

South Park Conservation Easement Proposal¹

dated May 24, 2022

The following is a proposal for one method of granting a permanent conservation easement on the land known as 18-22 South Park Avenue remaining after the approved sale to Aspetuck Land Trust (the "Remaining Land"). This proposal is intended to be consistent with a Petition for Town Meeting circulated in May, 2022 (the "Petition"). A draft of a potential easement document is attached for consideration at the Town Meeting.

In preparing the draft conservation easement the following issues were considered among others: (i) permanence and easement structure, (ii) access and use by the general public, and (iii) the impact on the easement on the existing lease. This document is a brief summary of these select considerations and is not intended as an exhaustive list, nor is it the only method of granting a restriction consistent with the Petition.

I. Permanence/Structure.

Connecticut law specifically authorizes the enforceability of a conservation easement to "any governmental body" and certain charitable entities. The following are excerpts from the relevant statute:

Sec. 47-42a. Definitions. For the purposes of sections 47-42b, 47-42c and 47-42d, the following definitions shall apply (a) "Conservation restriction" means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space... [clause (b) omitted]

Sec 47-42b Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. No conservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas and no preservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes.

Sec. 47-42c. Acquisition of restrictions. Enforcement by Attorney General. Such conservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land. Such restrictions may be enforced by injunction or proceedings in equity. The Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.

(emphasis added)

¹ Note: This is a Proposal by an individual Town property-owner and is not made on behalf of any organization. This document does not constitute legal advice to any person or entity.

Under these statutes the Town can grant a permanent conservation easement to either (i) its own Conservation Commission because the commission is a “governmental body” or (ii) to a land trust such as Aspetuck Land Trust that is a “charitable corporation or trust whose purposes include conservation of land.” Both are natural and appropriate grantees for perpetual conservation rights.

The structure proposed herein in which the Town grants the conservation easement to its own Conservation Commission has been implemented by at least one other Town. On September 12, 2007 the Town of Oxford granted to the Oxford Conservation Commission/Inlands Wetlands Agency a “conservation easement in perpetuity” “to preserve the natural, scenic, aesthetic and special character” of a Town-owned property in Oxford.² (See Book 330, Page 1132 Oxford Land Records).

A conservation easement to Aspetuck Land Trust or another land trust would also be perpetually enforceable but would require the acceptance of the land trust. Presumably they would willingly accept an easement however it might further limit the amount for which they might acquire the property completely in the future.³

II. Access and Use by the Public.

The Petition states that the easement will include a requirement that the property be made available to the general public for ‘passive recreational purposes.’ Passive recreation has an accepted general meaning and refers to non-consumptive uses such as wildlife observation, walking and biking. (See e.g., American Heritage Dictionary <https://www.ahdictionary.com/word/search.html?q=passive+recreation>). It generally would not include ATVs or motorized vehicles. The Petition is not specific on what portions of the property must be made available to the public, but it does not by its terms require every square foot of the property to be so accessed. Consistent with the Petition, the Town can reserve to itself the right to designate areas for recreation so long as the general intent of the Petition to provide access is met.

III. Existing Tenant.

The Remaining Property is subject to an existing lease by the Town. The Petition does not mention the tenancy. The Petition however is phrased in terms of preservation and conservation, not removal or restoration. In this regard it uses the word “remains”, *i.e.* “the easement will provide that the property **remains** in a natural and open condition...” (emphasis added). It is reasonable to believe the intent of the word “remains” and the easement generally is no new development or activities occur, as is customary with conservation easements.⁴ The attached easement is drafted in this manner. The tenancy remains month-to-month and the Town would retain the right to continue or terminate the tenancy it presently possesses.

Under this Proposal the apparent intent of the Petition would be achieved. The easement would be permanent, public access would be provided and, the present state of the property would be preserved while continuing the Town’s right to manage the existing tenancy. It should be noted there are a good number of other provisions on which various drafting choices could be made consistent with the Petition. The attached draft merely reflects one option on these provisions.

² Similarly, a review of various Connecticut Town Land records reveals many other conservation easements and restrictions in which a town Conservation Easement is the grantee from third parties. A conservation easement in favor of the Conservation Commission is permissible under C.G.S. Sec 47-42. Consideration should also be given to the enabling legislation for the Conservation Commission, C.G.S. Sec. 7-131a. This statute specifically permits delegation to the Commission for managing and administering open space and, coupled with the use by other towns of the proposed structure, it should be considered functional.

³ It is fair to note that any easement, whether to the Conservation Commission or to Aspetuck Land Trust, may significantly decrease the value of the Remaining Land, however, the intent of the Petition is clearly to conserve the property, not to maximize land value.

⁴ Indeed Section 47-42d of the Connecticut General Statutes, which generally provides that any tenant, owner or other party seeking any permit for a property subject to a conservation easement must first notify the easement holder (to provide an opportunity to object), makes a specific exception so that no notice is required with respect to existing buildings that do not expand the footprint.