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Doc # 0010397 May 30, 2007 1:06 PM
Book 3532 Page 0875 Page 1 of 18
Register of Deeds, Strafford County

CONSERVATION EASEMENT DEED

Adam R. Fogg, of 149 Mill Road, Durham, New Hampshire 03824, and **Troy L. Fogg** of 352 Packers Falls Road, Durham, New Hampshire 03824, and **Jade D. Fogg** of 5 Snow Lane, Nottingham, New Hampshire 03290, as joint tenants with rights of survivorship, (hereinafter collectively referred to as the "**Grantor**", which word where the context requires includes the plural and shall, unless the context clearly indicates otherwise, include the Grantor's executors, administrators, legal representatives, devisees, heirs, successors and assigns),

for consideration paid, with WARRANTY covenants, grant in perpetuity to

Town of Durham, a municipal corporation with a principal place of business at 15 Newmarket Road, Durham, Strafford County, State of New Hampshire, 03824, acting through its Conservation Commission pursuant to New Hampshire RSA 36-A:4 and with the approval of the Town Council (hereinafter referred to as the "**Grantee**" which shall, unless the context clearly indicates otherwise, include the Grantee's successors and assigns),

the Conservation Easement (herein referred to as the "**Easement**") hereinafter described with respect to that certain parcel/area of land (herein referred to as the "**Property**") with any and all buildings, structures, and improvements thereon/being unimproved land, consisting of approximately 2.8 acres, situated on Packers Falls Road in the Town of Durham, County of Strafford, State of New Hampshire, more particularly bounded and described in Appendix "A" attached hereto and made a part hereof and is shown as "Easement Area 2" on a plan entitled "Subdivision/Conservation Easement Plan The Fogg Property" prepared by Atlantic Survey Co, Inc. dated December 2006 (the "**Survey**") recorded as Plan #90-30 at the Strafford County Registry of Deeds.

1. DEFINITIONS

- A. *Aquifer* shall mean a geologic formation, group of formations or part of a formation that contains sufficient saturated permeable materials (including, but not limited to, sand, gravel, fractured bedrock) to yield significant quantities of water to wells and springs.

- B. *Biosolids* shall mean all treated wastes from the bodies of humans, including treated sewage sludge or compost.
- C. *Commercial activities* shall mean the wholesale or retail marketing, sale, storage, transportation, transmission, or advertising of products or services for a fee or other compensation intended to generate a net profit.
- D. *Community water system* shall mean any water supply which is piped for human consumption which serves at least 15 (fifteen) connections used by year-round residents or regularly serves at least 25 (twenty-five) year-round residents, or as this definition may be updated by the New Hampshire Department of Environmental Services or successor agency.
- E. *Groundwater* shall mean water below the land surface in the saturated zone (where the pore spaces between permeable materials including, but not limited to, sand, gravel, fractured bedrock are filled with water).
- F. *Industrial activities* shall mean the manufacturing, assembling or processing of materials.
- G. *Municipal water system* shall mean a community water system owned by a municipality or village district.
- H. *Pesticides* shall mean herbicides, insecticides, fungicides, rodenticides, biocides, and other similar substances that destroy, repel or control pests.
- I. Primary Watershed Zone shall comprise the following areas:
- a) land within 250 feet of the mean high water mark of a tributary which feeds directly into the reservoir without first emptying into another tributary; and/or
- b) land within 100 feet of the mean high water mark of other surface waters which are indirect tributaries to the reservoir, including wetlands, flowages or streams that normally flow year round, but not including intermittent streams.
- HJ. *Surface water* shall mean streams, lakes, ponds, marshes, water courses, and other bodies of water as defined in NH RSA 485 A:2.
- JK. *Sanitary zone* shall mean land within a 400 (four hundred) foot radius of any community water system wellhead or such distance as specified in the New Hampshire Drinking Water Regulations, Env-WS 310, or as they may be updated. Said zone, and the provisions which apply to the zone herein, shall become inoperative during periods when the well is inactive and Grantee determines that there is no current or anticipated future use for the well as a community water system. If the well is reactivated or a new one installed, then provisions for the sanitary zone contained herein shall apply.

KL. *Sustainable yield* shall mean that rate of annual water withdrawal that can be replenished from the aquifer on an annual basis, based on well recovery rates.

2. PURPOSES

The Easement hereby granted is pursuant to NH RSA 477:45-47, exclusively for the following conservation purposes (herein referred to as the "**Purposes**") for the public benefit:

- A. The protection of the natural habitats on the Property which include field habitat and wetlands, and including the enhancement and enlargement of 422 acres of conservation and open land which is adjacent to/nearby the Property, said other land including the common open space for Carriage Trail neighborhood and the University of New Hampshire's West Foss Farm; and
- B. The conservation and protection of open spaces, particularly the conservation of the productive farm land of which the Property consists and of the wildlife habitat thereon including the exceptional field and wetlands habitat for upland/grassland birds, and the long-term protection of the Property's capacity to produce agricultural products; and
- C. The maintenance of the scenic vista of open field with forest in the background for the scenic enjoyment of the general public from Packers Falls Road, Packers Falls Road being a Town designated Scenic Road; and
- D. The protection of the quality and potential for a sustainable yield of groundwater resources under the Property to safeguard present and future community drinking water supplies, including the stratified drift aquifer known as the Spruce Hole Aquifer that underlies the Property, and the land area on the Property which contributes to the protection of the Spruce Hole Aquifer.

The above Purposes are consistent with the clearly delineated open space conservation goals and/or objectives as stated in the Town of Durham Master Plan 2000, which states as a recommendation that: "... the Town should encourage keeping open or in agricultural use land that has the potential to develop into residences" (Recommendation 5, Page 4.51). Durham's Master Plan states further that the Town should: "Expand and strengthen the Durham greenway system through acquisition of conservation easements on important lands. . ." (Recommendation 1, Page 4.35). Table 4.1 of Durham's Master Plan identifies the Property as an important scenic resource recommended for protection and in addition the prime agricultural soils and Spruce Hole Aquifer that are all a part of the Property are identified in the Master Plan as important to protect. The above Purposes are also consistent with New Hampshire RSA Chapter 79-A which states: "It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources" and with NH RSA 485-C:1, the "Groundwater Protection Act", which states, in part: "The natural quality of the groundwater resource shall be preserved and protected in order that groundwater may be used for drinking water supply. Ambient groundwater quality standards shall meet

drinking water standards..."

The Purposes are also consistent with NH RSA 481:1-C, which states, in part: "an adequate supply of water is indispensable to the health, welfare, and safety of the people of the State, and is essential to the ecological balance of the natural environment of the State and that the water resources of the State are subject to an ever-increasing demand for new and competing uses; that, therefore, the general court declares and determines that the waters of New Hampshire whether occurring above or below ground constitute a precious, finite and invaluable public resource which should be protected, conserved, and managed in the interest of present and future generations..."

All of these Purposes are consistent and in accordance with the U.S. Internal Revenue Code, Section 170(h).

The Easement hereby granted with respect to the Property is as follows:

3. USE LIMITATIONS (Subject to the reserved rights specified in Section 4 below)

The Property shall be maintained in perpetuity as open space subject to the following use limitations:

- A. There shall not be conducted on the Property any industrial or commercial activities, except agriculture, as described below, and provided that the productive capacity of the Property to yield agricultural crops shall not be degraded by on-site activities.
 - i. For the purposes hereof, "agriculture" shall include animal husbandry, floriculture, and horticulture activities; the production of plant and animal products for domestic or commercial purposes; the growing, stocking, cutting, and sale of Christmas trees; and the processing and sale of products produced on the Property (such as pick-your-own fruits and vegetables and maple syrup), but shall specifically exclude the construction of structures such as barns and indoor riding rings, all as not detrimental to the Purposes of this Easement.
 - ii. Within the Sanitary Zone and the Primary Watershed Zone, no pesticides, biosolids, septage, manure, or similar soil amendments shall be used, stored or disposed of; no livestock or other domestic animals shall be kept or grazed; no new ponds or forestry or farm roads will be created; and no buildings shall be erected.
 - iii. Agriculture for industrial or commercial purposes shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Property.
 - a. The preparation of said agricultural plan is the responsibility of the Grantor. Said plan shall be prepared by the Grantor prior to undertaking any commercial or industrial agricultural activities, except haying, and said plan shall be updated at least once every ten (10) years or on such timetable as may be mutually agreed

upon in writing by the Grantor and the Grantee. A copy of said agricultural plan and updates shall be provided to the Grantee. Said plans shall include:

- Natural resource inventory of the Property (including special plant and animal habitat; wildlife; soils; water resources, location of steep slopes, floodplains, highly permeable or erodible soils, wetlands, and other surface waters);
 - Aquifer location and description (based on existing information);
 - Current or proposed wellhead and ancillary facilities and location(s), Sanitary Zone location;
 - Proposed transportation, storage, use, disposal, timetable, and application rates of specific pesticides, fertilizers, biosolids, septage, manure, and other similar soil amendments;
 - Farm road design and layout;
 - Proposed buffer zones, cover cropping, erosion controls, and other methods to protect ground and surface waters;
 - Location, uses and types of ancillary improvements; vehicle use; time of year or conditions for operations; conversion of forest to cleared land; exposure of bare soils; and creation of impervious areas;
 - Habitat and scenic impacts; and
 - Proposed resource extraction or agricultural by-product disposal.
- b. Agricultural management activities must be conducted, to the extent possible, in accordance with current scientifically based practices as recommended by state or federal natural resource agencies such as the Natural Resource Conservation Service and in accordance with "Best Management Practices" as set forth in the following publications or as these publications may be specifically updated or superseded:
- *Manual of Best Management Practices for Agriculture in New Hampshire*, NH Department of Agriculture, as amended August 1998;
 - *Pesticide Management Guidelines for Groundwater Protection*, UNH Cooperative Extension, November 1992;
 - *Buffers for Wetlands and Surface Waters: A Guidebook for New Hampshire Municipalities*, Audubon Society of NH, NH Office of State Planning, UNH Cooperative Extension, Natural Resource Conservation Service, as revised May 1997;
 - *Best Management Practices: Biosolids*, UNH Cooperative Extension, 1995;
 - *Best Management Practices to Control Nonpoint Source Pollution: A Guide for Citizens and Town Officials*, NH Department of Environmental Services, as revised November 1997;
- c. Agricultural management activities shall not be detrimental to the Purposes of this Easement, nor materially impair the scenic quality of the Property as viewed from public roads.

B. The Property shall not be subdivided and none of the individual tracts which together

comprise the Property shall be conveyed separately from one another, except that the lease of any portion of the Property for any use permitted by this Easement shall not violate this provision.

- C. No structure or improvement shall be constructed, placed, or introduced onto the Property, except for structures and improvements which are: i) necessary in the accomplishment of the agricultural, conservation, habitat management, or noncommercial outdoor recreational uses of the Property and which may include but not be limited to a road, dam, fence, utility line, bridge, culvert, and ii) not detrimental to the Purposes of this Easement. Notwithstanding the above, there shall not be constructed, placed, or introduced onto the Property any of the following structures or improvements: dwelling, mobile home, cabin, residential driveway, any portion of a septic system, tennis court, swimming pool, athletic field, golf course, tower, barn, indoor riding ring, shed, or aircraft landing area.
- D. No underground or above ground tanks for the storage of gaseous or liquid petroleum products shall be installed, placed or allowed to remain on the Property, except for above ground fuel tanks with adequate spill containment that are in active use in conjunction with on-site activities as permitted in Section 4 and approved by the New Hampshire Department of Environmental Services or successor agency.
- E. No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or subsurface water systems, wetlands, or natural habitat shall be allowed unless such activities:
 - i. are commonly necessary in the accomplishment of the agricultural, conservation, habitat management, or noncommercial outdoor recreational uses of the Property; and
 - ii. do not harm state or federally recognized rare, threatened, or endangered species, or exemplary natural communities, such determination of harm to be based upon information from the New Hampshire Natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species and/or natural communities; and
 - iii. A minimum distance of 5 (five) feet must be maintained between any altered land surface and the historical high groundwater table elevation, except in cases of pond creation in conjunction with permitted on-site activities approved by the Grantee and specified in Section 4; and
 - iv. Any surface so altered will be recontoured, stabilized and revegetated immediately upon completion of any work associated with permitted uses, with consideration to weather conditions favorable to revegetation; and
 - v. are not detrimental to the Purposes of this Easement.

Prior to commencement of any such activities, all necessary federal, state, local, and other governmental permits and approvals shall be secured.

- E. There shall be no outdoor advertising structures displayed on the Property except as desirable or necessary in the accomplishment of the agricultural, conservation, or noncommercial outdoor recreational uses of the Property, and provided such structures are not detrimental to the Purposes of this Easement. No sign on the Property shall exceed twenty-four (24) square feet in size, and no sign shall be artificially illuminated.
- F. There shall be no mining, quarrying, excavation or extraction of ground or surface water, or removal of rocks, minerals, gravel, sand, topsoil, or other similar materials on the Property, except in connection with any improvements outside the Sanitary Zone made pursuant to the provisions of sections 3.A., C., D., or E., above or improvements within the Sanitary Zone allowed pursuant to the provisions of Section 4 and provided that
- i. A minimum distance of 5 (five) feet must be maintained between any altered land surface and the historical high groundwater table elevation, except in cases of pond creation in conjunction with permitted on-site activities approved by the Grantee and specified in Section 4; and
 - ii. Any surface so altered will be recontoured, stabilized and revegetated immediately upon completion of any work associated with permitted uses, with consideration to weather conditions favorable to revegetation; and
 - iii. No such rocks, minerals, gravel, sand, topsoil, or other similar materials shall be removed from the Property.
- G. There shall be no substances which constitute a hazard to public health or the environment transported, used, stored, applied, or disposed of in any manner or to any extent on or under the Property, except as necessary in conjunction with on-site activities permitted in Section 4 and approved by Grantee.
- H. There shall be no pollution or degradation of surface water quality and groundwater quality by activities on the Property so that the surface or groundwater quality on the Property reaches or violates water quality standards set for public drinking water by the New Hampshire Department of Environmental Services, or such agency with the statutory authority to regulate public water supplies at the time.
- I. There shall be no activities that harm state or federally recognized rare, threatened or endangered species based upon information from the New Hampshire Natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having statutory responsibility for the conservation of such species.
- J. Buildings or other impervious materials permitted in conjunction with on-site activities as permitted in Section 3 and 4 shall cover no more than 3 (three) percent of the Property. The location of impervious surfaces within the Sanitary Zone must receive the prior review and approval of Grantee.
- K. There shall be no rights-of-way or easements of ingress or egress in favor of any third

party created or developed into, on, over, or across the Property without the prior written approval of the Grantee, except those of record as of the execution of this Easement and those specifically permitted in the provisions of this Easement.

- L. Except as provided in Section 4, there shall be no operation of dune buggies, motorcycles, all-terrain vehicles, aircraft, or any other types of motorized or mechanized vehicles on the Property.
- M. The sustainable yield of groundwater, as recharged from surface water and infiltration of precipitation, shall not be exceeded by on-site water withdrawals.
- N. In the Sanitary Zone, there shall be no camping, trails or other recreational improvements created or maintained and only non-motorized, dispersed pedestrian recreation shall be allowed.
- O. The area shown on the Survey as "Field" shall be maintained through management activities such as but not necessarily limited to mowing, haying, or agricultural uses consistent with the provisions of this Easement, so as to maintain the scenic views from Packers Falls Road.

4. RESERVED RIGHTS

- A. The Grantor reserves to itself the following rights related to a Municipal Drinking Water System:

At the Grantor's option, and with all necessary federal, state and local permits, groundwater may be withdrawn by the Grantee/Grantor or the Grantee's/Grantor's designee on a sustainable yield basis and exported from the Property if used for a municipal water system as defined herein. For the purposes hereof, permitted activities in conjunction with the provision of a municipal drinking water system shall be defined as the installation, maintenance, monitoring and replacement of water supply wells, monitoring wells, drinking water treatment facilities, a water distribution system, pump stations, and ancillary improvements such as roads, signs, utilities, security facilities; and the extraction and exportation of groundwater from the Property, all for the purpose of serving public drinking water supply needs. Said activities may be conducted provided that:

Design of facilities and extraction rates are in accordance with a "Water Extraction Plan" which must be approved in advance of implementation and in writing by the New Hampshire Department of Environmental Services or successor agency. Said Plan shall include but not be limited to:

1. Groundwater resource location, description, wellhead locations, wellhead protection zone, and wellhead protection area;
2. Proposed sustainable yield pumping and recharge rates;
3. Monitoring and reporting practices;
4. Facilities design, location and construction impacts;

5. Well-capping procedures; and
6. Anticipated changes in groundwater tables and surface water levels and associated wetlands and in-stream flows on and off the Property as a result of drinking water withdrawals, potential impacts on the associated biological communities, and provisions that shall provide for minimal disturbance to the conservation values of the Property during and after installation and operation of the water supply facilities.

B. The Grantor reserves the right to subdivide the Property into separately conveyable lots only as necessary for the Grantor's exercise of the reserved rights in Section 4.A above. The new lot containing the site and/or facilities for withdrawal and/or removal of groundwater shall be the minimum size necessary to accomplish said withdrawal and/or removal. In order to exercise said right, the Grantor shall provide written notice to the Grantee of the proposed exercise at least 90 days prior to submission of any subdivision application to governmental authorities or 90 days prior to the Grantor's conveyance of any newly created lot, whichever is earlier. Said notice shall include a recordable survey plan prepared by a licensed surveyor at the Grantor's expense showing the proposed boundaries of the new lots, and shall also demonstrate that said subdivision and/or separate conveyance shall minimize detrimental impacts on the purposes of this Easement. The design of any subdivision must receive the prior written approval of the Grantee and said approval shall be based on the proposal's consistency with the Purposes of this Easement. All other provisions of this Easement shall remain in effect on any parcels so subdivided.

C. Grantor reserves the right to operate motorized all terrain vehicles, farm equipment or other mechanized vehicles solely for the purposes of conducting permitted agriculture, monitoring, property management, wildlife habitat management, or other management activities permitted by this Easement, and for emergency or law enforcement purposes.

D. Grantor reserves the right to repair, maintain, and reconstruct the existing well and piping servicing the man-made ponds located in Easement Area 1 as shown on the Survey and grant an easement for such activities to the owner of Easement Area 1.

5. NOTIFICATION OF TRANSFER, TAXES, MAINTENANCE

- A. The Grantor agrees to notify the Grantee in writing at least 10 days before the transfer of title to the Property or any division of ownership thereof permitted hereby.
- B. The Grantee shall be under no obligation to maintain the Property or pay any taxes or assessments thereon.

6. BENEFITS AND BURDENS

The burden of the Easement conveyed hereby shall run with the Property and shall be enforceable against all future owners and tenants in perpetuity; the benefits of this Easement shall not be appurtenant to any particular parcel of land but shall be in gross and assignable or transferable only to the State of New Hampshire, the U.S. Government, or any subdivision of

either of them, consistent with Section 170(c)(1) of the U.S. Internal Revenue Code of 1986, as amended, or to any qualified organization within the meaning of Section 170(h)(3) of said Code, which organization has among its purposes the conservation and preservation of land and water areas, agrees to and is capable of protecting the conservation purposes of this Easement, and has the resources to enforce the restrictions of this Easement. Any such assignee or transferee shall have like power of assignment or transfer.

7. AFFIRMATIVE RIGHTS OF GRANTEE

- A. The Grantee shall have reasonable access to the Property and all of its parts for such inspection as is necessary to determine compliance with and to enforce this Easement and exercise the rights conveyed hereby and fulfill the responsibilities and carry out the duties assumed by the acceptance of this Easement.
- B. To facilitate such inspection and to identify the Property as conservation land protected by the Grantee, the Grantee shall have the right to place signs, each of which shall not exceed 24 square inches in size, along the Property's boundaries.

8. RESOLUTION OF DISAGREEMENTS

- A. The Grantor and the Grantee desire that issues arising from time to time concerning uses or activities in light of the provisions of the Easement will first be addressed through candid and open communication between the parties rather than unnecessarily formal or adversarial action. Therefore, the Grantor and the Grantee agree that if either party becomes concerned whether any use or activity (which together for the purposes of this Section, "Resolution of Disagreements," shall be referred to as the "Activity") complies with the provisions of this Easement, wherever reasonably possible the concerned party shall notify the other party of the perceived or potential problem, and the parties shall explore the possibility of reaching an agreeable resolution by informal dialogue.
- B. If informal dialogue does not resolve a disagreement regarding the Activity, and the Grantor agrees not to proceed or to continue with the Activity pending resolution of the disagreement concerning the Activity, either party may refer the disagreement to mediation by written notice to the other. Within ten (10) days of the delivery of such a notice, the parties shall agree on a single impartial mediator. Mediation shall be conducted in Durham, New Hampshire, or such other location as the parties shall agree. Each party shall pay its own attorneys' fees and the costs of mediation shall be split equally between the parties.
- C. If the parties agree to bypass mediation, if the disagreement concerning the Activity has not been resolved by mediation within sixty (60) days after delivery of the notice of mediation, or if the parties are unable to agree on a mediator within ten (10) days after delivery of the notice of mediation, the disagreement may be submitted to binding arbitration in accordance with New Hampshire RSA 542. If both parties agree to binding arbitration, the Grantor and the Grantee shall each choose an arbitrator within twenty (20) days of the delivery of written notice from either party referring the matter to arbitration. The arbitrators so chosen shall in turn choose a third arbitrator within twenty (20) days of

the selection of the second arbitrator. The arbitrators so chosen shall forthwith set as early a hearing date as is practicable, which they may postpone only for good cause shown. The arbitration hearing shall be conducted in Durham, New Hampshire, or such other location as the parties shall agree. A decision by two of the three arbitrators, made as soon as practicable after submission of the matter, shall be binding upon the parties and shall be enforceable as part of this Easement.

- D. Notwithstanding the availability of mediation and arbitration to address disagreements concerning the compliance of any Activity with the provisions of this Easement, if the Grantee believes that some action or inaction of the Grantor or a third party is causing irreparable harm or damage to the Property, the Grantee may seek a temporary restraining order, preliminary injunction or other form of equitable relief from any court of competent jurisdiction to cause the cessation of any such damage or harm, to enforce the terms of this Easement, to enjoin any violation by permanent injunction, and to require the restoration of the Property to its condition prior to any breach.

9. BREACH OF EASEMENT – GRANTEE’S REMEDIES

- A. If the Grantee determines that a breach of this Easement has occurred or is threatened, the Grantee shall notify the Grantor in writing of such breach and demand corrective action to cure the breach and, where the breach involves injury to the Property, to restore the portion of the Property so injured to its prior condition.
- B. The Grantor shall, within thirty (30) days after receipt of such notice or after otherwise learning of such breach, undertake those actions, including restoration, which are reasonably calculated to cure swiftly said breach and to repair any damage. The Grantor shall promptly notify the Grantee of its actions taken hereunder.
- C. If the Grantor fails to perform its obligations under the immediately preceding paragraph B. above, or fails to continue diligently to cure any breach until finally cured, the Grantee may undertake any actions that are reasonably necessary to repair any damage in the Grantor’s name or to cure such breach, including an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to any such injury.
- D. If the Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation features of the Property, the Grantee may pursue its remedies under this Section, “Breach of Easement...,” without prior notice to the Grantor or without waiting for the period provided for cure to expire.
- E. The Grantee shall be entitled to recover damages from the party directly or primarily responsible for violation of the provisions of this Easement or injury to any conservation features protected hereby, including, but not limited to, damages for the loss of scenic, aesthetic, or environmental attributes of the Property. Without limiting the Grantor’s liability therefore, the Grantee, in its sole discretion, may apply any damages recovered to

the cost of undertaking any corrective action on the Property.

- F. The Grantee's rights under this Section, "Breach of Easement...", apply equally in the event of either actual or threatened breach of this Easement, and are in addition to the provisions of the preceding Section, "Resolution of Disagreements," which section shall also apply to any disagreement that may arise with respect to activities undertaken in response to a notice of breach and the exercise of the Grantee's rights hereunder.
- G. The Grantor and the Grantee acknowledge and agree that should the Grantee determine, in its sole discretion, that the conservation features protected by this Easement are in immediate danger of irreparable harm, the Grantee may seek the injunctive relief described in the third paragraph of this Section, "Breach of Easement...", both prohibitive and mandatory, in addition to such other relief to which the Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The Grantee's remedies described in this Section, "Breach of Easement...", shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.
- H. Provided that the Grantor is directly or primarily responsible for the breach, all reasonable costs incurred by the Grantee in enforcing the terms of this Easement against the Grantor, including, without limitation, staff and consultant costs, reasonable attorneys' fees and costs and expenses of suit, and any costs of restoration necessitated by the Grantor's breach of this Easement shall be borne by the Grantor; and provided further, however, that if the Grantor ultimately prevails in a judicial enforcement action each party shall bear its own costs. Notwithstanding the foregoing, if the Grantee initiates litigation against the Grantor to enforce this Easement, and if the court determines that the litigation was initiated without reasonable cause or in bad faith, then the court may require the Grantee to reimburse the Grantor's reasonable costs and reasonable attorney's fees in defending the action.
- I. Forbearance by the Grantee to exercise its rights under this Easement in the event of any breach of any term thereof by the Grantor shall not be deemed or construed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of the Grantee's rights hereunder. No delay or omission by the Grantee in the exercise of any right or remedy upon any breach by the Grantor shall impair such right or remedy or be construed as a waiver. The Grantor hereby waives any defense of laches or estoppel.
- J. Nothing contained in this Easement shall be construed to entitle the Grantee to bring any action against the Grantor for any injury to or change in the Property resulting from causes beyond the Grantor's control, including, but not limited to, unauthorized actions by third parties, natural disasters such as fire, flood, storm, disease, infestation and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. The Grantee and the Grantor reserve the right, separately or collectively, to pursue all legal and/or equitable remedies, as set forth in this Section, "Breach of Easement..."

against any third party responsible for any actions inconsistent with the provisions of this Easement.

10. NOTICES

All notices, requests and other communications, required to be given under this Easement shall be in writing, except as otherwise provided herein, and shall be delivered in hand or sent by certified mail, postage prepaid, return receipt requested to the appropriate address set forth above or at such other address as the Grantor or the Grantee may hereafter designate by notice given in accordance herewith. Notice shall be deemed to have been given when so delivered or so mailed.

11. SEVERABILITY

If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid by a court of competent jurisdiction, by confirmation of an arbitration award or otherwise, the remainder of the provisions of this Easement or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

12. CONDEMNATION/EXTINGUISHMENT

- A. Whenever all or part of the Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate in whole or in part the Easement conveyed hereby, or whenever all or a part of the Property is lawfully sold without the restrictions imposed hereunder in lieu of exercise of eminent domain, the Grantor and the Grantee shall thereupon act jointly to recover the full damages resulting from such taking with all incidental or direct damages and expenses incurred by them thereby to be paid out of the damages recovered.
- B. The balance of the land damages recovered from such taking or lawful sale in lieu of exercise of eminent domain shall be divided between the Grantor and the Grantee in proportion to the fair market value, at the time of condemnation, of their respective interests in that part of the Property condemned. For this purpose and that of any other judicial extinguishment of this Easement, in whole or in part, the values of the Grantor's and Grantee's interests shall be determined by an appraisal prepared by a qualified appraiser at the time of condemnation or extinguishment.
- C. The Grantee shall use its share of the proceeds resulting from condemnation or extinguishment in a manner consistent with and in furtherance of one or more of the conservation purposes set forth herein.

13. ADDITIONAL EASEMENT


Should the Grantor determine that the expressed Purposes of this Easement could better be effectuated by the conveyance of an additional easement, the Grantor may execute an additional instrument to that effect, provided that the conservation purposes of this Easement

are not diminished thereby and that a public agency or qualified organization described in the Section "Benefits and Burdens," above, accepts and records the additional easement.

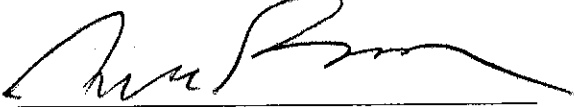
The Grantee, by accepting and recording this Easement, agrees to be bound by and to observe and enforce the provisions hereof and assumes the rights and responsibilities herein granted to and incumbent upon the Grantee, all in the furtherance of the conservation purposes for which this Easement is delivered.

IN WITNESS WHEREOF, We have hereunto set our hands this 30 day of May, 2007.


GRANTOR



Adam R. Fogg



Troy L. Fogg

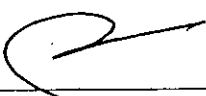


Jade D. Fogg

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss.

On this 30 day of May, 2007, before me personally appeared Adam R. Fogg known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same as his free act and deed for the purposes therein contained.

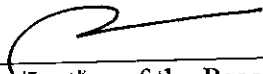




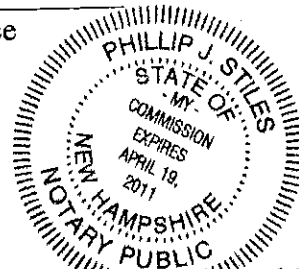
Notary Public/Justice of the Peace
My commission expires:

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss.

On this 30 day of May, 2007, before me personally appeared Troy L. Fogg known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same as his free act and deed for the purposes therein contained.

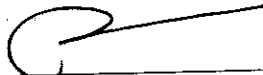


Notary Public/~~Justice of the Peace~~
My commission expires:

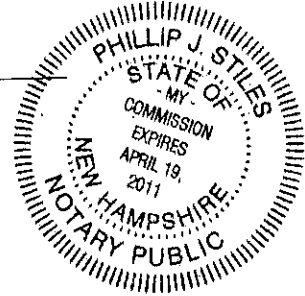


STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss.

On this 30 day of May, 2007, before me personally appeared Jade D. Fogg known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same as his free act and deed for the purposes therein contained.



Notary Public/~~Justice of the Peace~~
My commission expires:



ACCEPTED: TOWN OF DURHAM

By: [Signature]
Todd Selig

Title: Town Administrator
Duly Authorized by the Durham Town Council

Date: May 30, 2007

By: [Signature]
Cynthia Belowski

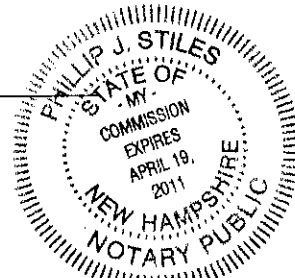
Title: Chair of Durham Conservation Commission
Duly Authorized by the Conservation Commission

Date: May 30, 2007

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss.

On this 30 day of May 2007, before me the undersigned officer, personally appeared Todd Selig known to me (or satisfactorily proven) to be the Town Administrator for the Town of Durham and authorized agent of the Town of Durham and that being authorized so to do on behalf of such entity, executed the foregoing instrument for the purposes therein contained. In witness whereof I set my hand and seal.

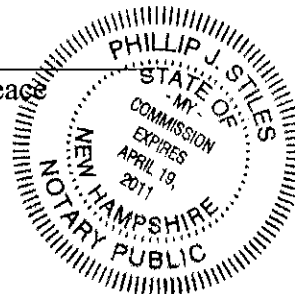
[Signature]
Notary Public/Justice of the Peace



STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss.

On this 30 day of May 2007, before me the undersigned officer, personally appeared Cynthia Belowski known to me (or satisfactorily proven) to be the Chair of the Conservation Commission for the Town of Durham and authorized agent of the Town of Durham and that being authorized so to do on behalf of such entity, executed the foregoing instrument for the purposes therein contained. In witness whereof I set my hand and seal.

[Signature]
Notary Public/Justice of the Peace



Appendix A - Property Description

Closing date: May 30, 2007
Borrower(s): The Town of Durham
Property Address: Packers Falls & Mill Road, Durham, New Hampshire 03824

A certain tract or parcel of land with any improvements thereon, situate on the sidelines of Mill Road and Packers Falls Road, in the Town Durham, County of Strafford and State of New Hampshire, and being shown as "Easement Area 1 and Easement Area 2" on a plan entitled "Subdivision/Conservation Easement Plan The Fogg Property" prepared by Atlantic Survey Co., Inc. dated December 2006 and recorded as Plan #90-30 and 31, at the Strafford County Registry of Deeds, bounded and described as follows:

EASEMENT AREA 2:

Beginning at an iron rod in a stone wall at the easterly sideline of Packers Falls Road; thence running S68°23'04"E along said stone wall and land of Mark S. Twickler and Susan M. Bissell, and land of Laurel A. Hobbs, a distance of 300.00 feet to an iron rod in said stone wall; thence turning and running N 08° 55' 22" E along Easement Area 1, a distance of 559.17 feet to an iron rod at land of the grantors; thence turning and running N 81° 04' 38" W along land of said grantors, a distance of 254.15 feet to an iron rod at said Packers Falls Road; thence turning and running S 08° 19' 16" E along said road, a distance of 114.77 feet to a point of curve to the right having a radius of 400.00 feet for a distance of 296.42 feet; thence turning and running S 38° 30' 21" W along said road, a distance of 77.73 feet to the point of beginning.

Said parcel contains 122,056 square feet or 2.80 acres, more or less, according to said plan.

Subject to current use taxation by the Town of Durham as filed in the Strafford County Registry of Deeds at Book 1008, Page 444.

The above described easement areas are subject to all matters as set-forth on Plan #90-30 and # 90-31, as recorded at the Strafford County Registry.

Meaning and intending to convey a portion of the premises acquired by Troy L. Fogg, Adam R. Fogg and Jade D. Fogg by deed of Clyde B. Fogg, Jr. dated April 18, 1997 and recorded at Book 1931, Page 483, in the Strafford County Registry of Deeds.