



Bk: 5571 Pg: 279 Franklin County
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David M. Smith Conservation Restriction

Owners:

Ellen D. Smith and Nancy V. A. Smith

being co-trustees for the David M. Smith Revocable Trust

Holder of Conservation Restriction:

Rattlesnake Gutter Trust

September 9, 2008

CONSERVATION RESTRICTION

We, Ellen D. Smith, with a mailing address of 116 Morningside Drive, Oak Ridge, Anderson County, Tennessee 37830 and Nancy V.A. Smith, with a mailing address of P.O.Box 683, Carbondale, Garfield County, Colorado 81623, being the co-trustees for the David M. Smith Revocable Trust, our successors and assigns ("Grantor"), acting pursuant to Sections 31, 32 and 33 of Chapter 184 of the General Laws of Massachusetts, hereby grant with quitclaim covenants as a gift to The Rattlesnake Gutter Trust, being a trust dated January 14, 1988 and recorded in the Franklin County Registry of Deeds in book 2191, page 304 as amended by document dated June 6, 1989 and recorded in the Franklin County Registry of Deeds in Book 2339, page 342 and having a mailing address of P.O. Box 195, Leverett, Massachusetts 01054, having the power to acquire interests in land in accordance with said General Laws, and its successors and permitted assigns, ("Grantee"), for no monetary consideration, this restriction being a gift, in perpetuity and exclusively for conservation purposes, the following Conservation Restriction on a parcel of land located in the Town of Leverett, Franklin County, Massachusetts, constituting approximately 115.5 wooded acres and more particularly described in Exhibit A, hereinafter the "premises."

Exhibit A also shows the easement for a power line of Western Massachusetts Electric Company and an adjacent highway-front lot of 2.107 wooded acres on which the aforesaid David M. Smith granted a similar Conservation Restriction to the Grantee on that portion of Exhibit A shown as the "fourth piece" in the Plan of Land, December 22, 2007, Book 125, page 45 and shown on the plan dated July 1, 1968 included in the Conservation Restriction given in 1999 and recorded with the Franklin County Registry, Deed Book 3513, Page 270.

For Grantor's title see Franklin County Registry of Deeds, Book 5314, Page 85. See also Plan of Land prepared for David M. Smith Revocable Trust located in Leverett, Massachusetts dated December 27, 2007 and recorded with said Registry of Deeds in Plan Book 125, page 45. There is no mortgage on the Premises. ✓

I. PURPOSES

This Conservation Restriction is defined in and authorized by Sections 31-33 of Chapter 184 of the General Laws and otherwise by law. The purpose of this Conservation Restriction is to assure that the Premises will be maintained in its current condition as set forth in baseline documentation in perpetuity and for conservation purposes, predominantly in a natural, scenic and undeveloped condition, and to prevent any use or change that would materially impair or interfere with its conservation and preservation values.

These values include the following:

- **Open Space Preservation.** The protection of the Premises contributes to the preservation of the scenic and natural rural character of that section of Leverett bounded by Number 6 Road, Shutesbury Road, and Brushy Mountain. The 115-acre Premises links three separate previously-protected areas. To the north, it abuts the 16-acre Mosher Conservation Area which was given to the Rattlesnake Gutter Trust in 2004. (See Franklin County Registry of Deeds, Book 04707, page 306.) To the south, the Premises abuts the 2-acre Smith CR (1999) that extends to Shutesbury Road. On the other side of the Shutesbury Road is the 40-acre Roaring Brook Conservation Area owned by the Town of Leverett (2000). The four protected conservation properties provide 173 acres of open space.
- **Scenic Protection.** The premises' wooded area is on both side of Old Mountain Road, a county way discontinued in 1888, which is now a hiking trail. It is shown on the Sketch Plan under its old name, Rat Hollow Road. Some spots have distant views of both the south and west as well as views of the property of the trails, forest interior and stone walls.
- **Surface Water Protection.** The Premises, except for Old Mountain Road (Rat Hollow Road) and the road in the power-line clearing, is under vegetative cover and drains into Roaring Brook. The lower slope of the premises is included in the Commonwealth's Priority Habitats (10/1/2006) for wetlands protection.
- **Protection of Wildlife Habitat.** The Premises is well stocked with native mammals and birds of all sizes and species., The power line clearing is shrub-covered and enhances the population by edge effects and supplies of edible berries. Hunting is allowed partly as a means of curbing the excessive population of deer. The aquatic life includes no species suitable to support fishing.
- **Public use.** Access on foot to existing trails and woods roads will be open except where prohibited by signs. The Premises will be generally available to the public for hiking and other passive recreational and educational activities, such as birding and observing results of forestry work, so long as such activities do not negatively impact the ecological health of the Premises or the conservation purposes of this Conservation Restriction.
- **Furtherance of Government Policy.** Protection of the Premises contributes to the implementation of all four overall goals listed in the *Leverett Conservation Committee's 2005-2010 Open Space Plan, Section 8, Goals and objectives:*

- Preserve the rural character of the Town
- Protect and preserve natural resources
- Improve public education related to open space
- Provide wider recreational uses of the Town's natural resources

II. PROHIBITED ACTS AND USES, EXCEPTIONS THERETO, AND PERMITTED USES

A. Prohibited Acts and Uses

Subject to the exceptions set forth in Paragraph B hereof, the Grantor will not perform, and will take reasonable actions to prevent others from performing the following acts and uses, which are prohibited, on, above, and below the Premises:

- (1) Constructing, placing or allowing to remain any temporary or permanent building, tennis court, landing strip, mobile home, swimming pool, asphalt or concrete pavement, sign, fence, billboard or other advertising display, antenna, utility pole, tower, conduit, line or other temporary or permanent structure or facility on, above or under the Premises;
- (2) Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit or otherwise make topographical changes to the area;
- (3) Placing, filling, storing or dumping on the Premises of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste or other substance or material whatsoever or the installation of underground storage tanks;
- (4) Cutting, removing or otherwise destroying trees or other vegetation;
- (5) Activities detrimental to drainage, flood control, water conservation, water quality, erosion control, soil conservation, or archaeological conservation;
- (6) Use, parking or storage of vehicles including motorcycles, mopeds, all-terrain vehicles, trail bikes, or and other motorized vehicles on the Premises shall not be permitted except for vehicles necessary for public safety (i.e. fire, police, ambulance, other government officials) in carrying out their lawful duties, forestry equipment necessary to maintain the forest, and individual transportation vehicles necessary for the mobility of persons with physical limitations or disabilities.
- (7) The disruption, removal, or destruction of the stone walls or granite fence posts on the Premises;
- (8) Prohibited/use toward development. Including subdivision thereof or use of the Premises as part of a gross tract area of this or another property for the purposes of determining density, lot coverage, open space or land area requirements, septic system densities, or zoning under otherwise applicable laws, regulations or ordinances controlling land use and building density, or transferring development rights which have been encumbered or extinguished by this Conservation Restriction to any other lands pursuant to a transferable developments rights scheme or cluster development arrangement or otherwise satisfying or determining building densities, septic system densities, ground coverage, zoning (including variances therefrom) or other development or future mitigation requirements.

(9) Any other use of the Premises or activity thereon which is inconsistent with the purpose of this Conservation Restriction or which would materially impair its conservation interests

B. Reserved Rights and Exceptions to Otherwise Prohibited Acts and Uses

Notwithstanding paragraph A above, the Grantor reserves the right to conduct or permit the following activities and uses on the Premises, but only if such uses and activities do not materially impair the purpose of this Conservation Restriction or other significant conservation interests:

(1) Recreational Activities. Fishing, boating, hiking, horseback riding, cross-country skiing, hunting, and other non-motorized outdoor recreational activities that do not materially alter the landscape, do not degrade environmental quality, or do not involve more than *de minimis* use for commercial recreational activities;

(2) Vegetation Management. In accordance with generally accepted forest management practices, removing of brush, selective *de minimis* pruning and cutting to prevent, control or remove hazards, disease, insect or fire damage, or to preserve the present condition of the Premises, including vistas, woods roads, fence lines and trails as shown in the baseline survey. The cutting and harvesting of trees for commercial timber production on a sustained yield basis, but only if carried out in accordance with a M.G.L. c. 132 Forest Cutting Plan prepared by a Massachusetts certified professional forester, and designed to protect the conservation values of the Premises, including, without limitation, water quality, water features, scenic views, wildlife habitat, etc. Motor vehicles are to be used only as necessary to conduct permitted forestry activities, but not including recreational activities and provided such use is not detrimental to water quality, wetland integrity, fragile habitat, and soil, wildlife, and plant conservation, and that such use is restricted to designated areas such as roads or trails designated as suitable with approval of Grantee. No new roads for forestry are permitted without the approval in writing by the Grantee.

(3) Non-native or nuisance species. The removal of non-native or invasive flora and interplanting of native species, and the control of species in a manner that minimizes damage to surrounding, non-target species and preserves water quality.

(4) Composting. The stockpiling and composting of stumps, trees and brush limbs and similar biodegradable materials originating on the Premises, provided that such stockpiling and composting is in locations where the presence of such activities will not have a deleterious impact on the purposes (including scenic values) of this Restriction;

(5) Wildlife Habitat Improvement. With the prior written permission of Grantee, measures designed to restore native biotic communities, or to maintain, enhance or restore wildlife, wildlife habitat, or rare or endangered species including selective planting of native trees, shrubs and plant species;

- (6) Archaeological Investigations. The conduct of archaeological activities, including without limitation survey, excavation and artifact retrieval, following submission of an archaeological field investigation plan and its approval in writing by Grantee and the State Archaeologist of the Massachusetts Historical Commission (or appropriate successor official);
- (7) Trails. The marking, clearing and maintenance of existing footpaths and existing woods roads;
- (8) Signs. The erection, maintenance and replacement of signs with respect to hunting, trespass, trail access, identity and address of the occupants, sale of the Premises, the Grantee's interest in the Premises, and the protected conservation values.
- (9) Permits. The exercise of any right reserved by Grantor under this Paragraph B shall be in compliance with zoning, the Wetlands Protection Act, and all other applicable federal, state and local laws, rules, regulations, and permits. The inclusion of any reserved right requiring a permit from a public agency does not imply that the Grantee or the Commonwealth takes any position of whether such permit should be issued.
- 10) Power-line Easement. The Western Massachusetts Electric Company and its assigns shall retain the rights and responsibilities it acquired by a 1969 Order of Taking (see Franklin County Registry of Deeds Book 1241, Pages 391-ff.) and the Grantors and assigns shall not be held responsible for the actions of that Company and its assigns.

C. Notice and Approval.

Whenever notice to or approval by Grantee is required under the provisions of paragraphs A or B, Grantor shall notify Grantee in writing not less than 60 days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Grantee to make an informed judgment as to its consistency with the purposes of this Conservation Restriction. Where Grantee's approval is required, Grantee shall grant or withhold approval in writing within 60 days of receipt of Grantor's request. Grantee's approval shall not be unreasonably withheld, but shall only be granted upon a showing that the proposed activity shall not materially impair the purposes of this Conservation Restriction. Failure of Grantee to respond in writing within 60 days shall be deemed to constitute approval by Grantee of the request as submitted, so long as the request sets forth the provisions of this section relating to deemed approval after 60 days in the notice.

III. LEGAL REMEDIES OF THE GRANTEE

A. Legal and Injunctive Relief

The rights hereby granted shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Premises to their condition prior to the time of the injury complained of (it being agreed that the Grantee may have no adequate remedy at law). The rights hereby granted shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantee for the enforcement of this Conservation Restriction. Grantee agrees to cooperate for a reasonable period of time prior to resorting to legal means in resolving issues concerning violations provided Grantor ceases objectionable actions and Grantee determines there is no ongoing diminution of the conservation values of the Conservation Restriction.

Grantor covenants and agrees to reimburse to Grantee all reasonable costs and expenses (including reasonable counsel fees) incurred in enforcing this Conservation restriction or in taking reasonable measures to remedy, abate or correct any violation therefore, provided that a violation of this Conservation Restriction is acknowledged by Grantor or determined by a court of competent jurisdiction to have occurred.

B. Non-Waiver

Enforcement of the terms of this Conservation Restriction shall be at the discretion of Grantee. Any election by the Grantee as to the manner and timing of its right to enforce this Conservation Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.

C. Disclaimer of Liability

By acceptance of this conservation restriction, the Grantee does not undertake any liability or obligation relating to the condition of the Premises pertaining to compliance with and including, but not limited to, hazardous materials, zoning, environmental laws and regulations, or acts not caused by the Grantee or its agents.

D. Acts Beyond the Grantor's Control

Nothing contained in this Conservation Restriction shall be construed to entitle the Grantee to bring any actions against the Grantor for any injury to or change in the Premises resulting from causes beyond the Grantor's control, including but not limited to fire, flood, storm and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Premises resulting from such causes. The parties to this Conservation Restriction agree that in the event of damage to the Premises from acts beyond the Grantor's control, that if

it is desirable that the Premises be restored, the parties will cooperate in attempting to restore the Premises if feasible.

IV. ACCESS

The Grantor hereby grants to the Grantee, or its duly authorized agents or representatives, the right to enter the Premises upon reasonable notice and at reasonable times, for the purpose of inspecting the Premises to determine compliance with or to enforce its Conservation Restriction. The Grantor also grants to the Grantee, after notice of a violation or failure of the Grantor to cure said violation, the right to enter the Premises for the purpose of taking any and all actions with respect to the premises as may be necessary or appropriate to remedy or abate any violation hereof, including but not limited to the right to perform a survey of boundary lines.

This Conservation Restriction does not grant to the Grantee, to the public, or to any other person or entity any right to enter upon the Premises, except as follows:

The Premises will be generally available to the public for hiking and other passive recreational and educational activities. Trails and woods roads will have signs describing use and may be closed temporarily to permit forestry operations.

Recreational Use Statute: Pursuant to M.G.L. c.21, s.17c, neither the Grantor nor the Grantee is liable to any member of the public for injuries to person or property sustained by such person while on the Property in the absence of willful, wanton, or reckless conduct.

V. EXTINGUISHMENT

A. If circumstances arise in the future such as render the purpose of this Conservation Restriction impossible to accomplish, this restriction can only be terminated or extinguished, whether in whole or in part, by a court of competent jurisdiction under applicable law. If any change in conditions ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then Grantee, on a subsequent sale, exchange, or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds in accordance with Section V. B. below, subject, however, to any applicable law which expressly provides for a different disposition of the proceeds. Grantee shall use its share of the proceeds in a manner consistent with the conservation purpose set forth herein.

B. Proceeds. Grantor and Grantee agree that the donation of this Conservation Restriction gives rise to a real property right, immediately vested in the Grantee, with a fair market value that is at least equal to the proportionate value that this Conservation Restriction, determined at the time of the gift, bears to the value of the unrestricted property at that time. Such proportionate value of the Grantee's property right shall remain constant.

C. Grantor/Grantee Cooperation Regarding Public Action. Whenever all or any part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Grantor and the Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. All related expenses incurred by the Grantor and the Grantee shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Grantor and Grantee in shares equal to such proportionate value. If a less than fee interest is taken, the proceeds shall be equitably allocated according to the nature of the interest taken. The Grantee shall use its share of the proceeds like a continuing trust in a manner consistent with the conservation purposes of this grant.

VI. ASSIGNABILITY

A. Running of the Burden

The burdens of this Conservation Restriction shall run with the Premises in perpetuity, and shall be enforceable against the Grantor and the successors and assigns of the Grantor holding any interest in the Premises.

B. Execution of Instruments

The Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Conservation Restriction; the Grantor, on behalf of herself and her successors and assigns, appoint the Grantee their attorney-in-fact to execute, acknowledge and deliver any such instruments on her behalf. Without limiting the foregoing, the Grantor and her successors and assigns agree themselves to execute any such instruments upon request.

C. Running of the Benefit

The benefits of this Conservation Restriction shall be in gross and shall not be assignable by the Grantee, except in the following instances:

As a condition of any assignment, the Grantee shall require that the purpose of this Conservation Restriction continues to be carried out; and the Assignee, at the time of the assignment, qualifies under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder, and is a donee eligible to receive this Conservation Restriction under Section 32 of Chapter 184 of the General Laws of Massachusetts. Any assignment will comply with article 97 of the Amendments to the constitution of the Commonwealth of Massachusetts, if applicable.

VII. SUBSEQUENT TRANSFERS

The Grantor agrees to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument by which he divests himself of any

interest in all or a portion of the Premises, including a leasehold interest and to notify the Grantee within 20 days of such transfer. Failure to do so shall not impair the validity or enforceability of this Conservation Restriction. Any transfer will comply with article 97 of the Amendments to the constitution of the Commonwealth of Massachusetts, if applicable.

The Grantor shall not be liable for violations not done by the Grantor and occurring after his or her ownership. Liability for any acts or omissions occurring prior to any transfer of ownership and liability for any transfer or violation of this Conservation Restriction shall survive the transfer. Any new owner shall cooperate in the restoration of the Premises or removal of violations caused by prior owner(s) and may be held responsible for any continuing violations.

VIII. ESTOPPEL CERTIFICATES

Upon request by the Grantor, the Grantee shall, if applicable within twenty (20) days, execute and deliver to the Grantor any document, including an estoppel certificate, which certifies the Grantor's compliance with any obligation of the Grantor contained in this Conservation Restriction.

IX. NON MERGER

The parties intend that any future acquisition of the Premises shall not result in a merger of the Conservation Restriction into the fee. The Grantor agrees that it will not grant, and the Grantee agrees that it will not take title, to any part of the Premises without having first assigned this Conservation Restriction to ensure that merger does not occur.

X. AMENDMENT

If circumstances arise under which an amendment to or modification of this Conservation Restriction may be appropriate, Grantor and Grantee may jointly amend this Conservation Restriction; provided that no amendment shall be allowed that will affect the qualification of this Conservation Restriction or the status of Grantee under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Sections 31-33 of Chapter 184 of the General Laws of Massachusetts. Any amendments to this conservation restriction shall occur only in exceptional circumstances. The Holder will consider amendments only to correct an error or oversight, to clarify an ambiguity, or where there is a net gain in conservation value. All expenses of all parties in considering and/or implementing an amendment shall be borne by the persons or entity seeking the amendment. Any amendment shall be consistent with the purposes of this Conservation Restriction, shall not affect its perpetual duration, shall be approved by the Secretary of Energy and Environmental Affairs and if applicable, shall comply with the provisions of Art. 97 of the Amendments to the Massachusetts

Constitution, and any gifts, grants or funding requirements. Any amendment shall be recorded in the Franklin County Registry of Deeds.

XI. EFFECTIVE DATE

This Conservation Restriction shall be effective when the Grantor and the Grantee have executed it, the administrative Approvals required by Section 32 of Chapter 184 of the General Laws have been obtained, and it has been recorded in the Franklin County Registry of Deeds. The Grantee shall record this instrument in timely manner at the Franklin County Registry of Deeds.

XII. NOTICES

Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage pre-paid, addressed as follows:

To Grantor: Trustees of the David M. Smith Revocable Trust:
Ellen D. Smith, 116 Morningside Drive, Oak Ridge, TN 37830
Nancy V.A. Smith, P.O.Box 683, Carbondale, Colorado 81623

To Grantee: Rattlesnake Gutter Trust, P.O. Box 195, Leverett, MA 01054

or to such other address as any of the above parties shall designate from time to time by written notice to the other or that is reasonably ascertainable by the parties.

XIII. GENERAL PROVISIONS

A. Controlling Law

The interpretation and performance of this Conservation Restriction shall be governed by the laws of the Commonwealth of Massachusetts.

B. Liberal Construction

Any general rule of construction to the contrary notwithstanding, this Conservation Restriction shall be liberally construed in favor of the grant to effect the purpose of this Conservation Restriction and the policy and purposes of Massachusetts General Laws Chapter 184, Sections 31-33. If any provision in this instrument is found to be ambiguous, any interpretation consistent with the purpose of this Conservation Restriction that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability

If any provision of this Conservation Restriction or the application thereof to any person or circumstance is found to be invalid, the remainder of the provision of this Conservation Restriction shall not be affected thereby.

D. Entire Agreement

This instrument sets forth the entire agreement of the parties with respect to this Conservation Restriction and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Restriction, all of which are merged herein.

XIV. MISCELLANEOUS

A. Pre-existing Public Rights.

Approval of this Conservation Restriction pursuant to M.G.L. Chapter 184, Section 32 by any municipal officials and by the Secretary of Energy and Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.

XIV. MISCELLANEOUS

A. Pre-existing Public Rights.

Approval of this Conservation Restriction pursuant to M.G.L. Chapter 184, Section 32 by any municipal officials and by the Secretary of Energy and Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.

WITNESS my hand and seal this 4th day of September, 2008

Ellen D. Smith
Ellen D. Smith

TENNESSEE (state)

of Anderson County (county)

On this 4th day of September, 2008 before me, the undersigned notary public, personally appeared Ellen D. Smith, proved to me through satisfactory evidence of identification which was TN. DRIVER'S LICENSE to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

Joann S. Oran
Notary Public
My Commission Expires: Feb 22 2010

