

**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”).<sup>[1]</sup> Sections of the First Edition Model CE were revised in 2016, mainly in response to the Internal Revenue Service’s position on amendment clauses.<sup>[2]</sup>

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:**

## **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

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.

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

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 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 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 are 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.