherwise permitted in Paragraph 4). Invasive species are dealt with in paragraph 4.6.

3.5 Changes to Vegetation. This broad provision prohibits all manner of changes to vegetation (except as permitted in Paragraph 4), with reasonable exception for health and safety protection activities. IT MAY BE ADVISABLE TO INCLUDE THE MAINTENANCE CUTTING OPTION FOR THE RIGHT TO MAINTAIN EXISTING OPEN AREAS AND TRAILS. Careful documentation of existing trails and open areas should be made for retained rights related to their maintenance.

3.6 Pesticides. This restricts Pesticide use except as provided in Paragraph 4.

3.7 Trash. This provision prohibits dumping and storage of trash and toxic substances on the property.

3.8 Pollution and Alteration of Water Resources. This protects water quality and natural water flow (except as otherwise permitted in Paragraph 4).

3.9 Recreational Vehicles. This provision broadly prohibits recreational vehicles (except as otherwise permitted in Paragraph 4). Optional language to be considered is whether to limit the prohibition to motorized vehicles or to extend it to mechanized vehicles (including bicycles) and whether to include horseback riding. In every case, special consideration should be given to whether and how the applicable prohibition can be enforced and whether it really is needed to further the Purpose of the Easement.

3.10 Commercial Recreational Activities. This provision broadly prohibits commercial recreational activities in accordance with the requirements for the estate tax reduction under the Internal Revenue Code. The drafter should consider whether the estate tax reduction is important enough to the landowner that it should be included, or whether to limit this to nonagricultural activities or to omit the paragraph altogether.

3.11 Other use. This catch-all provision prohibits any other use which may not have been listed, which would be inconsistent with or have an adverse impact on the Purpose.

4. GRANTOR'S RESERVED RIGHTS AND PERMITTED USES

This is the most important section to Grantor; it is where the rights specific to Grantor are set forth. Paragraph 4 makes clear that Grantor “reserves the right to undertake or continue any activity or use of the Protected Property not prohibited by this Easement and not inconsistent with the Purpose of the Easement”. The succeeding paragraphs go on to specifically enumerate the most important and known of those rights. The IRS code requires that the Grantor be obligated to notify Grantee before exercising any right that may have an adverse impact on the conservation interests associated with the Protected Property.

4.1 Mortgage and Convey Subject to Easement. This clarifies that Grantor retains the normal right to convey the property. This provision should be considered in light of, and coordinated with, the subdivision restrictions of Paragraph 3.1. and 4.7

4.2 Existing Structures. Existing structures may be repaired and maintained. Connecticut's iconic dry laid stone walls are protected here, though interior mortar may be utilized to prevent theft. If other types of walls are present, these should be addressed. It is critical to enforcement that the structures on the property that exist at the time of the grant are documented in the Baseline Report and/or maps.

4.3 Outdoor Recreational Activities. This provision has many variations. Grantee must thoughtfully consider the impact of the various activities on the Protected Property's Conservation Values as well as Grantee's willingness and capacity to enforce any particular provision.

4.4 Signs. Grantor may post the property for the listed typical management purposes.

4.5 Habitat Enhancement. Typical enhancement activities are allowed. Other such activities may be approved by the land trust or are permitted if recommended by a Qualified Natural Resource Professional (QRNP) approved by Grantee.

4.6 Invasive Species Removal. This is a minimally restrictive invasive species removal provision. It does not require that such activity be performed with professional assistance unless broad application of biocides is to be done. The activity must, however, be done in accordance with Best Management Practices and be accomplished in a manner with the least impact on non-target species.

It should be noted that a right of the land trust to do invasives management was not included in the Base Model, but such activity can always be done by a land trust with the consent of the landowner.

[4.7 Special Subdivision Rule. This is where special circumstances in which subdivision may be allowed may be added. If this is added, a reference to the paragraph should be added in 3.1 and 4.1]

5. GRANTEE'S RIGHTS

This section sets forth the rights of the land protection entity. Such rights include:

5.1 Right of Entry for Stewardship and Monitoring Purposes. The right of entry for monitoring and documentation of compliance. This right is only conditioned on Grantee making a reasonable effort to notify Grantor prior to entry, except in emergency circumstances. Facts, circumstances and the respective parties' availability and capacity are all very variable, so a specific type or time frame for notice was not included.

The land trust may wish to add a provision giving them the right to do invasives management. The right given Grantor in 4.6 can be adapted to such purpose.

Older easements often included, a seldom utilized broad provision stating, in effect, that Grantee may manage endangered species in accordance with a plan developed by a Qualified Natural Resource Professional. To include this right, see the Management by Grantee Option included in the Options.

5.2 Signs. Grantee is here given the right to install and maintain signs on the boundary of the Protected Property. Without this provision it is difficult for Grantee to locate boundaries in the field. This may be omitted if permanent features may make the bounds of the Protected Property obvious. Also, this may be a source of contention with Grantor, who may fear that such signs would be interpreted by the public to indicate public access. If this provision is included, Grantee should work with Grantor to make sure that Grantee is comfortable with the wording and placement of the anticipated signs.

6. NO PUBLIC ACCESS

This provision makes clear that the Easement does not create a right of access in the public. Sample alternate language is given in the Options for those situations where Grantor is permitting public access.

7. NOTICE AND APPROVAL

7.1 Notice. This provision sets forth information to be included in a required notice to Grantee. The Model specifies that notice is required 90 days before the activity requiring notice. A land trust should carefully consider for itself the time frame to be used here, based on its internal capacity for timely review, including the frequency and regularity of board meetings. Some land trust boards only meet quarterly. Some land trusts are stewards for a large number of properties and may have many issues to deal with at one time.

7.2 Approval. This provision sets forth the standard to be used in acting on requests for activities required to be approved by Grantee. The land trust should carefully consider for itself the time needed (in the worst case scenario) for review, including the frequency and regularity of board meetings and its other stewardship obligations.

Recent case law has found that “deemed approval” provisions (where if a decision is not made in a set time the request is deemed approved by the land trust) violate the perpetuity requirements for a deduction and accordingly, no exact time frame has been set for decision here. (*Hoffman Properties II LP V. Commissioner* 1413-15). Where a hard and fast time frame is important, a deemed denial provision may be considered.

7.3 Approval in Changed or Unforeseen Circumstances.

The Approval in Changed or Unforeseen Circumstances provision validates, empowers and recognizes the inherent administrative discretion that Grantee has to interpret and

enforce the Easement and to respond to changing technology and changing ecology and other unforeseen circumstances. It recognizes that the terms in the easement are based on a certain set of facts and assumptions which may not be accurate or stay accurate over time. This Approval is designed to be used in situations which are probably temporary, and in scale or magnitude do not arise to the level of requiring an amendment. Grantee's discretion is, however, substantially limited as set forth in the paragraph and in accordance with current case law.

The traditional title of this paragraph "Discretionary Consent" has been changed to minimize any confusion between the term and the various other types of discretion to be exercised by the land trust in administering the Easement.

If an Approval in Changed or Unforeseen Circumstances clause is not being included in an Easement, the drafter(s) of the Easement should be especially careful to build in other flexibility provisions to the document such that it will withstand changed circumstances, changed technology and changed environmental factors.

8. COSTS AND LIABILITIES

8.1 In General. This clarifies that the normal responsibilities of ownership remain with Grantor landowner.

8.2 Taxes. This states the traditional principle that the landowner continues to be responsible for the payment of all taxes despite Grantee having some real property ownership interest in the property.

8.3 Indemnification by Grantor. Grantor is responsible to release, hold harmless, and defend Grantee for accidents which may occur on the property unless they are caused by Grantee's negligent acts or misconduct, or arise out of Grantee's workers' compensation obligations.

8.4 Indemnification by Grantee. This reciprocal provision requires that Grantee release, hold harmless, defend and indemnify Grantor for damages from Grantee's activities on the Protected Property, other than those caused by Grantor or arising out of Grantor's workers' compensation obligations.

The inclusion of indemnification by Grantee is frequently debated in the land trust community, particularly if no public access is provided for by the Easement. A landowner is responsible generally for the condition of his or her land as to all guests and invitees and, accordingly, keeps it insured. It is argued that there is no reason to change this obligation if there is a conservation easement on the property and indeed, Grantee is taking on a big responsibility in holding the Easement and defending it in perpetuity. The provision was included in the Model because landowners view it as a fairness issue and liability will generally be decided in accordance with established principles of law, regardless of the inclusion or exclusion of this paragraph.

8.5 Acts Beyond Grantor’s Control. This provision makes clear that Grantor is not liable for matters beyond its control.

9. GRANTEE’S REMEDIES

Grantee shall give a thirty day notice to Grantor when it becomes aware of a violation of the Easement. This provision details the enforcement actions Grantee may thereafter take if the violation is not corrected.

9.1 In General. This provision broadly gives the Grantee the right to preserve and protect the Conservation Values.

9.2 Enforcement. This provision broadly gives Grantee the right to prevent activities inconsistent with the Purpose whether by Grantor or third parties, to require restoration when a violation occurs and to enforce the Easement by all appropriate legal proceedings. The IRS Code requires that the Easement include the right to require the restoration of the property to the condition it was in at the time of the donation. Further provisions in the Easement elaborate on these rights.

9.3 Emergency Enforcement. This provides that no notice or cure period (the time allowed to fix or “cure” a violation) is required in emergency situations.

9.4 Forbearance Not a Waiver. This is standard language that a delay in enforcement of the Easement shall not prevent later enforcement. Connecticut is blessed to have a statute exempting land trusts from adverse possession, but courts still consider other factors in enforcement actions.

10. COSTS

10.1 Grantee’s Entitlement to Costs of Enforcement. The Base Model requires that if a court of competent jurisdiction or other legal entity finds Grantor to be in violation of the Easement, Grantor shall pay Grantee’s costs of enforcement, including attorney’s fees. This is contrary to the typical American principle that each party bears its own expenses of litigation. It is important that the section be clear that “Grantor” is also responsible for its agents and that costs of enforcement is intended to broadly include related costs such as arbitration and drafting expenses related to enforcement. The paragraph also specifically states that if Grantor prevails, the reimbursement does not become reciprocal. There is good reason for the costs provisions not to be reciprocal. Not only is this not a consumer or commercial context, but rather the conservation easement requires the land trust to protect a charitable use. The land trust is responsible for upholding it in perpetuity. A reciprocal provision would be a huge burden to a land trust responsible to enforce, and a windfall to a landowner that was able to purchase expensive legal representation.

Inclusion of Grantee's entitlement to costs of enforcement creates a powerful financial incentive for Grantor to avoid or correct violations. Note that Grantor need not reimburse Grantee for litigation costs if Grantee does not prevail in a dispute. Thus Grantee is still deterred from taking unreasonable or unclear positions, because if it does not prevail it shall not recover its costs.

The Model's provision is consistent with Connecticut's particularly favorable statute with respect to enforcement. C.G.S. §52-560a, provides that upon a finding of encroachment on land subject to a conservation easement, the court shall order the violator to restore the land to its condition as it existed prior to such violation. In addition, the court may award reasonable attorney's fees and costs, injunctive or equitable relief, and damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars.

It is the common practice not to have a reciprocal provision requiring Grantee to indemnify Grantor landowner in enforcement actions by the land trust. Grantee is charged with enforcing the Easement; Grantor is not. Since the obligations of the parties are not reciprocal, the liabilities should not be. The expense and public relations ramifications to Grantee of pursuing a frivolous action is a substantial deterrent to any such suit. If a Grantor indemnification provision is still needed, the following language is suggested:

Grantee agrees to reimburse Grantor for all costs of suit, including reasonable attorneys' fees, incurred by Grantor in defense of any claim or action brought by Grantee in connection with any alleged violation hereof by Grantor, provided that Grantee acknowledges in writing that such claim or action was commenced by Grantee with actual knowledge that the allegations therein were materially untrue or if an arbitrator or court of competent jurisdiction, as the case may be, affirmatively determines that Grantee was acting unreasonably or frivolously in initiating a legal action to enforce this Easement and such action was commenced by Grantee with the actual knowledge that the allegations made therein were materially untrue.

However, for the previously stated reasons, and to encourage uniformity and discourage land trust shopping, not including any Grantor reimbursement is the preferred route in drafting.

10.2 Non-Enforcement Costs. Land trusts are increasingly adopting amendment policies that require the Grantor to pay for the costs associated with amendment requests or require an administrative fee for such requests. Several legal cases have reviewed the land trust's right to such costs, including the types of costs and how they are calculated. This paragraph establishes the right of the land trust to require reimbursement of the non-monitoring costs related to the administration of the easement, broadly worded to try to avoid parsing of which costs are reimbursable. The reimbursement is written to be discretionary with the land trust ("Grantee may require.") so that the land trust may waive

any or all of such costs. The land trust may wish to adopt a formal policy specifically identifying good cause criteria such as: hardship, contributing errors by Grantee, costs covered through a separate project or other grant, or if additional land is conserved.

11. TITLE

These are standard warranty covenants as to ownership by Grantor. By this paragraph, Grantor warrants that he or she has good title to convey the Easement. If there are mortgages or liens on the Protected Property, they must be released or subordinated (made lower in priority) to the Easement in a recorded document, so that the Easement cannot be terminated by a foreclosure of those mortgages or liens. This is both an IRS requirement for deductibility, and a sensible requirement for protection of the perpetual nature of the Easement. Strict IRS rules and case law govern the nature of the subordination. If a deduction is not being sought, a grantee may, after weighing the risks and benefits, and requirements if they are accredited, choose to accept an easement without subordination of a mortgage.

12. GRANTOR’S ENVIRONMENTAL WARRANTY AND HOLD HARMLESS

Grantor warrants no knowledge of environmental issues (which is not a guarantee that there are no environmental issues). Grantor agrees to pay any expenses incurred by the land trust if there is a claim based on a spill of Hazardous Materials, although, generally speaking, even if such a spill had occurred, the land trust would not be found liable regarding it, unless it had possession, custody and control of the Protected Property or had caused the spill. Regardless of whether this provision is included, the land trust should perform due diligence investigation of the property to minimize the risk of late discovery of environmental issues.

13. DURATION; PARTIES SUBJECT TO EASEMENT

This reiterates that the Easement is binding on all successors in interest and “runs” with the ownership of the Protected Property. Except for liability for acts or omissions occurring prior to transfer, the previous owner is no longer responsible for compliance with the Easement terms. The new owner steps into the shoes of the previous owner and all responsibility is transferred.

14. SUBSEQUENT TRANSFERS

This paragraph emphasizes that the provisions of the Easement carry over to and are binding upon every subsequent owner if the property is transferred, and that reference to the Easement should be put in the transferring document, and prior notice given to the land trust before the conveyance. The purpose of the prior notice is so the land trust can make sure that the transferee (new owner) is aware of the Easement and the land trust has an opportunity to establish a relationship with the new owner and perform appropriate

monitoring of the new owner's actions on the Protected Property. Lack of such notice in no way impacts the enforceability of the Easement.

15. NO EXTINGUISHMENT THROUGH MERGER

This paragraph clarifies the intent that if Grantee were to acquire the full ownership ("fee simple") interest in the Protected Property, the land trust would still be bound by the restrictions in the Easement. Common law holds that if the owner of property metaphorically holds all the "sticks" of ownership, all of the property rights in that property merge together and any easements or other restrictions on use disappear. Learned opinion and the Attorney General differ from the common law on this when it comes to conservation easements because under Connecticut law the easement is considered to be part of the public trust (the public in effect holds some of the "sticks") and there is no merger. There is no definitive legal decision in Connecticut clarifying this point. IRS regulations require that easements be perpetual, despite changes in ownership, so a merger provision is advised.

16. ASSIGNMENT

This paragraph sets forth the assignable nature of the Easement, appropriate holders of the Easement, and filing requirements. Some parties may wish to designate an appropriate back-up Grantee here, who would hold the Easement if Grantee is dissolved. Even if the designated back-up Grantee agrees to such designation at the time of the grant, it is not guaranteed that they will accept the assignment or be available to do so many years in the future.

17. LIMITATION ON AMENDMENT

The land trust community has learned through hard experience that a well-crafted amendment clause can be useful to assist the conservation easement to withstand the test of time and to avoid needless legal expense for amendments that all stakeholders agree would have a positive effect on the conservation purpose. The Land Trust Alliance has been recommending the inclusion of amendment clauses for many years, and accredited land trusts have been required to have a written amendment policy. A well-crafted amendment clause makes it clear that the easement is intended to be a living document that may change to keep it viable in perpetuity. It states who has authority to make such amendments and under what conditions an amendment is permissible. An amendment clause places limitations on amendment so that the easement may not be is not, however, a license to modify an easement in a way that is inconsistent with the Purpose, would impair net Conservation Values, or would violate charitable trust laws (which require, in brief, adherence to the charitable purpose of a charitable use). and such clauses make this clear. A land trust should never take actions, amendments or otherwise, that constitute impermissible private benefit or private inurement or violate law. Land trusts that hold conservation easements are advised to have amendment policies to guide their decision-making on these matters. The Land Trust Alliance report Amending Conservation

Easements: Evolving Practices and Legal Principles is a useful resource in formulating such a policy (Alliance Amendment Report). The document, as amended, as well as other related information may be found on the Alliance website <http://www.landtrustalliance.org>.

In recent years, controversy has arisen over whether to include an amendment clause in an easement as the IRS has been challenging the deductibility of easements containing amendment provisions, claiming that the easement is then no longer “perpetual”. A recent case, Pine Mountain Preserve v Commissioner 151 T. C. No. 14, December 27, 2018 has found that a provision allowing amendments, provided that they are “not inconsistent with the conservation purposes of the donation” did not prevent the easement from satisfying the granted-in-perpetuity requirement of the IRS code. That case [is being will likely be](#) appealed and there may be further precedent on this issue forthcoming. The Working Group has endeavored to draft a paragraph appropriately allowing but limiting amendments consistent with the current law. It should be noted that if there is no amendment clause, it does not mean that the Easement cannot be amended, the document just gives no guidance on the process.

18. EXTINGUISHMENT

Because the Easement is a perpetual grant of an interest in real property, if the Easement is taken by eminent domain or otherwise extinguished, the land trust is entitled to the fair value of its interest. This is an IRS requirement and it is also a sensible requirement to compensate the land trust. This also particularly protects the Easement because without it, a subsequent landowner would have a particularly strong interest in trying to terminate, or in assisting others to terminate, the Easement by eminent domain or otherwise. Original grantors of Easements generally have a strong conservation ethic; subsequent landowners may not have a similarly strong belief in the Purpose of the Easement.

It had become common practice to include in the extinguishment section a clause excluding the value of improvements made by the landowner after the date of the grant of easement. A recent case, (PBBM-Rose Hill, LTD v. Commissioner No. 26096-14 (Oct. 7, 2016)), disallowed a deduction which provided that the value of after easement improvements were excluded from calculation of the land trust’s proportional share. Although this is a fair provision, the Model does not include that provision on the judgment that the risk of far in the future extinguishment involving new structures is small, but the risk of a current disallowance of a charitable donation is much larger. It is hoped that this impractical precedent will be revised as soon as possible. If no deduction is sought, [the](#) clause related to after-easement improvements can be inserted.

19. GENERAL AND MISCELLANEOUS PROVISIONS

These provisions set forth general interpretation rules for legal agreement including:

19.1 In General. Connecticut law is controlling.

19.2 Liberal Construction. The Easement will be interpreted to advance its Purpose.

19.3 Severability. If any one provision is invalid, the whole document does not become invalid.

19.4 Entire Agreement. Oral agreements etc. are superseded by the written Easement.

19.5 Re-recording. Although Connecticut has a law, C.G.S. §47-33h (2001), which makes easements perpetual even if they fall outside the normal 40+ year scope of a title search, Grantee, as the holder of the conservation easement may still wish to re-record the Easement so that it continues to appear within a title search of the Protected Property. Doing this would put purchasers of the Protected Property on actual notice of the Easement and avoid arguments with subsequent purchasers.

19.6 Governmental Approvals. This confirms that the Easement does not (and cannot) override governmental regulations. This is true whether it is granted to a land trust or a municipal entity.

19.7 Captions. The captions have no effect upon construction or interpretation.

19.8 Counterparts. It is often difficult to get all owners and the land trust in the same room at the same time to sign all necessary Easement-related documents. This language verifies that the documents may be signed separately and on different copies, and taken together constitute one document.

19.9 Notices. This sets forth the parties mailing addresses and establishes that modern forms of electronic notice are permitted. Because notice may be accomplished by courier or Marshal service, actual residential addresses, if different, should be included.

19.10 Baseline Report. See discussion related to the Baseline Report in the Recitals section of the Commentary.

20. ECONOMIC HARDSHIP

This paragraph clarifies that economic hardship is not a basis for overturning the Easement or its terms.

21. NO TAX ADVICE

This paragraph clarifies that the land trust is not responsible for the donor receiving or not receiving a claimed deduction. Indeed, this area of the law is constantly evolving and no one can reasonably guarantee 100% how the IRS will act with regard to any particular deduction.

22. RECITALS AND EXHIBITS INCORPORATED HEREIN

This paragraph arises from informal IRS guidance. The provision is intended to assure that recitals and exhibits are treated as operative provisions, and not dismissed as purely precatory (non-binding) interpretive guidance.

23. ACCEPTANCE AND ACKNOWLEDGMENT OF EASEMENT

This provision satisfies the requirement of C.G.S. §47-6b, that the Easement “be signed by a duly authorized officer of such nonprofit land-holding organization to indicate acceptance of such interest by the nonprofit land-holding organization.”

IRS regulations require that every donation over \$250 to a charitable organization be acknowledged in writing by the recipient, and such writing must include a statement that no goods or a service was provided in consideration for the gift. The acknowledgement in the Model is not intended to replace that writing (usually a letter), but is intended to serve as a failsafe if such requirement is inadvertently overlooked. This language should not be included if the Easement is conveyed in a bargain sale transaction unless the purchase price is stated in the Granting Clause. The purchase price paid by the land trust would be considered to be goods and services that would reduce Grantor’s tax deduction. If the conveyance is acknowledged to be a fair market value purchase, this provision should be omitted.

SIGNATURES

Connecticut requires the signature of all owners of the Protected Property with two witnesses to each signature. In addition, each landowner must acknowledge his or her signature before an individual entitled to take oaths (a notary public, or a Commissioner of the Superior Court a/k/a Connecticut attorney). The oath-taker may sign as one of the witnesses, but must sign again to acknowledge the oath. An additional second witness is still required. The acknowledgment should be revised if Grantor is not an individual, to indicate the appropriate entity name and the capacity of the signer.

Grantee must also sign the Easement, both to acknowledge its obligations under the Easement, and also because Connecticut has a special law, previously referred to, requiring that it do so. C.G.S. §47-6b states:

- (b) Any deed or other instrument of conveyance by which an interest in real property, including, but not limited to, a conservation restriction or easement, is conveyed to a nonprofit land-holding organization on or after October 1, 2004,

shall, in addition to other requirements of law, be signed by a duly authorized officer of such nonprofit land-holding organization to indicate acceptance of such interest by the nonprofit land-holding organization.

Any Grantor who fails to get the required signature can be liable for fines and unfair or deceptive trade practices penalties. The law is unclear whether a reference to acceptance is required in conjunction with the signature, or simply the signature alone. A document missing the signature is not void, but voidable. This law was passed because some Connecticut land trusts were being conveyed land or Easements without their knowledge or acceptance.

Schedule A - The property description of the Protected Property needs to be attached to the Easement.

CONNECTICUT MODEL FOREVER WILD CONSERVATION EASEMENT OPTION

NOTE: This is a comprehensive drafting option for those parties wishing to ensure a natural area is preserved in perpetuity. A Forever Wild Easement generally allows passive use and limited human intervention with the goal of protecting and restoring wild ecological systems and their many benefits. A Forever Wild Easement retains the fewest landowner rights but offers the greatest assurance that the property will be an intact ecosystem in the future.

This Forever Wild Easement was created as a stand-alone option. A number of the sections of the base Model had to be modified and an add-in section would not be sufficient or practical. If you are planning to use the Forever Wild Easement you should review the accompanying commentary to the base Model for drafting considerations and explanations for the various base model component sections.

Like many non-agricultural open space easements, the Forever Wild Easement prohibits agricultural uses. Land trusts are encouraged to do soil mapping to determine if agricultural soils are present, in order to have appropriate information on which to base their decision to use the Forever Wild option.

A Forever Wild Easement is essential if the landowner intent is for property to evolve in a condition shaped primarily by natural processes. Forest is the natural condition across most of New England, and a Forever Wild Easement would typically increase what used to be the most common but is now the rarest habitat: old-growth forest.

Forever Wild landscapes offer unique places of beauty and solitude for people, as well as structural and habitat features for many organisms. Initially, because of the virtual absence of old growth forests, properties preserved as Forever Wild will not necessarily be older than nearby properties. However, over time, these wildlands will grow older, support a greater diversity of many types of organisms, sequester the highest levels of carbon and provide vital habitats for many species not found in younger or managed forests. A Forever Wild Easement is ideal for wildlife corridors – particularly corridors that extend north-south – giving forest interior species the possibility to move and migrate during a changing climate.

Looking ahead, a Forever Wild Easement provides a landowner the highest confidence that the landowner's forest can be enjoyed by, but remain largely undisturbed by, humans in the future. It is best-suited for forests that are large, adjacent to additional forest and/or have few invasive plants. However, biologists have found that even small forest patches can exhibit old-growth characteristics.

The issue of dealing with invasive species in Forever Wild Easements has been discussed in the ecological preservation community for several years. Many agree we should allow the removal of non-native invasive plants and animals to facilitate native structure and function and native biodiversity and provide flexibility to land managers of the future

who may have new tools and techniques for controlling invasives. Without invasive management, some properties, particularly smaller ones in suburban areas, can become dominated by non-native plants, which often diminish the beauty of the parcel and reduce the diversity of some native organisms. Others believe that manipulation by humans is inherently against the spirit of a wildland where nature is left to self-organize. In this case wildlands also provide essential scientific value as biological controls against which to compare the effects of human management

Accordingly we have provided for options between the two trains of thought. The parties must determine how to best preserve the Protected Property based on what they are trying to achieve. A Forever Wild zone can be drafted into a more conventional, but hybrid easement - offering an opportunity for some areas of a property preserved in primarily a natural condition and others reserved for ongoing farming, forestry or other uses.

Taking the long view, a Forever Wild Easement contributes to the rarest habitat in the state and one that offers unique features that benefit both nature and people. It contributes a property with the highest ability to store carbon, mitigate flooding, and protect our water resources. While the rights of a landowner in a Forever Wild easement are limited, they are exchanged for the highest assurance that nature would be protected from unnecessary intervention in perpetuity.

The Model Forever Wild Conservation Easement below and this commentary have been prepared for illustrative and informational purposes only. The use of the modifier “model” in the document and associated commentary is not intended to imply that the document satisfies all legal requirements. While based on current developments in the continuing evolution of land conservation law, practice and documentation, neither the Connecticut Land Conservation Council, its funders, officers, directors, employees, contractors, agents or other representatives, nor the members of the Connecticut Model Conservation Easement Working Group guarantee the qualification of this model conservation easement document under federal, state and local law. Neither these publications nor their release are intended to impart definitive legal, accounting or tax planning advice. Because of the complexity of the subject matter and the conditions of these documents’ release, anyone intending to use or apply this sample document or the related commentary should retain the services of competent professional counsel.

Drafting Directions: Areas in the Model where information needs to be inserted, or choices between options particularly need to be made, are indicated by brackets. THE DRAFTER SHOULD DO A GLOBAL SEARCH FOR THE BEGINNING BRACKET TO MAKE SURE THAT NO SUCH AREAS ARE LEFT UNCONSIDERED AND UNEDITED.

If an X appears in a number in the Base Model or the Options, you are to insert the proper numerical listing for that paragraph as it is dependent on the numbering of other provisions.

After recording, please return to:

_____[Grantee or Grantee's attorney]

CONSERVATION EASEMENT

This Grant of **CONSERVATION EASEMENT** made this [_____] day of [_____, 201_] by and between [Donor names] having an address at [_____] who with his/her/their/its successors in title to all or any portion of the Protected Property as hereinafter defined, including heirs, executors, administrators, successors and assigns, in perpetuity, are collectively referred to as “**Grantor**,” and [_____] [A Connecticut nonstock corporation with a business address at _____, _____][a municipal entity having a principal place of business at _____,] together with its successors and assigns, in perpetuity, hereinafter referred to as “**Grantee**.” Grantor and Grantee are hereinafter collectively referred to as the “**Parties**.”

RECITALS:

A. Grantor is the owner in fee simple of certain real property in the Town of [_____] County of [_____] and State of Connecticut, with an address of [_____] and comprising [___#___] acres[more or less], hereinafter called the “**Protected Property**,” which has ecological, scientific, educational and aesthetic value in its present state as a natural area which has not been subject to development or exploitation, which Protected Property is more particularly described in Schedule A attached hereto and incorporated by this reference [and delineated on a certain map entitled “[_____]” recorded in the land records of the town where the Protected Property is located.]

[ALTERNATIVE 1: WHERE LAND TRUST IS THE GRANTEE B. Grantee is a publicly-supported tax exempt, non-stock organization incorporated under the laws of the State of Connecticut, whose primary purpose is to preserve and conserve natural areas for aesthetic, scientific, charitable, and educational purposes. Grantee is qualified to acquire and hold conservation restrictions under the provisions of Connecticut General Statutes Section 47-42a et seq. and is a “qualified organization” under Section 170(h) of the Internal Revenue Code of 1986, as amended, and the regulations thereunder (hereinafter referred to as the “Code”). Grantee has received determination letters from the Internal Revenue Service, on file at the offices of Grantee, to the effect that Grantee is a “publicly supported” charitable organization [or, if applicable: “charitable supporting organization”] under Sections 501(c)(3) and 170(b)(1)(A)(vi) [or: 509(a)(2) or 509(a)(3)] of the Code and is not a private foundation as defined in Section 509(a) of the Code.]

[ALTERNATIVE 2. WHERE MUNICIPAL ENTITY IS THE GRANTEE B.

Grantee is a governmental unit described in Section 170(b)(1)(A)(v) of the Internal Revenue Code of 1986, as amended, (hereinafter referred to as the “Code”), and is a “qualified organization” under Section 170(h) of the Code to receive qualified conservation contributions.]

C. The Protected Property possesses significant natural, scenic, forested, and open space conservation values and conservation interests (collectively “**Conservation Values**”) of great importance to Grantor and the people of [____], County of [____], and State of Connecticut as set forth below in these Recitals and as documented in the **Baseline Report**.

D. Grantor and Grantee have the common purpose of conserving the Protected Property in perpetuity by Grantor’s placing voluntary restrictions upon the use of the Protected Property and by providing for the transfer from Grantor to Grantee of affirmative rights for its protection in perpetuity, intending the grant of such restrictions to be a “qualified conservation contribution” as that term is defined under Section 170(h)(2)(C) of the Code, **[and as a “qualified conservation easement” under Section 2031(c) of the Code,]** and so as to qualify as a “Conservation Restriction” under the Connecticut General Statutes Sections 47-42a through 47-42e. Grantor and Grantee wish to avail themselves of the provisions of those laws through the protection of those Conservation Values hereinafter described in the following Recitals.

In addition, the conservation of the Protected Property will accomplish a number of the factors that determine “significant public benefit” under Treas. Reg. Section 1.170A-14(d)(4)(iv), such as but not limited to the following: (i) development of the Protected Property beyond the [limited] development permitted hereunder would lead to or contribute to the degradation of the scenic, natural, and open character of the area, [particularly in light of the fact that the region is under development pressure], (ii) by [limiting/prohibiting] development of the Protected Property and limiting its use, this conservation easement will help prevent habitat fragmentation and will increase the potential for restoring or increasing biological diversity and native plant communities, (iii) the Protected Property is an integral part of the scenic character of the local rural landscape in which it lies, and (iv) this conservation easement is consistent with public programs for conservation in the region, some of which are enumerated below.

The protection of those Conservation Values hereinafter described is in fulfillment of, and consistent with, the corresponding “conservation purposes” that are required to be protected under Section 170(h)(4) of the Code.

E. BENEFITS OF FOREVER WILD PROTECTION.

Fragmentation and loss of wildlife habitat due to human activity, including development and logging, has fractured ecosystems and wildlife corridors, and splintered natural communities, and impeded their natural function, degrading air and water quality.

Due to the integrated nature of forested ecosystems, human activities on the Protected Property will affect not only the Protected Property's Conservation Values, as herein defined, but also those of nearby lands.

Old Growth Forests, that will eventually develop in Forever Wild parcels, were originally the predominant ecosystem type in Connecticut, and now rank among the rarest ecosystems in Connecticut and New England;

Forever Wild forests are an important source of carbon sequestration, helping to mitigate rising CO2 levels and associated climate change.

Forever Wild forests provide exceptional locations of solitude and beauty.

Forever Wild ecosystems harbor or will foster much of the Biological Diversity, genetic diversity, and age diversity that was present in Old Growth Forest habitats of Connecticut; Forever Wild forests have or will gain over time, more complex ecological structure and function driven by natural forces;

Forever Wild land preservation can be used to prevent further fragmentation and habitat loss and to restore Ecological Integrity (as hereinafter defined).

SCENIC ENJOYMENT:

F. Preservation of the Protected Property is for the scenic enjoyment of the general public and will yield a significant public benefit in accordance with Section 170(h)(4)(A)(iii)(I) of the Code. Specifically, the Protected Property is situated on and prominently visible from **[specify view characteristics and identify public ways, public areas etc.]**

HABITAT PRESERVATION:

G. This conservation easement protects a significant "relatively natural habitat of fish, wildlife, or plants, or similar ecosystem," in accordance with Section 170(h)(4)(A)(ii) of the Code. Specifically, the Protected Property [is habitat for or is adjacent to habitat for] **[elaborate]**, and is within an area which Grantee has determined is of substantial **[scenic and ecological]** importance to the Town of **[_____]**;

[specifically, the Protected Property is habitat for species of greatest conservation need and their habitat, as listed on the Connecticut Department of Energy and Environmental Protection Wildlife Division Natural Diversity Database and referenced in Connecticut's Comprehensive Wildlife Conservation Strategy completed under the U.S. State Wildlife Grant Program and approved by the U.S. Fish and Wildlife Service, which species have been observed on or about the property, including: [reference, if applicable, federally listed species, state-listed endangered, threatened and special concern species, Global Status Rank, State (subnational) Status Rank and New England Regional Conservation Concern]

H. The Protected Property abuts [is adjacent to][is in close proximity to][is contiguous to] property owned by **[Grantee/Town/State of Connecticut etc.]** and as a result is part of a corridor of protection for a diversity of species and their associated habitat, including nesting and migratory birds, other woodland species and mammal, reptile and insect species.

[OPTION OUTDOOR RECREATION AND EDUCATION:

I. This Conservation Easement preserves “land areas for outdoor recreation by, or for the education of, the general public” in accordance with Section 170(h)(4)(A)(i) of the Code. Specifically [elaborate]:]

WATER QUALITY PROTECTION:

J. The Protected Property is traversed by a watercourse **[elaborate]** and its protection affords an ecologically important buffer for the protection of water quality and habitat in accordance with Section 170(h)(4)(A)(ii) of the Code.

PUBLIC POLICY:

K. The preservation of the Protected Property is pursuant to clearly delineated federal, state and local governmental conservation policies and will yield a significant public benefit in accordance with Section 170(h)(4)(A)(iii)(II) of the Code. Specifically:

(1) in 1963, the Connecticut General Assembly declared “that it is in the public interest to encourage the preservation of farmland, forest land and open space land in order to maintain a readily available source of food and farm products close to the metropolitan areas of the state, to conserve the state’s natural resources and to provide for the welfare and happiness of the inhabitants of the state...” (P.A. 490, Section 1; C.G.S. Section 12-107a); and

(2) in 1971, the Connecticut General Assembly passed Public Act 173 (C.G.S. Sections 47-42a through 47-42c which authorizes the creation and enforcement of conservation restrictions “whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural farming, forest or open space use;” and

(3) the Protected Property has been specifically designated on the Open Space Plan of the Town of [_____ as _____]; and

(4) in a letter dated _____, the Town of _____ endorsed the preservation of the Protected Property through this conservation easement , referencing the consistency of such preservation with the [Town Plan of Conservation and Development][Open Space Plan] of the Town and the conservation and preservation goals of the Town relating particularly to **[wetlands/habitat][elaborate];** and

(5) The U.S. State Wildlife Grant Program provides funding for the protection of species of greatest conservation need and their habitat, as listed on the Connecticut Department

of Energy and Environmental Protection Wildlife Division Natural Diversity Database, which species have been observed on or about the Protected Property, including:
[_____]

(6) **[Add any other public policies that relate to the specific property and are consistent with Forever Wild, such as those described in the town plan, regional plan or other public conservation policy document; for further examples see commentary.]**

NOW, THEREFORE, Grantor, for and in consideration of the facts above recited and of the mutual covenants, terms, conditions and restrictions herein contained **[if a purchased or bargain sale easement, insert consideration here]** and as an absolute and unconditional **[gift/grant]**, does hereby give, grant and convey to Grantee this conservation easement (“**Easement**”) in perpetuity over the Protected Property of the nature and character and to the extent hereinafter set forth.

1. PURPOSE. It is the purpose (“**Purpose**”) of this Easement:

i. to preserve and restore the Forever Wild character of the Protected Property, with minimal interference by humans, in order to conserve plant and wildlife habitats and Biological Diversity, native flora and fauna, and the environments and ecological processes that support them, as those values exist on the date of this Easement and as they may evolve in the future; and to contribute to the preservation of larger forest ecosystems and other natural resources.

ii. to prevent any use of the Protected Property that will significantly impair or interfere with the Conservation Values of the Protected Property described above.

Grantee and Grantor recognize the wildlife habitat and wilderness values of the Protected Property, and share the common purpose of preserving these values for present and future generations through the conveyance and acceptance of this Conservation Easement.

2. DEFINITIONS. [READ CAREFULLY AND EXCLUDE ITEMS AND PARTS OF DEFINITIONS AS REQUIRED – Add relevant definitions if any optional sections have been added to the Easement] The following definitions apply throughout this Easement. Many terms are defined within the individual paragraphs of this Easement. Defined terms are indicated as such in the body of this Easement by capitalization.

ALL TERMS ARE BROADLY WORDED AND ARE SUBJECT TO CONDITIONS, LIMITATIONS AND EXCLUSIONS AS FURTHER SET FORTH IN THIS EASEMENT.

2.X **“Baseline Report”** is defined in Paragraph 19.10.

2.X **“Best Management Practices”** unless a specific set of practices is otherwise indicated, Best Management Practices are a series of guidelines or minimum

standards recommended by governmental resource management agencies, professional organizations and universities for proper farming and forestry operations and application of pesticides, with the goal of limiting non-point pollution of water resources and other disturbances of soil, water, and vegetative resources and to protect wildlife habitats.

“Biological Diversity” is the variety of life and its processes; it includes the variety of living organisms and the genetic differences among them, the communities and ecosystems in which they occur, and the ecological and evolutionary processes that keep them functioning; it is ever changing and adapting.

2.X “Code” is defined in the Recitals.

2.X “Conservation Values” are defined in the Recitals.

2.X “Ecological Integrity” describes a condition in which natural processes (e.g. biological competition and cooperation, floods, fire, drought, seed dispersal, herbivory, nutrient cycling, and maintenance of microclimates) are allowed to occur within their natural variation over time without human manipulation or suppression. This dynamic and changing environment provides opportunities for biological evolution.

2.X “Environmental Laws” means any and all federal, state, local, or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies, or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, Hazardous Materials, worker and community right-to-know, light, noise, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building, and land use restrictions as may now or at any time hereafter be in effect.

2.X “Forever Wild” means land protected in its natural condition, as free from human manipulation and disturbance as possible[,with management actions, if any, primarily limited to those necessary for health and safety, trail maintenance, or ecological restoration, or to preserve natural communities and rare species at risk]. The Ecological Integrity and wild character of the land are intended to be preserved and protected in perpetuity. Non-human occurrences such as floods, weather events, fire, and native insect outbreaks should continue to influence the land over time, creating at times areas of Old-growth Forest, downed/dead wood, and early successional habitat. Land managed as Forever Wild benefits the natural communities therein, as well as humans who benefit from its Ecological Integrity and Biological Diversity, and may enjoy the scenic beauty and other wilderness values.

2.X “Grantee” is defined in the first paragraph of this Easement and includes the initial Grantee.

2.X “Grantor” is defined in the first paragraph of this Easement. It shall also mean the masculine, feminine, corporate, singular or plural form of the word as needed in the

context of its use.

2.X “Hazardous Materials” means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment.

2.X “Invasive Species” are: (i) non-native plants that are disruptive in a way that causes environmental or economic harm or harm to human health, and (ii) non-native insects, fungi, parasites, and other organisms that attack Native Species of flora and fauna or threaten the diversity and health of the forest or other natural ecological communities.

2.X “Native Species” are those that were present in the area of the Protected Property prior to Euro-American settlement or that have moved into an area since that time without direct human assistance.

2.X “Non-native Invasive Species” are non-native animal, plant, or other organisms that through their capacity to spread into native systems demonstrably or potentially threaten Native Species.

2.X “Old-growth Forest” is a forest that has attained great age without significant disturbance and thereby exhibits unique ecological features and is classified as a climax community. Old-growth Forest features include diverse tree-related configurations that provide varied wildlife habitat that increases the biodiversity of the forested ecosystem. Diverse tree-related structures includes multi-layered canopies and canopy gaps, greatly varying tree heights and diameters, diverse tree species of all age classes, and extensive woody debris on the forest floor. A forest is considered to have reached the Old-growth Forest stage when enough time passes for the effects of past human disturbance to be no longer readily evident.

2.X “Purpose” is defined in Paragraph 1 hereof.

2.X “Qualified Natural Resource Professional” is a certified professional forester, forest ecologist, wildlife biologist, soil scientist or agricultural specialist with substantial training and expertise, and any necessary certifications, in the relevant environmental sciences.

2.X “Structure” means anything constructed or erected, the use of which requires permanent location on, above or under the ground, or attachment to something having a permanent location on, above or under the ground. This includes, but is not limited to: dwellings and buildings.

3. LIMITATIONS AND PROHIBITED USES. In order to carry out the Purpose, and subject to the Retained Rights set forth in **Paragraph 4** below and provisions elsewhere

in this Easement, the following acts or uses are expressly prohibited on or in connection with the Protected Property:

3.1 Subdivision. The Protected Property shall together constitute one entire and undivided parcel of land for purposes of the Connecticut General Statutes Chapter 422a notwithstanding that said Protected Property may be described as one or more parcels of land on Schedule A hereof. The Protected Property shall be granted, sold, exchanged, gifted, conveyed or transferred as a unit in order to prevent land and management fragmentation, whether or not said Protected Property is described herein or has been described in any prior deed, as more than one piece or parcel of land. The Protected Property may not be divided, partitioned, or subdivided, nor conveyed, except in its current configuration as an entity or except as may be permitted in **Paragraph 4** below; provided, however, that with prior approval from Grantee, Grantor may convey any portion of the Protected Property to any organization or government entity that would qualify as an eligible assignee in accordance with this Easement. Any portion of the Protected Property conveyed pursuant to this provision shall remain subject to this Easement in all respects.

3.2 Use for Development. The Protected Property and any portion thereof shall not be included as part of the gross area of other property not subject to this Easement for the purposes of determining density or lot coverage, setbacks and frontage requirements, under otherwise applicable laws, regulations or ordinances controlling land use and building density. No development rights which have been encumbered or extinguished by the Easement shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise. Nothing herein contained shall be construed to prevent Grantor from using any of the Protected Property as property qualifying for open space, forest or farmland for tax exemption purposes under applicable statutes and laws.

3.3 Prohibited Structures and Other Improvements. There shall be no construction or placing of any building, tennis or other recreational court, landing strip, mobile home, swimming pool, crypt, fence or sign (other than those reasonably required by Grantor for appropriate management), asphalt or concrete pavement, parking area, billboard or other advertising display, antenna, utility pole, tower, conduit, line, electric light or any other temporary or permanent Structure or facility on, under or above the Protected Property except as provided in **Paragraph 4** below.

3.4 Changes in Topography and Mining. There shall be no ditching, draining, diking, filling, excavating, dredging, surface or subsurface mining or drilling, removal of topsoil, sand, gravel, rock, stone walls, minerals or other materials, nor any building of roads or change in the topography of the land in any manner except as provided in **Paragraph 4**.

3.5 Changes to Vegetation. To ensure the wild and natural character of the Protected Property, in accordance with the Purpose, there shall be no removal, destruction or cutting of trees, shrubs or herbs, or planting of non-native species, introduction of non-native animals, grazing of domestic animals, or disturbance or

change in the natural habitat except in connection with:

(i) the maintenance of existing unpaved trails and open areas;

[(ii) the removal of Non-native Invasive species or non-native pest species of plant or animals including feral animals;]

(iii) the right to conduct limited cutting of dead or damaged trees to remove dangerous conditions (but not to remove dead or dying trees that are not a hazard). If dead or damaged trees are cut, whenever practicable the wood shall remain on the Protected Property;

[(iv) the prevention of the spread of nonnative plant or animal species that pose a significant threat to Native Species of interest and to the native structure and function of the forest, with the consent of the Grantee pursuant to Paragraph 4.5 or pursuant to Paragraph 5.X.;

[(v) restoration of areas impacted by the activities listed in (i) (ii) (iii) and (iv) above with native flora.]

(vi) with consent of Grantee [in its sole discretion] [pursuant to Paragraph 4.5 or pursuant to Paragraph 5.X.]

3.6 Pesticides. There shall be no use of pesticides, including but not limited to insecticides, fungicides, rodenticides, and herbicides, or other potentially harmful substances or the use or disposal of said products and by-products on the Protected Property[, **except as (i) provided in Paragraph 4.5 and 4.6 below, (ii) as used in a selective manner, in accordance with applicable law and Best Management Practices to treat non-native insects, fungi, parasites, Invasive Species and other organisms that attack Native Species of flora and fauna or threaten the diversity of the forest or other natural ecological communities on or adjacent to the Protected Property, (iii) as used by a licensed pesticide applicator in accordance with a written forest and/or wildlife management plan prepared by a Qualified Natural Resource Professional, which plan must be approved in writing by Grantee, or (iv) as approved in writing by Grantee, in its sole discretion. The use of any pesticides in the neonicotinoid family is prohibited. The use of pesticides, defined above, for such purposes shall be undertaken in accordance with Best Management Practices for pesticide application in a manner reasonably designed to control the identified threat with the least possible damage to non-target species; for example, by use of non-broadcast, narrowest spectrum, least persistent, material appropriate for the target species and all such use shall be subject to the prior written approval of Grantee in its sole discretion].**

3.7 Trash. There shall be no storage, placing, filling or dumping of ashes, trash, vehicles or vehicle parts, debris, junk, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks, in, on or under the Protected Property. The preceding restriction shall not apply to the aboveground presence, use or storage on the Protected Property of small quantities of the aforementioned substances that are generally recognized to be appropriate to normal residential use.

3.8 Pollution and Alteration of Water Resources. There shall be no

pollution, alteration, depletion nor extraction of surface water, natural water courses, lakes, ponds, marshes, wetlands, subsurface water or any other water bodies, nor shall there be activities conducted on the Protected Property, which would be detrimental to water purity or quality, or which could alter natural water level and/or flow in or over the Protected Property, except as provided in **Paragraph 4**.

3.9 Recreational Vehicles There shall be no operation of snowmobiles, dune buggies, motorcycles, [bicycles], all-terrain vehicles, hang gliders, aircraft, helicopters, jet skis, motorized boats or any other types of motorized [or mechanized] recreational vehicles except as provided in Paragraph 4 below.

3.10 Commercial Recreational Activities. There shall be no commercial or industrial uses of the Protected Property.

3.11 Prohibition on Hunting and Trapping. There shall be no hunting or trapping of animals except as reasonably required to remove nuisance animals that pose an immediate risk to human or animal health or safety (for example animals with rabies or distemper)[or pursuant to Paragraph 4.5 Habitat Enhancement].

3.11 Other use. Any other use of the Protected Property which would be inconsistent with the Purpose of this Easement or that would impair the Protected Property's Conservation Values is prohibited, unless such use or activity is deemed necessary by Grantor and Grantee for the protection of the Protected Property's Conservation Values, in which case such use or activity shall be subject to the prior written approval of Grantee as provided in **Paragraph 7**.

4. GRANTOR'S RETAINED RIGHTS AND PERMITTED USES. Grantor retains the right to undertake or continue any activity or use of the Protected Property not prohibited by this Easement and not inconsistent with the Purpose of the Easement. Notwithstanding the Limitations and Prohibited Uses of **Paragraph 3**, the following activities and uses are hereby acknowledged by Grantor and Grantee to be consistent with the Purpose of this Easement, and are expressly permitted to be carried out on the Protected Property by Grantor and Grantor's guests and invitees in a manner that does not impair the Conservation Values protected by this Easement. To the extent required for compliance with 26 CFR. 1.170A-14(g)(5)(ii), and only to the extent such activity is not otherwise subject to Notice or Approval under this Easement pursuant to **Paragraph 7**, Grantor agrees to notify Grantee before exercising any right that may have an adverse impact on the conservation interests associated with the Protected Property.

4.1 Mortgage and Convey subject to Easement. Grantor reserves the right to sell, give, mortgage, lease, devise or otherwise convey the Protected Property in its entirety, except as otherwise provided herein. Any such conveyance shall be subject to the terms of this Easement. Grantor shall provide written notice of any conveyance that is not a mortgage to Grantee at least thirty (30) days prior to such conveyance.

4.2 Existing Structures; Trails. Grantor reserves the right to maintain such Structures as currently exist on the Protected Property, if any, **[as shown at Exhibit __**

hereof] [or, in the Baseline Report] [which Structures may be repaired or replaced, but not expanded, on the same site by like Structures used for the same or similar purposes.]

Existing stone walls [as shown at Exhibit __ hereof or in the Baseline Report] may be maintained, replaced or repaired utilizing only dry-laid field stone construction, although the interior layers may be mortared to maintain the integrity of the wall or prevent the unauthorized removal of stones. No stones from walls, forest floor, or any other location may be removed from the Protected Property.

Existing trails and Woods Roads may be maintained. All new trails and Woods Roads, and relocation of existing trails and Woods Roads, shall be subject to the Grantee's Approval and all conditions imposed by Grantee to protect the Conservation Values of the Protected Property. Trails and Wood Roads shall be planned, located, and constructed to substantially prevent sedimentation or erosion of the Protected Property and wetlands and watercourses on or adjacent to the Protected Property. The extent and use of such improvements shall not, individually or in the aggregate, have an adverse impact on the Purpose of this Easement. The use of any on-site materials such as sand and gravel must be done in a manner that is limited in scope and impact consistent with protecting the Conservation Values of the Protected Property. Such paths, trails, and Woods Roads may be surfaced with permeable materials only, including but not limited to sand, gravel, shell, rock, or crushed stone and subsurface synthetic stabilization materials. For the purposes of this Easement, "Woods Road" means a passable vehicular roadway, surfaced in accordance with the above limitations, suitable for the activities permitted to Grantor hereunder.

4.3 Outdoor Recreational Activities. Grantor reserves the right to engage in non-commercial non-motorized outdoor recreational activities ("Outdoor Recreational Activities") that do not (a) require development of, or the construction of Structures or other facilities described in **Paragraph 3.3** on the Protected including by way of illustration and not limitation, [camping,] walking, hiking, running, cross country skiing, wildlife observation, ecological education, [horseback riding] snowshoeing, and similar uses, but not those activities involving the recreational use of motorized vehicles or mountain bikes, or that would impair the Conservation Values protected by this Easement. All dog walking shall be performed with the dog under leash [leash with direct remote control] [under control]. Provided, however, that there shall be no fishing, shooting, or hunting of any kind unless otherwise specifically allowed under other provisions of this Easement.

4.4 Signs. Grantor reserves the right to place signs identifying the Protected Property and to post all or a portion of the Protected Property about permitted uses and against trespass, hunting or prohibited uses.

[4.5 Habitat Enhancement. Grantor reserves the right to carry out land management actions designed to assure ecological restoration or preservation of natural communities and rare species to a scale and density that matches the best

scientific knowledge of their pre-Euro-American settlement state as recommended in writing by a Qualified Natural Resource Professional who is approved by Grantee; **Provided, however, that any forest management, cutting, or logging activities, such as cutting vegetation, shall be limited to ecological restoration to remove Non-native Species, damage or disease posing an extreme threat to the health of a particular Native Species in the forest ecosystem, and re-introducing extirpated species. All such activity shall be based on peer-reviewed scientific literature that identifies an extreme threat and recommends the felling or removal of forest flora. The most minimally invasive option necessary to protect an imperiled species in the forest ecosystem shall be utilized. No such forest management, cutting, or logging is permitted without the prior written Approval of Grantee in its sole discretion.]**

4.6 Necessary Vehicles. As reasonably necessary in connection with permitted uses, management, and protection of the Protected Property, the right to bring on the Protected Property and operate automobiles, light trucks, off-road vehicles (but not motorcycles), farm equipment, forestry equipment, emergency and rescue vehicles, maintenance equipment, and other vehicles and equipment.

5. GRANTEE’S RIGHTS OF ENTRY. To accomplish the Purpose of this Easement, the following rights of entry are conveyed to Grantee by this Easement:

5.1 Right of Entry for Stewardship and Monitoring Purposes. Grantee has the right to enter the Protected Property at all reasonable times and in a reasonable manner, including the use of drone aircraft, for the purposes of: (i) inspecting the Protected Property to determine if Grantor is complying with the terms of this Easement; and (ii) documenting Grantor’s compliance with this Easement and the condition of the Protected Property through photographs and other forms of visual media. Grantee will make a reasonable effort to notify Grantor prior to entry onto any area of the Protected Property, except when emergency circumstances or prevention of a threatened breach of this Easement requires immediate entry.

5.2 Signs. Grantee shall have the right to install and maintain signs on the boundary of the Protected Property in furtherance of the rights and responsibilities of Grantee under this Easement.

5.3 Management by Grantee. The right, but not the obligation, subject to the approval of Grantor which approval will not be unreasonably withheld, to monitor the condition of plant and animal populations, plant communities, and natural habitats on the Protected Property[, **and to manage them to promote the Purpose of this Easement, in accordance with the recommendations of a Qualified Natural Resource Professional and consistent with the standards in Paragraph 4.5].**

6. NO PUBLIC ACCESS. Nothing contained in this Easement shall give or grant to the public a right to enter upon or to use the Protected Property or any portion thereof where

no such right existed in the public immediately prior to the execution of this Easement.

7. NOTICE AND APPROVAL.

7.1 Notice. Whenever notice to or approval by Grantee is required under the provisions of this Easement, or whenever Grantor intends to undertake any activity or to exercise any right that may have a material adverse effect on the Conservation Values of the Protected Property, Grantor shall notify Grantee in writing not less than ninety (90) days prior to the date Grantor intends to undertake the activity in question or exercise such right. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the Purpose of this Easement.

7.2 Approval. Where Grantee's approval is required by the terms of this Easement, Grantee shall approve or withhold its approval in writing. Grantee's approval shall not be unreasonably withheld, but shall only be granted upon Grantee's finding that the proposed activity is not inconsistent with the Purpose of this Easement and will not impair the Conservation Values protected hereby. Grantee may establish reasonable conditions for the conduct of activities approved under this provision.

7.3 Approval in Changed or Unforeseen Circumstances.

No use shall be made of the Protected Property and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purpose of this Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Easement, they are unable to foresee all potential future land uses, future technologies and future evolution of the land and other natural resources, and other future occurrences affecting the Purpose of this Easement or the Protected Property. Grantee therefore, in its sole discretion, may determine whether the following are consistent with the Purpose of this Easement: (a) proposed uses or proposed improvements not contemplated, or addressed by this Easement or (b) alteration in existing uses or Structures.

Recognizing that Best Management Practices, technologies, climate and the ecological state of the region, and scientific knowledge will change over time, Grantor and Grantee agree that Grantee may grant approval for activities otherwise restricted or prohibited, or for which no provision is made in this Easement, as provided in this paragraph.

A. Grantee's approval for activities otherwise restricted or prohibited, or for which no provision is made in this Easement, may be given in limited circumstances if Grantee determines, in its sole discretion, that such approval would 1.) consistent with the Purposes of this Easement; 2.) be in substantial conformity with the intent of the original Grantor, and 3.) result in **[a material improvement][no negative impact]** in the protection of important Conservation Values or ecological resources on the Protected Property. The circumstances that would justify such approval include:

(i) disease, pests, fire, storm or natural disaster;

- (ii) changes in scientific knowledge, technology, or Best Management Practices;
- (iii) the existence of threatened or endangered species on or abutting the Protected Property;
- (iv) changes in climate affecting the ecological condition of the surrounding area or ecological system; or
- (v) other unforeseen circumstances that would threaten or have an adverse impact on the Purpose of this Easement,

B. Grantee and Grantor have no right or power to agree to any activities under this Paragraph that would:

- (i) adversely affect the perpetual duration of this Easement or Purpose of this Easement;
- (ii) result in the termination of this Easement over all or a portion of the Protected Property; or
- (iii) impair the qualification of this Easement or the status of Grantee under any applicable laws, including C.G.S. § 47-42a through 47-42e, and Sections 170(h) and 501(c)3 of the Code.

C. All requests for approval shall be in writing and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activities with the Purpose of this Easement. Grantee shall not be liable for any failure to grant approval under this paragraph.

8. COSTS AND LIABILITIES.

8.1 In General. Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Protected Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantor shall keep Grantee's interest in the Protected Property free of mechanics liens arising out of any work performed for, materials furnished to or obligations incurred by Grantor.

8.2 Taxes. Grantor agrees to pay any real estate taxes or other assessments levied on the Protected Property.

8.3 Indemnification by Grantor. Grantor acknowledges that Grantee has neither possessory rights in the Protected Property, nor any right to control, maintain, or keep up the Protected Property. Grantor agrees to release, hold harmless, indemnify and defend Grantee from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees which Grantee may suffer or incur as a result of or arising out of the condition of the Protected Property or the activities of Grantor, Grantor's invitees, licensees and lessee on the Protected Property, other than those caused by the negligent acts or acts of misconduct of Grantee, and except those arising out of Grantee's workers' compensation obligations.

8.4 Indemnification by Grantee. Grantee agrees to release, hold harmless, defend

and indemnify Grantor from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expense and fees which Grantor may suffer or incur as a result of or arising out of the activities of Grantee on the Protected Property, other than those caused by the negligent acts or acts of misconduct of Grantor, and except those arising of Grantor's workers' compensation obligations.

8.5 Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Protected Property resulting from causes beyond Grantor's control, including without limitation, fire, flood, storm, earth movement, natural disease, unauthorized wrongful acts of third persons, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes; and nothing in this Easement shall require Grantor to take any action to restore the condition of the Protected Property after any act or event over which Grantor has no control. Notwithstanding the foregoing, nothing contained herein shall limit or preclude Grantor's and Grantee's rights to pursue any third party for damages to the Protected Property from vandalism, trespass, or any other violation of the terms of this Easement. In the event of violations of this Easement caused by unauthorized wrongful acts of third persons, at Grantee's option, Grantor agrees to assign its right of action to Grantee, to join in any suit, and/or to appoint Grantee its attorney-in-fact for the purposes of pursuing enforcement action.

9. GRANTEE'S REMEDIES.

9.1 In General. Grantee has the right to preserve and protect the Conservation Values of the Protected Property.

9.2 Enforcement. Grantee has the right generally to (i) prevent any activity on or use of the Protected Property by Grantor or third persons (whether or not claiming by, through, or under Grantor) that is inconsistent with the Purpose of this Easement; (ii) to require Grantor or third persons to restore such areas or features of the Protected Property that may be damaged by any inconsistent activity or use to its condition at the time of the donation; and (iii) to enforce this Easement in the case of violation of its terms by Grantor or by third persons (whether or not claiming by, through, or under Grantor) by appropriate legal proceedings.

Specifically, in the event that Grantee becomes aware of a violation of the terms of this Easement, Grantee shall give notice to Grantor, and request corrective action sufficient to abate such violations and restore the Protected Property to its previous condition prior to the violation. Grantor agrees that the Baseline Report shall be deemed to provide objective information concerning the Protected Property's conditions at the time of this grant. Failure by Grantor to discontinue or take such other corrective action as may be requested by Grantee within thirty (30) days after receipt of such notice shall entitle Grantee to bring an action at law or equity in a court of competent jurisdiction to enforce the terms of this Easement; to require the restoration for the Protected Property to its condition substantially similar to that which existed prior to the violation; to enjoin such

non-compliance by ex parte temporary or permanent injunction in a court of competent jurisdiction; and/or to recover any damages arising from such noncompliance. Such damages when recovered may be applied by Grantee, in its sole discretion, to corrective action on the Protected Property. The Parties to this Easement specifically acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity or through administrative proceedings.

9.3 Emergency Enforcement. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Property, Grantee may pursue its remedies under this Grantee's Remedies Paragraph without prior notice to Grantor or without waiting for the period for the thirty (30) day cure to expire.

9.4 Forbearance Not a Waiver. Any forbearance, failure or delay by Grantee to exercise its rights hereunder in the event of any breach of any term set forth herein by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver, laches or estoppel of its rights to do so later.

10. COSTS. Grantor acknowledges that Grantee has accepted this Easement in reliance on its entitlement to costs as set forth hereafter. By accepting a deed to the Protected Property, any successor Grantor agrees to be personally bound by the terms and conditions of this Easement, including the obligations of this paragraph.

10.1 Grantee's Entitlement to Costs of Enforcement. Recognizing that Grantee is a charitable organization with limited resources that has a duty to protect the Protected Property and property rights it holds in the public interest, Grantor agrees to reimburse Grantee for all reasonable costs incurred by Grantee in enforcing or defending this Easement or in taking reasonable measures to remedy or abate any violation hereof by Grantor, Grantor's agents, employees, lessees, guests or others for whose action the Grantor is responsible, including without limitation, costs and expenses of investigation, dispute management, negotiation, mediation and, if applicable, arbitration costs, settlement or suit and reasonable attorneys', expert's and consultant's fees, staff time and any fees and costs of restoration, remediation or other damage correction necessitated by any such action, and including the drafting of any related new conservation protection or enhancement documents, and other payments as may be ordered by such court or arbitrator. If Grantor ultimately prevails in a judicial enforcement action, each party shall bear its own costs.

10.2 Non-Enforcement Costs. Grantor acknowledges that its general

operating funds and any stewardship endowment it may have do not cover Grantee's non-monitoring costs in considering and documenting any request made to Grantee by Grantor to interpret, clarify, amend or approve requested activities. Grantee may require Grantor to pay all reasonable costs incurred by Grantee, whether or not the request is granted, pertaining to such requests and, if applicable, of implementing any permission granted. Such costs shall include, as applicable, staff time and consulting fees for reviewing the request and evaluating its potential environmental impacts, appraisal costs to determine if such approval would result in private inurement or confer an impermissible private benefit, and any necessary boundary surveys and monumentation.

11. TITLE. Grantor covenants and represents that Grantor is the sole owner and is seized of the Protected Property in fee simple and has good right to grant and convey this Easement; that the Protected Property is free and clear of any and all encumbrances, including but not limited to, any mortgages not subordinated to this Easement, and that Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Easement.

12. GRANTOR'S ENVIRONMENTAL WARRANTY AND HOLD HARMLESS. Grantor warrants that Grantor has no actual knowledge of any notices by any governmental authority of any violation or alleged violation of, non-compliance or alleged non-compliance with, or any liability under any Environmental Laws relating to the operations or conditions of the Protected Property. Grantor further warrants that Grantor has no actual knowledge of a release or threatened release on, at, beneath or from the Protected Property of Hazardous Materials.

Grantor hereby promises to hold harmless and indemnify Grantee against all litigation, claims, demands, penalties, and damages, including reasonable attorneys' fees, arising from or connected with the release or threatened release of any Hazardous Materials on, at, beneath or from the Protected Property by Grantor, or arising from or connected with a violation of any Environmental Laws by Grantor.

13. DURATION; PARTIES SUBJECT TO EASEMENT. The covenants agreed to and the terms, conditions, and restrictions imposed by this Easement shall not only be binding upon the Parties but also their lessees, agents, personal representatives, successors and assigns, and all other successors to Grantor and Grantee in interest and shall continue as a servitude running in perpetuity with the Protected Property. A Party's rights and obligations under this Easement shall terminate upon the transfer of the Party's interest in the Easement or Protected Property to a party assuming its obligations hereunder, except that liability for acts or omissions occurring prior to transfer shall survive such transfer, but this Easement shall not be affected by such transfer, the transferee having the rights and obligations of the transferring party.

14. SUBSEQUENT TRANSFERS. Grantor agrees that the terms, conditions, restrictions and Purpose of this Easement or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests either the fee

simple title or possessory interest in the Protected Property; and Grantor further agrees to notify Grantee of any pending transfer at least thirty (30) days prior to the said transfer **[to be consistent with Paragraph 4.1]**. By acceptance of any deed or other conveyance of the Protected Property, any successor Grantor personally accepts and agrees to comply with the covenants and obligations set forth in this Easement. The Parties recognize that Grantee has accepted this Easement in reliance on every successor Grantor's acceptance of such obligations and liabilities.

15. NO EXTINGUISHMENT BY MERGER. Grantor and Grantee agree that the terms of this Easement shall survive any merger of the fee and Easement interest in the Protected Property in view of the public interest in the enforcement of this Easement. In the event of merger, (i) Grantee as successor in title to Grantor shall observe and be bound by the obligations of Grantor and the restrictions imposed upon the Protected Property by this Easement; (ii) Grantor and Grantee shall immediately undertake such steps as are necessary under the laws of the State of Connecticut to reinstate the terms and conditions of this Easement; and (iii) Grantee as promptly as practicable shall assign Grantee's interests in this Easement of record to another holder in conformity with the requirements of this Paragraph and with the assignment provisions of this Easement. Any instrument of assignment of this Easement or the rights conveyed herein shall refer to the provisions of this Paragraph, and shall contain language necessary to continue it in force. Further, no deed, transfer, or assignment shall be effective if it will result in merger, until alike conservation easement has been granted to avoid merger. This provision survives the extinguishment of this Easement.

16. ASSIGNMENT. The parties hereto recognize and agree that the benefits of this Easement are in gross and assignable. Grantee hereby covenants and agrees that in the event it transfers or assigns this Easement, the organization receiving the interest must be a qualified organization as that term is defined in Section 170(h)(3) of Code (or any successor section) and the regulations promulgated thereunder, which is organized and operates primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Code. Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out in perpetuity the conservation purposes which this Easement was originally intended to advance.

17. LIMITATION ON AMENDMENTS. This Easement is intended by the Parties to protect the Conservation Values of the Protected Property in perpetuity. There may come a time when unusual and unforeseen circumstances arise which in the judgment of Grantor and Grantee merit consideration of amendment of this Easement, and Grantee determines, in its sole and absolute discretion, that such amendment is appropriate to enhance the preservation of the Protected Property in perpetuity, to correct an error or clarify an ambiguity, to add new land area to the protection of the Easement, to remove a Grantor's retained right, or to upgrade standard language and format to reflect statutory and regulatory changes, improve enforcement and improve administration, and is consistent with the conservation purposes of the Easement.

Such amendment must meet ALL of the following criteria, as determined by Grantee in its sole and absolute discretion:

- (a) clearly serve the public interest and be consistent with Grantee's mission,
- (b) comply with all applicable federal, state and local laws,
- (c) not jeopardize Grantee's tax-exempt status or status as a charitable organization under federal or state law,
- (d) not result in private inurement or confer an impermissible private benefit,
- (e) be consistent with the Purpose and intent of this Easement,
- (f) not be inconsistent with the documented intent of the donor, Grantor and any direct funding source,
- (g) have a net beneficial or neutral effect on the relevant Conservation Values protected by this Easement, and
- (h) not negatively affect the enforceability of this Easement.

The Parties may not amend this Easement in any way that could adversely affect the perpetual duration of this Easement with respect to all or any portion of the Protected Property.

Any amendment of this Easement in accordance with this Paragraph shall be executed by Grantee or by Grantee's successor in title to the benefits of this Easement and by the record owner or owners of the portion or portions of the Protected Property to which the amendment applies and recorded in the official land records of the town where the Protected Property is located. Grantee shall not be liable for any failure to grant approval under this paragraph.

18. EXTINGUISHMENT. Grantor hereby agrees that at the time of the conveyance of this Easement to Grantee, this Easement gives rise to a real property right, immediately vested in Grantee. The value of Grantee's real property right is represented by the ratio of the value of this Easement on the date of this Easement to the value of the Protected Property, without deduction for the value of the Easement, on the date of this Easement, as determined in accordance with the valuation substantiation requirements of Treas. Reg. Section 1.170A-14(h)(3) (the "Grantee's percentage interest").

The Parties shall maintain, together with the Baseline Report [and the appraisal on which Grantor's claimed tax deduction attributable to this Easement is based], a record of the ratio of those values and Grantee's resulting percentage interest and shall amend such values and Grantee's percentage interest, if necessary, to reflect any final determination thereof by the Internal Revenue Service or court of competent jurisdiction. For purposes of this Paragraph, the ratio of the value of this Easement to the value of the Protected Property unencumbered by this Easement shall remain constant, and Grantee's percentage interest in the fair market value of the Protected Property thereby determinable shall remain constant, [1]

If a subsequent unexpected change in the conditions surrounding the Protected Property can make impossible or impractical the continued use of the Protected Property for conservation purposes, this Easement can only be terminated or extinguished, whether with respect to all or part of the Protected Property, by judicial proceedings in a court of competent jurisdiction and in accordance with state law. Unless otherwise required by applicable law at the time, in the event of any sale of all or a portion of the Protected Property (or any other property received in connection with an exchange or involuntary conversion of the Protected Property) after such termination or extinguishment, and prior to the payment of any costs or expenses associated with such sale, Grantee shall be entitled to receive Grantee's percentage interest in the gross proceeds of such sale, exchange, or involuntary conversion of the Protected Property in priority to the owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion, and in priority to any other lien or claim encumbering the Protected Property, as such percentage interest is determined under the provisions of this Paragraph.

The owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion shall bear the responsibility for the payment and satisfaction of any claims or liens against the Protected Property. If Grantee does not receive its percentage interest from the proceeds of such sale, exchange, or involuntary conversion, then Grantee may recover the resulting deficiency from the post-extinguishment owner of the Protected Property in whom the Protected Property is titled at the time of such post-extinguishment sale, exchange, or involuntary conversion. Grantee may record a lien to secure its recovery of such deficiency. All such proceeds received by Grantee shall be used by Grantee in a manner consistent with the Purpose of this Easement.

Any extinguishment of this Easement in accordance with the provisions of this Paragraph shall be recorded in the official land records of the town where the Protected Property is located and Grantee shall, upon request, promptly and without charge, execute in recordable form and deliver to Grantor such instrument as Grantor may reasonably request for this purpose. In the event of extinguishment, the provisions of this Paragraph shall survive extinguishment.

Whenever all or any part of the Protected Property or an interest therein is taken by public authority under power of eminent domain or other act of public authority, then Grantor and Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. Prior to any reimbursement of related expenses incurred by Grantor and Grantee, Grantee shall first be entitled to receive Grantee's percentage interest from the recovered proceeds in conformity with the provisions of this Paragraph (with respect to the allocation of proceeds). The respective rights of Grantor and Grantee set forth in this subparagraph shall be in addition to, and not in limitation of, any rights they may have at common law. Grantee shall use its share of the proceeds in a manner consistent with the Purpose set forth herein.

19. GENERAL AND MISCELLANEOUS PROVISIONS.

19.1 In General. The interpretation and performance of this Easement shall be governed by the laws of the State of Connecticut. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect. The obligations imposed by this Easement upon Grantor, if more than one, shall be joint and several. Reference to any Paragraph herein shall be construed to include all subparagraphs and subsections under the referenced Paragraph. Whenever the context so requires or admits, words in the singular number shall include the plural, and vice-versa, and any word in a given gender shall include either or both genders.

19.2 Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed to effect the conservation Purpose of this Easement and the policy and purpose of Sections 47-42a through 47-42e of the Connecticut General Statutes, as amended. If any provision of this Easement is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid and perpetually enforceable shall be favored over any interpretation that would render it invalid..

19.3 Severability. If any provision of this Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions for this Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

19.4 Entire Agreement. This Easement and the schedules attached hereto set forth the entire agreement of the parties with respect to this Easement and supersede all prior discussions, negotiations, understandings, or agreements relating to this Easement, all of which are merged herein.

19.5 Re-recording. Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Easement; for such purpose, Grantor appoints Grantee its attorney-in-fact to execute, acknowledge and deliver any necessary instrument on its behalf. Without limiting the foregoing, Grantor agrees to execute any such instruments upon request.

19.6 Governmental Approvals. The conveyance of this Easement by Grantor to Grantee shall not relieve Grantor of the obligation and responsibility to obtain any and all applicable federal, state, and local governmental permits and approvals, if necessary, to exercise Grantor's retained rights and uses of the Protected Property even if consistent with the Purpose of this Easement.

19.7 Captions. The captions herein have been inserted solely for convenience of reference and are not a part of this Easement and shall have no effect upon construction or interpretation.

19.8 Counterparts. The Parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both Parties; each counterpart

shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

19.9 Notices. Any notices required in this Easement shall be sent by registered or certified mail return receipt requested, or sent by receipted delivery service or acknowledged facsimile transmission, or delivered by an official authorized to make service of process in the recipient's jurisdiction, to the following address or such address as may be hereafter specified by notice in writing:

Grantor: **[Insert Name(s)]**
[mailing and street address here]

Grantee: **[Insert Name]**
[mailing and street address here]

If no address has been designated, notice shall be provided to the address shown for the owner of the Protected Property or Grantee on the Assessor's records of the Town where the property is located.

19.10 Baseline Report. In order to establish the condition, present uses and state of improvement of the Protected Property and its Conservation Values as of the date of this Easement, Grantee and Grantor have prepared an inventory of the Protected Property's relevant features and conditions (the "Baseline Report") including maps, photographs, and other documentation, and have certified the same as an accurate representation of the condition of the Protected Property as of the date of this Easement. The Baseline Report is intended to serve as an objective information baseline for monitoring compliance with the terms of this Easement. It may be used by Grantee to establish that a change in the use or character of the Protected Property has occurred, but its existence shall not preclude the use by Grantee or Grantor of other evidence to establish the condition of the Protected Property as of the date of this Easement. Grantee shall maintain copies of the Baseline Report.

20. ECONOMIC HARDSHIP. In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. It is the intent of both Grantor and Grantee that any such changes shall not be deemed to be a circumstance justifying the amendment, termination or extinguishment of this Easement. In addition, the inability of Grantor, or Grantor's successors and assigns, to conduct or implement any or all of the uses permitted under the terms of this Easement, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment.

21. NO TAX ADVICE. Each Party hereto acknowledges and agrees that it has not received and is not relying upon tax or other advice from any other Party, and that it has

and will continue to consult its own advisors. Grantee makes no representation or warranty whatsoever regarding the tax treatment to Grantor of this Easement.

22. RECITALS AND EXHIBITS INCORPORATED HEREIN. Any and all Recitals in this Easement are agreed by the Parties to be accurate, are incorporated into this Easement by reference, and shall constitute integral terms and conditions of this Easement. Any and all schedules, exhibits and addenda attached to and referred to in this Easement are hereby incorporated into this Easement as if fully set out in their entirety herein.

23. ACCEPTANCE AND ACKNOWLEDGMENT OF EASEMENT. As attested by the signature of its authorized officer affixed hereto, Grantee hereby accepts the interest in real property and the rights and responsibilities conveyed by this Easement, in accordance with the provisions of section 47-6b of the Connecticut General Statutes. Except for the monetary consideration, if any, specifically set forth herein, Grantee acknowledges that no goods or services were provided as consideration for this Easement.

TO HAVE AND TO HOLD this Easement unto the said Grantee forever.

IN WITNESS WHEREOF, Grantor and Grantee, intending to be legally bound hereby, have hereunto set their hands on the date first above written.

Witness:

[INSERT NAME]

Grantor

[Print name of above signer]

[Print name of above signer]

Witness

[INSERT NAME]

Grantee

[Print name of above signer]

[Print name of above signer]

By _____
[insert name of signer]

Its **[insert capacity of signer]**,
duly authorized

STATE OF CONNECTICUT)
) ss. Town of , 20__
COUNTY OF _____)

On this the ____ day of _____, 20__, before me personally appeared _____ to me personally known, who, being by me duly sworn, did depose and say that he/she is the person named in the foregoing instrument, and acknowledged said instrument to be his/her free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

Commissioner of Superior Court/
Notary Public
My commission expires:

STATE OF CONNECTICUT)
) ss. Town of , 20__
COUNTY OF _____)

On this the ____ day of _____, 20__, before me personally appeared _____, to me personally known, who, being by me duly sworn, did say that [he/she] is the _____ of _____, the corporation named in the foregoing instrument; and acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I hereunto set my hand and official seal.

Commissioner of Superior Court/
Notary Public
My commission expires:

OPTIONS FOR THE MODEL CONSERVATION EASEMENT

- **Accessory Structures Option**
- **Agricultural Activities Option**
- **Easement of Access and Right of Way Option**
- **Ecosystem Services Option**
- **Forestry Activities Option**
- **Hunting and Trapping Options**
- **Maintenance Cutting Option**
- **Management by Grantee Option**
- **Public Access Option**
- **Reserved Residential Area Option**
- **Trails and Woods Roads Option**
- **Watercourse Maintenance and Erosion Control Options**

COMMENTARY

PLEASE ALSO REVIEW THE SEPARATE COMMENTARY TO THE BASE MODEL.

IN BOTH THE BASE MODEL AND THE OPTIONS, ALTERNATIVE LANGUAGE IS INDICATED BY BRACKETS AND BOLDING.

NUMBERING CROSS REFERENCES ARE BOLDING TO FACILITATE EDITING.

NOTE ANY REQUIRED DEFINITIONS TO BE ADDED TO THE DEFINITIONS SECTION OR OTHER CHANGES TO THE BASE MODEL.

The original 2014 Model Easement, included very few landowner (Grantor) retained rights. A list of options was appended, but no suggested language for the options was included. A major goal of the 2019 Model was to provide basic options for Grantor and Grantee rights with full language. Not all of the options are appropriate for every property and this is by no means a comprehensive compilation of possible clauses. It cannot be said often enough: “the conservation values drive the drafting”. The threshold question for all drafting is “What are we trying to protect?” Conservation easements should be drafted with the specific property being protected in mind, its intended uses and conservation values, as well as with careful consideration of the capacity, procedures and mission of the land protection entity which will hold the restriction. Easement drafting is a process of thoughtful negotiation and the land trust must be willing to draw the line on options which are not appropriate for the project. It is the land trust’s duty to decide what is important to protect and how to do that in the field. The attorney’s job is only to attempt to create a legal document that will do that.

Both the Grantor, and the Grantee, must be mindful that the IRS regulations state that “ a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests”. The drafter of a conservation easement must carefully consider the impact each included option may have on other portions of the easement, with particular consideration of the characteristics of the property to be protected Above all, it should be remembered that a conservation easement is meant to be perpetual.

The Options and this Commentary, should not be construed or relied upon as legal advice or legal opinion regarding any specific facts or circumstances. They are not a substitute for representation of competent counsel. The Model and the Options are based on the current state of the law, but laws and their interpretation can change, and indeed this area of the law is rapidly evolving and is filled with gray areas. The parties, both land protection entity (Grantee) and landowner (Grantor), should each seek competent counsel before entering into a conservation easement. The Land Trust Alliance Standards and Practices, as revised, Standard 9, Practice A states: “[The land trust]obtain a legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.” This is a recognition that a smart investment in legal services from the start in drafting and reviewing an easement could save many times that amount in litigation or stewardship costs, or missed opportunities for years to come. The Model and the options are a template that should be revised and modified, and sections added or omitted, to meet the particular needs of the property and the parties. All such modifications and factual differences have the potential to affect the interpretation and enforceability of the document. And although the parties are, hopefully, working toward the same goal of protecting the Conservation Values of a property, they still may have very different interests in how that should be done. Accordingly, Grantor and Grantee should be separately represented.

Commentary on the specific Options is located at the beginning of each Option to aid the drafter. The Forever Wild Easement option was created as a stand-alone easement for land intended primarily as an intact nature preserve and is not directly attached to these Options. The Forever Wild Easement commentary precedes that document.

- **Accessory Structures Option**

This allows structures without full footings or foundations. The parties should set forth a maximum total footprint to avoid undue impact on the Conservation Values by an excess of such structures. It should be noted that the Base Model definition of Structures does not include improvements which do not have a permanent location on the ground.

4.X. Accessory Structures.

The right to construct and place temporary or minor accessory structures set forth herein (“Accessory Structures”), to accomplish the activities permitted to Grantor under this restriction, including construction and placement of (a) roosting, watering, and nesting shelters for wildlife;

(b)fences, benches, observation blinds, interpretive and directional signs, tent platforms or portable shed; and (c) pole sheds and gazebos used for private non-commercial recreational purposes. No such structures will contain foundations, full footings or any facilities requiring a septic or other underground waste disposal system or require the excavation of land. **[The total area coverage of all structures, excluding fences, constructed under this paragraph should not exceed _____[ex. 200] square feet in aggregate footprint. “Footprint” means the surface space occupied by a structure or device including, but not limited to, closed and unenclosed porches and garages, unenclosed decks, raised surfaces or roofs, basements and attics, measured as a product of the outermost width and length dimensions.]**

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- **Agricultural Activities Option.**

This option is only recommended for hybrid easements whose purpose includes a balancing of many conservation values.

The Purpose contained in the Base Model “to assure that the Protected Property will be retained forever predominantly in its natural, scenic, [agricultural,][forested,] and open space condition for the protection of the Protected Property’s Conservation Values” inherently involves a balancing of various Conservation Values by the land trust, the holder and enforcer of the easement. Easements where agriculture is the primary purpose should utilize an agricultural easement format where a priority is set on preservation of agricultural soils, productivity and farm viability, over and above other conservation values. In an agricultural easement, only to the extent those other conservation values do not conflict with the agricultural conservation values, will they be protected. Agriculture usually requires a variety and number of structures: structures for livestock, equipment, produce, supplies, residences for farm owners and farm help, and structures to sell products. Agriculture that is structure intensive is beyond the scope of this Option and the Model Easement. In 2014 a Model Agricultural Easement was created with the assistance of American Farmland Trust, Inc., Connecticut Farmland Trust, Inc. and CLCC, among others. It is available on the CLCC website. We refer you to that model as an example of a comprehensive agriculture easement designed to reflect conditions specific to agricultural use and provide the flexibility necessary for farm operations to meet evolving agricultural practices and market demands. That easement is also in the process of updating to reflect evolving law on easements, but remains a useful resource when drafting such an easement.

Perhaps the most important part of any Agricultural Activities provision is to carefully define Agricultural Activities. Reliance on the state statutory definition of Agriculture is not recommended. Statutory definitions change and sometimes they change too slowly, or too quickly. Connecticut’s statutory definition does not mention agritourism activities and this has been the source of some contention. Hay rides and corn mazes may be considered agriculture, but what about weddings and birthday parties on the farm, wineries, farm concerts etc.? These can all support the financial viability of a farm, but may not be consistent with other important

conservation values. Our Option does include alternative language to allow such activity, but requires that it not be impact the Purpose significantly and the Option permits such activities only at the sole discretion of the land trust. Farming is not about scenic qualities, even though to many of us, a farm is a beautiful thing.

Despite the inherent difficulties, the 2019 Working Group considered that an Agricultural Option should be included in this revision as it is frequently sought in connection with a hybrid easement where some limited agricultural rights are desired to be retained over a portion or all of an easement area. Care should be particularly taken to avoid as much as possible inherent conflicts between the different parts of the purpose (for example, the right to construct a large barn in a location which will block an important scenic view).

Connecticut's farmland is not just valuable open space, but vitally important to the state's growing and evolving \$3 billion agricultural sector. As the land protection movement has evolved, land protection entities and conservation practitioners are increasingly cognizant that previous open space conservation easements do not always adequately or appropriately protect agricultural uses even when they were intended to do so. The Option is intended to provide only basic agricultural language, but including a broad definition of Agricultural Activities for consideration.

Conservation easements should be drafted with the specific property being protected in mind, its intended uses and conservation values, as well as with careful consideration of the capacity, procedures and mission of the land protection entity which will hold the easement.

4. X FARM, AGRICULTURAL AND WILDLIFE MANAGEMENT ACTIVITIES.

A. Agricultural Activities Defined. Grantor retains the right to conduct Agricultural Activities, as defined herein, **[in the area described on Schedule ___/ shown on the Plan etc.]** on the Protected Property. Agricultural Activities include the following activities, provided that any activity requiring structures subject to and governed by the Agricultural Structures Limitations set forth below:

1.) The cultivation of the soil. Cultivation of the soil includes the creation, restoration, and/or maintenance of fields, grasslands, pasture, coverts, or meadows for commercial and/or non-commercial farm, nursery, agricultural or Wildlife Management purposes, including by way of example and not limitation: clearing forest trees and other growth for the purposes set forth above; clearing and preparing land for agricultural, pasture, garden, or open meadow use; planting, seeding, and re-seeding agricultural crops, but not species with known invasive characteristics; trimming and cutting brush and trees in order to maintain clear borders around or paths within such areas; applying herbicides, pesticides, fungicides, and fertilizers for bona-fide agricultural purposes; irrigation, and farm pond impoundment; composting and soil enhancement; and other similar uses upon written request to the Grantee, in Grantee's sole discretion; and

2.) Production of Agricultural Commodities. The cultivation, raising, production, harvesting, or sale of any agricultural or horticultural commodity grown on the Protected Property, including, but not limited to: field crops and biofuels; fruits, nuts, tree products

and non-timber forest products; vegetables; horticultural specialties, including seeds, nursery stock, Christmas trees, compost, and flowers; livestock and livestock products, including cows, horses, swine, poultry, bees, fur bearing animals and wildlife; the private or commercial stabling, breeding, training, riding, pasturing and care of horses and other livestock, and other animals, including maintaining a riding stable; Forestry Activities; and other similar commodities upon written request to the Grantee, in Grantee's sole discretion.

3.) Associated Uses. Agricultural Activities shall also include the following associated uses which are customary, supportive and agriculturally compatible uses in Connecticut:

1.) The lawful onsite disposal of animals and agricultural products raised or housed on the Protected Property and the storage and treatment of biodegradable organic waste from permitted activities;

2.) Interior stone walls may be removed or breached and stones may be moved within the Protected Property for Agricultural Activities and Forestry Activities. **[If there is an Reserved Residential Area add: Provided, however, that boundary (exterior) walls and walls delineating the Reserved Residential Area, if any, are not to be removed, but may be breached for Agricultural and Forestry Activities.]**

[3.) Agritourism Activities such as corn mazes, hay rides, farm concerts, birthday parties and weddings on the farm which do not significantly impact the Purpose of the Easement, upon written request to the Grantee, in Grantee's sole discretion.]

4.) Other similar uses upon written request to the Grantee, in Grantee's sole discretion.

B. In General. An adequate buffer of high grasses, shrubs, or trees should generally be maintained between the permitted activity and adjacent slopes, wetlands, and watercourses on the Protected Property in order to ensure the preservation of the quality thereof and to protect the Purpose of the Conservation Restriction. Applications of herbicides, pesticides, fungicides, and fertilizers may be applied for bona fide agricultural purposes and shall be undertaken in accordance with law, agricultural best management practices, and in light of the actual needs of the crops or cover being grown at any time and the slope, filtration, and run-off characteristics of the site. The use of fields or wooded areas as pasture for animals shall be managed to limit erosion and sedimentation of the Protected Property and limited in extent so as to prevent detrimental levels of animal waste.

Agricultural lands shall be managed in accordance with sound soil and water conservation practices in a manner which will not destroy or substantially and inevitably diminish the

[option: Grassland areas shall not be mowed during the bird nesting season and shall only be mowed at a height and frequency that supports the continuation of a meadow state.]

C. Agricultural Structures Limitations. Grantor retains the right to maintain, replace and /or construct:

1.) Existing Agricultural Structures. Existing agricultural structures and improvements as shown on **[the Baseline Report/ the Plan]** may be repaired, **[enlarged up to ____ percent]** and replaced at their current locations for agricultural purposes without the approval of the Grantee.

2.) Temporary and Small Agricultural Structures. Temporary or small agricultural structures, such as run-in sheds or chicken coops as limited herein. Such structures shall not exceed an aggregate of _____ sq. ft in impermeable surface Footprint. No such structures shall contain foundations, full footings or any facilities requiring septic or other underground waste disposal system or require the excavation of a significant amount of land unless approved by Grantee in its sole discretion.

[Option for Specific List of allowed Structures: 2.) Permanent Agricultural Structures. One barn to house livestock or farm equipment, not to exceed _____ sq.ft in footprint [specify location if possible]. Said structure may be serviced with improvements for fresh water supply, and utilities. A septic waste disposal is/is not permitted. Grantor shall notify Grantee at least ____ days before construction of any such structure.]

[Option – Defined Area for Structures 1.) New buildings and other structures and improvements to be used solely for agricultural production on the Protected Property, including barns, equipment sheds, and improvements to be used for agricultural production purposes of sale of farm product predominantly grown or raised on the Protected Property but not including any dwelling or farm labor housing, a be built within [the area defined in Schedule ____ (“the Farmstead Building Area”]

Add to definitions section:

“Forestry Activities” means: planting, growing, spraying, pruning, thinning, cutting, and clearing of live or dead trees

“Wildlife Management” means management of areas of the Protected Property for the benefit of specific types of wildlife by: (i) selectively cutting trees and shrubs over a defined area or areas to thin or clear the forest canopy to create or maintain a habitat i.e. openings comprised of warm season grass or maintained in an early successional state; and (ii) planting trees, shrubs, bushes, and grasses that do not have invasive characteristics for the purpose of creating or maintaining habitat for specific types of wildlife.

“Footprint” means the surface space occupied by a Structure or device including, but not limited to, closed and unenclosed porches and garages, unenclosed decks, raised surfaces or roofs, basements and attics, measured as a product of the outermost width and length dimensions.

This Option may require the addition of a Schedule for “Farmstead Building Area”

Consider adding the options for Watercourse Maintenance and Erosion Control when including an Agricultural Activities Option

- **Easement of Access and Right of Way Option**

Some easements do not have direct access to a road, accordingly the drafter should be sure to include a right of access as necessary for the land trust monitoring and other rights. The land trust must have access to the property for monitoring, though it can be across other land of the land trust.

5.3 Grant of Permanent Easement of Access and Right of Way. Grantors convey to Grantee an easement of access and right of way across other land of Grantors, more particularly bounded and described in Schedule ____ attached hereto, as reasonably necessary for the specific purpose of access to the Protected Property for monitoring the Protected Property, and administering, performing and enforcing the Grantee's rights and obligations under this Easement.

- **Ecosystem Services Option**

This is an emerging area of conservation easement drafting. Some such functions The Working Group believes it is important for new conservation easements to allow for cutting edge climate change mitigation programs if not inconsistent with the Purpose of the Easement.

Such functions may involve structures. Consider whether to limit these activities to a portion of the Protected Property. Alternative provisions could retain the rights in the Grantee, split them between the parties or limit them to the original Grantor. Deductibility of easement donations may be affected if any rights retained conflict with other important conservation purposes.

4. X Ecosystem Services. Subject to Grantee's prior written consent, in its sole discretion, Grantor may exercise the right to participate in, and retain any income received from, any current or future programs with governmental agencies or private entities, intended to provide incentive or compensation for the restoration or relocation of rare, imperiled, threatened, or endangered species or communities on the Protected Property in a manner designed to restore historic natural systems, or for other environmental preservation or enhancement efforts (including but not limited to wetland mitigation (other than the creation of wetlands from historically upland property), stream bank restoration, carbon credit, and similar programs), provided such program is consistent with the Purpose of this Easement and enhances the Conservation Values. Grantee is not responsible for monitoring any such activities for compliance with permit(s) or requirements therefore, and the Grantee has no obligation to enforce the permits or requirements. Grantor may delegate or assign such right to Grantee, in its sole discretion.

- **Forestry Activities Option**

This option provoked the most discussion among the Working Group participants. Particular care should be taken to select terms that are appropriate to the property, the goals of the parties and the capacity of the land protection entity.

A Forestry Activities Option was included for consideration as a tool to enhance conservation values and purposes while also providing the benefit of working lands rights to landowners. Dependent on the characteristics of the Protected Property and the desires of the landowner and land protection entity, the contrary, a Forever Wild Easement, or the omission of Forestry

Activities may also be appropriate. Forestry practices can create habitat, control invasive species, maintain non-self sustaining forest types and fill in for the absence of the natural occurrence of fire. This Option was specifically designed to protect against environmentally unsound forest management practices, for example those which create erosion and sedimentation, or high grading (the removal of all high quality trees such that there is poor regeneration of woodland).

Forestry Activities provisions can vary greatly depending on the Conservation Values to be protected, the size of the property, its vegetation, water resources and soil type, and the capacity and desire of the land trust to oversee forestry practices. There is no one size that fits all. The option below incorporates a basic division of such activities into personal and commercial, because these are a good indicator of scale and intensity. This Option also allows for as-of-right forestry for personal use, to control disease, to maintain existing open areas and to remove hazard trees. The option requires that any Commercial Forestry at a minimum require qualified supervision and a forest management plan, unless waived by the land trust. The best plan will not be adequate if it is not carried out appropriately. The Parties may wish to incorporate volume limits such as board feet or cords/year, but these are highly dependent on timber volume, stand type and other specific information on the Protected Property and their appropriateness may change over time.

If the Easement is to include a right to conduct Forestry Activities, whether personal or commercial, the Baseline Report should contain a basic Forest Management Plan that quantifies timber volume and site indices. The Baseline Report should also contain information designating existing open areas.

4.X Forestry Activities.

A. In General. The right to conduct Forestry Activities is permitted on the Protected Property. Any Forestry Activities conducted on the Protected Property shall be (i) carried out in accordance this paragraph (ii) in accordance with generally accepted Best Management Practices, including by way of illustration and not limitation, the most current Best Management Practices for Water Quality While Harvesting Forest Products, prepared by the Connecticut Department of Energy and Environmental Protection or any successor management practices or regulations promulgated by said Agency, (iii) conducted in a manner designed to minimize erosion or sedimentation of the Protected Property, and (iv) carried out in a manner to minimize impact on the Conservation Values of the Protected Property. Without permission of Grantee, Grantor may conduct Forestry Activities to reasonably control insects and disease, prevent personal injury and property damage, harvest wood products for personal use, and to maintain existing open areas on the Protected Property. Any other Forestry Activities shall be carried out under the supervision of a Qualified Natural Resource Professional and in accordance with a Forest Management Plan **[and a detailed Harvest Plan]** approved by Grantee, unless said plans[s] or supervision are waived in writing by Grantee.

B. Forest Management Plan.

If a Forest Management Plan is required pursuant to this paragraph, said plan must contain appropriate methods and procedures to protect the Conservation Values of the Protected Property and said plan must require oversight by a licensed forester over any timber harvesting and cutting or removal of live or dead trees to ensure compliance with the plan.

[Such Forest Management Plan shall also contain the following information: (i) the location of boundary lines, existing conditions including maps and documentation depicting stands and their existing vegetation, (ii) reasons for harvest practices (iii) location and timing of planned harvests, (iv) plans and locations for access ways and access improvements needed.] [Forest harvests for the purpose of creating fields for permitted Agricultural Activities, if permitted, do not require a Forest Management Plan.]

[Except for clearing for permitted Agricultural Activities (if any), the currently forested area of the Protected Property, as shown in the Baseline Report, shall be maintained in a canopied state of one or more stages of successional forest growth.]

[re-number as needed] C. Definitions. “Forestry Activities” means: planting, growing, harvesting, spraying, pruning, or cutting or removal of live or dead trees, other than Christmas trees and nursery stock [(which are defined as Agricultural Activities)], including the right to construct, use and maintain access roads or trails, and to use motorized vehicles, only as necessary for such operations. Such activities also may include actions to preserve or enhance habitat for particular wildlife species and overall forest productivity.

Add to definitions section:

(a) “**Commercial**” means the purchase and sale or exchange of goods and commodities, other than *de minimus* amounts that bear no rational relationship to for profit activities, arising from activities permitted to Grantor in this Easement.

- **Hunting and Trapping Options**

Note: If hunting is not otherwise prohibited, it is allowed.

No provision will be perfect in all circumstances. Accordingly we have provided a strict provision and a less restrictive provision. The land trust may need to rely on the availability of Approval in Unforeseen Circumstances for some situations if it chooses the stricter provision.

3.X **Prohibition on Hunting and Trapping.** There shall be no hunting or trapping of animals.

OR

3.X **Prohibition on Hunting and Trapping.** Grantor shall not hunt or trap animals on the Protected Property, or grant permission to others to do so, except with the Approval of Grantee, in accordance with law, and as reasonably required to: (i) protect garden crops, agricultural crops, meadows and pastures, or (ii) remove nuisance animals that pose an immediate risk to human or animal health or safety (for example animals with rabies or distemper).

- **Maintenance Cutting Option**

This provision recognizes that a landowner will want and need to maintain the property. The suggested language is directed at maintaining the current condition of the property, to minimize the opportunity for abusive overbroad interpretation. It is therefore most important that the current

condition of the Protected Property be documented in the Baseline Report, Plan or other permanent record.

4.X Maintenance Cutting. The right, **[upon prior written consent of Grantee, which shall not be unreasonably withheld, delayed, or conditional,]** to cut and clear vegetation for existing trail and road maintenance, and to otherwise preserve the current condition of the Protected Property, including maintaining current vistas **[elaborate]** and preserving and maintaining existing open areas of the Protected Property, including the routine mowing, seeding, haying, baling or otherwise maintaining the open fields, if any. No such cutting or clearing shall be permitted unless the existing condition of the Protected Property as to such condition is documented in the Baseline Report or otherwise approved in writing by the Grantee.

- **Management by Grantee Option**

Although typically the landowner retains the responsibility of caring for their property, a land trust will in certain circumstances wish to protect the Conservation Values by performing management activities which the landowner is unwilling or unable to perform.

5.X Management by Grantee. The right, but not the obligation, to monitor the condition of plant and animal populations, plant communities, and natural habitats on the Protected Property, and to manage them, if necessary, to ensure their continued presence and viability on the Protected Property. Such activities shall be in accordance with management practices of Grantees, which may include but not be limited to **[invasives removal]**, mowing, fencing, planting, haying, trail clearing and restoration by filling, seeding, prescribed burning, etc.

- **Public Access Option**

Public Access can take many forms. We have provided sample trail language.

6.0 PUBLIC ACCESS. Consistent with the Purpose of this Easement, Grantee is conveyed the right to establish, maintain and manage recreational trail(s) for public use on the Protected Property as set forth below: [elaborate]

[OPTION]] Such trail(s) shall be no more than _____ (____)feet in tread width [this should be over 36" to accommodate wheelchairs under applicable law]and shall be located _____. Grantee may use, establish, or relocate the trail to remain contiguous with trails on abutting properties now or hereafter established for the safe and orderly passage and re-passage of the public provided, however that any such relocation shall be subject to the approval of the Grantor, which approval shall not to be unreasonably withheld. Grantee may mark and designate the trail(s) with such symbols, blazes or signs as it deems necessary to regulate the safe and orderly usage of the trail. Grantee may improve the trail with, by way of example and not limitation, timber steps, boardwalks, railings, culverts and bridges, barriers to discourage use by motor vehicles, cairns, surfacing with permeable materials and alterations necessary to prevent erosion, and may selectively cut and prune vegetation, and remove leaners and blowdowns, to preserve safety and provide scenic views.]

[Use of the trail by the public shall be limited to walking, running, hiking, cross-country skiing, snow-shoeing, and similar non-motorized, passive recreational uses,[including bicycling, handicapped mobility devices, use of service animals, dog walking and/or equestrian use],

provided such use shall be subject to the rules, regulations and/or limitations, including regulations established by Grantee to regulate trail activities and uses. The Grantee shall take reasonable steps to prevent the general public from using the trail in a manner inconsistent with its intended purpose. The Grantee shall take reasonable steps to ensure that the trail is used only in such a manner that the responsibility of the Grantor for any injury to person or property shall be limited to the maximum extent possible in accordance with Sections 52-557g through 52-557i of the Connecticut General Statutes as amended. The Grantee shall make the trail available to the general public consistent with the provisions hereof without charge, rent, fee, or other commercial service.]

- **Reserved Residential Area Option**

The easiest way to create a Reserved Residential Area is to cut it out of the easement. An additional way to provide for Residential and other structures is to specifically list them in the document.

The following Reserved Residential Area Option should only be used if there is a specific reason to keep the Reserved Residential Area within the easement's protections.

The main benefit to including a Reserved Residential Area, rather than cutting the area completely out of the easement, is that unless otherwise provided, it prevents division of the residential area from the rest of the property and requires less monitoring than restrictions limiting building size, etc. Another alternative is to place a deed restriction on the land not subject to a conservation easement. The deed restriction can limit division or subdivision and run to the benefit of the holder of the easement on the abutting land, thus qualifying as perpetual under Connecticut law.

It is very important that the boundaries of the Reserved Residential Area be adequately defined to locate them on the ground, in a place that does not impact the Conservation Values, and in a way that makes monitoring practical and that your reasoning for such location is apparent. The Baseline Report should also document that the location does not negatively impact the Conservation Values. “Floating lots” (not located on the ground) ~~do~~may** not meet the IRS deduction's perpetuity requirements. The IRS requirements in this area are complex and it is especially important to consult**

knowledgeable counsel when incorporating a building area into an easement.

4.X **Reserved Residential Area.**

A. Establishment of Reserved Residential Area. Notwithstanding any other provision herein to the contrary, Grantor reserves and retains a Reserved Residential Area as shown in **[Schedule B] [the Plan]** on the Protected Property for the maintenance of the existing Residential Dwelling, if any, or construction of a new residential Dwelling Unit (as hereinafter defined), and Accessory Buildings (as hereinafter defined) and to provide access and utilities thereto. All improvements for such Dwelling Unit and its Accessory Buildings, exclusive of access drives and power and communication utility lines, shall be located in the Reserved Residential Area. Grantor and Grantee agree that the Reserved Residential Area is located in an area where it will not have an adverse impact on the Conservation Values.

At least thirty (30) days prior to the Grantor constructing a new Residential Dwelling in the Reserved Residential Area, Grantor shall provide Grantees with an A-2 survey showing the location of the boundaries of such Reserved Residential Area and the location of the Dwelling Unit and Accessory Buildings, if known. Such plan shall also show all mitigating measures necessary to ensure that the construction activities will not have an adverse impact on the Purpose of this Easement.

1.) Definitions. The following definitions apply for purpose of this Paragraph:

a.) “Dwelling Unit” means a structure or self-contained portion thereof designed as a single-family dwelling (including associated wells and septic systems). A Dwelling Unit may include an in-law apartment, household guest and employee quarters and a home occupation or professional offices for the occupant as allowed by law and may have Accessory Buildings as hereinafter defined.

b.) “Accessory Building” means other buildings, structures, and improvements customarily incidental and subordinate to the principal building. Such Accessory Buildings may include or contain separate guest and employee quarters, studios, workshops, swimming pools, tennis courts, solar panels, flagpoles, gazebos, barns, stables, and other buildings and facilities for forestry and agriculture activities and for the personal use of Grantor and others on the Protected Property. Improvements for fresh water supply, utilities, and communication, satellite dishes, septic waste disposal facilities, outbuildings, garages, and outdoor furniture and ornaments, are all allowed as by law.

B. Access to Reserved Residential Area. Within the Reserved Residential Area, Grantor reserves the right to construct, improve, pave, and maintain private driveways to

permitted structures. Grantor may construct private roads and rights-of-way to such improvements outside of the Reserved Residential Area, subject to the prior Approval of Grantee, if it is impractical to do so within the Reserved Residential Area, but any such improvement shall be undertaken and maintained in a manner that creates the least possible disturbance to the Conservation Values protected by this Easement and in no event shall such improvements be greater than the minimum size and area required by law.

[OPTION: C. Renewable Energy/Ancillary Improvements. Without permission from the Grantee, improvements necessary to undertake alternative energy activities such as wind, solar, methane and other similar energy generation activities, [as well as communications facilities such as cell towers] may be built exclusively within the Reserved Residential Area [for use principally on the Protected Property.] [Construction of a telecommunications tower is prohibited.] Subject to the prior Approval of Grantee, Grantor may construct private roads and rights-of-way to such improvements outside of the Reserved Residential Area, , if it is impractical to do so within the Reserved Residential Area, but any such improvement shall be undertaken and maintained in a manner that creates the least possible disturbance to the Conservation Values protected by this Easement and in no event shall such improvements be greater than the minimum size and area required by law.

[Option D. Grantee may permit construction of other improvements in the Reserved Residential Area which are not inconsistent with the Conservation Values, in its sole discretion.]

[renumber as required] E. Prohibitions in the Reserved Residential Area

The following shall apply to uses within or associated with the Reserved Residential Area:

1.) Subdivision. The legal or de facto division, subdivision, re-subdivision, or boundary line adjustment of the Protected Property, including the Reserved Residential Area, or any division of the title to the Protected Property, including the Reserved Residential Area, in the form of condominium or cooperative form of ownership, or other form of common ownership, transfer or division that allows separate control and management of different areas of the Protected Property, is hereby prohibited. The Protected Property, including the Reserved Residential Area, may only be conveyed as a whole, regardless of its current configuration in multiple parcels, except as follows:

With prior approval from the Grantee, Grantor may convey any portion of the Protected Property or the Reserved Residential Area to any organization or government entity that would qualify as an eligible assignee of this Grant as provided herein.

2.) Use for Development. The Protected Property and any portion thereof shall not be included as part of the gross area of other property not subject to this Grant for the purposes of determining density, lot coverage, or open space requirements under otherwise applicable laws, regulations, or ordinances controlling land use and building density. No development rights that have been encumbered or extinguished by this Grant shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise; provided, however, that with Approval of the Grantee, this paragraph shall not preclude such transfer

of development rights resulting from the destruction or demolition of any existing residential building on the Protected Property.

3.) Invasive Species. There shall be no planting of Invasive Species.

4.) Roads. Except for private driveways serving the permitted Dwelling Units and Accessory Structures, as defined herein, there shall be no construction of roads with impermeable materials, unless required by governmental authorities or necessary to prevent harmful runoff, erosion, or sedimentation of wetlands or areas of the Protected Property.

5.) Erosion. Grantor's activities shall be conducted in a manner designed to prevent runoff, erosion, sedimentation, or drainage flows that would have an adverse impact on the Protected Property or be inconsistent with the Purpose of this grant of Conservation Restriction.

6.) Trash. There shall be no storage or dumping of trash, garbage, or similar unsightly or offensive waste material except for storage and composting of biodegradable waste principally produced on the Protected Property, as part of activities permitted to Grantor hereunder, hazardous substance or toxic waste, nor any placement of underground storage tanks in, on, or under the Protected Property. The preceding sentence shall not apply to the aboveground presence, use, or storage on the Protected Property of small quantities of the above mentioned substances that are generally recognized to be appropriate to normal residential uses on the Protected Property.

7.) Alteration of Water Resources. Pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor activities on the Protected Property, that would be detrimental to water purity, or that materially alter natural water level and/or flow in or over the Protected Property are prohibited, except as may otherwise be provided in this Easement

8.) Other Use. Any other use of the Reserved Residential Area which would be inconsistent with the Purpose of this Grant or that would impair the Protected Property's Conservation Values outside the Reserved Residential Area is prohibited, unless such use or activity is deemed necessary by the Grantor and Grantee for the protection of the Purpose of this Easement, in which case such use or activity shall be subject to the prior written approval of Grantee at Grantee's sole discretion.

Need: Schedule B or Plan identifying the boundaries of the Reserved Residential Area. It is best that this information be included in a recorded document, not just the Baseline Report.

• **Trails and Woods Roads Option**

4.X Trails and Woods Roads.

The right to construct, relocate on site, repair, maintain, and use unpaved trails and Woods Roads(as defined herein), stone walls, bridges, culverts, gates and fences in furtherance of the activities permitted herein only, and the right to utilize motorized vehicles in performing construction, repair and maintenance activities. Trails and Wood Roads shall be planned, located, constructed and used in a manner to substantially

prevent sedimentation or erosion of the Protected Property and adverse impacts on wetlands and watercourses on or adjacent to the Protected Property. The extent and use of such improvements shall not, in the aggregate, have an adverse impact on the Purpose of this Easement. The use of any on-site materials such as sand and gravel must be done in a manner that is limited in scope and impact consistent with protecting the Conservation Values of the Protected Property. Upon completion of removal of on-site materials, Grantor shall restore removal location in conformance with Treasury Regulations §1.170A-14(g)(4)(i). Such trails and Woods Roads may be surfaced with permeable materials only, including but not limited to sand, gravel, shell, rock, or crushed stone and subsurface synthetic stabilization materials. All new trails and Woods Roads whose purpose includes vehicular travel shall be subject to the Grantee's Approval. For the purposes of this Easement, "Woods Road" means a passable vehicular roadway, surfaced in accordance with the above limitations, suitable for the activities permitted to Grantor hereunder.

- **Watercourse Maintenance and Erosion Control Options (2)**

Note: Consider adding both when there are Agricultural Activities or Forestry Activities

4.X Watercourse Maintenance.

The right to use, maintain, establish, construct, and improve water sources, watercourses, and water bodies within the Protected Property for permitted activities. Grantor may alter the natural flow of water over the Protected Property in order to improve drainage of agricultural soils, reduce soil erosion, or improve the Agricultural or Forestry potential of the Protected Property, provided such alteration is consistent with the Purpose of this Grant and is carried out in accordance with law and a Conservation Plan or applicable Forest Management Plan. Grantor may conduct wetlands and watercourse habitat improvement or restoration, including Invasive Species control, as allowed by law and the applicable Conservation Plan or Forest Management Plan.

If such activity is aimed at increasing Aquaculture on the Protected Property and would have a substantial impact on farmland soils, such activity may only be conducted with prior Approval of the Grantee, in its sole discretion.

Conservation Plan means that plan prepared by the U.S. Department of Agriculture, Natural Resources Conservation Service, or by its successor, or by a qualified conservation professional approved by Grantee. This plan shall be updated periodically, and in any event at any time the basic type of agricultural operation on the Protected Property changes or ownership of the Protected Property changes; and shall provide for management of the Protected Property in a manner consistent with generally accepted Best Management Practices, including, but not limited to, those practices identified by the Natural Resource Conservation Service (NRCS) Electronic Field Office Technical Guide, and in a manner that takes into account the protection of the Conservation Values of the Protected Property. The Grantor may develop and implement a Conservation Plan that proposes a higher level of conservation and is consistent with the standards and specifications of the NRCS Electronic Field Office Technical Guide or comparable source. Grantor shall provide Grantee with a copy of the Conservation Plan [within one year of

execution of this Grant] and with copies of any updates and/or revisions. Grantor and NRCS or other applicable organization, shall have the right to enter the Protected Property, with advance notice to Grantor, in order to monitor compliance with the Conservation Plan.

4. X Erosion Control.

The right to remove, place, or replace soil or ground material to control and reduce soil erosion, preserve man-made wetlands, restore or remove dams, and restore man-made ponds within the existing Footprint as depicted in the Baseline Report. Such modifications shall only be conducted as part of a Conservation Plan or Forest Management Plan in furtherance of Agricultural Activities and/or Forestry Activities.

Conservation Plan means that plan prepared by the U.S. Department of Agriculture, Natural Resources Conservation Service, or by its successor, or by a qualified conservation professional approved by Grantee. This plan shall be updated periodically, and in any event at any time the basic type of agricultural operation on the Protected Property changes or ownership of the Protected Property changes; and shall provide for management of the Protected Property in a manner consistent with generally accepted Best Management Practices, including, but not limited to, those practices identified by the Natural Resource Conservation Service (NRCS) Electronic Field Office Technical Guide, and in a manner that takes into account the protection of the Conservation Values of the Protected Property. The Grantor may develop and implement a Conservation Plan that proposes a higher level of conservation and is consistent with the standards and specifications of the NRCS Electronic Field Office Technical Guide or comparable source. Grantor shall provide Grantee with a copy of the Conservation Plan [within one year of execution of this Easement] and with copies of any updates and/or revisions. Grantor and NRCS or other applicable organization, shall have the right to enter the Protected Property, with advance notice to Grantor, in order to monitor compliance with the Conservation Plan.

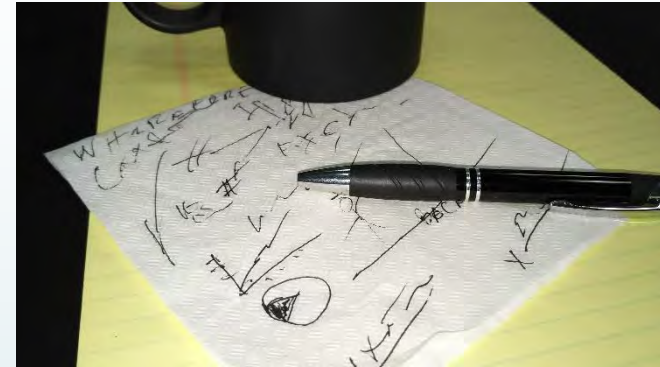
Forever Wild: Enforcing Easements, Protecting Land CBA

March 9, 2020



Keith R. Ainsworth, Esq.
51 Elm Street, Suite 201
New Haven, Connecticut

Conservation Easements and Fee Properties



Easements

- CGS 47-42a
- Model Easement
- Easier to Obtain
- Someone else still owns the land
- Increased Monitoring Duties
- More Encroachment
- Requires AG and Court approval to modify

Fee Ownership

- Simple deed
- Relatively Expensive
- Sole ownership
- Less monitoring
- May dispose of or modify protections at will
- IRS Has No Role (unless deduction taken)

Conservation Easements

CGS sec. 47-42a



“Conservation restriction” means

a limitation, whether or not stated in the form of a restriction, easement, covenant or condition,

in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, ...

whose purpose is...

to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.”



Statute of Charitable Uses Conn. Gen. Stat. § 47-2

All estates granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care and maintenance of any cemetery, cemetery lot or monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they were granted, according to the true intent and meaning of the grantor, and to no other use whatever.

aka “Statute of 1702”, first adopted in 1684



Easements Are Not Ownership and Are Reasonably Interpreted

- *Cheshire Land Trust, LLC v. Casey*, 156 Conn. App. 833, 844, 115 A.3d 497 (2015) (“*easements are not ownership interests but rather privileges..*”)
- *Stefanoni v. Duncan*, 282 Conn. 686, 701, 923 A.2d 737 (2007)(“*use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit*”)
- “[A]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement ... it generally authorizes limited uses of the burdened property for a particular purpose.” *Il Giardino, LLC v. Belle Haven Land Co.*, 254 Conn. 502, 528, 757 A.2d 1103 (2000).

PREVENTING/ADDRESSING ENCROACHMENTS

1. Make sure you have excellent **BASELINE** documentation.
2. Conduct regular monitoring of preserves and easements.
3. Measured or 'Stepped' Response
4. Develop written policies and procedures for responding to potential encroachments...(Grovenburg says can be oral policies, but don't go there)

*Grovenburg v. Rustle Meadow
Assoc., LLC*
174 Conn. App. 317 (2017)

- **Condo community; deeded easement rights**
- **Owner wanted fence; permission required from Assoc.**
- **“Not unreasonably withheld”**
- **Lesson: Holder of Easement Can exercise discretion, but must be consistent**
- **Encroacher has burden of proof**

Organizing Your Team

- **RESOURCES:**
- Photos, Aerial photos (UConn CLEAR), smart phone tags, BASELINES
- Experts – engineers, attorneys, biologists, chemists, arborists, contractors
- Arborist – Familiar with “Guide to Plant Appraisal”, Internat’l Soc. of Arboriculture, Urbana, Illinois 2018.
- Natural Resource consultants/LEP, soil scientist, GIS Consultant (aerial photos)

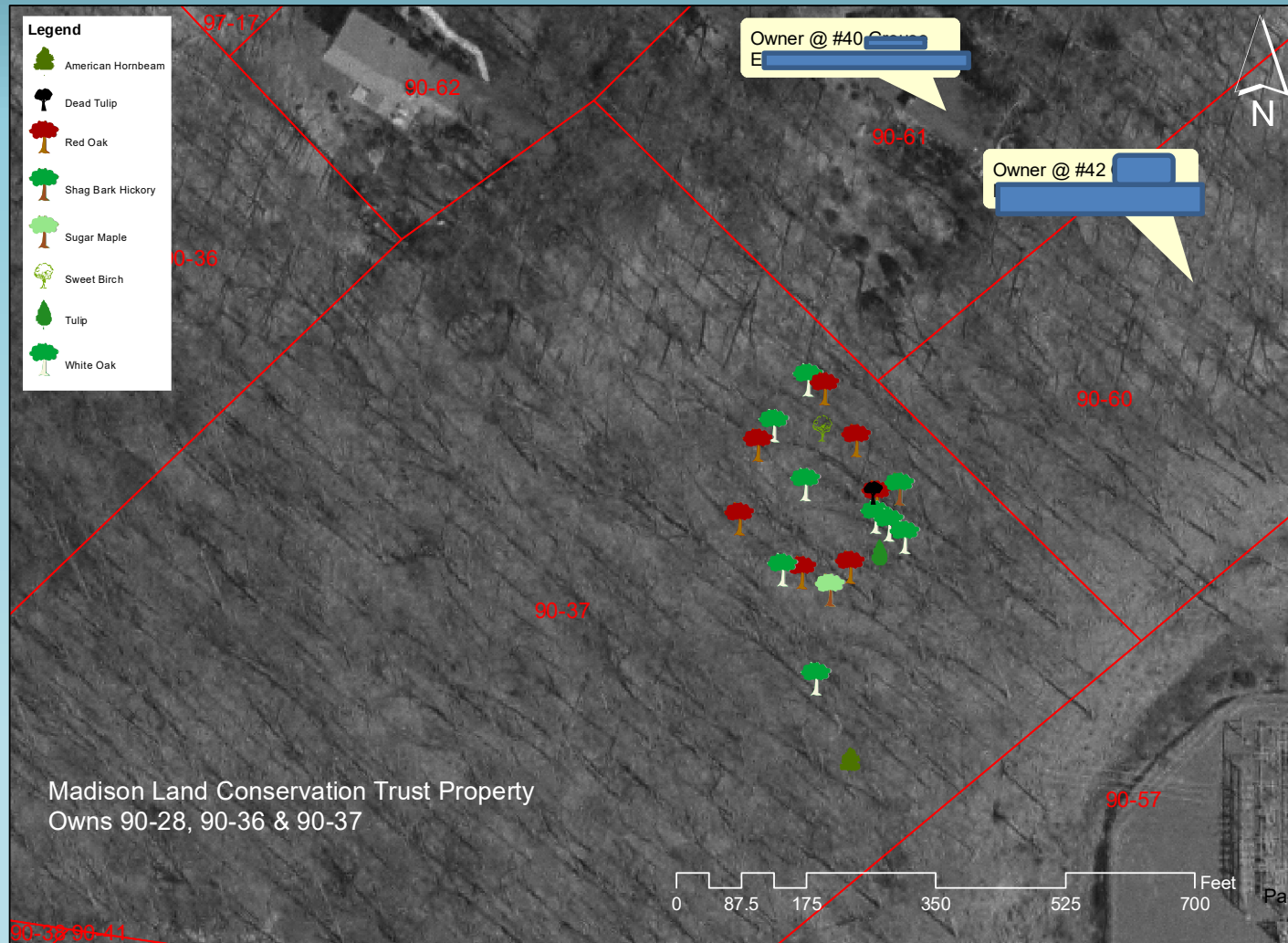
Document The Specific Loss/Injury



- Quantity Of Trees Cut
- Identify By Species
- Record Stump Diameters (DIB)
- Note Health And Condition Of Cut Trees
- Note Size And Quality Of Surrounding Trees
- Additional Disturbance?
- Map Using GPS
- Photographic Evidence
- Baseline Data

Map Extent of Encroachment Using GIS Data

Papermill Timber Encroachment



SOURCES OF EVIDENCE

Aerial Images

Satellite Images

Geographic Data

Survey Maps

Topographic Maps

Historical Maps

Tax Assessors Maps

Town Clerk Maps & Deeds

Field Survey Data

Photos & Videos



GEOSPATIAL MONITORING SYSTEMS

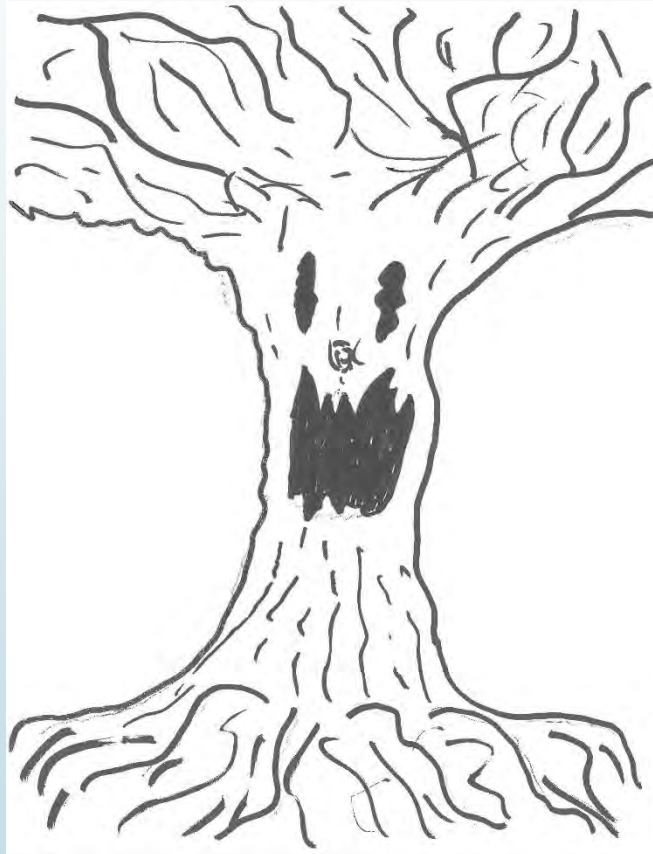
ENCROACHMENT DETECTION



Page 141 of 191

Tree Law

**“If lightning is the anger of the gods, then the gods are concerned mostly about trees.”
— Lao Tzu**





Your Trees – (Not) Your Responsibility

- Trees on private property do not have to be pruned or removed
- Land Owners/LT's not liable for fallen tree
- Exception – If you do something to make it fall, you can be liable for your actions
- HB 5533 -HB 5533 --AN ACT CONCERNING A PROPERTY OWNER'S LIABILITY FOR THE EXPENSES OF REMOVING A FALLEN TREE OR TREE LIMB.
- ***“That the general statutes be amended to impose liability on the owner of real property for the expenses of removing a tree or limb from a tree located on such real property that falls on adjoining private real property, provided an arborist, as defined in section 23-61a of the general statutes, inspected the tree or tree limb and documented that such tree or tree limb was dead, hazardous or likely to fall on an adjoining private property's land.”***

Tree Case Law

- If a tree branches or roots encroach on neighbor's land, neighbor can cut the branches or roots up to boundary line -- *McCrann v. Town Planning & Zoning Commission*, 161 Conn. 65 (1971).
- Private landowner sued neighbor after tree fell onto shed after notification that tree was dangerous. Court struck claim b/c tree was natural condition and CT failed to pass liability statute- *Corbin v. HSBC Bank USA, N.A.*, 2016 WL 3536424, 62 Conn. L. Rptr. 451 (June 3, 2016).
- See also, *New London County Mutual Ins. Co. v. Playhouse Condominium Ass'n, Inc.*, 2017 WL 1334280, 64 Conn. L. Rptr. 204 (March 2, 2017).



The “Level” Field of Play:

Know Your Rights

- Easement Holders Enjoy Special Status and Unique Protections
- Adverse Possession Does Not Run Against Conservation Easement Holders
- Multiple Damages for Harm to LT Property (CGS 52-560a)
- Attorney General Can Intervene (CGS 47-42e)
- Moral High Ground and Credibility

Participation in Agency Hearings

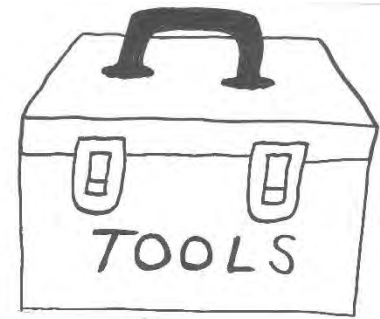
ZONE CHANGES ----- C.G. S §8-3 – Petition presented to zoning commission, signed by owners of 20% of the area of lots included in proposed change or of lots within 500 feet of property included in the zone change, 2/3 supermajority vote required.

CEPA INTERVENTION C.G.S §22a-19 – intervention in any agency (local or state) proceeding with jurisdiction over environmental issues upon showing of detailed facts

CEPA HISTORIC --C.G.S §22a-19a –Only to protect properties on the National Historic Register or in listed District. Will not protect stone walls, but possibly historic sites if “listable”

PUBLIC HEARING PETITION -- C.G.S §4-177 et seq public hearing can be required for state agency permitting action with 25 signatures. Applies also to local wetlands agencies.

Statutory Tools



- **Anti-SLAPP Suit C.G.S. §52-196a** — Early motion to Dismiss, Award of Atty Fees/Costs Where Person is Exercising Free Speech in Environmental Forum [NEW in 2018](#)
- **Encroachment Statute Conn.Gen.Stat. §52-560a** — court can award restoration or cost of restoration incl. management fees, attorney fees, costs, equitable relief & penalty of 5x restoration cost or 5K statutory damages. Attorney General can also enforce.
- **Park Replacement Statute - C.G.S. §7-131n** Taking of land previously intended for use as park or for other recreational or open space purposes. Must provide comparable replacement in value and size and give notice and hold public hearing.
- **CT Environmental Protection Act – §22a-16** – Injunction for restoration –Attorney's fees and costs

Other Laws (handout)

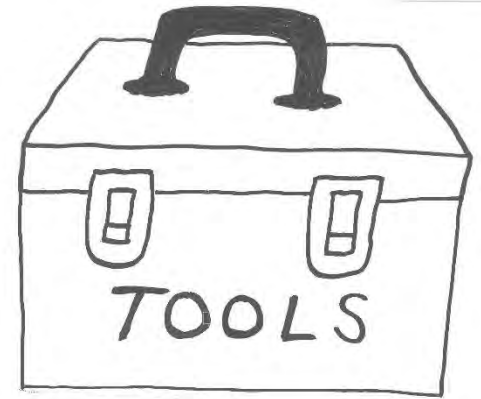


Law Offices of
Keith R. Ainsworth, Esq., LLC
51 Elm Street, Suite 201
New Haven, CT 06510-2049
Of Counsel to Cooper, Whitney & Francis, Attorneys
(203) 435-2014 k.ainsworth@kwe.com

CONNECTICUT LAND USE & ENVIRONMENTAL LAWS

- C.G.S. §22a-19/§22a-19a – CT Environmental Protection Act – (CEPA) environmental and historic
- C.G.S. §22a-16 – injunctions under CEPA
- C.G.S. §8-3(b) – Protest petition signed by owners of 20% of land area w/in 500ft of land area affected by zone change forces 2/3 majority vote.
- C.G.S. §4-174 – Administrative procedure act – allows the call of a public hearing on state agency permitting decisions on the presentation of 25 signatures.
- C.G.S. §22a-41 et seq – Inland Wetlands & Watercourses Act – often adopted verbatim on local level allowing for calling of public hearing on petition of 25 people.
- C.G.S. §47-33h (2001) excludes Conservation Easements (CEs) from Marketable Record Title Act.
https://www.cga.ct.gov/current/PUB/chap_821.htm#sec_47-33h
- C.G.S. § 47-27(b) (2002, 2015, 2016) bars adverse possession and prescriptive easement claims against non-profit land holding organizations.
https://www.cga.ct.gov/current/PUB/chap_821.htm#sec_47-27
- C.G.S. § 47-42a. Definitions (1971) Broad definition of Preservation & Conservation Restrictions
https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42a
- C.G.S. § 47-42b. (1971) Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. Allows

Tools for Making Your Case

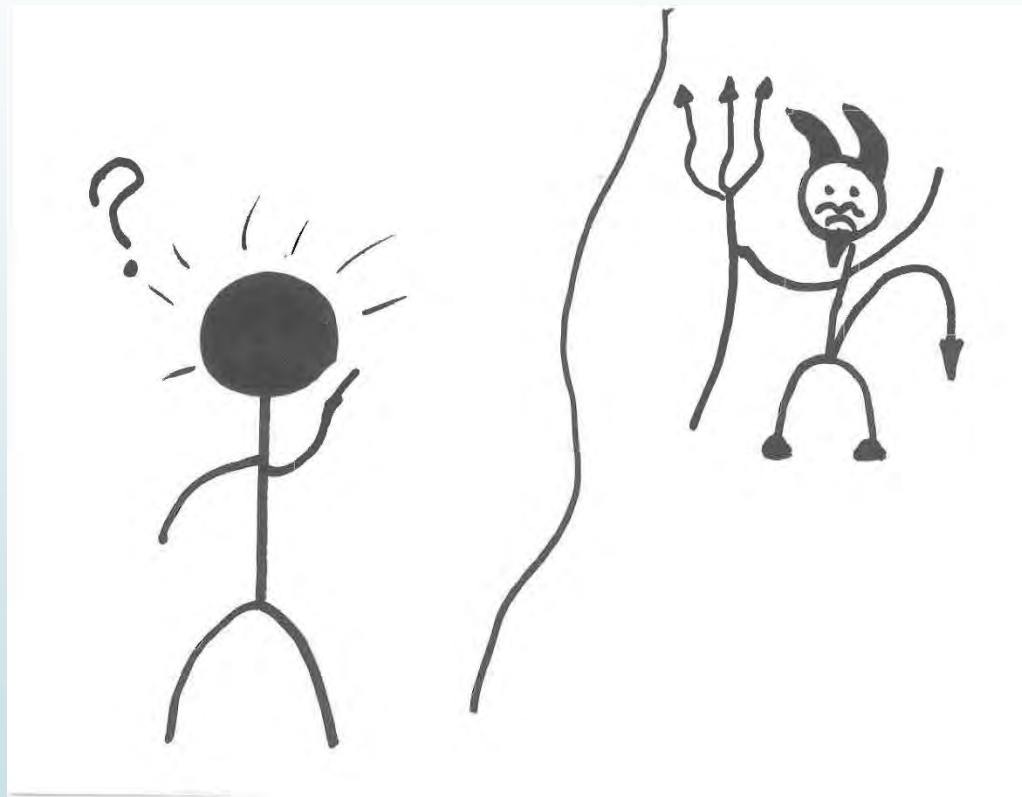


- **Media** – Don't be afraid to speak with the press, but heed Rules of Prof Responsibility section 3.6(a) (avoid undue influence on legal proceedings)
- **Diplomacy** – For encroachments, escalating pressure; peer pressure, letters, attorney communication
- **Community organizing** – Petitions can persuade; albeit with no legal effect; Social media

Common Law Tools

- **Negligence** – Allege negligence so homeowner's insurance may cover the claim.
- **Trespass** -- Intentional Invasion of *Possessory* Rights in Property.
- **Nuisance** – Unreasonable Use of One's Property interfering with reasonable use and enjoyment – no possessory right required

When Good Neighbors Go Bad – Case Studies



Welcome to the neighborhood!

Land Trust v. A Rabbit Named Marvin Schwartz

Caution with Retained Rights

- **Farmland Conservation Easement**
- **Allows a “*barn for animals*” in Building Envelope A, but not in Area B**
- **Builds tractor shed in Area B**
- **Land Trust approaches him – “I’ll throw a couple of rabbits in there”**
- **Land Trust sues – removes tractor – adds painting easel, bad art – “It’s an art studio”**
- **Art studio allowed in Area B- Building permit was for “equipment storage”**
- **Case resolves, Removes art, no tractor, reapplies for barn for animals - “What animals are in there?” “A Rabbit named Marvin Schwartz”**





House in the Easement – Complicated Easements



Legend
 tax lot
 CT Tax Parcels

Scale
 1 inch = 128 feet
 0 50 100 150 Feet
 (1) The property boundaries shown on this map are approximate. All tax lot numbers and boundaries are subject to change. (2) The map is for planning purposes only. (3) The map is not to be used for legal purposes.



Land Trust v. The Pirate Ship

- **Land Trust Fee adjacent to residential subdivision w/conservation overlay**
- **Neighbor clears portion of 3rd neighbor's land and that of Land Trust**
- **Denies he did it – aerial photos prove it happened during his ownership**
- **Says it was his land – survey proves it was not**
- **Insurance company settled after restoration report compiled under Guide to Plant Appraisal**



AERIAL PHOTOGRAPH

CT

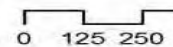
NOTES

- (1) The boundaries shown on this map are approximate;
(2) This map contains no authoritative data and is intended for planning purposes only

Legend



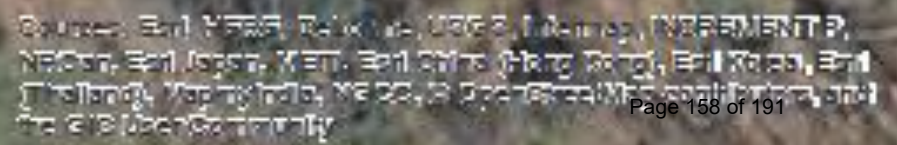
SCALE

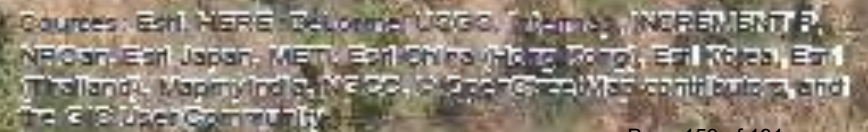


Map Prepared E

Windsor, CT 061

August, 2017





Madison Land Conservation Trust v. Suppa

















Madison Land Conservation Trust Takes Action

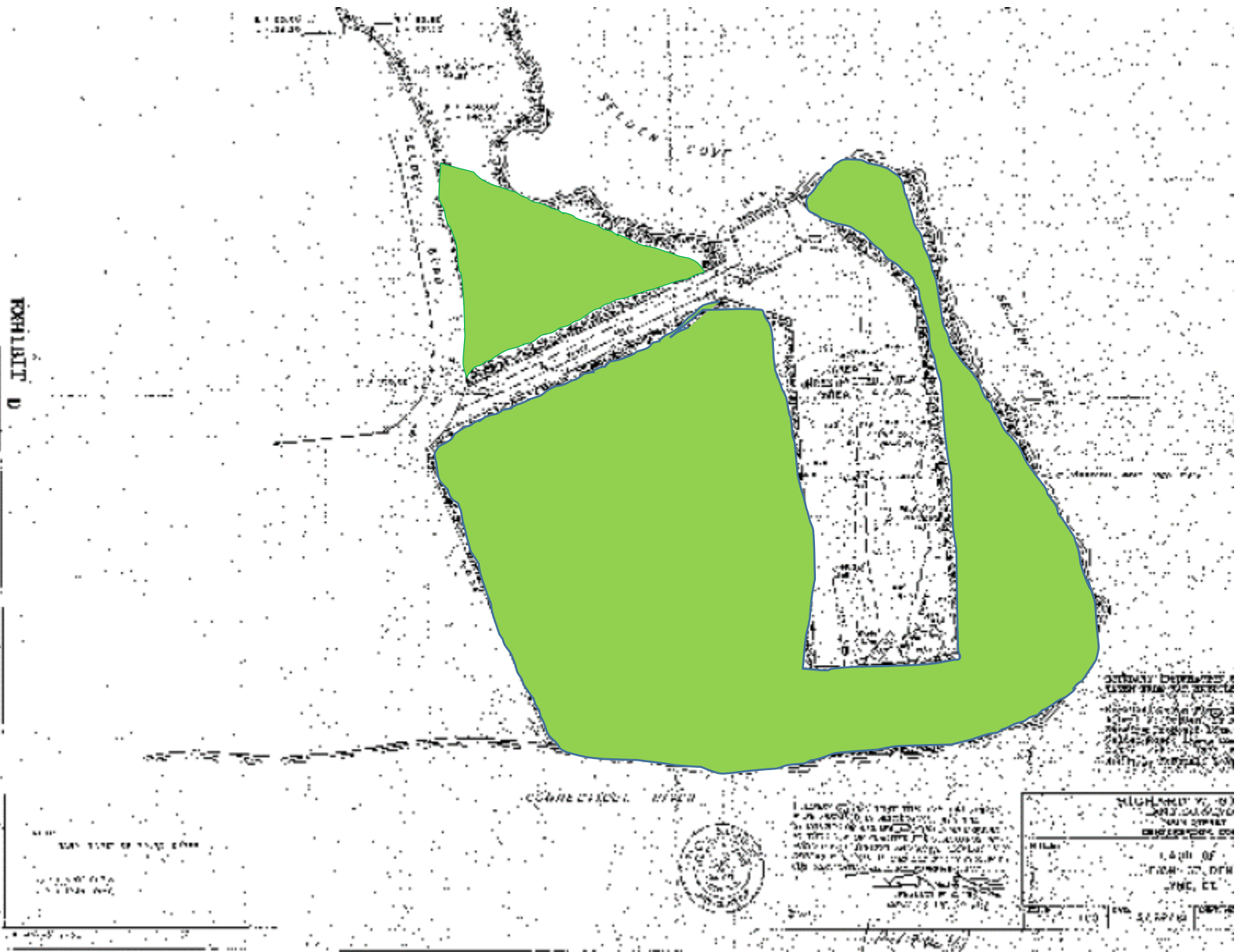
The Measured Response

- Contacted by letter – No response -
- WEO issues Notice of Violation, settled for 4 trees and 4 shrubs
- MLCT files own wetlands restoration permit 16 trees, 7 shrubs
- FILED PJR – *with TRO (immediate hearing)* -- **Practice Tip**
- Encroachment Statute, CEPA, Negligence, Nuisance, Trespass
- \$56k verdict x no multiplier, plus \$26k atty fees
- **NEVER ENGAGE PUBLIC OFFICIALS UNLESS YOU KNOW WHERE THEY STAND**

Lyme Land Conservation Trust v. Beverly Platner – The Saga Continues



FOURTH D







Lyme Land Conservation Trust Takes Action

- Contacted by letter – Easement returned with the word “mow” circled
- Filed declaratory judgment action in 2009
- No PJR – *No TRO (immediate hearing)* -- *Practice Tip*
- January 30, 2013 – CT AG Moves to Intervene § 47-42c
- W/drew dec action; replaced w/Encroachment statute
- Motion to Dismiss (310 filings) – **Lyme Conservation Trust v. Lyme *Land* Conservation Trust**
- Countersuit - defamation – settled/confidentiality agreement
- \$100k verdict x 3.5 multiplier, plus \$300k atty fees
- Supreme Court – upheld verdict, recalculated attorneys' fees
- Supreme Court vacated damages, recused trial judge, told trial court to recalculate damages
- Natural Attenuation – Mother Nature Remediating for less than \$250,000



Discussion and Questions

Law Offices of Keith R. Ainsworth, Esq., LLC
KeithRAinsworth@live.com
(203) 435-2014

Forever Wild: Enforcing Easements Protecting Land

- 1. Easements and Fee Holdings**
 - a. Easements vs. Fees differences similarities**
 - b. Interpretation of Easements**
- 2. Preparing for/responding to Encroachments**
- 3. Documenting encroachments and developing evidence to protect easement and fee rights**
- 4. Most Common encroachment – tree cutting – Tree Law**
- 5. Rights of Land holders and Easement Holders in Encroachment Situations and other threats**
 - a. Agency Hearings**
 - b. Statutory tools**
 - c. Land protection statutes**
 - d. Common law causes**
- 6. Case Studies**
 - a. Complications from retained rights**
 - b. Beware complex easements**
 - c. Resolving encroachments using evidence**
 - d. *Lyme Land Trust v. Platner***

Law Offices of
Keith R. Ainsworth, Esq., LLC

51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203)435-2014 keithrainsworth@live.com

2019 CONNECTICUT LAND USE & ENVIRONMENTAL LAWS

- **(NEW 2018!) C.G.S §52-196 – Anti-SLAPP Suit Provision – Allows for dismissal of suits filed against a person who comments on environmental matters**
- **C.G.S §22a-19/§22a-19a – CT Environmental Protection Act – (CEPA) environmental and historic Also: C.G.S §22a-16 – injunctions under CEPA**
- **C.G.S §8-3(b) – Protest petition signed by owners of 20% of land area w/in 500ft of land area affected by zone change forces 2/3 majority vote.**
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https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42a
- **C.G.S. § 47-42b. (1971) Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. Allows perpetual CEs to be held by land trusts.**
https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42b
- **C.G.S. § 47-42c. (1971) Acquisition of restrictions. Enforcement by Attorney General.** https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42c

- C.G.S. §47-42d (2005) requires notice to CE holders of permit applications with state & local land use agencies & building officials.
https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42d
- C.G.S. § 47-42e (2010) Municipal property acquired with intent to place restriction or dedicated as park or open space land. Recording in land records. Enforcement. AG enforcement
https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42e
- C.G.S. §52-560a (2006) For encroachment on land trust (LT) land or CEs, court can award restoration or cost of restoration incl. management fees, atty fees, costs, equitable relief & penalty of 5x restoration cost or \$5,000 statutory damages. Attorney General can also enforce.
<https://www.cga.ct.gov/2011/pub/chap925.htm#Sec52-560.htm>
- C.G.S. §52-560 (1961) Treble damages for cutting of trees (including Christmas trees) on private land. Does NOT include land trust land.
https://www.cga.ct.gov/current/pub/chap_925.htm#sec_52-560
- C.G.S. §52-577m (1986) Immunity for officers and directors of a non-profit organization acting in good faith except for “the reckless, wilful or wanton misconduct of such person”.
https://www.cga.ct.gov/current/pub/chap_925.htm#sec_52-577m
- C.G.S. §52-557k (1979) Immunity for firewood harvesting (w or w/o charge), pick your own and sale of maple sugaring products for no fee, unless >100 cords of wood/yr or charge an entry fee.
https://www.cga.ct.gov/current/pub/chap_925.htm#sec_52-557k
- C.G.S. § 7-131n (1975/77) Taking of land previously intended for use as park or for other recreational or open space purposes. Must provide comparable replacement in *value and size* and hold public hearing.
- C.G.S. § 47-2. (1949) Charitable uses “All estates granted for any other public and charitable use, shall forever remain to the uses to which they were granted, according to the true intent and meaning of the grantor, and to no other use whatever.” https://www.cga.ct.gov/current/PUB/chap_821.htm#sec_47-2
 - Doctrine of Administrative Deviation (modification of admin. terms)
 - Cy Pres (modification of Charitable Purpose)
- C.G.S. § 52-557g. (1971) Liability of owner of land available to public for recreation; exceptions. Landowner who makes land available to the public without charge for recreational purposes owes no duty of care to keep the land safe for entry or use by others for recreational purposes, or to give any warning of a danger, use, structure or activity on the land to persons entering for recreational purposes. <https://www.cga.ct.gov/2011/pub/chap925.htm#Sec52-557g.htm>

■ **C.G.S §22a-381e. Prohibited actions re running bamboo. Disclosure statement. Penalties. Enforcement. Running bamboo as nuisance.**

Bamboo planted within 40ft of a property line or which crosses a boundary is a statutory nuisance. Damages and \$100/day penalty.

https://www.cga.ct.gov/current/pub/chap_446i.htm#sec_22a-381e

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
VS.	) NEW HAVEN AT NEW HAVEN
	)
DWAYNE T. ENCROACHER	) AUGUST 6, 2020

**APPLICATION FOR PREJUDGMENT REMEDY OF ATTACHMENT OF
REAL PROPERTY**

TO THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN:

The Applicant-Plaintiff, Generic Land Trust ("GLT"), of 10 Lonely Road, Generic, Connecticut pursuant to Conn.Gen.Stat. §52-278 alleges the following:

- I. The Plaintiff is about to commence an action against the Defendant, Dwayne T. Encroacher, ("Encroacher"), of 31 Rural Road, Willbury, Connecticut for encroachment and removal of vegetation and trees on the GLT's open space land adjacent to the Encroacher property located at 52 Rural Road, Generic, Connecticut ("Encroacher Property") in violation of Conn.Gen.Stat. §52-560a. A copy of the proposed unsigned Complaint is attached hereto.
2. There is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any known defenses, counterclaims or setoffs, will be rendered in the matter in favor of the Applicant and that to secure the judgment the Applicant seeks an order from this court directing that a prejudgment remedy of attachment be granted to secure the sum of \$65,000.00 and to attach to the value of \$65,000.00 the interest in real property of Dwayne T. Encroacher, at 52 Rural Road, Generic, Connecticut and described as follows:

All that certain parcel of land, situated in the Town of Generic, County of Fairfield and State of Connecticut, being shown and designated as "Parcel I B 2.258 Acres" and "Access 0.237 Ac." on that certain map entitled "Laurel Acres Map Prepared for Larry B. Finch, Generic, Connecticut" dated March 7, 2001, revised through October 5, 2007, prepared R K W Land Surveying, which map is on file in the Generic Town Clerk's Office as Map No. 4285.

Together with a 20' Grading Easement in Favor of Lot 1B as shown on said Map No. 5554.

And as further described in a warranty deed recorded at Volume 414, Page 973 of the Generic Land Records.

3. Plaintiff, the GLT is owner of a certain open space land on real property situated adjacent to the Encroacher Property in Generic, Connecticut.
4. Sometime in or about August 2018, without the permission or knowledge of the GLT, Defendant, Encroacher, cut and removed, or retained third parties to cut and remove, at least 28 mature trees, various shrubs, understory, and other vegetation situated on the GLT's open space parcel adjacent to the Encroacher Property.
5. The tree and vegetation removal constitutes a trespass, and a nuisance encroachment in violation of Conn.Gen.Stat. §52-560a and has unreasonably impaired the natural resources of the state in violation of Conn.Gen.Stat. §22a-16 in that the vegetative clearing impaired the habitat, ecological and scenic value of protected open space. Further, the site has been exposed to the increased and accelerated colonization of invasive species.
6. There are no defenses, setoffs or counterclaims of which Plaintiff has notice.

PLAINTIFF,

By _____
Keith R. Ainsworth
Law Offices of Keith R. Ainsworth, Esq., LLC #403269
51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203)435-2014/(203)865-1021 fax
keithrainsworth@live.com

RETURN DATE:
GENERIC LAND TRUST, INC.

VS.

DWAYNE T. ENCROACHER

) SUPERIOR COURT
)
) JUDICIAL DISTRICT OF
) NEW HAVEN AT NEW HAVEN
)
) AUGUST , 2020

ORDER FOR HEARING AND NOTICE

The foregoing Application for Prejudgment Remedy of Attachment having been presented to the Court, it is hereby

ORDERED: Dwayne T. Encroacher, of 31 Rural Drive, Willbury, Connecticut shall appear before this court at a hearing at the Superior Court, 235 Church Street, New Haven, Connecticut on _____ at _____ and that the Plaintiff shall give notice to the Defendant, Dwayne T. Encroacher, in accordance with Section 52-278c of the Connecticut General Statutes of the pendency of the application and of the time when it will be heard by causing a true and attested copy of the application, the proposed unsigned writ, summons, complaint, affidavit and of this order together with such notice as is required under subsection (e) of Section 52-278c to be served upon the defendant by some proper officer or indifferent person on or before _____, 2020, and that due return of service be made to the court.

Dated at New Haven, Connecticut this _____ day of _____, 2020.

BY THE COURT

_____, J.

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
VS.	) NEW HAVEN AT NEW HAVEN
	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

SUMMONS

TO THE STATE MARSHAL OF THE COUNTY OF FAIRFIELD GREETINGS: BY
AUTHORITY OF THE STATE OF CONNECTICUT,

You are hereby commanded without delay to summon **Dwayne T. Encroacher** of 31
Rural Drive, Willbury, Connecticut by serving him at the address above commanding
him to appear before the Superior Court for the Judicial District of New Haven at New
Haven at 235 Church Street, New Haven, CT on the _____ Tuesday of
_____, 2020, by serving a true and attested copy of the foregoing order for
hearing and notice, notice, verified application, affidavit, proposed order and proposed
unsigned writ, complaint and this summons on the Defendant on or
before _____, 2020.

I, Keith R. Ainsworth, the subscribing authority, hereby certify that I have personal
knowledge as to the financial responsibility of the plaintiff, and deem it sufficient.

Of this writ with your actions thereon make due return.

Dated at New Haven, this _____ day of _____, 2020.

Keith R. Ainsworth, Commissioner of the Superior Court

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
VS.	) NEW HAVEN AT NEW HAVEN
	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

AFFIDAVIT OF GENERIC LAND TRUST

We, Fluffy Ermine and Gortex Lupine, being duly sworn, depose and say as follows:

1. We are over the age of eighteen years and understand the obligations of an oath.
2. We are the current co-Presidents of the Generic Land Trust, Inc., (GLT), a Connecticut not-for-profit corporation dedicated to the protection of open space in the Generic, Connecticut area.
3. We are personally familiar with the events surrounding the encroachment on the GLT's open space parcel described below.
4. In the Fall of 2018, it came to the attention of the GLT's board that trees and other vegetation had been removed from the GLT Open Space parcel in Generic adjacent to the property of Dwayne T. Encroacher located at 52 Rural Road in Generic ("Encroacher Property").
5. A physical inspection of the GLT Open Space showed that a number of trees and understory vegetation had been cleared and that the owner of 52 Rural Road had been doing site work on his own parcel at the same time.
6. The tree and vegetation removal was done without the permission or knowledge of the GLT and without permits from the Town of Generic.

7. Subsequent to the tree removal, GLT has contacted Dwayne T. Encroacher and his counsel and demanded he restore the land to its former condition in accordance with report created by a licensed arborist using the Functional Replacement Cost Method, pursuant to the Guide for Plant Appraisal (Council of Tree & Landscape Appraisers, 10th edition) as set forth in Conn. Gen. Stat. §52-560a. To date, Dwayne T. Encroacher has refused to fully restore the land or to pay the reasonable costs of restoration.
8. The GLT retained at its own expense the services of Dr. Alec Einstein, a registered soil scientist and licensed arborist to evaluate the damages and the costs of restoration of the open space parcel.
9. A true and accurate copy of Dr. Einstein's report and estimate of the cost to fully restore the GLT Open Space in accordance with sound practice is attached hereto at Exhibit 1. That report estimated the value of a proper restoration at \$64,047.00.
10. The tree removal has substantially altered the condition of the open space parcel because, among other effects, the vegetation removal has increased the likelihood for soil erosion.
11. GLT has retained the services of the Law Offices of Keith R. Ainsworth, Esq., LLC to enforce the GLT's rights in this matter and will incur other associated costs in this matter.
12. We know of no counterclaims, defenses or setoff to these sums.

Further, the affiants sayeth not.

Fluffy Ermine

The above, Fluffy Ermine, personally appeared and sworn before me, this _____ day of _____, 2020 and acknowledged the execution of this document to be her/his free act and deed.

_____, Commissioner of the Superior Court/Notary Public

Gortex Lupine

The above, Gortex Lupine, personally appeared and sworn before me, this _____
day of _____, 2020 and acknowledged the execution of this document to
be her/his free act and deed.

_____, Commissioner of the Superior Court/Notary Public

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
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	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

COMPLAINT

COUNT ONE (negligence as to Defendant Dwayne T. Encroacher)

1. The Defendant, Dwayne T. Encroacher, ("Encroacher"), is a Connecticut resident and owner of the real property at 52 Rural Road, Generic, Connecticut ("Encroacher Property").
2. Plaintiff, the Generic Land Trust, Inc., ("the GLT") is a Connecticut not-for-profit corporation located in Generic, Connecticut dedicated to the preservation of open space in and around Generic.
3. The GLT owns a certain open space parcel on a scenic ridgeline adjacent to the Encroacher Property in Generic which is held in trust as conservation open space.
4. In the Summer of 2018, Defendant or persons at his direction cut and removed trees and vegetation located on the GLT open space parcel.
5. Without the permission or knowledge of the GLT and without other required legal authorization, Dwayne T. Encroacher caused to be removed at least 28 trees and various understory vegetation located on GLT open space.
6. Dwayne T. Encroacher had a duty to the GLT not to encroach upon its land and a duty to use reasonable care in clearing the land in and around the Encroacher Property so as not to damage GLT's trees and vegetation.

7. Encroacher breached his duty of care by failing to determine the ownership of the land on which he was clear cutting or having determined the ownership by proceeding to remove the vegetation in disregard to the property lines.
8. As a result of Encroacher's negligence in removing or having the GLT's trees removed, he is responsible for monetary damage to the GLT in the amount of the replacement and stewardship costs of restoring the GLT open space to its previous condition.
9. The Plaintiff has requested that Encroacher properly and fully restore the GLT land in accordance with sound ecological practice and as set forth in Conn. Gen. Stat. §52-560a, and he has failed, refused and neglected to do so.

COUNT TWO (Encroachment Statute 52-560a)

- 1-5. Paragraphs 1 through 5 of Count One are herein re-alleged as if fully set forth.
6. Encroacher's removal of the vegetation constitutes an encroachment on conservation land owned by the GLT as open space in violation of Conn.Gen.Stat. §52-560a.
7. Encroacher's violation of §52-560a has caused harm to the GLT property and will require ecological restoration.
8. Encroacher's encroachment was the result of a self-serving and intentional act which enriched the value of his property at the expense of the quality of the conserved ecology on the GLT open space justifying the imposition of multiple damages.

COUNT THREE (Connecticut Environmental Protection Act)

1-5. Paragraphs 1 through 5 of Count One are herein re-alleged as if fully set forth.

6. The trees and vegetation on the GLT open space are natural resources of the state.

7. Encroacher's removal of the trees and vegetation without legal authority or permission was an unreasonable act in that he impaired the integrity of protected open space by not seeking permission to clear vegetation on a protected ridgeline and failed to review the boundary markers and maps available to him.

8. Encroacher's encroachment on the GLT protected open space constitutes an unreasonable harm to the public trust in the natural resources of the state in that, *inter alia*, the trees provided mature canopy habitat and their removal increased the likelihood of erosion and eliminated shade, making the growth in the open space parcel by invasive species more likely and therefore constitutes a violation of the Connecticut Environmental Protection Act Conn.Gen.Stat. §22a-16 ("CEPA").

COUNT FOUR (Trespass)

1-5. Paragraphs 1 through 5 of Count One are herein re-alleged as if fully set forth.

6. Encroacher's physical invasion of Plaintiff's property and removal of the trees and vegetation thereon without permission or other legal authority constitutes a trespass to the GLT.

7. Encroacher intended the harm, the vegetation and tree removal, he caused and therefore he is responsible for monetary damages represented by the cost of restoration of the land.

8. The Plaintiff has demanded proper and complete restoration of the GLT land and defendant has failed to do so.

**PLAINTIFF,
GENERIC LAND TRUST, INC.,**

By _____
Keith R. Ainsworth
Law Offices of Keith R. Ainsworth, Esq., LLC #403269
51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203) 435-2014/(203) 865-1021 fax
keithrainsworth@live.com

We, Fluffy Ermine and Gortex Lupine, as Co-Presidents of the Generic Land Trust, Inc., Inc., hereby verify that we are over the age of eighteen and believe in the obligations of an oath and have personal knowledge of the facts stated in this application and certify that it is true and accurate to the best of our knowledge and belief.

The above Fluffy Ermine personally appeared before me this ____ day of _____
2020 and acknowledged the above as her free act and deed.

, Commissioner of the Superior Court/Notary

The above Gortex Lupine personally appeared before me this ____ day of _____
2020 and acknowledged the above as his free act and deed.

, Commissioner of the Superior Court/Notary

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
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	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

DEMAND FOR RELIEF

The Plaintiff in the above captioned matter claim the following:

1. A mandatory injunction against the Defendant requiring him to restore the GLT property in accordance with sound conservation practice pursuant to C.G.S §22a-16, §52-560a and §52-471.
2. Money damages pursuant to common law and §52-560a and §22a-18(e)
3. The reasonable attorney's fees, costs and witness fees of this action pursuant to Conn.Gen.Stat. §22a-18(e) and §52-560a.
4. Multiple damages pursuant to §52-560a.
5. Any other relief which the court in its equitable discretion deems proper.

PLAINTIFF,

By _____
 Keith R. Ainsworth
 Law Offices of Keith R. Ainsworth, Esq., LLC #403269
 51 Elm Street, Suite 201
 New Haven, CT 06510-2049
 (203) 435-2014/(203) 865-1021 fax
 keithrainsworth@live.com

RETURN DATE:

) SUPERIOR COURT

GENERIC LAND TRUST, INC.

)

) JUDICIAL DISTRICT OF

VS.

) NEW HAVEN AT NEW HAVEN

)

DWAYNE T. ENCROACHER

) AUGUST , 2020

STATEMENT OF AMOUNT IN DEMAND

The Plaintiff through its Complaint claims equitable relief in the form of an injunction and damages in excess of \$15,000.00 exclusive of attorneys' fees, interest and costs.

PLAINTIFF,

By _____

Keith R. Ainsworth

Law Offices of Keith R. Ainsworth, Esq., LLC #403269

51 Elm Street, Suite 201

New Haven, CT 06510-2049

(203) 435-2014/(203) 865-1021 fax

keithrainsworth@live.com

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GENERIC LAND TRUST, INC.	)
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	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

ORDER GRANTING PREJUDGMENT REMEDY

Whereas from an examination of the foregoing Application, proposed complaint and affidavit, and taking into account any defenses, counterclaims and/or setoffs and whereas, after due hearing and notice it is found that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, will be rendered in this matter in favor of the plaintiff, it is hereby:

ORDERED that the Plaintiff may: Attach to the value of \$65,000.00 the interest in real property of Dwayne T. Encroacher at 52 Rural Road, Generic, Connecticut more fully described as follows:

All that certain parcel of land, situated in the Town of Generic, County of Fairfield and State of Connecticut, being shown and designated as "Parcel I B 2.258 Acres" and "Access 0.237 Ac." on that certain map entitled "Laurel Acres Map Prepared for Larry B. Finch, Generic, Connecticut" dated March 7, 2001, revised through October 5, 2007, prepared R K W Land Surveying, which map is on file in the Generic Town Clerk's Office as Map No. 5554.

Together with a 20' Grading Easement in Favor of Lot 1B as shown on said Map No. 5554.

And as further described in a warranty deed recorded at Volume 414, Page 973 of the Generic Land Records.

BY ORDER OF THE COURT,

_____, J this ____ day of _____, 2020.

RETURN DATE:	) SUPERIOR COURT
GENERIC LAND TRUST, INC.	)
	) JUDICIAL DISTRICT OF
VS.	) NEW HAVEN AT NEW HAVEN
	)
DWAYNE T. ENCROACHER	) AUGUST , 2020

SUMMONS AND ATTACHMENT

BY THE AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to attach the value of \$65,000.00 the interest in real property of the Defendant Dwayne T. Encroacher of 31 Rural Drive, Willbury, Connecticut, at 52 Rural Road, Generic, Connecticut and summon Dwayne T. Encroacher to appear at the SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN, 235 Church Street, New Haven, Connecticut on the

_____ Tuesday of _____, 2020, said appearance to be made by said defendants or their attorney by filing a written statement of appearance with the Clerk of said Court on or before the second day after said return date and then and there answer unto the Generic Land Trust, Inc. of 10 Lonely Road, Generic, Connecticut.

By _____
 Keith R. Ainsworth
 Law Offices of Keith R. Ainsworth, Esq., LLC #403269
 51 Elm Street, Suite 201
 New Haven, CT 06510-2049
 (203) 435-2014/(203) 865-1021 fax
 keithrainsworth@live.com