

COMMENTARY TO THE MODEL CONSERVATION EASEMENT

The Connecticut Model Conservation Easement (the “Model”) was created as a project of the Connecticut Land Conservation Council (CLCC) with grant funding from the Geoffrey C. Hughes Foundation. The 2014 project Working Group included Amy B. Paterson* (Executive Director CLCC) who served as coordinator, Dennis Collins (Norfolk Land Trust, Litchfield Hills Greenprint), John Erickson (Southbury Land Trust), Catherine Rawson* (Executive Director, Weantinoge Heritage Land Trust), Connie Manes* (Executive Director, Kent Land Trust), Daniel P. Brown, Jr.* (Granby Land Trust), Eric Lukingbeal (President, Connecticut Forest and Park Association), 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 this first draft was provided by Stefan Nagel (Law Offices of Stephen J. Small, Esq., P.C.), Elisabeth Moore (Director of Conservation, Connecticut Farmland Trust, Inc.), Janet Brooks (Janet Brooks, Attorney at Law, LLC), Steven H. Law (Executive Director, Steep Rock Association), and Cherie Phoenix (Murtha Cullina LLP). Not all participants agreed with all portions of the final documents.

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Hints for Drafters: 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.

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”.

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 (rights). Generally throughout this Commentary, for ease of discussion, we will assume that Grantee is a land trust.

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.

For example, a 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.

Types of Conservation Easements

Conservation easements vary depending upon the resource being protected. There are three basic types of such easements: 1) “forever wild”, 2) hybrids with specific uses reserved to Grantor, and 3) working lands (farmland or forestland) easements.

Conservation easements may be further divided among those that are donated, those that are partially donated in bargain sale transactions and those that are purchased at their fair market values. **This Model is intended mainly as a “forever wild” easement, whether donated or purchased, although we have added in the appendix a listing of various**

options that may be considered in different situations. This 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. It does not address working lands or historic preservation easements. The Model would need to be substantially modified to have different protection/use areas (i.e. if it were to include reserved residential areas) if a “hybrid” style document is intended. This Model is a first edition. CLCC plans to undertake future efforts to build on the Model’s suggested format and “boilerplate” provisions both to improve the current version and to create new or revised versions intended for other purposes.

A Model Agricultural Conservation Restrictions for Connecticut was recently developed as a project of the American Farmland Trust (AFT), 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 the protection of agricultural use of the property. That model is narrowly focused and is not a hybrid easement incorporating potential agricultural uses as one of many among a wide range of conservation values being protected. 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 the Connecticut Model Agricultural Conservation Restriction.**

THE 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. 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. Grantee is the recipient of those rights, or as discussed above, the enforcer of the Easement, and this term also includes successors to Grantee if the Easement is assigned or otherwise transferred to another holder. Some Models proposed by other drafters refer to the parties as the Owner and Holder, but since Grantor and Grantee are the standards in Connecticut, we have retained those terms.

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, and a sensible requirement for protection of the perpetual nature of the Easement.

RECITALS

The Model then moves on to the Recitals, often known as the “Whereas Clauses” and sometimes referred to as the “Premises” or “Preamble”. 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 Model assumes that minimal protection areas such as reserved residential areas, farmstead building areas, or working lands areas will not be included in the Protected Property, restrictions on what may be done in those areas of limited protection may be added if careful modifications are made in drafting.

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. 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 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.

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 to the remaining clauses. 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: E. Scenic Enjoyment, F. Habitat Preservation, G. Outdoor Recreation and Education, H. Water Quality Protection, and I. Public Policy. The E, F, G, and I groups in the Model mimic the main “Conservation Purposes” recognized by the IRS. This is known as 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 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 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 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 Protected Property is entirely within a federal Forest Legacy Area and the federally designated Upper Housatonic Valley National Heritage Area and the Highlands Region of the Northeastern United States. The Highlands Region was described by the 2004 Highlands Conservation Act "as being of national significance and worthy of protection." The 2006 United States Forest Service Highlands Study for Connecticut designates the area as of highest conservation value for its water, biological and recreational and cultural resources as well as its

overall composite resource value for the Connecticut Highlands. The Protected Property is entirely within the Northwestern Uplands of Connecticut. This area was identified by the 2005 Connecticut Conservation and Development Plan as protecting much of the remaining agricultural and wild land in the state.

- Reference to CT state plan -- "Conservation area":

The Protected Property is designated as a "Conservation Area" in the *2013-2018 Conservation and Development Policies Plan for Connecticut* produced by the State of Connecticut Office of Policy Management. Conservation Areas are considered in the State Plan as "lands that contribute to the state's need for food, water and other resources and environmental quality by ensuring that any changes in use are compatible with the identified conservation values";

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, because restrictions of this nature require complex drafting, and because 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, although a reference to the historic nature of a property and/or its buildings can be made to show its importance to the community and the reason, from the perspective of the parties, for any particular easements 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 also 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 the defining of 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.

The Baseline Report should also try to convey 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. 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 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.

THE GRANTING CLAUSE

The Granting Clause is the formal clause where the transfer of property rights occurs and the consideration 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”. Further, 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 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.

For this reason, it is quite important to consider the inclusion of discretionary consent and amendment clauses in the Easement (and other documentation), as 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 certain requirements.

1. THE PURPOSE

The Purpose Clause is set forth in Paragraph 1 and 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 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.

If agriculture is not a purpose, section (iii) should be removed. Additional drafting and additional provisions should be included if (iii) is included. Careful consideration should be given to possible conflicts between agriculture and other parts of the Purpose. Drafters may wish to consider prioritizing of conservation values and considerations listed in the definition of Purpose.

2: DEFINITIONS

The Purpose is followed by a Definitions section. Defined terms are capitalized throughout the document and are bolded the first time they are used in the Model. The definitions may be referred to whenever the term is used in the document. In the Model, the definitions are broadly worded and are 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 something like a Table of Contents function. An alternative is to put it later in the document, much like a glossary or index. Some documents have no Definitions paragraph 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. Easements in Connecticut are 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 continues on to prohibit a broad list of possible conflicting activities (the Limitations and Prohibited Uses) except as provided in Paragraph 4. Thus, Paragraph 4, Grantor's Reserved Rights and Permitted Uses, is 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 all 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 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 otherwise permitted (except as otherwise 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).

3.5 Changes to Vegetation. This broad provision prohibits all manner of changes in vegetation (except as permitted in Paragraph 4), including agricultural uses, with reasonable exception for maintenance of existing trails and removal of invasive species, habitat enhancement and health and safety protection activities.

3.6 Pesticides. This restricts non-selective biocide use except under specific provisions by a licensed professional (except as otherwise permitted 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. It may appeal to the current owner to prohibit hunting, for instance, but how can the land trust enforce such a provision? Would it not be wise to consider exceptions or sunset provisions?

3.10 Commercial Recreational Activities. This provision broadly prohibits commercial recreational activities and includes an option for language for qualification for estate tax reduction under the Internal Revenue Code. Another option would 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 4.8

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. If other types of walls are present, these should be addressed.

4.3 Outdoor Recreational Activities. This provision has many variations. Grantee must thoughtfully consider the impact of the various activities on the property 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 if recommended by a Qualified Natural Resource Professional (QARNP), the selection of which QARNP shall be approved by Grantee. If further oversight is desired, may be performed if approved by Grantee. If additional protections and oversight are desired, the parties may include additional language which provides that other enhancement activities are subject to the Grantee's approval.

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. 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.

If additional protections and oversight are desired, the following language is recommended:

Such use is subject further to the following: (i) all applicable laws and regulations; (ii) all applications are to be conducted by a licensed pesticide applicator; and (iii) all applications are to be applied 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.

[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 traditional 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.

Intentionally omitted from the Model was a provision stating, in effect, that Grantee may manage endangered species in accordance with a plan developed by a Qualified Natural Resource Professional. A provision of this nature appears in many older easements, but is seldom utilized and may be a source of contention with Grantor.

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. The Model indicates this as optional, since 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. Alternate language is given 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 Model does not include a provision for deemed approval after a certain time frame. As stated in regard to the notice time frame, a 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.

If after careful consideration, a land trust is willing to include a deemed approval provision, the following language is recommended:

The failure of Grantee to respond in writing within such _____ (____) days shall be deemed to constitute approval by Grantee of the request as submitted if (i) the request sets forth the provisions of this paragraph relating to deemed approval after the passage of time, and (ii) the requested activity is not specifically prohibited by nor inconsistent with the limitations on such activities in this Easement.

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 respond to changing technology and changing ecology in its interpretation of the Easement provisions and to respond to other unforeseen circumstances, and that the terms in the easement are based on a certain set of facts and assumptions. This 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 the IRS 2016 Conservation Easement Audit Techniques Guide requirements for amendments, available on the IRS website.

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 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 to the effect that states that a delay in enforcement of the Easement shall not prevent later enforcement.

10. COSTS

10.1 Grantee’s Entitlement to Costs of Enforcement. This paragraph is intended to make clear that the Easement 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 attorneys 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 is a perpetual hybrid of a deed with a contract provision protecting 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.

It should be further noted that Connecticut has a particularly helpful 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.

Again, it is the common practice not to have a reciprocal provision requiring Grantee to indemnify Grantor landowner. 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 to Grantee of pursuing a frivolous action is a

substantial deterrent to any such suit. If a Grantor indemnification provision is preferred by the parties, 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 without 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 foregoing 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, 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.

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 shoes of the previous owner and all liability 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, with prior notice 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 can perform appropriate monitoring of the new owner’s actions on the Protected Property.

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 Easement would still bind the land trust. 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 differs from the common law on this when it comes to easements but 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 required.

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.

17. LIMITATION ON AMENDMENT

Inclusion of an amendment clause in a particular conservation easement should be evaluated carefully by each party's legal counsel. At the 2015 National Land Trust Alliance Rally and in certain legal challenges to charitable deductions, the Internal Revenue Service (IRS) has taken the position that certain amendment clauses violate the perpetuity requirements of the IRS code and will result in a denial of a deduction. The IRS 2016 Conservation Easement Audit Techniques Guide states:

The restriction on the use of the real property must be enforceable in perpetuity, meaning that it lasts forever and binds all future owners. An easement deed will fail the perpetuity requirements of § 170(h)(2)(C) and (h)(5)(A) if it allows any amendment or modification that could adversely affect the perpetual duration of the restriction or conservation purposes.

This gives little direction when deciding how or whether to include an amendment clause in a conservation easement. The Land Trust Alliance (the Alliance) recommends including such clauses to define and limit the amendment decision making process. We have NOT included a specific amendment clause in the Model form because the choice of such a clause is dependent on a number of factors which should be carefully considered in each case..

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 purposes. The 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 should 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>.

If a clause allowing amendments is not being included in a new conservation easement the drafter(s) of the conservation easement should be especially careful to build in flexibility to the easement document such that it will withstand changed circumstances,

changed technology and changed environmental factors. Additionally, it is recommended that the parties execute a letter or memorandum in writing for the land trust's permanent records that the absence of an amendment clause does not indicate a presumption against any amendment and that future amendments will be guided by the land trust's written amendment policy. Even without an amendment clause, some so-called "low risk" amendments (such as those that have only positive effects on the conservation purposes and Conservation Values) may be permissible; "high risk" amendments (such as those that involve tradeoffs of restrictions and possible harm to the conservation purposes) will likely require court approval under charitable *cy pres* principles. Amendments which fall between those categories ("more risk" amendments) should be reviewed by the Attorney General for determination of whether a court action is indicated. Anyone considering any amendment should consult the Attorney General's office as protector under our Connecticut General Statutes of the public interest in the easement.

Despite the current controversy, the Alliance continues to recommend that a well-drafted amendment clause be contained in all conservation easements. Easement drafters are encouraged to discuss the issue with appropriate Alliance experts, including the Conservation Defense Director. The Alliance finds it difficult to imagine any judge agreeing that a properly written amendment clause violates perpetuity requirements if it includes the limitations and guidelines of their Amendment Report noted above.

The following are alternatives for amendment clauses developed by the CT Model Easement Working Group:

ALTERNATIVE 1.

NO AMENDMENT CLAUSE

RENUMBER MODEL AS NEEDED. Consider executing a memorandum to the permanent land trust file that sets forth the intent of the omission.

ALTERNATIVE 2.

This clause may be included in Connecticut conservation easements when 1) the parties wish to allow amendments consistent with the Alliance's position and are aware of the risks involved, including the potential to disqualify the Grantor's charitable deduction, or 2) in cases where no charitable deduction will be sought. This clause has been drafted with a view to incorporating the suggestions in the Alliance Report and the IRS Audit Guide.

ALTERNATIVE AMENDMENT CLAUSE (INSERT THE FOLLOWING):

16. Limitation on Amendment. 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, or
- to add new land area to the protection of the Easement or remove a Grantor's retained right.

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

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

Notwithstanding the foregoing, the parties may not amend the Easement in any way that could adversely affect the perpetual duration of this Easement or conservation purposes or grant additional development rights not permitted herein [IN AGRICULTURAL EASEMENTS FOR WHICH NO DEDUCTION IS SOUGHT ADD: "except for structures for bona fide Agricultural Activities [MAKE SURE THIS IS A DEFINED TERM] consistent with the Purpose of the 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 where the Protected Property is located. Grantee shall not be liable for any failure to grant approval under this paragraph.

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.

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 now has a special 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.

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, 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.

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 signer 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.

Appendix – a brief listing of possible additional provisions is attached.