

## OPTIONS FOR THE MODEL CONSERVATION EASEMENT

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

### COMMENTARY

PLEASE ALSO REVIEW THE SEPARATE COMMENTARY TO THE BASE MODEL.

IN BOTH THE BASE MODEL AND THE OPTIONS, ALTERNATIVE LANGUAGE IS INDICATED BY BRACKETS AND BOLDING.

NUMBERING CROSS REFERENCES ARE BOLDED TO FACILITATE EDITING.

NOTE ANY REQUIRED DEFINITIONS TO BE ADDED TO THE DEFINITIONS SECTION OR OTHER CHANGES TO THE BASE MODEL.

The original 2014 Model Easement, included very few landowner (Grantor) retained rights. A list of options was appended, but no suggested language for the options was included. A major goal of the 2019 Model, as amended, is to provide basic options for Grantor and Grantee rights with full language. Not all of the options are appropriate for every property and this is by no means a comprehensive compilation of possible clauses. It cannot be said often enough: “the conservation values drive the drafting”. The threshold question for all drafting is “What are we trying to protect?” Conservation easements should be drafted with the specific property being protected in mind, its intended uses and conservation values, as well as with careful consideration of the capacity, procedures and mission of the land protection entity which will hold the restriction. Easement drafting is a process of thoughtful negotiation and the land trust must be willing to draw the line on options which are not appropriate for the project. It is the land trust’s duty to decide what is important to protect and how to do that in the field. The attorney’s job is only to attempt to create a legal document that will do that.

Both the Grantor, and the Grantee, must be mindful that the IRS regulations state that “ a deduction will not be allowed if the contribution would accomplish one of the enumerated

conservation purposes but would permit destruction of other significant conservation interests”. The drafter of a conservation easement must carefully consider the impact each included option may have on other portions of the easement, with particular consideration of the characteristics of the property to be protected. Above all, it should be remembered that a conservation easement is meant to be perpetual.

The Options and this 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. The Model and the Options are based on the current state of the law, but laws and their interpretation can change, and indeed this area of the law is rapidly evolving and is filled with gray areas. The parties, both land protection entity (Grantee) and landowner (Grantor), should each seek competent counsel before entering into a conservation easement. The Land Trust Alliance Standards and Practices, as revised, Standard 9, Practice A states: “[The land trust] obtain a legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.” This is a recognition that a smart investment in legal services from the start in drafting and reviewing an easement could save many times that amount in litigation or stewardship costs, or missed opportunities for years to come. The Model and the options are a template that should be revised and modified, and sections added or omitted, to meet the particular needs of the property and the parties. All such modifications and factual differences have the potential to affect the interpretation and enforceability of the document. And although the parties are, hopefully, working toward the same goal of protecting the Conservation Values of a property, they still may have very different interests in how that should be done. Accordingly, it is advisable that Grantor and Grantee be separately represented.

To aid the drafter, Commentary on the specific Options is located at the beginning of each Option.

The Forever Wild Easement option was created as a stand-alone easement for land intended primarily as an intact nature preserve and is not directly attached to these Options. The Forever Wild Easement commentary precedes that document.

### **Minor Structures Option**

This allows structures without full footings or foundations, sometimes this type of structure is referred to as a “Accessory Structures” or “Temporary Structure”. Care should be taken to distinguish the naming of the structure from Accessory Buildings which may be allowed under the Reserved Residential Area Option. The parties should set forth a maximum total footprint to avoid undue impact on the Conservation Values by an excess of such structures. It should be noted that the Base Model definition of Structures does not include improvements which do not have a permanent location on the ground.

#### **4.X Minor Structures.**

The right to construct and place temporary or minor accessory structures set forth herein (“Minor Structures”), to accomplish the activities permitted to Grantor under this restriction, including construction and placement of (a) roosting, watering, and nesting shelters for wildlife; (b) fences, benches, observation blinds, interpretive and directional signs, tent platforms or portable shed;

and (c) pole sheds and gazebos used for private non-commercial recreational purposes. No such Minor Structures will contain foundations, full footings or any facilities requiring a septic or other underground waste disposal system or require the excavation of land. **[The total area coverage of all Minor Structures, excluding fences, constructed under this paragraph should not exceed \_\_\_\_\_ [ex. 200] square feet in aggregate Footprint.]**

**Note to drafter: Add to definitions: “Footprint”. See Agriculture option.**

### **Agricultural Activities Option**

**This option is only recommended for hybrid easements whose purpose includes a balancing of many conservation values.**

The Purpose contained in the Base Model “to assure that the Protected Property will be retained forever predominantly in its natural, scenic, [agricultural,][forested,] and open space condition for the protection of the Protected Property’s Conservation Values” inherently involves a balancing of various Conservation Values by the land trust, the holder and enforcer of the easement. Easements where agriculture is the primary purpose should utilize an agricultural easement format where a priority is set on preservation of agricultural soils, productivity and farm viability, over and above other conservation values. In an agricultural easement, only to the extent those other conservation values do not conflict with the agricultural conservation values, will they be protected. Agriculture usually requires a variety and number of structures: structures for livestock, equipment, produce, supplies, residences for farm owners and farm help, and structures to sell products. Agriculture that is structure intensive is beyond the scope of this Option and the Model Easement. In 2014 a Model Agricultural Easement was created with the assistance of American Farmland Trust, Inc., Connecticut Farmland Trust, Inc. and CLCC, among others and it was updated in 2020. It is available on the CLCC website. We refer you to that model as an example of a comprehensive agriculture easement designed to reflect conditions specific to agricultural use and to provide the flexibility necessary for farm operations to meet evolving agricultural practices and market demands.

Perhaps the most important part of any Agricultural Activities provision is to carefully define Agricultural Activities. Reliance on the state statutory definition of Agriculture is not recommended. Statutory definitions change and sometimes they change too slowly, or too quickly. Connecticut’s statutory definition does not mention agritourism activities and this has been the source of some contention. Hay rides and corn mazes may be considered agriculture, but what about weddings and birthday parties on the farm, wineries, farm concerts etc.? These can all support the financial viability of a farm, but may not be consistent with other important conservation values. Our Option does include alternative language to allow such activity, but requires that it not impact the Purpose significantly and the Option permits such activities only at the sole discretion of the land trust. Farming is not about scenic qualities, even though to many of us, a farm is a beautiful thing.

Despite the inherent difficulties, the 2019 Working Group considered that an Agricultural Option should be included in this revision as it is frequently sought in connection with a hybrid easement where some limited agricultural rights are desired to be retained over a portion or all of an easement area. Care should be particularly taken to avoid, as much as possible, inherent

conflicts between the different parts of the purpose (for example, the right to construct a large barn in a location which will block an important scenic view).

Connecticut's farmland is not just valuable open space, but vitally important to the state's growing and evolving \$3 billion agricultural sector. As the land protection movement has evolved, land protection entities and conservation practitioners are increasingly cognizant that previous open space conservation easements do not always adequately or appropriately protect agricultural uses even when they were intended to do so. This Option is intended to provide only basic agricultural language, but including a broad definition of Agricultural Activities which should be carefully considered and edited as appropriate. It bears repeating that conservation easements should be drafted with the specific property being protected in mind, its intended uses and conservation values, as well as with careful consideration of the capacity, procedures and mission of the land protection entity which will hold the easement.

#### **4.X Farm, Agricultural And Wildlife Management Activities.**

**A. Agricultural Activities Defined.** Grantor retains the right to conduct Agricultural Activities, as defined herein, [in the area described on Schedule \_\_\_/ shown on the Plan etc.] on the Protected Property. Agricultural Activities include the following activities, provided that any activity requiring Structures is subject to and governed by the Agricultural Structures Limitations set forth below:

**1.) The cultivation of the soil. Cultivation of the soil includes** the creation, restoration, and/or maintenance of fields, grasslands, pasture, coverts, or meadows for commercial and/or non-commercial farm, nursery, agricultural or Wildlife Management purposes, including by way of example and not limitation: clearing forest trees and other growth for the purposes set forth above; clearing and preparing land for agricultural, pasture, garden, or open meadow use; planting, seeding, and re-seeding agricultural crops, but not species with known invasive characteristics; trimming and cutting brush and trees in order to maintain clear borders around or paths within such areas; applying herbicides, pesticides, fungicides, and fertilizers for bona-fide agricultural purposes; irrigation, and farm pond impoundment; composting and soil enhancement; and other similar uses upon written request to the Grantee, in Grantee's sole discretion; and

**2.) Production of Agricultural Commodities.** The cultivation, raising, production, harvesting, or sale of any agricultural or horticultural commodity grown on the Protected Property, including, but not limited to: field crops and biofuels; fruits, nuts, tree products and non-timber forest products; vegetables; horticultural specialties, including seeds, nursery stock, Christmas trees, compost, and flowers; livestock and livestock products, including cows, horses, swine, poultry, bees, fur bearing animals and wildlife; the private or commercial stabling, breeding, training, riding, pasturing and care of horses and other livestock, and other animals, including maintaining a riding stable; Forestry Activities; and other similar commodities upon written request to the Grantee, in Grantee's sole discretion.

**3.) Associated Uses.** Agricultural Activities shall also include the following associated uses which are customary, supportive and agriculturally compatible uses in Connecticut:

1.) The lawful onsite disposal of animals and agricultural products raised or housed on the Protected Property and the storage and treatment of biodegradable organic waste from permitted activities;

2.) Interior stone walls may be removed or breached and stones may be moved within the Protected Property for Agricultural Activities and Forestry Activities. **[If there is an Reserved Residential Area add: Provided, however, that boundary (exterior) walls and walls delineating the Reserved Residential Area, if any, are not to be removed, but may be breached for Agricultural and Forestry Activities.]**

**[3.) Agritourism Activities such as corn mazes, hay rides, farm concerts, birthday parties and weddings on the farm which do not significantly impact the Purpose of the Easement, upon written request to the Grantee, in Grantee's sole discretion.]**

4.) Other similar uses upon written request to the Grantee, in Grantee's sole discretion.

**B. In General.** An adequate buffer of high grasses, shrubs, or trees should generally be maintained between the permitted activity and adjacent slopes, wetlands, and watercourses on the Protected Property in order to ensure the preservation of the quality thereof and to protect the Purpose of the Conservation Restriction. Applications of herbicides, pesticides, fungicides, and fertilizers may be applied for bona fide agricultural purposes and shall be undertaken in accordance with law, agricultural best management practices, and in light of the actual needs of the crops or cover being grown at any time and the slope, filtration, and run-off characteristics of the site. The use of fields or wooded areas as pasture for animals shall be managed to limit erosion and sedimentation of the Protected Property and limited in extent so as to prevent detrimental levels of animal waste.

Agricultural lands shall be managed in accordance with sound soil and water conservation practices in a manner which will not destroy or substantially and inevitably diminish the productive capability of the Property or water quality.

**[option: Grassland areas shall not be mowed during the bird nesting season and shall only be mowed at a height and frequency that supports the continuation of a meadow state.]**

**C. Agricultural Structures Limitations.** Grantor retains the right to maintain, replace and /or construct:

1.) Existing Agricultural Structures. Existing agricultural structures and improvements as shown on **[the Baseline Report/ the Plan]** may be repaired, **[enlarged up to \_\_\_ percent]** and replaced at their current locations for agricultural purposes without the approval of the Grantee.

2.) Temporary and Small Agricultural Structures. Temporary or small agricultural structures, such as run-in sheds or chicken coops as limited herein. Such structures shall not exceed an aggregate of \_\_\_\_\_ sq. ft in impermeable surface Footprint. No such structures shall contain foundations, full footings or any facilities requiring septic or other underground waste disposal system or require the excavation of a significant amount of land unless approved by Grantee in its sole discretion.

**[Option for Specific List of allowed Structures: 2.) Permanent Agricultural Structures. One barn to house livestock or farm equipment, not to exceed \_\_\_\_\_ sq.ft in footprint [specify location if possible]. Said structure may be serviced with improvements for fresh water supply, and utilities. A septic waste disposal is/is not permitted. Grantor shall notify Grantee at least \_\_\_ days before construction of any such structure.]**

**[Option – Defined Area for Structures 1.) New buildings and other structures and improvements to be used solely for agricultural production on the Protected Property, including barns, equipment sheds, and improvements to be used for agricultural production purposes of sale of farm product predominantly grown or raised on the Protected Property but not including any dwelling or farm labor housing, a be built within [the area defined in Schedule \_\_\_\_ (“the Farmstead Building Area”)]**

**Add to definitions section:**

**“Footprint”** means the surface space occupied by a Structure or device including, but not limited to, closed and unenclosed porches and garages, unenclosed decks, raised surfaces or roofs, basements and attics, measured as a product of the outermost width and length dimensions.

**“Forestry Activities”** means: planting, growing, spraying, pruning, thinning, cutting, and clearing of live or dead trees.

**“Wildlife Management”** means management of areas of the Protected Property for the benefit of specific types of wildlife by: (i) selectively cutting trees and shrubs over a defined area or areas to thin or clear the forest canopy to create or maintain a habitat i.e. openings comprised of warm season grass or maintained in an early successional state; and (ii) planting trees, shrubs, bushes, and grasses that do not have invasive characteristics for the purpose of creating or maintaining habitat for specific types of wildlife.

This Option may require the addition of a Schedule for “Farmstead Building Area”

## **Consider adding the options for Watercourse Maintenance and Erosion Control when including an Agricultural Activities Option**

### **Easement of Access and Right of Way Option**

Some easements do not have direct access to a road, accordingly the drafter should be sure to include a right of access as necessary for the land trust monitoring and other rights. The land

trust must have access to the property for monitoring, though it can be across other land of the land trust.

**5.3 Grant of Permanent Easement of Access and Right of Way.** Grantors convey to Grantee an easement of access and right of way across other land of Grantors, more particularly bounded and described in Schedule \_\_\_\_ attached hereto, as reasonably necessary for the specific purpose of access to the Protected Property for monitoring the Protected Property, and administering, performing and enforcing the Grantee's rights and obligations under this Easement.

### **Ecosystem Services Option**

This is an emerging area of conservation easement drafting. It is important for new conservation easements to allow for cutting edge climate change mitigation programs if not inconsistent with the Purpose of the Easement. It is important to note, that if the easement is restrictive of forest management, it may prohibit the granting of carbon credits in the future.

Some ecosystem services may involve structures. Consider whether to limit these activities to a portion of the Protected Property. Alternative provisions could retain the rights in the Grantee, split them between the parties or limit them to the original Grantor. Deductibility of easement donations may be affected if any rights retained conflict with other important conservation purposes.

**4.X Ecosystem Services.** Subject to Grantee's prior Approval, in its sole discretion, Grantor may exercise the right to participate in, and retain any income received from, any current or future programs with governmental agencies or private entities, intended to provide incentive or compensation for the restoration or relocation of rare, imperiled, threatened, or endangered species or communities on the Protected Property in a manner designed to restore historic natural systems, or for other environmental preservation or enhancement efforts (including but not limited to wetland mitigation (other than the creation of wetlands from historically upland property), stream bank restoration, carbon credit, and similar programs), provided such program is consistent with the Purpose of this Easement and enhances the Conservation Values. Grantee is not responsible for monitoring any such activities for compliance with permit(s) or requirements therefore, and the Grantee has no obligation to enforce the permits or requirements. Grantor may delegate or assign such right to Grantee, in its sole discretion.

### **Forestry Activities Option**

This option provoked the most discussion among the Working Group participants. Particular care should be taken to select terms that are appropriate to the property, the goals of the parties and the capacity of the land protection entity.

A Forestry Activities Option is included for consideration as a tool to enhance conservation values and purposes while also providing the benefit of working lands rights to landowners. It is important to note, that if the easement is restrictive of forest management, it may prohibit the granting of carbon credits in the future.

Depending on the characteristics of the Protected Property and the desires of the landowner and land protection entity, a Forever Wild Easement, or the omission of Forestry Activities may also be appropriate. Forestry practices can create habitat, control invasive species, maintain non-self sustaining forest types and fill in for the absence of the natural occurrence of fire, but many espouse the value of allowing natural systems to evolve with as little human intervention as possible. This Option was specifically designed to protect against markedly unsound forest management practices from an environmental perspective, for example those which create erosion and sedimentation, or high grading (the removal of all high quality trees such that there is poor regeneration of woodland).

Forestry Activities provisions can vary greatly depending on the Conservation Values to be protected, the size of the property, its vegetation, water resources and soil type, and the capacity and desire of the land trust to oversee forestry practices. There is no one size that fits all. The option below incorporates a basic division of such activities into personal and commercial, because these are a good indicator of scale and intensity. This Option also allows for as-of-right forestry for personal use, to control disease, to maintain existing open areas and to remove hazard trees. The option requires that any Commercial Forestry at a minimum require qualified supervision and a forest management plan, unless waived by the land trust. The best plan will not be adequate if it is not carried out appropriately. The Parties may wish to incorporate volume limits such as board feet or cords/year, but these are highly dependent on timber volume, stand type and other specific information on the Protected Property and their appropriateness may change over time.

If the easement is to include a right to conduct Forestry Activities, whether personal or commercial, it is advisable that the Baseline Report contain a basic Forest Management Plan that quantifies timber volume and site indices. The Baseline Report should also contain information designating existing open areas.

#### **4.X Forestry Activities.**

**A. In General.** The right to conduct Forestry Activities is permitted on the Protected Property. Any Forestry Activities conducted on the Protected Property shall be (i) carried out in accordance this paragraph (ii) in accordance with generally accepted Best Management Practices, including by way of illustration and not limitation, the most current Best Management Practices for Water Quality While Harvesting Forest Products, prepared by the Connecticut Department of Energy and Environmental Protection or any successor management practices or regulations promulgated by said Agency, (iii) conducted in a manner designed to minimize erosion or sedimentation of the Protected Property, and (iv) carried out in a manner to minimize impact on the Conservation Values of the Protected Property. Without permission of Grantee, Grantor may conduct Forestry Activities to reasonably control insects and disease, prevent personal injury and property damage, harvest wood products for personal use, and to maintain existing open areas on the Protected Property. Any other Forestry Activities shall be carried out under the supervision of a Qualified Natural Resource Professional and in accordance with a Forest Management Plan **[and a detailed Harvest Plan]** approved by Grantee, unless said plans[s] or supervision are waived in writing by Grantee.



**B. Forest Management Plan.** If a Forest Management Plan is required pursuant to this paragraph, said plan must contain appropriate methods and procedures to protect the Conservation Values of the Protected Property and said plan must require oversight by a licensed forester over any timber harvesting and cutting or removal of live or dead trees, to ensure compliance with the plan.

**[Such Forest Management Plan shall also contain the following information: (i) the location of boundary lines, existing conditions including maps and documentation depicting stands and their existing vegetation, (ii) reasons for harvest practices (iii) location and timing of planned harvests, (iv) plans and locations for access ways and access improvements needed.] [Forest harvests for the purpose of creating fields for permitted Agricultural Activities, if permitted, do not require a Forest Management Plan.]**

**[Except for clearing for permitted Agricultural Activities (if any), the currently forested area of the Protected Property, as shown in the Baseline Report, shall be maintained in a canopied state of one or more stages of successional forest growth.]**

[re-number as needed] **C. Definitions.** “Forestry Activities” means: planting, growing, harvesting, spraying, pruning, or cutting or removal of live or dead trees, other than Christmas trees and nursery stock [(which are defined as Agricultural Activities)], including the right to construct, use and maintain access roads or trails, and to use motorized vehicles, only as necessary for such operations. Such activities also may include actions to preserve or enhance habitat for particular wildlife species and overall forest productivity.

Add to definitions section:

“**Commercial**” means the purchase and sale or exchange of goods and commodities, other than *de minimus* amounts that bear no rational relationship to for profit activities, arising from activities permitted to Grantor in this Easement.

## **Hunting and Trapping Options**

**Note:** If hunting is not otherwise prohibited, it is allowed.

No provision will be perfect in all circumstances. Accordingly we have provided a strict provision and a less restrictive provision. The land trust may need to rely on the availability of Approval in Unforeseen Circumstances for some situations if it chooses the stricter provision.

**3.X Prohibition on Hunting and Trapping.** There shall be no hunting or trapping of animals.

OR

**3.X Prohibition on Hunting and Trapping.** Grantor shall not hunt or trap animals on the Protected Property, or grant permission to others to do so, except with the Approval of Grantee, in accordance with law, and as reasonably required to: (i) protect garden crops, agricultural crops, meadows and pastures, or (ii) remove nuisance animals that pose an immediate risk to human or animal health or safety (for example animals with rabies or distemper).

## Maintenance Cutting Option

This provision recognizes that a landowner will want and need to maintain the property. The suggested language is directed at maintaining the current condition of the property, to minimize the opportunity for abusive overbroad interpretation. It is therefore most important that the current condition of the Protected Property be documented in the Baseline Report, Plan or other permanent record.

**4.X Maintenance Cutting.** The right, [upon prior written consent of Grantee ] to cut and clear vegetation for existing trail and road maintenance, and to otherwise preserve the current condition of the Protected Property, including maintaining current vistas [elaborate] and preserving and maintaining existing open areas of the Protected Property, including the routine mowing, seeding, haying, baling or otherwise maintaining the open fields, if any. No such cutting or clearing shall be permitted unless the existing condition of the Protected Property as to such proposed activity is documented in the Baseline Report or otherwise approved in writing by the Grantee.

## Management by Grantee Option

Although typically the landowner retains the responsibility of caring for their property, a land trust will in certain circumstances wish to protect the Conservation Values by performing management activities which the landowner is unwilling or unable to perform.

**5.X Management by Grantee.** The right, but not the obligation, to monitor the condition of plant and animal populations, plant communities, and natural habitats on the Protected Property, and to manage them, if necessary, to ensure their continued presence and viability on the Protected Property. Such activities shall be in accordance with management practices of Grantee, which may include but not be limited to [invasives removal], mowing, fencing, planting, haying, trail clearing and restoration by filling, seeding, prescribed burning, etc.

## Public Access Option

Public Access can take many forms. We have provided sample trail language.

**6.0 PUBLIC ACCESS.** Consistent with the Purpose of this Easement, Grantor conveys to Grantee the right to establish, maintain and manage recreational trail(s) for public use on the Protected Property as set forth below: [elaborate]

[OPTION]] Such trail(s) shall be no more than \_\_\_\_\_ (\_\_\_)feet in tread width [this should be over 36” to accommodate wheelchairs under applicable law]and shall be located \_\_\_\_\_ . Grantee may use, establish, or relocate the trail to remain contiguous with trails on abutting properties now or hereafter established for the safe and orderly passage and re-passage of the public; provided, however, that any such relocation shall be subject to the approval of the Grantor, which approval shall not to be unreasonably withheld. Grantee may mark and designate the trail(s) with such symbols, blazes or signs as it deems necessary to regulate the safe and orderly usage of the trail. Grantee may improve the trail with, by way of example and not limitation, timber steps, boardwalks, railings, culverts and bridges, barriers to discourage use by motor vehicles, cairns, surfacing with permeable materials and

alterations necessary to prevent erosion, and may selectively cut and prune vegetation, and remove leaners and blowdowns, to preserve safety and provide scenic views.]

[Use of the trail by the public shall be limited to walking, running, hiking, cross-country skiing, snow-shoeing, and similar non-motorized, passive recreational uses,[ including bicycling, handicapped mobility devices, use of service animals, dog walking and/or equestrian use], provided such use shall be subject to the Grantee’s rules, regulations and/or limitations, including regulations established by Grantee to regulate trail activities and uses. The Grantee shall take reasonable steps to prevent the general public from using the trail in a manner inconsistent with its intended purpose and to ensure that the trail is used only in such a manner such that the responsibility of the Grantor for any injury to person or property shall be limited to the maximum extent possible in accordance with Sections 52-557g through 52-557i of the Connecticut General Statutes as amended. The Grantee shall make the trail available to the general public consistent with the provisions hereof without charge, rent, fee, or other commercial service. ]

### **Reserved Residential Area Option [consider renaming this the Limited Building Area]**

One way to create a Reserved Residential Area is to cut it out of the easement. An additional way to provide for Residential and other structures is to specifically list them in the document.

The following Reserved Residential Area Option should only be used if there is a specific reason to keep the Reserved Residential Area within the easement’s protections.

The main benefit to including a Reserved Residential Area, rather than cutting the area completely out of the easement, is that unless otherwise provided, it prevents division of the residential area from the rest of the property and requires less monitoring than restrictions limiting building size, etc. Consider encumbering the area cut out of the easement with a second (non-deductible) easement. Another alternative is to place a deed restriction on the land not subject to a conservation easement. The deed restriction can limit division or subdivision and run to the benefit of the holder of the easement on the abutting land, thus qualifying as perpetual under Connecticut law.

It is very important that the boundaries of the Reserved Residential Area be adequately defined to locate them on the ground, in a place that does not impact the Conservation Values, and in a way that makes monitoring practical. Your reasoning for such location should be made apparent. The Baseline Report should also document that the location does not negatively impact the Conservation Values (i.e., because it is located in a previously disturbed area, has no redeeming Conservation Values etc.).

“Floating lots” (not located on the ground) do not meet the IRS deduction’s perpetuity requirements. The IRS requirements in this area are complex and it is especially important to consult knowledgeable counsel when incorporating a building area into an easement. One way to proceed is to designate multiple limited building areas and dictate that when one is chosen the others expire.

#### **4.X Reserved Residential Area.**

**A. Establishment of Reserved Residential Area.** Notwithstanding any other provision herein to the contrary, Grantor reserves and retains a Reserved Residential Area as shown in **[Schedule B] [the Plan]** on the Protected Property for the maintenance of the existing Residential Dwelling, if any, or construction of a new residential Dwelling Unit (as hereinafter defined), and Accessory Buildings (as hereinafter defined) and to provide access and utilities thereto. All improvements for such Dwelling Unit and its Accessory Buildings, exclusive of access drives and power and communication utility lines, shall be located in the Reserved Residential Area. Grantor and Grantee agree that the Reserved Residential Area is located in an area where it will not have an adverse impact on the Conservation Values

At least thirty (30) days prior to the Grantor constructing a new Residential Dwelling in the Reserved Residential Area, Grantor shall provide Grantees with an A-2 survey showing the location of the boundaries of such Reserved Residential Area and the location of the Dwelling Unit and Accessory Buildings, if known. Such plan shall also show all mitigating measures necessary to ensure that the construction activities will not have an adverse impact on the Purpose of this Easement.

**1.) Definitions.** The following definitions apply for purpose of this Paragraph:

**a.) “Dwelling Unit”** means a structure or self-contained portion thereof designed as a single-family dwelling (including associated wells and septic systems). A Dwelling Unit may include an in-law apartment, household guest and employee quarters and a home occupation or professional offices for the occupant as allowed by law and may have Accessory Buildings as hereinafter defined.

**b.)“Accessory Building”** means other buildings, structures, and improvements customarily incidental and subordinate to the principal building. Such Accessory Buildings may include or contain separate guest and employee quarters, studios, workshops, swimming pools, tennis courts, solar panels, flagpoles, gazebos, barns, stables, and other buildings and facilities for forestry and agriculture activities and for the personal use of Grantor and others on the Protected Property. Improvements for fresh water supply, utilities, and communication, satellite dishes, septic waste disposal facilities, outbuildings, garages, and outdoor furniture and ornaments, are all allowed as by law.

**B. Access to Reserved Residential Area.** Within the Reserved Residential Area, Grantor reserves the right to construct, improve, pave, and maintain private driveways to permitted structures. Grantor may construct private roads and rights-of-way to such improvements outside of the Reserved Residential Area, subject to the prior Approval of Grantee, if it is impractical to do so within the Reserved Residential Area, but any such improvement shall be undertaken and maintained in a manner that creates the least possible disturbance to the Conservation Values protected by this Easement and in no event shall such improvements be greater than the minimum size and area required by law or utility provider

**[OPTION: C. Renewable Energy/Ancillary Improvements. Without permission from the Grantee, improvements necessary to undertake alternative energy activities such as wind, solar, methane and other similar energy generation activities, [as well as communications facilities such as cell towers] may be built exclusively within the Reserved Residential Area [for use principally on the Protected Property.] [Construction of a telecommunications tower is prohibited.] Subject to the prior Approval of Grantee, Grantor may construct private roads and rights-of-way to such improvements outside of the Reserved Residential Area, if it is impractical to do so within the Reserved Residential Area, but any such improvement shall be undertaken and maintained in a manner that creates the least possible disturbance to the Conservation Values protected by this Easement and in no event shall such improvements be greater than the minimum size and area required by law.**

[Option D. Grantee may permit construction of other improvements in the Reserved Residential Area which are not inconsistent with the Conservation Values, in its sole discretion.]

**[renumber as required] E. Prohibitions in the Reserved Residential Area**

The following shall apply to uses within or associated with the Reserved Residential Area:

**1.) Subdivision.** The legal or de facto division, subdivision, re-subdivision, or boundary line adjustment of the Protected Property, including the Reserved Residential Area, or any division of the title to the Protected Property, including the Reserved Residential Area, in the form of condominium or cooperative form of ownership, or other form of common ownership, transfer or division that allows separate control and management of different areas of the Protected Property, or partition of the Protected Property between owners or tenants in common, is hereby prohibited. The Protected Property, including the Reserved Residential Area, may only be conveyed as a whole, regardless of its current configuration in multiple parcels, except as follows:

With prior approval from the Grantee, Grantor may convey any portion of the Protected Property or the Reserved Residential Area to any organization or government entity that would qualify as an eligible assignee of this Grant as provided herein.

**2.) Use for Development.** The Protected Property and any portion thereof shall not be included as part of the gross area of other property not subject to this Grant for the purposes of determining density, lot coverage, or open space requirements under otherwise applicable laws, regulations, or ordinances controlling land use and building density. No development rights that have been encumbered or extinguished by this Grant shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise; provided, however, that with Approval of the Grantee, this paragraph shall not preclude such transfer of development rights resulting from the destruction or demolition of any existing residential building on the Protected Property.

**3.) Invasive Species.** There shall be no planting of Invasive Species.

**4.) Roads.** Except for private driveways serving the permitted Dwelling Units and Accessory Structures, as defined herein, there shall be no construction of roads with impermeable materials, unless required by governmental authorities or necessary to prevent harmful runoff, erosion, or sedimentation of wetlands or areas of the Protected Property.

**5.) Erosion.** Grantor's activities shall be conducted in a manner designed to prevent runoff, erosion, sedimentation, or drainage flows that would have an adverse impact on the Protected Property or be inconsistent with the Purpose of this grant of Conservation Restriction.

**6.) Trash.** There shall be no storage or dumping of trash, garbage, or similar unsightly or offensive waste material except for storage and composting of biodegradable waste principally produced on the Protected Property as part of activities permitted to Grantor hereunder, hazardous substance or toxic waste, nor any placement of underground storage tanks in, on, or under the Protected Property. The preceding sentence shall not apply to the aboveground presence, use, or storage on the Protected Property of small quantities of the above mentioned substances that are generally recognized to be appropriate to normal residential uses on the Protected Property.

**7.) Alteration of Water Resources.** Pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor activities on the Protected Property, that would be detrimental to water purity, or that materially alter natural water level and/or flow in or over the Protected Property are prohibited, except as may otherwise be provided in this Easement.

**8.) Other Use.** Any other use of the Reserved Residential Area which would be inconsistent with the Purpose of this Grant or that would impair the Protected Property's Conservation Values outside the Reserved Residential Area is prohibited, unless such use or activity is deemed necessary by the Grantor and Grantee for the protection of the Purpose of this Easement, in which case such use or activity shall be subject to the prior written approval of Grantee at Grantee's sole discretion.

Need: Schedule B or Plan identifying the boundaries of the Reserved Residential Area. It is best that this information be included in a recorded document, not just the Baseline Report.

### **Trails and Woods Roads Option**

Depending on the property and its Conservation Values, this may be edited to only allow Trails, not Woods Roads.

**4.X Trails and Woods Roads.** The right to construct, relocate on site, repair, maintain, and use unpaved trails and Woods Roads(as defined herein), stone walls, bridges, culverts, gates and fences in furtherance of the activities permitted herein only, and the right to utilize motorized vehicles in performing construction, repair and maintenance activities. Trails and Wood Roads shall be planned, located, constructed and used in a manner to substantially prevent sedimentation or erosion of the Protected Property and adverse impacts on wetlands and watercourses on or adjacent to the Protected Property. The extent and use of such improvements shall not, in the aggregate, have an adverse impact on the Purpose of this Easement.

Such trails and Woods Roads may be surfaced with permeable materials only, including but not limited to sand, gravel, shell, rock, or crushed stone and subsurface synthetic stabilization materials. All new trails and Woods Roads whose purpose includes vehicular travel shall be subject to the Grantee's Approval. For the purposes of this Easement, "Woods Road" means a passable vehicular roadway, surfaced in accordance with the above limitations, suitable for the activities permitted to Grantor hereunder.

## **Watercourse Maintenance and Erosion Control Options (2)**

Note: Consider adding both when there are Agricultural Activities or Forestry Activities.

**4.X Watercourse Maintenance.** The right to use, maintain, establish, construct, and improve water sources, watercourses, and water bodies within the Protected Property for permitted activities. Grantor may alter the natural flow of water over the Protected Property in order to improve drainage of agricultural soils, reduce soil erosion, or improve the Agricultural or Forestry potential of the Protected Property, provided such alteration is consistent with the Purpose of this Grant and is carried out in accordance with law and a Conservation Plan or applicable Forest Management Plan. Grantor may conduct wetlands and watercourse habitat improvement or restoration, including Invasive Species control, as allowed by law and the applicable Conservation Plan or Forest Management Plan.

If such activity is aimed at increasing Aquaculture on the Protected Property and would have a substantial impact on farmland soils, such activity may only be conducted with prior Approval of the Grantee, in its sole discretion.

Conservation Plan means that plan prepared by the U.S. Department of Agriculture, Natural Resources Conservation Service, or by its successor, or by a qualified conservation professional approved by Grantee. This plan shall be updated periodically, and in any event at any time the basic type of agricultural operation on the Protected Property changes or ownership of the Protected Property changes; and shall provide for management of the Protected Property in a manner consistent with generally accepted Best Management Practices, including, but not limited to, those practices identified by the Natural Resource Conservation Service (NRCS) Electronic Field Office Technical Guide, and in a manner that takes into account the protection of the Conservation Values of the Protected Property. The Grantor may develop and implement a Conservation Plan that proposes a higher level of conservation and is consistent with the standards and specifications of the NRCS Electronic Field Office Technical Guide or comparable source. Grantor shall provide Grantee with a copy of the Conservation Plan [within one year of execution of this Grant] and with copies of any updates and/or revisions. Grantor and NRCS or other applicable organization, shall have the right to enter the Protected Property, with advance notice to Grantor, in order to monitor compliance with the Conservation Plan.

**4.X Erosion Control.** The right to remove, place, or replace soil or ground material to control and reduce soil erosion, preserve man-made wetlands, restore or remove dams, and restore man-made ponds within the existing Footprint as depicted in the Baseline Report. Such modifications

shall only be conducted as part of a Conservation Plan or Forest Management Plan in furtherance of Agricultural Activities and/or Forestry Activities.

Conservation Plan means that plan prepared by the U.S. Department of Agriculture, Natural Resources Conservation Service, or by its successor, or by a qualified conservation professional approved by Grantee. This plan shall be updated periodically, and in any event at any time the basic type of agricultural operation on the Protected Property changes or ownership of the Protected Property changes; and shall provide for management of the Protected Property in a manner consistent with generally accepted Best Management Practices, including, but not limited to, those practices identified by the Natural Resource Conservation Service (NRCS) Electronic Field Office Technical Guide, and in a manner that takes into account the protection of the Conservation Values of the Protected Property. The Grantor may develop and implement a Conservation Plan that proposes a higher level of conservation and is consistent with the standards and specifications of the NRCS Electronic Field Office Technical Guide or comparable source. Grantor shall provide Grantee with a copy of the Conservation Plan [within one year of execution of this Easement] and with copies of any updates and/or revisions. Grantor and NRCS or other applicable organization, shall have the right to enter the Protected Property, with advance notice to Grantor, in order to monitor compliance with the Conservation Plan.