



LYME LAND CONSERVATION TRUST, INC.

www.lymelandtrust.org

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The Lyme Land Trust Will Enforce Restrictions in Conservation Easements it Holds as a Fiduciary

Remarks delivered at the 2010 LLCT Annual Meeting on May 28, 2010
By George Moore, President.

Preserving land advances the values of our community.

Preserving land helps create open space.

Preserving land protects our watersheds, streams, rivers and the remaining agricultural acreage.

Preserving land helps to preserve the historic rural character of Lyme.

Preserving land requires two distinct efforts:

- First, acquisition -- working with landowners, the Town and other conservation organizations to secure and protect land, and
- Second, stewardship -- ensuring that the land the Trust owns and the conservation easements it holds are managed and protected in a manner consistent with the original purpose for protecting them.

When the Land Trust owns land or a conservation easement, it does not own it in the same way as you do as a private landowner. The Land Trust holds it as a *fiduciary*, representing the public's interest – *your interest* - in that land.

Fiduciary means: “of or relating to a holding of something in trust for another.”

We take this to mean it is our fiduciary duty to protect and defend the land and the conservation easements we have been given for as long as we hold those interests. When talking about conservation easements the phrase “in perpetuity” is used. “Perpetuity” means forever.

Conservation easements -- or “conservation restrictions,” as they are called in Connecticut -- are a legal conveyance of an interest in property. (For ease of reference, I am simply going to call them “easements.”) They are public documents recorded in the Land Records at Town Hall. They travel with the land and remain in force when it is sold. Anyone buying property and doing a title search will discover any easement restrictions placed on real estate.

As a non-profit charitable organization, the Lyme Land Conservation Trust Inc., owns land -- and holds all of its assets, including easements -- in public trust. We are accountable to the Connecticut Attorney General's office to act in the public interest. Because many easements resulted in tax savings to those who donated them in the first place, we are also accountable to the Internal Revenue Service. Except in very rare and unique circumstances, the Land Trust cannot change, terminate or abandon any part or provision of an easement. We must defend them.

This is our responsibility to our members, to our community, and to the State of Connecticut. It is also our responsibility to the land we all live on and love. In the end, this is the very reason the Land Trust was formed 43 years ago, and it is why our members have supported it

Donated Easements

Most of the conservation easements we hold were freely granted by conservation-minded donors. These generous individuals wanted to protect the land they love from future development, and they wanted it to stay the way it is forever. They went to considerable expense to retain an attorney to write the easement document; to pay a surveyor to describe and flag it; and to hire an appraiser to value it.

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The conservation easement document carefully explains what are -- and what are not --permitted activities. We refer to this as the “*donor’s intent*.”

Before accepting a conservation restriction today, the Land Trust’s attorney reviews the documents to make sure we can accept the donor’s wishes. Our Stewardship Committee assesses the obligation we are assuming, and our Preservation Committee makes sure it fits with the conservation priorities we have developed in consultation with the Town. Once accepted, the Land Trust has a fiduciary duty to honor and protect the donor’s wishes - forever.

Almost all of our easements fall into this category, and it is because of the cumulative effect of these easement restrictions together with the Land Trust’s wholly owned properties that we still have large areas of intact forests and watersheds, healthy rivers, diverse wildlife habitat, and many agricultural fields in the town of Lyme. This is why our landscape remains the way we all want it to and why -- if we do our job properly -- generations to come will also enjoy it.

Regulatory Easements

There is another type of easement, one we aren’t keen on accepting unless it also has compelling conservation attributes. That is an easement granted for the purpose of a landowner getting approval from the Town to build or subdivide. We refer to this type of easement as a “regulatory” easement, because it arises from a landowner’s application to one of our Town regulatory commissions.

It is time to explain the Land Trust’s side of a prolonged dispute involving such a “regulatory” conservation easement we hold on land on Selden Road.

Second and third owners don’t always share the original donor’s love of the land and conservation ethic. Land Trusts nationwide are experiencing an increase in violations of easements. Nonetheless, it is our fiduciary duty to defend the easement even when the offending party is a new owner.

In 2007, Brian & Beverly Platner bought a house at the end of Selden Road that came with a conservation easement held by the Land Trust. This easement, which was our first, was written in 1981 by the donor’s attorney when the town granted permission for a subdivision of his property.

As a very early easement, it does not reflect the many lessons the conservation community has learned since then. In some places it is subject to differing interpretations.

However, the clear intent was to protect the land bordered by the Connecticut River, Selden Creek and Selden Cove. I quote from the easement document:

“The purpose of these restrictive covenants is to assure retention of the premises predominately in their natural, scenic or open condition and in agriculture, farming, forest and open space use...”

In 1981 the Lyme Conservation Commission, which also serves as the Inland Wetlands Agency, approved the easement and allowed the use of the site for a single family residence that was to be located in a defined area not covered by the easement. The remainder of the land was designated and defined as a protected area covered by the easement now held by the Land Trust.

The irony is that the Land Trust didn’t seek this easement. It sought us. After it was written and approved by the Town’s Conservation Commission, the Town asked the Land Trust to hold it on the Town’s behalf because back then the Town didn’t have the legal authority to hold such easements.

The Land Trust is a charitable organization. When it accepted the easement, it became a charitable asset, held by the Land Trust in its fiduciary capacity for the benefit of the public interest. There was nothing we could do but defend it as written. It is our duty to do so.

Since then, two successive owners have abided by the easement and governed their actions accordingly. In contrast, the current owners have chosen to disregard the easement and have proceeded to do what they want, where they want.

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We acknowledge some of the language in the easement is subject to differing interpretations, and since 2007, we have tried to engage in meaningful discussions, but to no avail. When attempting to carry out our rightful annual stewardship inspection, our volunteers and staff were harassed and verbally abused.

So here we are, spending time and money defending an easement whose provisions the Land Trust had no role in drafting and which the land Trust never sought in the first place.

We are grateful to the Town of Lyme for its support. In the Selectmen's Spring 2010 Newsletter, the Lyme Board of Selectmen express support for our ongoing stewardship of easements we hold for the Town with the following: *"The selectmen want to go on the record with a public statement of appreciation and support for the Land Trust and its continuing commitment to the fiduciary responsibility required to uphold the integrity of such (regulatory) easements."*

The Land Trust couldn't just walk away from its fiduciary obligations, and so last November we reluctantly filed an action in state Superior Court called a "Declaratory Judgment." Basically we said to the court: the Land Trust and the landowner have different interpretations of this easement – you tell us what it says and what our obligations are under its provisions.

Because the Court would determine each party's rights and obligations, we believe this request for a judicial interpretation of the easement to be in everyone's interest, the Land Trust's and the current and future owners'. The Land Trust will accept whatever the court decides, satisfied we did our duty. (By the way, in case you think the Land Trust is litigious; this is our first law suit in our 43 years.)

Unfortunately, rather than joining us to seek a prompt determination of the easement's terms, and put this behind us, the current owners have chosen to delay the resolution of the action and have challenged the Land Trust's very right to defend and protect the easement it accepted on behalf of the Town. These actions have delayed the case in court and temporarily prevent us from obtaining an injunction against construction work on the site that clearly violates the Conservation Restriction.

In January while the action for Declaratory Judgment was still before the Court, the Platners sought approval from the Inland Wetlands Commission (IWC) to undertake activities that are clear violations of the Conservation Restriction: relocation of the driveway, installation of a wet well and hydrant, re-grading areas, and construction of other improvements on the areas protected by the Conservation Restriction.

We argued the IWC should not give approval when an easement exists, citing state statute 47-42d. The IWC, on advice of counsel, read the statute differently. It ruled that it could not consider whether the application violated the easement, and it granted approval based solely on IWC criteria.

Let's be very clear. The IWC ruling did not and could not alter or change the meaning of this conservation restriction or its legal effect. That will be determined by the Superior Court. Any violation of the conservation restriction based on the IWC approval occurs at the Platner's legal peril.

Some are saying that by the time the Court acts it will be too late - what is done is done. That is not so. If the Land Trust succeeds in its legal action, we expect the Court to order them to move the driveway back into the unrestricted area and restore any other damage caused in the easement area.

This is a very uncomfortable experience for the Land Trust. We realize that our ability to protect land and important conservation resources depends on our relationships with landowners. However, it is our legal obligation to defend and protect the property we hold for the public benefit.

If we shirk our duty, we would violate this obligation. If we fail in our duty, would any landowners rely on us in the future to steward and protect their land? Would our donors trust us to protect the land purchased with their kind donations? Effective conservation includes both acquiring land and easements and having the resolve to protect those interests when they are threatened. In this instance, our duty requires us to resort to a Court action. We did so in a responsible manner and only when given no other reasonable alternative.

The Lyme Land Trust has enjoyed many years of productive and meaningful work in Lyme because we reflect the vision of a special community that includes our natural world.

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The members of the Land Trust have long empowered it to make this vision a reality, to ensure that as time passes we do not lose that vital link to the woods, waters and fields that nurture our sense of living in this special place.

Usually, it is a rewarding experience working with landowners as partners to protect land. Sometimes however, like now, it is the difficult task of working through a dispute.

Rest assured that the Land Trust Board understands its obligations, and its current directors hope that future boards and landowners will recognize that in this difficult instance we stood up and accepted our duty to protect the property we steward.

We are confident that at the end of this legal dispute we will have fulfilled both our legal duties and our responsibilities to the future of our community.

In closing let me put one myth to rest. We are not trying to impose our views on anyone. The Land Trust directors strongly support the right of landowners to enjoy their property as they see fit, respecting zoning and Inland Wetlands regulations, and if a conservation easement is involved, respecting that as well. The only reason we are involved in the Selden Road dispute is a conservation easement exists, and we have a legal and fiduciary duty to defend it.

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If you wish to join the 450 member families and households supporting the Lyme Land Trust's goal of preserving open space and the natural environment, you can download the membership form at its website, www.lymelandtrust.org. Click on "Membership" on the home page and follow instructions to download the membership form.