

ANATOMY OF A CONSERVATION EASEMENT

USING THE CT MODEL CONSERVATION EASEMENT



Presented by:
Linda P. Francois
Cooper, Whitney & Francois

A project of the:

CONNECTICUT
Land Conservation Council



CLCC MODEL DOCUMENTS

Conservation Easement

The model conservation easement, options, and related commentary have been prepared for illustrative and informational purposes only. The use of the modifier "model" in the document and associated commentary is not intended to imply that the document satisfies all legal requirements.

[2022 Model CE >>](#)

Conservation Easement 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.

[2022 Model CE Commentary >>](#)

Conservation Easement Compilation of Options

The Compilation of Options is a compilation of provisions setting forth basic Options for Grantor and Grantee Rights including prohibited uses, reserved rights, etc. The Compilation and Commentary, should not be construed or relied upon as legal advice or legal opinion regarding any specific facts or circumstances. They are not a substitute for representation of competent counsel.

[2022 Model CE Compilation of Options >>](#)

Forever Wild Conservation Easement

A Forever Wild Easement generally allows passive use and limited human intervention with the goal of protecting and restoring wild ecological systems and their many benefits. A Forever Wild Easement retains the fewest landowner rights but offers the greatest assurance that the property will be an intact ecosystem in the future.

[2022 Model Forever Wild CE >>](#)

Agricultural Easement

This easement is a compilation of the 2014 Connecticut Model Grant of Agricultural Conservation Restriction (developed by a coalition including the American Farmland Trust, Connecticut Farmland Trust, CT Dept. of Agriculture), and the Connecticut Land Conservation Council Model [Open Space] Conservation Easement (Second Edition 2019 rev. 2022).

[2022 Agricultural Easement >>](#)



Where to start?

**What are you trying
to protect?**

Land trust needs to decide this – not the attorney

Know the property

Typical CE structure



*“The Bundle
of Sticks”*

- Prohibit Everything
- Give back specific rights

But build in SENSIBLE flexibility

Opening paragraph= Who?

[Run your title search early!]

- Identify the Parties
- Introduces Grantor and Grantee
(Landowner/Land Trust)

“Recitals” aka “Premises” aka “Whereas Clauses” = What and Why?

- Identify the Protected Property
- Capacity of Parties – LT and owner
- Define “**Conservation Values**” (aka “CV”s)
Include: IRS recognized Conservation Purposes:

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

Scenic Enjoyment

Requires Visual Access



Habitat Preservation

**“Significant
relatively natural
habitat”**



**rare species (NDDDB),
high quality habitat,
protection of
conservation area**

Outdoor Recreation And Education



Public Policy

The most used IRS conservation purpose

Many Sources:

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



Water Quality Protection

(implicates habitat, public policy, scenic)



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

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

Use is confined to activities consistent with Purpose

2. Definitions

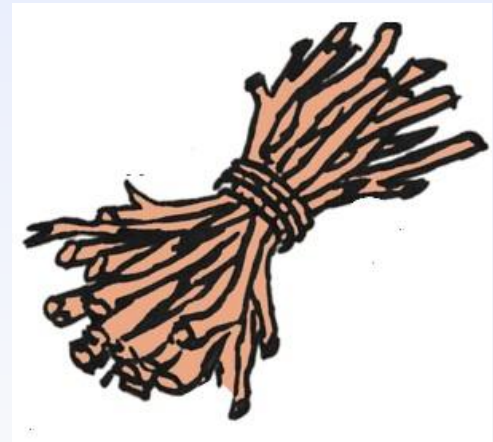
The Devil is in the details... and lack of definitions.

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

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



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

4. Grantor's Reserved Rights and Permitted Uses

- any activity or use not inconsistent with the Purpose is RESERVED.

4.1 Mortgage and Convey subject to Easement.
notice prior to transfer

4.2 Existing Structures

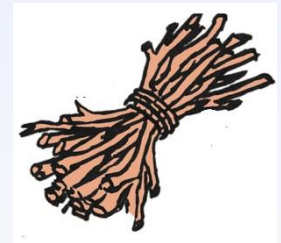
4.3 Outdoor Recreational Activities. [options!]

4.4 Signs

4.5 Habitat Enhancement

4.6 Invasive Species Removal

[4.7 Special Subdivision Rule [option]



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]

6. No Public Access

- DOES NOT MEAN IT IS PROHIBITED – JUST NOT GRANTED
- Define any allowed public access



7. Notice and Approval Process

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

7.3 Approval in Changed or Unforeseen Circumstances

(a/k/a, “Discretionary Consent”)

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

BUT

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

May NOT:

- allow additional development?(specify), or impair qualification of CE or land trust (impair CVs)

8. Costs and Liabilities

- Generally owner still maintains, pays taxes etc.
- But: re: liabilities, injuries, damages, fees:
 - 8.3 Indemnification by Grantor –
8.4 Indemnification by Grantee –
 - Fairness issue between parties
 - *often a sticking point, some LTs delete these*
 - **Not about Violations! See Par. 9.1**

9. Grantee's Remedies (if violation of CE by landowner)

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



10. Grantee's Entitlement to Costs of Enforcement

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

10.2 Non-enforcement Costs

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

11 & 12 Grantor's Warranties

- Good title
- No actual knowledge of
 - violation of Environmental Laws
 - release or threatened release of Hazardous Materials.
- Grantor to hold harmless and indemnify Grantee against all claims etc. for
 - RE: Hazardous Materials
 - Violation of any Environmental Laws

Do your homework, original Grantor may be judgment proof.

“Boilerplate” Provisions - Perpetuity



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

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]



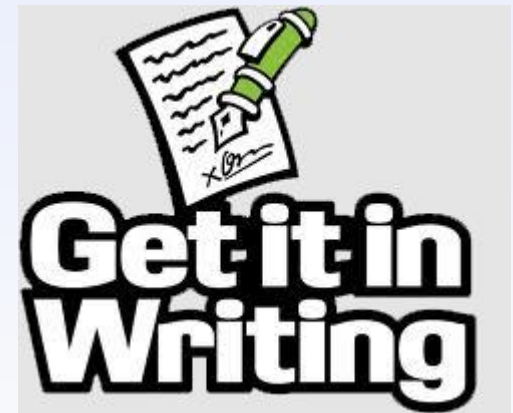
18. Extinguishment

- 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)

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



Baseline Report

Referenced in easement and integral to enforcement and deduction

- Coordinated with Recitals to document CVs
- Signed by both parties at closing
- Include written descriptions, maps and photographs, that document CVs, restrictions and retained rights.
- Required by IRS, S&P, accreditation, Terra Firma insurance, and common sense. But CE should stand alone.

No Excuses

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



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**

Schedule A

- Refer to a recorded A-2 survey with pins at the corners and pins where no visible field identifiers (e.g., open fields)
- Metes and bounds description, (more accurate and can serve as a backup for survey)
- Easements are valid with somewhat imperfect descriptions – but can lead to problems of enforcement

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



Forestry Activities

The issues :

Management v. Forever Wild?

Personal v. Commercial use?

Forest Management Plan?

Certified Forester?

Supervision of cutting?

Affect on ability to sell
carbon credits?

What is the capacity of the land trust to
review plans and professionals?



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



Reserved Residential or Limited Building Area

- *Leave in or cut out of CE?*
- *Permit other uses or structures?*
- *Permit Renewable Energy improvements*



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?
- If CE does not prohibit it is a retained right



Maintenance Cutting

The purpose is to maintain the status quo BUT status quo must be documented in Baseline!

Not recommended to use the term “selective cutting”= forestry



Accessory Structures

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



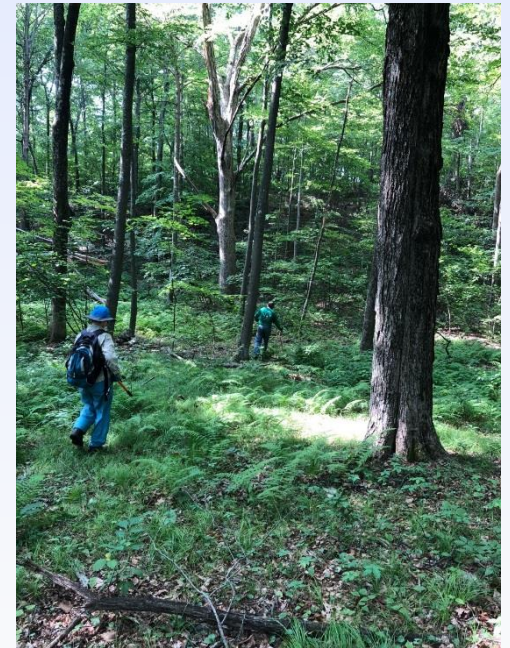
Public Access

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



Forever Wild Easement

- **Stand Alone Easement**
- **No management or limited management to combat negative human impact**
- **Native v. non-native invasives**
- **Limits on Pesticides**
- **Limits on Hunting and Trapping**
- **May impact the ability to monetize carbon sequestration**



Ongoing Issues:

- Extinguishment language
- Amendments
- Carbon Credits & Forever Wild
- Syndication
- Phase One investigations
- Surface Mining
- Shortage of qualified professionals – appraisers, surveyors and attorneys

Syndicated Transactions

In 2022, U.S. Congress passed the Charitable Conservation Easement Program Integrity Act. The Act disallows a charitable deduction for CE if the deduction claimed exceeds 2.5 times the basis, **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 LTA S&P 10c(4) which requires land trusts to obtain an appraisal prior to closing when engaging in transactions with pass-through entities of unrelated parties

A quote by Margaret Mead is presented on a slide. The background is a photograph of a dirt path winding through a dense, sunlit forest. The trees are tall and thin, with sunlight filtering through the canopy, creating a dappled light effect on the path and foliage. The quote is written in white, sans-serif font, enclosed in large white quotation marks. The author's name, MARGARET MEAD, is centered below the quote in a smaller, white, all-caps font. At the bottom center, the website address www.thellocharlie.com.au is written in a small, white font.

“

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.thellocharlie.com.au

CONNECTICUT
Land Conservation Council

Share your thoughts! Scan the QR codes below to fill out evaluations online
for the 2024 Connecticut Land Conservation Conference



General Conference Evaluations



Workshop Evaluations