

MODEL CONSERVATION EASEMENT BOILERPLATE
MAINE LAND CONSERVATION ATTORNEYS NETWORK
Version Date: June 23, 2011

INTRODUCTORY NOTES:

1) This is not a complete model conservation easement. This document contains only boilerplate provisions in a typical donated conservation easement, and does not contain any model language on land use restrictions and reserved rights, which are the heart of any conservation easement. The Maine Land Conservation Attorney Network (MLCAN) is circulating these minimum boilerplate language provisions for review and use by those in the conservation world. Additional language pertaining to model restrictions, reserved rights, and other terms may be forthcoming.

2) All annotations, notes and section headings are written in italics. Any final conservation easement based on this document should not include any of this italicized language, which is provided only for convenience of the drafter.

3) These provisions will be most useful for parties negotiating a conservation easement to be donated to a nonprofit land trust. Most of the provisions will also be applicable to a conservation easement being sold to a nonprofit land trust without any public funding. Various changes or a different template will be necessary for an easement that is (a) donated or sold to a governmental entity; and (b) sold to a nonprofit land trust, using public funding sources (such as Land For Maine's Future).

4) This document is advisory, and no party is required to adopt its provisions in whole or in part. At the same time, the MLCAN members hope that this document will add uniformity to the conservation easement negotiating and drafting process, and thereby lower the time and costs of drafting and monitoring a conservation easement.

5) This document is the product of the work of several Maine attorneys who have informally collaborated together as the Maine Land Conservation Attorneys Network (MLCAN). For more information about MLCAN or to learn about meetings, contact Donna Bissett at dbissett@mcht.org

This document will be updated from time to time by MLCAN to reflect relevant changes to federal or state law. The most current version of this document can be found on the Maine Land Trust Network website, www.mltn.org. It is intended to serve as an aid to, and not a replacement for, experienced legal advice to the parties to the easement from their respective counsel.

7) Suggested changes to this document may be submitted to Donna Bissett at dbissett@mcht.org

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SECTION I. (OPTIONAL) Title of Conservation Easement

Example:

**Conservation Easement on Beautiful Island
Town of Harpswell, Maine
To be Held by ABC Land Trust, Inc.**

SECTION II. CONVEYANCING LANGUAGE

Section II.A. Identification of Parties

***Identify Grantor, address [and marital status, if the conveyance includes any gift component].
Holder, as grantee, is identified after the words of conveyance in II.B. below.***

“I/We, [Grantors’ name or names], of [Grantor’s address], being married/unmarried
[choose one] (hereinafter referred to as the “Grantors,”)

For corporate or other business entity Grantor, use the following paragraph:

[Insert exact corporate name/limited liability name/partnership name], a [Insert state of
incorporation or residency] corporation/limited liability company/partnership [Choose
one] authorized to do business in the State of Maine, with its principal place of business
in [Insert town/state where it conducts business] and a mailing address of [Insert mailing
address], (hereinafter referred to as the “Grantor”),

Section II.B. Consideration - Words of Conveyance – Covenants of Title

State whether any consideration is to be paid, or whether a portion/all is a gift. Examples:

for full consideration paid *OR*
for consideration paid, a portion/all of which being a gift *OR*
for consideration being an absolute and unconditional gift *OR*
for consideration being a gift and in consideration of the gifts of others

GRANT/GRANTS with WARRANTY COVENANTS, [[*OPTIONAL with title
attorney’s advice to assure good title: with QUITCLAIM COVENANT*]]

to [Holder’s exact legal name], a governmental entity of the State of Maine *OR* a
nonprofit corporation organized and operating in the State of Maine *OR* a nonprofit

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corporation authorized to do business in the State of Maine, and whose mailing address is _____ (hereinafter referred to as the “Holder”);

Section II.C. Legal Description of the Land

Include the title reference for Grantor’s ownership in this section, as this will help ensure that the easement is found for all relevant future title searches.

the following described premises: A Conservation Easement pursuant to Title 33, Maine Revised Statutes, Sections 476 through 479-C, inclusive, as amended, over, through, under and across certain parcels of land adjacent to [*Insert in bold the road and town name, water body name for ease of reference by those examining document in registry of deeds records*] in the Town/City of _____, County of _____, and State of Maine, being more particularly described in **Exhibit A**, and depicted on **Exhibit B**, both attached hereto and made a part hereof, being all of/a portion of [*choose one*] that premises acquired by deed to the Grantors from [*prior owner*], dated [*date deed signed*] and recorded in the _____ County Registry of Deeds, Book _____, Page _____ (hereinafter referred to as the “Property” or the “Protected Property”), exclusively for conservation purposes as follows:

Section II.D. Other rights: E.g., rights of access for lands not served by public roads, rights of first refusal, third party enforcement rights can be included here as part of the Conservation Easement; for Third Party rights, see Section 10.E.

Section II.D.1. If right of access is included for land not served by public roads:

“TOGETHER WITH a right-of-way for pedestrian and vehicular access to the Protected Property as necessary or appropriate to exercise the Holder’s rights hereunder, [*choose one of the following:*] over and across any and all rights-of-way and roads owned by Grantor or over which Grantor has rights of access to the Protected Property/over and across the following described right-of-way/ over and across a certain parcel of land , as more particularly described in **Exhibit A**; exclusively for conservation purposes, as follows:”

Section II.D.2. If first refusal rights are included:

“TOGETHER WITH a right of first refusal to acquire the Protected Property, as more fully set forth at Paragraph 16; exclusively for conservation purposes as follows;”

Section II.D.3 If third parties with rights of enforcement are included:

“And Grantor further grants to [*third party name, legal entity status*], of [*third party address*] (hereinafter, “Third Party Holder” or “Third Party Enforcer”), third party rights of enforcement in the Conservation Easement, as more fully set forth in Paragraph 17, exclusively for conservation purposes as follows:”

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INSERT HERE THE SUBSTANTIVE SECTIONS OF THE EASEMENT: PURPOSES, RESTRICTIONS AND RESERVED RIGHTS, INCLUDING PUBLIC ACCESS RIGHTS IF ANY.

The restrictions and reserved rights may be numbered as Paragraph numbers 1-9.

Section III Purposes: For example

Purpose. It is the purpose of this Conservation Easement to assure that the Protected Property will be retained forever in its essentially undeveloped, open space, scenic, and natural condition, consistent with the terms of this Conservation Easement, including its recitals, and to prevent any use of the Protected Property that will impair or interfere with this condition. Grantor and Holder intend that this Conservation Easement will confine, in perpetuity, the uses of the Protected Property to activities which are compatible with these purposes and the protection of wildlife habitat and preservation of its scenic, open space and natural values.

Section IV Recitals: For example:

WHEREAS, Grantor is the sole owner in fee simple of certain parcels of real property (hereinafter the “Property” or the “Protected Property”), situated in the Town [*OR: City*] of _____, _____ County, Maine, which is described in **Exhibit A** which Exhibit is attached hereto and made a part hereof; and shown on a Plan entitled “Boundary Survey [*or Plan as the case may be*] of _____” by _____, dated _____, 2006 and recorded as Plan File _____ (the “Plan”) and shown as **Exhibit B** attached hereto and made part hereof; and

WHEREAS, Holder is qualified to hold conservation easements pursuant to 33M.R.S.A. §476(2)(B), as amended, and is a qualified organization under the Internal Revenue Code, 26U.S.C.A. §§170(h)(3) and 501(c)(3), whose purpose it is to preserve and conserve natural areas for aesthetic, scientific, charitable and educational purposes; and

WHEREAS, the Protected Property represents wooded open space, wildlife habitat, wetlands and lake shorefront [change according to the Property] having scenic, wildlife, natural, ecological, and aesthetic values in its present natural state, and particularly includes shoreline along _____ Pond and adjoining wetlands, habitat and woodlands of special scenic and natural values to the surrounding community and the public at large; and

WHEREAS, Grantor and Holder also have the common purpose of conserving in perpetuity the Protected Property as “a relatively natural habitat of fish, wildlife or plants, or similar ecosystem,” as that phrase is used in 26 U.S.C.A. §170(h)(4)(ii), and in regulations promulgated thereunder; and

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WHEREAS, any significant change or development of the scenic, open space and natural conditions of the Protected Property, except as expressly herein provided, would have an adverse effect on the scenic and natural resources of the community, its public values and those of the environment; and

OTHER RECITALS ARE RECOMMENDED AS MAY BE NECESSARY TO DESCRIBE THE IMPORTANT CONSERVATION ATTRIBUTES OF THE PROTECTED PROPERTY AND GENERALLY TO SHOW THAT THE IRS CONSERVATION PURPOSES TEST WILL BE MET.

SECTION V: Now Therefore clause.

NOW, THEREFORE, in consideration of the above recited purposes and recitals and of the covenants, terms, conditions and restrictions herein contained, and pursuant to the laws of the State of Maine, Grantor and Holder have established, forever and in perpetuity, a Conservation Easement in gross over the Protected Property, as follows.

SECTION VI: Sample Restrictions and Reserved Rights.

[To be discussed]

1. Land Uses
2. Subdivision
3. Structures
4. Surface Alterations
5. Vegetation Management
6. Chemical Use and Water Protection
7. Public Use and Access
8. Definitions
9. Left for other miscellaneous restrictions

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SECTION VII: BOILERPLATE COVENANTS.

10. Holder's Affirmative Rights

10.A. Entry and Inspection. Holder shall have the right to enter the Protected Property for inspection and monitoring purposes and for enforcement, at a reasonable time and in a reasonable manner that is consistent with the conservation purposes hereof. [*OPTION: (NOTE: If the easement allows for public access, the following sentence is not necessary, but if the easement does not allow for public access, the following sentence may be added.)* Except in emergency circumstances, Holder will make reasonable efforts to contact Grantor [*option: and/or persons in residence on the Protected Property and/or Grantor's adjacent property*], prior to entry onto any area of the Protected Property. "Emergency circumstances" shall mean that the Holder has a good-faith basis to believe a violation of the easement is occurring or is imminent.]

10.B. Enforcement. Holder shall have the right to enforce this Conservation Easement by proceedings at law and in equity, including the right to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement and to require the restoration of the Protected Property to the condition that existed prior to any such injury.

Prior to initiation of an enforcement action, Holder shall provide Grantor with prior notice and reasonable opportunity to cure any breach, except where emergency circumstances require more immediate enforcement action.

[*OPTION 1 for mandatory ADR:* Prior to the initiation of an enforcement action, the parties shall follow the provisions of Paragraph 13 herein relative to attempting to resolve a dispute over violation by Alternative Dispute Resolution ("ADR").]

[*OPTION 2 for optional ADR:* The parties may agree to resolve disputes through alternative dispute resolution, in accordance with the provisions of Paragraph 13 herein.]

If Holder is the prevailing party in any action against Grantor to enforce or defend this Conservation Easement, Grantor shall reimburse Holder for any reasonable costs of enforcement or defense, including court costs, mediation and/or arbitration costs, reasonable attorneys' fees, and any other payments ordered by such Court or arbitrator.

Grantor is not responsible for injury to or change in the Protected Property resulting from natural causes or environmental catastrophe beyond Grantor's control, such as fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes.

10.C. Boundaries.

[*Option:* The Protected Property has been professionally surveyed.] It shall be Grantor's obligation to keep the boundaries of the Protected Property clearly marked. In the event

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boundaries are not adequately clear or marked and Grantor fails to accurately mark within a reasonable time after notice by Holder, Holder shall have the right to engage a professional surveyor to re-establish and re-mark boundaries of the Protected Property or any part thereof. [OPTION: The costs associated with such survey work shall be paid by the Grantor if and to the extent necessary to determine if a breach of this Conservation Easement has occurred.]

10.D. Holder Acknowledgement Signs. Holder shall have the right [[*Optional: , after consultation with Grantor,*]] to install and maintain small unlighted signs visible from public vantage points and along boundary lines, to identify Holder and inform the public and abutting property owners that the Protected Property is under the protection of this grant.

10.E. [Optional. NOTE: *There are many varying roles for the Third Party Enforcer, some similar to co-Holdership, with obligation review all notices and to co-approve all requests for approval. This is a back-up right with varying ongoing obligations.]*

Third Party Rights. If Holder is no longer in existence, or has been determined by a local court of competent jurisdiction to be negligent in its monitoring and enforcement responsibilities with respect to this Conservation Easement, Third Party has the right to enforce the terms and conditions of this Conservation Easement. Until such time as a successor to Holder that is acceptable to Third Party is named, Third Party shall act as Holder. If Holder is not replaced by a successor within 30 days of Holder's dissolution or said court determination, Third Party may succeed as Holder.]

10.F. [Optional. Affirmative Management Rights. Example, the right to mow, the right to manage public access, the right to build a trail]]

11. Notices and Requests for Approval

11.A. Notice and Approval Requirements. Grantor agrees to notify Holder prior to undertaking any activity or exercising any reserved right that may have a material adverse effect on the conservation purposes of this grant, and where prior notice or approval is specifically required in this Conservation Easement. Grantor's notices must include sufficient information to enable Holder [*where applicable: and Third Party Enforcer*] to determine whether Grantor's plans are consistent with the terms of this Easement and the conservation purposes hereof. Holder's approval shall be conditioned on compliance with the terms of Paragraph 15.F.

11.B. Method for Notice. Any notices or requests for approval required by this Easement shall be in writing and shall be personally delivered or sent certified mail, return receipt requested, or by such commercial delivery service as provides proof of delivery, to Grantor and Holder, [*and, if applicable, to the Third Party Enforcer*], at the following addresses, unless one has been notified by the other of a change of address or change of ownership:

To Grantor: At the address of the owner(s) of record as noted hereinabove or as provided by Grantor in writing, or if not provided, as set forth below.

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To Holder: *[List address, contact information, or as set forth below.]*

[To Third Party: List address, contact information, or as set forth below.]

In the event that notice mailed to Holder[, *Third Party Enforcer*], or to Grantor at the last address on file with Holder is returned as undeliverable, the sending party shall provide notice by regular mail to Grantor's last known address on file with the municipality of [*municipality in which property is located*], Maine, or the State Tax Assessor in the case of land in the unorganized territories; or in the case of Holder or Third Party, or in the case of a corporate owner, to the address on file with the Secretary of State, State of Maine, and the mailing of such notice shall be deemed compliance with the notice provisions of this Easement.

11.C. Time for Notice and Reply

- i. Where Grantor is required to provide notice to Holder [*and Third Party Enforcer*] pursuant to this Easement, such notice as described hereinabove shall be given in writing _____ (___) days prior to the event giving rise to the need to give notice except as otherwise specifically provided herein.
- ii. Where Grantor is required to obtain Holder's [*and Third Party Enforcer's*] prior written consent and approval, such request as described hereinabove shall be given in writing _____ (___) days prior to undertaking the proposed activity except as otherwise specifically provided herein. Holder, upon receipt of Grantor's request, shall acknowledge receipt of the same. Following such review, Holder shall grant, grant with conditions, or withhold its approval. Failure to approve Grantor's request within _____ (___) days shall be deemed a denial of such request. No proposed activity may proceed without Holder's written consent and approval as provided herein.

12. Costs, Taxes, Liability

12.A. Taxes and Liens. Grantor shall pay and discharge when due all property taxes and assessments imposed upon the Protected Property and any uses thereof, and shall avoid the imposition of any liens that may impact Holder's rights hereunder. Grantor shall keep the Protected Property free of any liens or encumbrances that may adversely impact Holder's rights hereunder, including without limitation those arising out of any work performed for, materials furnished to, or obligations incurred by Grantor; and Grantor shall promptly notify Holder of the filing or recording of any such lien or encumbrance. Holder may, at its discretion, pay any outstanding taxes, assessments, liens or encumbrances, and shall then be entitled to reimbursement by Grantor, together with interest at the then-prevailing statutory post-judgment interest rate in Maine under Title 14 MRSA Section 1602-C or successor provisions thereof, calculated from the date of Holder's payment. Grantor and Holder agree that Holder shall have a lien on the Protected Property to secure Holder's right to reimbursement and that Holder may record such lien at any time. In any collection process or court action brought by Holder for reimbursement, Holder shall be entitled to recover its costs and expenses, including, without limitation, reasonable attorneys fees.

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12. B. Responsibility of Owners. Grantor acknowledges that Holder has neither possessory rights in the Protected Property, nor any responsibility or right to control, maintain, or keep up the Protected Property [*option if holder acquires affirmative management rights: other than as set forth in Paragraph 10.____ .*]. Grantor shall retain all responsibilities and shall bear all costs and liabilities of any nature related to the ownership, operation, upkeep, improvement and maintenance of the Protected Property. [*Optional: Grantor shall indemnify, defend and hold Holder harmless from and against any and all liabilities, costs, damages, or expenses of any kind including, without limitation, reasonable attorneys fees, that Holder may suffer or incur as a result of or arising out of the activities of Grantor or any other person on the protected property, other than those caused by the negligent acts or acts of misconduct of Holder, and except those arising out of Holder's workers' compensation obligations. Holder's right to be defended, held harmless and indemnified by Grantor shall extend without limitation to any action based upon the presence of toxic and/or hazardous substances upon or emanating from the Protected Property.*]

OPTIONAL:

13. Dispute Resolution.

This Easement is in accordance with Maine's established public policy that encourages the use of non-litigative methods of dispute resolution. When a dispute arises between the Grantor and the Holder concerning uses or activities on the Protected Property, which they cannot resolve by informal means, the following dispute resolution procedures [*OPTION 1- shall*] [*OPTION 2- may*] be followed:

A. Conditions for Required Alternative Dispute Resolution ("ADR"). Prior to bringing an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, the parties [[*OPTIONS - shall/may*]] seek to resolve the dispute through mediation if the Holder determines that the following conditions (the "ADR Conditions") are met:

- i. The Grantor agrees not to proceed with the disputed use or activity pending resolution of the dispute, and
- ii. No injury to the Protected Property has occurred or will occur while the parties are engaging in the ADR process.

B. Conditional Waiver of Right to Litigate. In submitting the dispute to mediation, the parties acknowledge they are temporarily, voluntarily waiving their rights to litigate the dispute in a court of law, so long as the ADR Conditions are being met. In the event either of the ADR Conditions is violated, the Holder shall have the immediate right to bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, as is more fully set forth in Section 10.B, above.

C. Conditions for ADR By Mutual Agreement of the Holder and Grantor. Regardless of whether the ADR Conditions are met, the parties by mutual agreement may, in addition to

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mediation, submit the dispute to other forms of ADR such as binding or non-binding arbitration. By mutual agreement, other conditions may be set under which the process of ADR would proceed. The violation of these additional conditions by one of the parties, would give the other party the right to immediately proceed with an action in law or equity.

D. Dispute Resolution. The procedure the parties shall use for mediation is as follows:

i. Either party may serve the other with a written request for mediation. A mediation session shall be scheduled no later than sixty (60) days after the date of the request if the Holder determines that the ADR Conditions are met or unless the parties agree otherwise.

ii. Mediation shall be conducted by a mediator mutually agreeable to Holder and Grantor who is on the Superior Court roster maintained by the Maine Court Alternative Dispute Resolution Service (CADRES) (or successor or alternative entity that meets mediation standards recognized under state law.)

iii. If the parties cannot agree on a mediator, they shall each pick a mediator, and those two mediators shall select a third mediator who alone shall actually conduct the mediation.

iv. The costs of mediation shall be shared equally by the parties unless otherwise agreed or unless reimbursement to Holder is applicable under Paragraph 10.B. herein.

14. Standard Provisions

14.A. Maine Conservation Easement Act. This Conservation Easement is established pursuant to the Maine Conservation Easement Act at Title 33, Maine Revised Statutes Annotated, Sections 476 through 479-C, inclusive, as amended, and shall be construed in accordance with the laws of the State of Maine. *OPTIONAL:* The recreational trail easement established hereunder is further authorized under Title 33 Maine Revised Statutes Annotated, Section 1581, et seq.

OPTION for Gifts and Bargain Sales **14.B. Conservation Purposes.** This Conservation Easement is established exclusively for conservation purposes pursuant to the Internal Revenue Code, as amended (hereinafter referred to as the “Code”) at Title 26, USCA, Section 170(h)(1)–(6) and [*list any other applicable IRC sections:* Sections 2031(c), 2055, and 2522,] and under Treasury Regulations at Title 26 CFR §1.170A-14 *et seq.*, as amended.

14.C. Qualified Holder. The Holder is qualified to hold conservation easements pursuant to Title 33, Maine Revised Statutes Annotated, Section 476(2)(B), as amended, [*OPTION:* and recreational trail easements under Title 33 Maine Revised Statutes Annotated, Section 1581(1), as amended,] and is a qualified donee under Internal Revenue Code Section 170(h)(3): [*for governmental holders:* a governmental entity with the commitment to preserve the conservation values of the Protected Property.] [*for nonprofit organizations:* a publicly supported, nonprofit 501(c)(3) organization with the authority to accept lands, easements, and buildings for the purpose of preserving and protecting natural, scenic, educational, recreational or open-space values of real property, and with the commitment to preserve the conservation values of the Protected Property.]

14.D. Assignment Limitation. This Conservation Easement is assignable, but only to an entity that satisfies the requirements of Section 170(h)(3) of the Internal Revenue Code (or successor

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provisions thereof) and the requirements of Section 476(2) of Title 33 of the Maine Revised Statutes Annotated, as amended (or successor provisions thereof), and that as a condition of transfer, agrees to uphold the conservation purposes of this grant.

14.E. Baseline Documentation. In order to establish the present condition of the Protected Property and its [conservation attributes protected by this Conservation Easement *AND/OR* natural and scenic resources *AND/OR* agricultural resources, etc.] so as to be able to monitor properly future uses of the Protected Property and assure compliance with the terms hereof, Holder and Grantor have prepared an inventory of the Protected Property's relevant features and conditions (the "Baseline Documentation") and have certified the same as an accurate representation, to the extent known, of the condition of the Protected Property as of the date of this grant, as required under Treasury Regulations §1.170A-14, for tax deductible conservation easement gifts.

14.F. Liens Subordinated. Grantor represents that as of the date of this grant there are no liens or mortgages outstanding against the Protected Property [*CONFIRM:*, except any listed in Exhibit A, which are subordinated to Holder's rights under this Conservation Easement, as required under Treasury Regulations §1.170A-14]. Grantor has the right to use the Protected Property as collateral to secure the repayment of debt, provided that any lien or other rights granted for such purpose, regardless of date, are subordinate to Holder's rights under this Conservation Easement. Under no circumstances may Holder's rights be extinguished or otherwise affected by the recording, foreclosure or any other action taken concerning any subsequent lien or other interest in the Protected Property.

[11-19-10 Note: Due to the U.S. Tax Court's recent opinion in Kaufman v. Commissioner, 134 T.C. 9 (U.S.T.C. 2010), there is some uncertainty as to whether a mortgage subordination must subordinate all of the mortgagee's rights to the conservation easement in order for a donated conservation easement to remain eligible for a federal income tax charitable deduction. Land trusts and landowners and their respective counsel are encouraged to heed this issue in drafting any mortgage subordination.]

14G. Value of Conservation Easement, Takings, Extinguishment, Proceeds

1. The parties agree that the grant of this Conservation Easement creates a property right that vests immediately in Holder. The parties further agree that this property right as of the date of its creation has a fair market value that is equal to the percentage by which the fair market value of the unrestricted property as a whole as valued in accordance with IRS Regulations at 1.170A-14(g)(6)(ii), is reduced by the terms and conditions imposed by this Conservation Easement, as of the date of the execution of this Conservation Easement (hereinafter the "Original Percentage Reduction").

2. (a) If either Holder or Grantor receives notice of the actual or threatened exercise of the power of eminent domain (hereinafter a "Taking") with respect to any interest in or any part of the Protected Property, the party who receives the notice shall promptly notify the other and the parties may proceed jointly or either party may at its discretion take such legal action as it deems necessary to: (i) challenge the Taking; (ii) challenge the amount of allocation of any award tendered by the Taking authority; or (iii) otherwise participate in, challenge or appeal such

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proceedings, findings or awards. Any third party counsel and consultants (including appraisers) hired by either party shall be reasonably acceptable to the other party. Each party shall be responsible for its own costs and legal fees, absent written agreement of the parties.

(b) In the event of a Taking of all or a portion of the Protected Property the following allocation provisions shall apply:

- (i) the parties agree that notwithstanding any other valuation process proposed to calculate compensation due to the parties by the entity accomplishing the Taking, Holder shall be entitled to a portion ("Holder's Portion") of the proceeds of any compensation award resulting from such Taking and Grantor shall be entitled to the balance of the proceeds of such compensation award;
- (ii) Holder shall use such proceeds for its conservation purposes;
- (iii) Holder's Portion of the proceeds of any compensation award shall be the proceeds multiplied by a fraction, the numerator of which is the amount by which the fair market value of the interest taken at the time of such Taking unrestricted by this Conservation Easement, is reduced by the terms and conditions of this Conservation Easement, and the denominator of which is the fair market value of the interest taken at the time of such Taking unrestricted by this Conservation Easement; and
- (iv) notwithstanding the foregoing, Holder's Portion of the proceeds resulting from such Taking shall not include value of the Protected Property prior to such Taking attributable to authorized improvements made and paid for by Grantor after the date of this grant, but shall include improvements made by or at the expense of Holder.

3. Except for a Taking in accordance with subsection 14.G.2 above, this Conservation Easement may only be extinguished or terminated by judicial order in a court of competent jurisdiction. It is the intention of the parties that an extinguishment or termination be approved by a court only if all of the conservation purposes of this Conservation Easement are impossible to accomplish, and if both Grantor and Holder (and any Third Party Enforcer, if existing) agree. Should this Conservation Easement be terminated or extinguished as provided in this paragraph, in whole or in part, Holder shall be entitled to be paid no less than a portion of any proceeds of sale, exchange or lease computed as to the greater of: (i) the Original Percentage Reduction; (ii) the proportion that the value of this Conservation Easement bears to the unrestricted Protected Property at the time of the extinguishment, as determined by the agreement of the parties or, in the absence of such agreement, by an independent appraiser mutually selected by Grantor and Holder (Such proportion shall not include value attributable to permitted improvements made to the Protected Property by Grantor after the effective date hereof.); or (iii) the increase in value of the Grantor's estate resulting from such extinguishment, as determined by the court, or in the absence of such court determination, by the agreement of the parties or, in the absence of such agreement, by an independent appraiser mutually selected by Grantor and Holder. Holder shall use its share of the proceeds or other moneys received under this paragraph in a manner consistent, as nearly as possible, with the stated, publicly beneficial purposes of this Conservation Easement. Grantor agrees and authorizes Holder to record a notice of a lien on the

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Protected Property which lien will be effective as of the date of such extinguishment, to secure its rights under this Paragraph.

[For donated and bargain sale easements. Same language should also be included in a separate letter that also references any stewardship contribution.]

14.H. Contemporaneous Written Acknowledgment. In compliance with I.R.C. Section 170(f)(8), Holder acknowledges receipt of this conservation easement on the date hereof, and states that it has not provided Grantor(s) with any goods or services in consideration, in whole or in part, for Grantor(s)' [bargain sale] contribution of this easement. *[CAUTION: must add an exception if Holder paid any amount as compensation, including paying for Grantor's appraisal or other transaction costs usually paid by Grantor or the bargain sale purchase price].*

15. General Provisions

15.A. Controlling Law and Interpretation. The interpretation and performance of this Easement shall be governed by the laws of the State of Maine . Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the conservation purposes of this Easement and the policy and purpose of the Maine Conservation Easement Act at Title 33, Maine Revised Statutes Annotated, Sections 476 through 479-C, inclusive, as amended. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the conservation purposes of this Easement shall govern.

15.B. Grantor and Holder Definitions. The term "Grantor" or "Grantors" as used in this easement shall include, unless the context clearly indicates otherwise, the within-named Grantor(s), jointly and severally, their personal representatives, heirs, successors and assigns and any successors in interest to the Protected Property. The term "Holder" as used in this easement shall, unless the context clearly indicates otherwise, include the Holder's successors and assigns.

15.C. Owner's Rights and Obligations, Joint Obligation. A person's or entity's obligation hereunder as Grantor, or successor owner of the Protected Property, shall be joint and several, and will cease, only if and when such person or entity ceases to have any ownership interest in the Protected Property, (or relevant portion thereof) but only to the extent that the Protected Property (or relevant portion thereof), is then in compliance herewith, and provided such person or entity shall have fulfilled the requirements of Paragraph 15.D below. Responsibility of owners for breaches of this Conservation Easement that occur prior to transfer of title will survive such transfer; provided that the new owner shall also be responsible for bringing the Protected Property into compliance.

15.D. Subsequent Deeds and Transfers.

15.D.1. This Easement must be incorporated by reference in any deed or other legal instrument by which Grantors convey any interest in the Protected Property, including, without limitation, a leasehold or mortgage interest. Grantors further agree to give written notice to

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Holder within thirty (30) days of the transfer or conveyance of any interest in the Protected Property[*OPTIONAL*: pursuant to Paragraph 15.D.2]. The failure of Grantors to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

[OPTIONAL]

15.D.2. Required Transfer Fee and Recording of Notices with Respect to Transfer--Resulting Lien. At any time the Protected Property itself, or any interest in it, is transferred by Grantor to any third party, Grantor shall pay a \$100 transfer fee to Holder and Grantor shall notify Holder of such transfer within thirty (30) days of such transfer or conveyance in writing, using the form in Exhibit D attached hereto. [*OPTION*: Failure to record the Notice of Transfer described herein shall result in a continuing lien in favor of Holder.]

15.E. Compliance/Estoppel Certificates. Upon written request by Grantor, Holder will provide Compliance/Estoppel Certificates to Grantor or third parties, indicating the extent to which, to Holder's knowledge after due inquiry, the Protected Property is in compliance with the terms of this grant. The inspection of the Protected Property for this purpose will be made by Holder at Grantor's cost within a reasonable time after Grantor's written request.

15.F. Discretionary Approvals and Amendments.

15.F.1. Discretionary Approvals. Grantor and Holder recognize that certain activities by the Grantor may warrant the prior discretionary approval of Holder, and that Holder has the right to issue such discretionary approvals without prior notice to any other party. Nothing in this paragraph shall require either party to agree to any discretionary approval.

15.F.2. Amendments. Grantor and Holder recognize that rare and extraordinary circumstances could arise which warrant modification of certain of the provisions of this Conservation Easement. To this end, subject to more restrictive laws and regulations, if any, Grantor and Holder have the right to agree to amendments to this Conservation Easement without prior notice to any other party, provided that in the sole and exclusive judgment of Holder, such amendment enhances or does not materially detract from the conservation values intended for protection under this Conservation Easement. Amendments will become effective upon recording at the _____ County Registry of Deeds. Nothing in this paragraph shall require the Grantor or the Holder to agree to any amendment or to negotiate regarding any amendment. *OPTIONAL*: All rights of Holder to amend this Conservation Easement shall require the consent of the Third Party Enforcer.

15.F.3. Further Limitations on Discretionary Approval and Amendments. Notwithstanding the foregoing, except as provided by 33 M.R.S.A. §§ 476 *et seq.*, as amended, Holder and Grantor have no right or power to approve any action or agree to any discretionary approval or amendment that would

- (a) materially detract from the conservation values intended for protection;
- (b) limit the term or result in termination of this Conservation Easement; or

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(c) adversely affect the qualification of this Conservation Easement or the status of the Holder under applicable laws, including the Maine Conservation Easement Act at Title 33, M.R.S.A. §476 *et seq.*, and Sections 170(h), 501(c)(3), 2522, and 2031(c) of the Internal Revenue Code, successor provisions thereof and regulations issued pursuant thereto.

[*OPTIONAL*: (d) enlarge the area for residential or other building development, or the number of residences, if any, permitted by the express terms of this Conservation Easement,]

[(*e*) *OPTIONAL*: insert standards based on the specific conservation purposes of the easement, for example, for forever wild easements.]

15.G. Economic Hardship. In making this grant, Grantors have considered the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. In addition, the unprofitability of conducting or implementing any or all of the uses permitted under the terms of this Conservation Easement shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. It is the intent of both Grantors and Holder that any such economic changes shall not be deemed to be changed conditions or a change of circumstances justifying the judicial termination, extinguishment or amendment of this Conservation Easement.

15.H. Nonwaiver. The failure or delay of the Holder, for any reason whatsoever, to do any action required or contemplated hereunder, or to discover a violation or initiate an action to enforce this Conservation Easement shall not constitute a waiver, laches, or estoppel of its rights to do so at a later time.

15.I. Severability, Entire Agreement, No Forfeiture. If any provision of this Conservation Easement or the application of any provision to a particular person or circumstance is found to be invalid, the remainder of this Conservation Easement and the application of such provision to any other person or in any other circumstance, shall remain valid. This instrument and the Baseline Documentation set forth the entire agreement of the parties with respect to the Conservation Easement and supercedes all prior discussions, negotiations, understandings, or agreements relating to the Conservation Easement, all of which are merged herein. Nothing contained herein will result in a forfeiture of this Conservation Easement or reversion to Grantor of any rights extinguished or conveyed hereby.

15.J. Standing to Enforce. Only Holder, Grantor [*Optional*], and Third Party Enforcer] may bring an action to enforce this grant, and nothing herein should be construed to grant any other individual or entity standing to bring an action hereunder, unless otherwise provided by law; nor to grant any rights in the Protected Property by adverse possession or otherwise, provided that nothing in this Easement shall affect any public rights in or to the Protected Property acquired by common law, adverse possession, prescription, or other law, independently of this grant.

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15.K. Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

15.L. Independent Representation. Grantor has retained legal counsel *[[Optional: Insert name and address of attorney]]* to represent only his/her/their interest in this transaction. Grantor and Holder acknowledge and agree that they have not received and are not relying upon legal, tax, financial or other advice from each other. Grantor acknowledges that Holder has recommended that it/she/he/they keep independent counsel.

OPTION: 16. Holder's Right of First Refusal.

In the event that Grantor wishes to sell the Protected Property or, if permitted by the terms of this Conservation Easement any portion thereof, Grantor shall first offer the premises to Holder by written notice containing an offer to sell in accordance with the same terms as set forth in a binding purchase and sale contract with a third party (proposed transferee) that is contingent on Holder's release of this Right of First Refusal, a copy of which shall be included in such notice, and specifically including the name of the proposed transferee, the proposed selling price and the relevant terms of sale. Holder shall either agree in writing to purchase or to reject those terms within 30 days of such notice. If accepted, an additional 30 days shall be permitted for closing with Holder; if rejected by Holder, Grantor may convey only to the same person and only on the same terms as offered to Holder. Upon such conveyance this right of first refusal *[[OPTION 1: shall continue and be binding on the transferee.]]* *[[OPTION 2: shall terminate.]]*

This right of first refusal shall not apply to the following transactions:

- A. A gift of the premises or any part thereof to a relative by blood or marriage in which case this right of first refusal shall continue and be binding upon the donee and upon the donee's heirs and assigns.
- B. Descent or devise of the Protected Property or any part thereof upon death in which case this right of first refusal shall continue and be binding upon the heirs and/or devisees and their heirs and assigns.
- C. A bona fide mortgage to a financial institution. A transfer of the Protected Property or, if permitted by the terms of this Conservation Easement any portion thereof, pursuant to foreclosure of a bona fide mortgage to a financial institution shall free the interest so transferred from this right of first refusal, provided that this right of first refusal shall continue and be binding upon the successors and assigns of said financial institution.

The recording of an affidavit by Grantor stating that notice has been given to Holder, that Grantor has not received from Holder written notice of election to purchase in accordance with the time frame herein provided, and that the conveyance will be made to the proposed transferee and on the terms provided to Holder, shall be prima facie evidence of compliance with the provisions hereof.

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Section VIII. Habendum

[Choose one of the following:]

TO HAVE AND TO HOLD the said Conservation Easement unto the said Holder, and its successors and assigns forever.

Or

TO HAVE AND TO HOLD the said Conservation Easement including all development rights, covenants, and restrictions conveyed thereby, with all the privileges and appurtenances thereof, unto the said [insert land trust name], and its successors and assigns, to its own use and behoof forever.

Section IX. Signatures

[Choose one of the following:]

[Note: each owner must sign, and for gifts and bargain sales, non-owner spouses must sign, and all signatures should be notarized.]

For use by grantor who is not married:

IN WITNESS WHEREOF, I, _____, being unmarried, have hereunto set my hand and seal this (____) day of _____, (____) [year].

Signed, sealed and delivered
in the presence of:

Witness

[Grantor's printed name]

For use by married grantors, both of whom are record owners:

IN WITNESS WHEREOF, We, _____, husband and wife, have hereunto set our hands and seals this (____) day of _____, (____) [year].

Signed, sealed and delivered
in the presence of:

Witness

[Grantor's printed name]

Signed, sealed and delivered
in the presence of:

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Witness

[Grantor's printed name]

For use when easement is a gift or partial gift being granted by married person. Non-owner spouse should join in gift.

IN WITNESS WHEREOF, _____, Grantor herein, and _____, his/her spouse, joining in this deed and relinquishing all rights herein by descent or otherwise, have hereunto set their hands and seals, this (____) day of _____, (____) [year].

Signed, sealed and delivered
in the presence of:

Witness

[Grantor's printed name]

Signed, sealed and delivered
in the presence of:

Witness

[Grantor's spouse printed name]

For use by a Trust:

IN WITNESS WHEREOF, I, _____, Trustee of [insert name of trust], hereunto duly authorized, have hereunto set my hand and seal this (____) day of _____, (____) [year].

Signed, sealed and delivered
in the presence of:

Witness

[Printed name of trustee,] Trustee
[Insert name of trust]

For use by a corporation or other legal entity:

[Note: if other corporate entity such as a partnership or LLC is the Grantor, consult Grantor's counsel as to format]

IN WITNESS WHEREOF, Grantor, _____ [insert corporate name] _____ has caused these presents to be signed and sealed in its corporate name and behalf by _____ [insert person's name] _____, its [insert title] _____, hereunto duly authorized, this (____) day of _____, (____) [year].

Signed, sealed and delivered
in the presence of:

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Witness

[corporation name]

By: _____

Its: _____

Section X. Acknowledgement

ACKNOWLEDGMENT (Notarization)

[NOTE: Maine law requires only one signature to be notarized for a document to be recorded, but it is advisable for all signatures to be notarized. For out-of-state or out-of-county executions, many lawyers prefer that the signature of each signer be notarized to prevent fraud or forgeries. Acknowledgment clause form may vary in other states. It is advisable to consult a lawyer in the state of execution for the correct format. For recording in Maine, any foreign notarization clause must have the printed name of the notary and the expiration date of their commission.]

STATE OF MAINE)

COUNTY OF _____) _____, 20____.

Then personally appeared the above-named _____ and acknowledged the foregoing instrument to be his/her/their free act and deed.

Before me,

Notary Public

[Printed name of notary]

My commission expires: _____

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Section XI. Holder Acceptance

(note that document will not use the Section designation, which is provided for convenience of the drafter in the manner of a checklist)

The above and foregoing Conservation Easement was authorized to be accepted by the [*Holder's Name*] and the [*Holder's Name*] does hereby accept the foregoing Conservation Easement, by and through [*Name of Authorized Rep*], its [*Title*], this _____ day of _____, 20__.

Signed, sealed and delivered in the presence of:

Witness

[*HOLDER'S NAME*]

By: _____

Printed Name: _____

Title: _____

STATE OF MAINE)

COUNTY OF _____)

_____, 20__.

Personally appeared _____, [*Name and Title*], duly authorized representative of the above-named [*Holder's Name*] and acknowledged the foregoing instrument to be his/her free act and deed in his/her said capacity, and the free act and deed of the [*Holder's Name*].

Before me,

Notary Public

Printed name of notary

My commission expires: _____

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Section XII. Exhibits and Attachments

EXHIBIT A

Legal Description of the Protected Property

[Include relevant surveys, reference to prior recorded deeds, and existing easements and rights of way that burden or benefit the Protected Property.]

EXHIBIT B

Sketch Plan

[Include perimeter of Protected Property, land use areas, and location of items noted in the easement.]

EXHIBIT C

Description or Map of Land Use Areas

[Can be combined with Exhibit B, but separate descriptions may require additional exhibits.]

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EXHIBIT D – NOT TO BE COMPLETED AT TIME OF EASEMENT RECORDING
[OPTIONAL UNDER 15.D.2]

Notice of Transfer of Protected Property

To: *[Insert name and address of holder]* ("Holder")

From: *[Insert name and address of fee owner]* ("Grantor")

Pursuant to Paragraph 15.D.(2) of the Deed of Conservation Easement, from _____ to Holder, dated _____, and recorded at the _____ County Registry of Deeds at Book _____ and Page _____, Holder is hereby notified by Grantor of the transfer of the fee simple interest in the subject Property legally described in Exhibit A attached hereto effective [insert date of closing] to [insert name of new Grantor], who can be reached at [insert name, legal address, phone and fax number]. This notice is accompanied by a transfer fee in the amount of \$_____, paid to Holder.

GRANTOR:

By:

Title:

STATE OF MAINE

COUNTY OF _____)

Then personally appeared the above-named _____ and acknowledged the foregoing instrument to be his/her/their free act and deed.

Before me,

Notary Public

Printed name of notary

My commission expires:_____