

How Stewardship and Enforcement Inform Transactions March 25, 2023 CLCC Conference Materials Referenced and Sample Easement Provisions

Land Trust Alliance Publications

[Amending Conservation Easements: Evolving Practices and Legal Principles \(2017\)](#)

This report, originally published in 2007 and updated in 2017, reveals the complexity and range of perspectives in easement amendment decisions. It identifies seven definitive amendment principles that should guide all easement amendment decisions and provides questions to help land trusts evaluate amendment requests and potential risks.

[A Guided Tour of the Conservation Easement Enabling Statutes](#), Robert Levin (2014)(note 2023 update coming soon and will be available by the same link)

Conservation easement enabling statutes serve as the internal structural frame upon which thousands of easements have been granted. As the land conservation movement has matured in recent years, there has been a corresponding interest in amending enabling statutes. This report is a resource for those in the land conservation field, including land trust staff, government agencies that hold easements, attorneys and elected officials. In certain cases, these individuals might wish to amend their state statute to plug a gap or otherwise strengthen it. In other cases, they might be playing defense, fending off a bill that would be deleterious to sound easement practices. Finally, some might simply be curious as to how their state statute compares to others.

[Land Conservation Case Law Summaries](#), Robert Levin (2022)

The purpose of Land Conservation Case Law Summaries is to provide a brief overview of land-conservation-related cases. Each summary seeks to identify the issues of the case, present the holding, and analyze the reasoning of the court. These summaries include unpublished opinions and orders. Unpublished opinions and orders often have little or no precedential effect in a court of law and in certain instances are prohibited from being cited (check rules of relevant jurisdiction to be certain). However, outside of a formal litigation context, attorneys and laypersons commonly discuss and analyze unpublished opinions and orders as examples of how courts have resolved legal issues. Thus, they are presented here for the purpose of furthering discussion among practitioners. These summaries are intended to serve as a starting point for additional research and discussion, and not as the sole or definitive source of information. Moreover, any subjective analysis or commentary expresses the views of the

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author, and not those of the Land Trust Alliance. Many of the excerpts below are pulled from the Ask an Expert forum, thank you to all who share your language with our community.

[Practical Pointer: Why Certain Conservation Easement Language is Non-Negotiable](#) (2022)

Negotiating easement terms with a landowner attorney who is not experienced in conservation law can be a challenge. The pointer provides a sampling of easement language to orient attorneys for landowners on the variety of easement provisions which are non-negotiable. Share it with landowners and their attorneys for smoother easement negotiations.

[Practical Pointer: Drafting Pointers for Risk Balancing in Conservation](#) (2021)

Suggestions and sample clauses for balancing risk when drafting conservation easements.

[Carbon Offsets in Conservation Easements](#) (2020)

This publication offers practical guidance to land trust practitioners on drafting conservation easements to allow the development of carbon offset projects, and convey or clarify the ownership of the carbon offsets generated by such a project.

Case Law:

[*Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, No. 78462 \(20th Jud. Cir. Va. June 19, 2014\), aff'd 782 S.E.2d 131 \(Va. Feb. 12, 2016\)](#)

Easement drafters and land trust stewardship staff should read this case carefully, as there are many lessons to be drawn here. It is the latest in a number of cases to distinguish what kinds of activities fall within the definition of farming or agriculture.

[*Lancaster Cnty. Agricultural Preserve Board v. Fryberger*, 257 A.3d 192, No. 684 C.D. 2020 \(Pa. Commw. Ct. May 26, 2021\)](#)

Another case interpreting the ways that farmers seek to earn income from their land. The ruling against retroactivity is troubling insofar as it will make it difficult for state and county agencies to formulate streamlined administrative solutions to inherently ambiguous and vague terms.

[*Dep't of Agric. And Rural Dev. v. Engle*, No. 359098 \(Mich. Ct. App. Nov. 10, 2022\)](#)

In this November 2022 decision, the Michigan Appellate Court handed down a huge victory for conservation in deciding to keep a protected farm unified pursuant to a no division clause in the underlying conservation easement. The opinion includes a helpful discussion on prohibitions on divided ownership, restraints on alienation and the timing of enforcement actions.

[Spaulding v. Howe, Docket No. 475-9-06 WRCV \(Windsor Sup. Ct., Vt. Sept. 20, 2007\)\(UNPUBLISHED\)](#)

This case provides an important lesson for land trusts, which generate copious maps in the course of their operations. The disclaimer language on the map made this a very easy case for the court, and it would behoove land trusts to include similar language on all maps they prepare. Ultimately, in a default judgment, Howe was found liable for trespass and was ordered to pay damages and attorney's fees of \$30,000.

[Goldmuntz v. Town of Chilmark, 651 N.E.2d 864 \(Mass. App. Ct. 1995\)](#)

This case provides an interesting example of how a landowner sought to construe the easement's allowance of accessory structures to include a swimming pool. The appellate court affirmed the lower court's ruling that the construction of the swimming pool would be in violation of the conservation easement.

[Avery v. Medina, 94 A.3d 1241, 151 Conn. App. 433 \(Conn. App. Ct. 2014\)\(Avery I\); 163 A.3d 1271, 174 Conn. App. 507 \(Conn. App. Ct. July 11, 2017\)\(Avery II\)](#)

Even though this case involves a restrictive covenant between two individuals, and not a conservation easement, the holdings are noteworthy for their interpretation of the terms 'outbuilding' and 'permanent structure.'

Example Easement Language

The Land Trust Alliance does not endorse any of the following language but rather provides it for instructional purposes only. Drafters are strongly advised to work with knowledgeable local legal counsel to revise this language being thoughtful about consistency with the easement as a whole and compliance with state and federal law. The Land Trust Alliance designed this material to provide information about the subject matter covered, with the understanding that the Alliance is not engaged in rendering legal, accounting, tax or other professional counsel. If a land trust requires legal advice or other expert assistance, they should seek the services of competent professionals.

Example Prohibitions on Division

The entire Protected Property described in Exhibit A may be granted, sold, exchanged, devised, gifted, transferred or otherwise conveyed in unified title as one (1) parcel only. The following are expressly prohibited: the legal or "de facto" division or subdivision of the Property, which shall include, but shall not be limited to, any subdivision, short subdivision into remainder tracts, platting, testamentary division or other process by which the Property is divided in ownership or in which legal or equitable title to different portions of the Property are held by different owners. Grantor may not indirectly divide any of the Property through the distribution of property rights among partners, shareholders or members of any legal entity, creation of a horizontal property regime, condominium, common interest community, interval or time-share

ownership, partitioning among tenants-in-common, judicial partition of the Property or by any other means.

The Protected Property shall remain in unified ownership, which may be joint or undivided, but without division, partition, subdivision, or other legal or de facto creation of lots or parcels in separate ownership, [may add: leaseholds OR use agreements]; [select additional options: notwithstanding that the Protected Property was acquired in separate parcels or lots or may be the subject of an approved subdivision; OR except as may be required by law for the residential development permitted in Paragraph 3.A., provided that the resulting lots must remain in one ownership with the remainder of the Protected Property; OR except that not more than three (3) separate lots, each of not less than one thousand (1,000) contiguous acres, may be established, all subject to the terms of this grant; OR except that not more than one (1) lot or parcel for each of the principal residences permitted in Paragraph 3 may be established, provided that the dividing lines shall be located to avoid fragmentation of important agricultural soils [or other named resource area], subject to the prior written approval of Holder; OR In the event of such a division, the deed of conveyance shall allocate any limited quantifiable land use right reserved herein between the lots, unless otherwise allocated herein.]”

Example Easement Language Concerning Temporary and Recreational Structures

Definition:

Structure “The term “structure,” as used in this Conservation Easement, is intended to include all objects, constructions, assemblages, buildings, or erections, temporary or permanent, with or without anchors or foundations, placed, assembled, or constructed on, over, or under the surface of the earth by human efforts.”

Accessory Structures and Improvements. A Structure or Improvement (as defined herein), the use of which is customarily incidental and subordinate to the Residential Units (as defined herein) or necessary for permitted Home Occupations and Rural Enterprises (as defined herein). Accessory Structures and Improvements include, but are not limited to, detached garages, tool sheds, storage sheds, pool houses, cabanas, swimming pools, tennis courts, bocce ball courts, decks, educational structures and other structures and improvements customarily incidental to the residence(s) as well as those described in Section ____ below. Such Accessory Structures and Improvements must be located completely within the building envelope.

Reserved Rights:

As of the date of this grant, there are no structures on the Protected Property except for [list all that will be depicted on attached maps or exhibits: a farm residence with an attached barn, a detached two-car garage, a three-stall horse barn and corral, a subsurface septic waste disposal system, a well with cover and pump house and associated subsurface piping, and a fenced kennel with cement floor, all located in the Building Area where generally depicted in Exhibit B,

the sketch map of the Building Area], as well as [list other minor structures: boundary markers, wire fences, stone walls, feed troughs, small unlighted signs, rustic trail improvements, culverts, trail bridges, gates and barriers on woods roads, poles and power lines, a mailbox at the roadside, a well with cover, piping, and a pump house at a spring/well, fire rings, privies and picnic tables at (____) primitive campsites, and erosion control devices along roadways and trails such as culverts, drainbars, and retaining walls], as documented in Baseline Documentation.” [Note size of any of these larger items, if they are to be limited to their original size: “The farm residence is (____) feet in height and (____) square feet in “footprint” OR “gross covered ground area” as defined in Paragraph _____, located where generally indicated on the sketch map at Exhibit B, and as documented in Baseline Documentation.”] “No additional structures of any kind, temporary or permanent, may be constructed, located, placed, or installed on the Protected Property without the prior written consent of Holder; except, however, the Grantor reserves the following rights:

A. Existing Structures “Grantor reserves the right to maintain and replace existing structures listed above with substantially similar structures in substantially the same locations, or as otherwise specifically permitted hereinbelow.”

Option for Minor Structures “Grantor reserves the right to install additional boundary markers and minor, small-scale structures to enhance the opportunity for traditional “nonintensive outdoor recreation” by the general public as defined in Paragraph _____, and as necessary for the management of such recreation not detrimental to the conservation values of the Protected Property, including but not limited to [list: trail markers; small unlighted informational and interpretive signs; trail improvements such as steps, bog bridges, water bars, footbridges, platforms, and railings; wells and springs for freshwater supply; canoe platforms, outhauls, docks, or piers with specific numbers and locations; primitive campsite facilities that may be limited in number and type of amenities, such as: fire rings, pit toilets, picnic tables, and temporary tents for camping; tent platforms; registration boxes; wildlife observation stations; study markers and grids; gates, barriers, or low fences to control unauthorized use, prevent access by motor vehicles, or protect fragile areas and areas under active management or study].”

Campsites and Picnic Areas. Holder is hereby granted the right to establish and maintain on the Protected Property not more than (____) primitive campsites and day-use picnic areas (day-use sites) for public use, subject to prior written notice to Grantor as to size, specific location, and number of tent sites at each campsite. [Alternatively, specific areas may be defined in the easement and depicted in an exhibit.] Campsites may contain tent platforms, pit or backcountry toilets, fire rings, small unlighted signs, picnic tables, and other rustic campsite improvements. Day-use picnic sites may contain pit or backcountry toilets, fire rings, small unlighted signs, and picnic tables. All campsites and day-use sites shall be maintained and managed by Holder. [Option: Grantor may establish, maintain, and manage, at its own expense, and after prior written notice to Holder in accordance with Paragraph _____, not more than (____) additional

individual primitive campsites, provided that the size and character shall be consistent with restrictions of this section, and otherwise in compliance with the terms of this Conservation Easement.

An approach to address yurt/cabin type uses:

Residential Dwellings. All of the existing and reserved residential dwellings (the “Residential Dwellings”) associated with the Property are described below. The Residential Dwellings are, or shall be, all located within the Building Envelopes and may be used for residential occupancy as described below. No other structures on the Property, aside from the Residential Dwellings, may be used for residential occupancy.

Seasonal Residential Dwellings. One (1) new seasonal residential dwelling (the “Seasonal Dwelling”) may be built on the Property within the _____ Building Envelope depicted and described on Exhibit C. For purposes of this Easement, a Seasonal Dwelling may be a rustic cabin, yurt, wall tent, or similar structure. The Seasonal Dwelling may not exceed 1,000 square feet of total living area, excluding porches and decks. The Seasonal Dwelling shall not be connected to any commercial or public utilities, unless located within the _____ Building Envelope. The Seasonal Dwelling may be served with an onsite wastewater treatment system, such as a porta-potty, vault toilet, or an associated outhouse (“OWTS”), located within the Building Envelope or the Seasonal Dwelling Envelope, as the case may be, in which the Seasonal Dwelling is located. The Seasonal Dwelling is intended for seasonal use and shall not be used for permanent residential occupancy. Bed and breakfasts or commercial overnight occupancy operated within the Seasonal Dwelling(s) is permitted in compliance with Paragraph 18 (Commercial Uses) provided that the Seasonal Dwelling is served with an OWTS.

Commercial Uses. No industrial uses shall be allowed on the Property. Unless explicitly prohibited herein, commercial uses are allowed, as long as they are conducted in a manner that is consistent with § 170(h) of the I.R.C. and the Treasury Regulations adopted pursuant thereto, are consistent with the Conservation Purposes, and do not substantially diminish or impair the Conservation Values. Without limiting other potential commercial uses that meet the foregoing criteria, the following uses are allowed as long as they meet the foregoing requirements: processing or sale of farm or ranch products predominantly grown or raised on the Property; home occupations conducted by and in the home of a person residing on the Property; hunting, fishing, wildlife viewing, and camping in undeveloped or unimproved sites; and customary rural enterprises, including but not limited to habitat enhancement, farm machinery repair, bed and breakfasts or commercial overnight occupancy operated within the Residential Dwellings described in Paragraph 4 (Construction of Buildings and Other Structures), if any, livestock veterinary services, and similar enterprises conducted by Grantor or by another person residing on the Property. For any commercial use not expressly enumerated in this paragraph, Grantor shall provide Grantee with written notice of Grantor’s proposed use, and Grantor shall only commence such use with Grantee’s written approval.

Example Future Evolution Clause:

No use shall be made of the Protected Property, and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purposes of this Conservation Easement. Grantors and Holder acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Conservation Easement or the Protected Property. Grantee, therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement or (b) alterations in existing uses or structures, or (c) any potential adaptations are necessitated by new occurrences whether from natural events or otherwise, are consistent with the Purposes of this Conservation Easement.

Example Disclaimer Language for Maps:

From the above referenced case [Spaulding v. Howe, Docket No. 475-9-06 WRCV \(Windsor Sup. Ct., Vt. Sept. 20, 2007\)\(UNPUBLISHED\)](#):

This map is not a survey and must not be construed as one. The information imparted with this map is meant to assist the Vermont Land Trust, Inc., in their efforts to clearly depict property boundaries, describe the placement of certain retained reserved or excluded rights and to calculate acreage figures.

From the map shown in the slides:

The map is created from a subset of data from the State of Connecticut & the Housatonic Valley Association (HVA) GIS databases. HVA makes no claims, no representations, and no warranties, express or implied, concerning the validity (express or implied), the reliability or the accuracy of the GIS data and GIS data products furnished by HVA, including the implied validity of any uses of such data. Data sources are listed in the footer of this map.

For more examples of disclaimers for maps and data, see examples from [Massachusetts municipalities](#).

Example Easement Language Concerning Assignment:

Excerpts from Land Conservation Law Textbook © 2022 Conservation Law, P.C.:

Right to Proceed Against Third Parties:

The Grantee has the right to proceed against any third party or parties whose actions threaten or damage the Conservation Values, including the right to pursue all remedies and damages provided in this paragraph _____. The Grantor shall cooperate with the Grantee in such proceeding.

Right to Require Assignment of Trespass Claims:

If requested by the Grantee, the Grantor shall assign to the Grantee any cause of action for trespass resulting in damage to the Conservation Values that may be available to such Grantor.

The Grantor may condition such assignment to provide for the (i) diligent prosecution of any such action by the Grantee and (ii) division according to the proportionate values determined pursuant to subparagraph ____ below, between the Grantee and such Grantor of any recovery, over and above the Grantee's attorney's fees and expenses incurred, and costs of restoration of the Property, resulting from such action.

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