

ANATOMY OF A CONSERVATION EASEMENT

USING THE CT MODEL CONSERVATION EASEMENT



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A project of the:

CONNECTICUT
Land Conservation Council

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Where to start?

What are you trying to protect?

Land trust needs to decide this – not the attorney

Know the property

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Typical CE structure



*"The Bundle
of Sticks"*

- Prohibit Everything
- Give back specific rights

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Opening paragraph= Who?

[Do your title search early!]

- Identify the Parties
- Introduces Grantor and Grantee

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"Recitals" = What and Why?

- Identify the Protected Property
- Capacity of Parties – LT and owner
- Define "Conservation Values"

Incl: IRS recognized Conservation Purposes:

This does not mean you can't have other purposes.

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Scenic Enjoyment

Requires Visual Access



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Habitat Preservation

"Significant relatively natural habitat"



rare species, high quality habitat, protection of conservation area

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Outdoor Recreation And Education



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Water Quality Protection

(implies habitat, public policy, scenic)



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Public Policy

Most useful IRS conservation purposes

Many Sources:

- DEEP Website
- Plans of Conservation and Development
- Federal Programs



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1. Purpose (pulls all the CVs into a common concept).

- natural, scenic, [agricultural,] [forested], and open space condition;
- [protect rare plants, animals, or plant communities] [ecological qualities...]
- [protect agricultural soils, agricultural viability, and agricultural productivity]
- prevent use that will significantly impair CVs.

Confine use to activities consistent with Purpose

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2. Definitions

The Devil is in the details... and lack of definitions.

- Up front
- Capitalized in text
- First Use is bolded
- Subject to restrictions in relevant sections

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3. Limitations and Prohibited Uses

Taking everything away

- 3.1 Subdivision Limitations.
- 3.2 No Use for Development.
- 3.3 Prohibited Structures.
- 3.4 No Changes in Topography and Mining.
- 3.5 No Changes to Vegetation
- 3.6 Limitations on Pesticides



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Limitations and Prohibited Uses (cont'd)

- 3.7 Trash
- 3.8 Pollution and Alteration of Water Resources
- 3.9 Recreational Vehicles.
 - Motorized? Mechanized? Horses?
- 3.10 [option] Commercial Recreational Activities
- 3.11 Other use

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4. Grantor's Reserved Rights and Permitted Uses

- any activity or use not inconsistent with the Purpose.
 - 4.1 Mortgage and Convey subject to Easement.
notice prior to transfer
 - 4.2 Existing Structures
 - 4.3 Outdoor Recreational Activities. [options!]
 - 4.4 Signs
 - 4.5 Habitat Enhancement
 - 4.6 Invasive Species Removal
 - [4.7 Special Subdivision Rule]



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5. Grantee's Rights of Entry

- 5.1 Right of Entry for Stewardship and Monitoring Purposes
 - Reasonable effort to notify
 - Not management
- 5.2 Signs. [Optional]

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6. No Public Access

- Define any allowed public access



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7. Notice and Approval

- 7.1 **90 Day written notice**
 - Where Notice or Approval **Required**
No Deemed Approval
- 7.2 **Approval**
 - Not unreasonably withheld
 - Must not impair Conservation Values
 - Not inconsistent with Purpose
 - May establish reasonable conditions

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7.3 Approval in Changed or Unforeseen Circumstances

(a/k/a, "Discretionary Consent")

- o Disease, pests, natural disaster
- o Change in technology, BMPs, climate
- o Unforeseen circumstances

BUT Must be consistent with the Purpose & original intent
Result in improvement or no negative impact on CVs.

May NOT:

- terminate or impair Purpose, [allow additional development?], or Impair qualification of CE or land trust (impair CVs)

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8. Costs and Liabilities

- **8.1 & 8.2 Generally owner still maintains, pays taxes etc.**

- **But: re: liabilities, injuries, damages, fees:**

- o **8.3 Indemnification by Grantor –**
b/c of PP condition or acts of Grantor
- o **8.4 Indemnification by Grantee –**
b/c of Grantee acts

- Fairness issue between parties
- often a sticking point, some LTs delete these
- **Not about Violations! See Par. 9.1**

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9. Grantee's Remedies (in event of violation)= HOW WE PROTECT

- Notice to landowner- request corrective action
- 30 days after notice Grantee may start action to enforce;
 - o require the **restoration** for the property
 - o **enjoin (stop)** such non-compliance by ex parte temporary or permanent injunction
 - o **recover damages**
 - o **Emergency enforcement**



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10. Grantee's Entitlement to Costs of Enforcement

- 10. Grantee accepted CE in reliance on right
- Comprehensive right of reimbursement FOR GRANTEE for all reasonable costs of enforcing & remedying any violation including:
 - o *costs of suit, reasonable expert and attorneys' fees, mediation, drafting "fixes". Not just litigation.*

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10.2 Non-enforcement Costs

- May charge costs of interpretation or amendment requests, including:
 - o staff time
 - o consulting fees
 - o appraisal
 - o boundary surveys
 - o monumentation

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11 & 12 Grantor's Warranties

- Title
- No actual knowledge of
 - o violation of Environmental Laws
 - o release or threatened release of Hazardous Materials.
- Grantor to hold harmless and indemnify Grantee against all claims etc., including reasonable attorneys' fees
 - o RE: Hazardous Materials on Protected Property
 - o Violation of any Environmental Laws by Grantor

Do your homework, original Grantor may be judgment proof.

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"Boilerplate" Provisions - Perpetuity

- 13. DURATION; PARTIES SUBJECT TO EASEMENT.
- 13. SUBSEQUENT TRANSFERS.
- 14. NO EXTINGUISHMENT BY **MERGER**.
 - What is that?
- 15. ASSIGNMENT.

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17. Limitation on Amendments

Without an amendment clause there is nothing to state what the Grantor intended.

Model Easement: Amendment allowed under specific strict circs: consistent with public interest, mission, laws, Purpose, CVs, no private inurement

[Beware of too restrictive/permissive clause – no perfect answers]



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18. Extinguishment

- Real property right vested in Grantee
- Entitled to fair value of proportional interest
- IRS requirement
- Helps prevent collusion
- DOES NOT except improvements after date of CE (IRS rule)

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19. General Legal Boilerplate

- 19.1 In General
- 19.2 Liberal Construction
- 19.3 Severability |
- 19.4 Entire Agreement
- 19.5 Re-recording
- 19.6 Governmental Approvals
- 19.7 Captions
- 19.8 Counterparts
- 19.9 Notices
- 19.10 Baseline Report



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Baseline Report

Not a part of the easement but integral to enforcement/deduction

- Referenced in Recitals
- Contemporaneous with execution of CE
- Documents CVs
- Document condition of PP for enforcement
- Required by IRS, S&P, accreditation, Terra Firma, common sense. But do not rely on it for important easement terms.

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Baseline Report

Not a part of the easement but integral to enforcement/deduction

- BDR must include written descriptions, maps and photographs, that documents: (a) The conservation values protected by the easement, (b) The relevant conditions of the property as necessary to monitor and enforce the easement
- Prepare the report prior to closing and have it signed by the landowner and land trust at or prior to closing;
- In the event that seasonal conditions prevent completion of a full baseline documentation report by closing, the landowner and land trust sign a schedule for finalizing the full report and an acknowledgement of interim data that for donations and bargain sales meets Treasury Regulations §1.170A-14(g)(5)(i)] at closing

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No Excuses

- 20. ECONOMIC HARDSHIP
- 21. NO TAX ADVICE
- 22. Incorporation of Recitals and Addenda



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23. Acceptance and Acknowledgement of CE

- 47-6b of the Connecticut General Statutes.
- Failsafe for f(8) "no goods or services" letter protection
- SIGNATURES, WITNESSES, NOTARY,
- **SCHEDULE A PROPERTY DESCRIPTION**

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Schedule A

- Refer to a recorded A-2 survey of the protected property with pins at the corners and along property lines that do not have visible field identifiers (e.g., open fields)
- Consider also including the metes and bounds description, which can be more accurate for complex boundaries and can serve as a "belts and suspenders" backup if the survey is not recorded as intended
- Do not use the Schedule A property description to make changes to the recorded map

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The Options (not an exhaustive list -sample templates)

Remember: the Conservation Values drive the drafting!

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

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Forestry Activities

The Issues :

Management v. Forever Wild?
 Personal v. Commercial use?
 Certified Forester or other Qualified Pro?
 Supervision of cutting?
 Forest Management Plan?
 # Specific Limits?
 Affect on ability to sell carbon credits?



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Agriculture Option

Not an Agriculture easement – hybrid balancing – Purpose is broad and multiple, not a prioritization

Limited structure provisions – very simple

No farm support housing

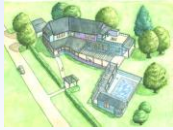


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Reserved Residential Area

- *In or Out? Adds additional complexity*
- *Other kinds of uses/structures?*
- *Renewable Energy improvements allowed*



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Ecosystem Services

- Carbon credits, stream bank restoration etc.
- Not new wetlands
- Consistent with the purpose and enhances CVs
- Assign to land trust
- Will the easement affect the right to sell carbon credits?



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Hunting and Trapping

- Two alternatives
 1. None (but discretionary consent) or
 2. With approval of land trust
- How do you allow reasonable hunting? What is a good reason? "Immediate" threat?



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Maintenance Cutting

Aiming to maintain the *status quo*, requires that condition must be documented in BDR.

Not recommended to use the term "selective cutting"= forestry



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Accessory Structures

- **LIMIT. LIMIT. LIMIT.**
- foundations, full footings or any facilities requiring a septic?
- Coverage?
- Location?
- Document in BDR



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Public Access

- **Sample trail corridor language**
- **Uses**
- **Width**
- **Improvements**
- **Recreational Use immunity language**



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Forever Wild Easement

- **Stand Alone Easement**
- **No management v. limited management to combat negative human impact**
- **Native v. non-native**
- **Pesticides**
- **Hunting and Trapping**
- **Impact on ability to get carbon credits**



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New Issues:

- Extinguishment
- Amendments
- Merger
- Carbon & Forever Wild conflicts
- Syndication
- Phase One investigations
- Surface Mining

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Carbon Rights

A conservation easement grantor may assign carbon rights to a land trust as the holder of a conservation easement.

This has implications for easement stewardship, project management and managing revenue generated by a carbon offset project.

If a land trust assumes the responsibility for monitoring and managing the carbon rights, it must have the financial and human capacity and expertise to oversee all relevant responsibilities.

If the land trust is a TerraFirma member, it should consider increasing its legal defense funding because TerraFirma is unlikely to cover legal costs or litigation regarding carbon rights as these are affirmative, rather than negative, rights.

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Syndicated Transactions

In December 2022, U.S. Congress passed the Charitable Conservation Easement Program Integrity Act. The Act disallows a charitable deduction for a qualified conservation contribution if the deduction claimed exceeds 2.5 times the sum of each partner's relevant basis in the contributing partnership,

unless one of the following two exceptions is met:

1. The contribution meets a three-year holding period test.
2. Substantially all of the contributing partnership is owned by members of a family.

See also Practice 10c(4) which requires land trusts to obtain an appraisal prior to closing, when engaging in transactions with **pass-through entities of unrelated parties**

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“Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has.”

MARGARET MEAD

www.thelifecharity.com.au

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