

**AGREEMENT BETWEEN THE TOWN OF CONCORD
AND PRESIDENT AND FELLOWS OF HARVARD COLLEGE FOR
LIMITED PUBLIC ACCESS TO A PORTION OF ESTABROOK TRAIL**

This agreement (the “Agreement”) is made by and between the Town of Concord (the “Town”) and President and Fellows of Harvard College (“Harvard”), and is effective as of the ___ day of March, 2019, for the term specified herein.

WHEREAS, the Town brought and is currently pursuing a civil action styled as *Town of Concord v. Neil E. Rasmussen, et al.*, Case No. 17-MISC-000605-HPS, which is currently pending in the Land Court Department of the Massachusetts Trial Court, in which the Town seeks a judicial declaration regarding an alleged public right to use a certain trail within Estabrook Woods, located on certain privately-owned properties, including certain properties owned by Harvard, within Town limits (the “Estabrook Trail Litigation”);

WHEREAS, Harvard denies and disputes the Town’s claims in the Estabrook Trail Litigation, to the extent that those claims pertain to and may affect certain Harvard-owned properties, and contends that it has voluntarily chosen to allow members of the public to make limited, low-impact use of that portion of the established trail which crosses Harvard-owned property, consistent with the terms of the gifts by which Harvard acquired its land holdings in Estabrook Woods, and in the exercise of Harvard’s sole discretion;

WHEREAS, the limited, low-impact, recreational public use of that portion of the established trail which crosses Harvard-owned property continues to be generally acceptable, as a practical matter, to both the Town and Harvard; and

WHEREAS, the Town and Harvard mutually wish to avoid the immediate and continuing further expense, distraction, and uncertainty of litigating to conclusion the Town’s claims against Harvard in the Estabrook Trail Litigation;

NOW, THEREFORE, the Town and Harvard agree to the following terms and conditions, according to which (1) the parties will stipulate to the dismissal, without prejudice, of all claims asserted by the Town against Harvard in the Estabrook Trail Litigation; and (2) Harvard will grant a right of limited access to the public, for a defined effective term, for permitted purposes, and according to specified rules, to those unpaved parts of the Estabrook Trail that are located on Harvard-owned land in Estabrook Woods in the Town of Concord (the “Harvard-Owned Parts of Estabrook Trail in Concord”).

- I. **Agreed-Upon Factual and Legal Premises.** The Town and Harvard stipulate to and confirm the following foundational matters:
 - A. Estabrook Trail in Concord. There is currently no generally-accepted clear, complete, and simple definition of that portion of Estabrook Trail which lies within the Town of Concord and which is the subject of the Estabrook Trail Litigation. In light of that fact, and to avoid potential misunderstandings about the meaning and scope of the term

“Estabrook Trail in Concord” as used in this Agreement, the parties jointly stipulate that the following statements are true and accurate:

- (1) Estabrook Trail is a path that runs through a number of parcels of land in the area known as Estabrook Woods, in the Towns of Concord and Carlisle. Within the Town of Concord, Estabrook Trail runs along a generally north-south course, as shown on the annotated site plan attached to this Agreement as **Exhibit A**;
- (2) Estabrook Trail in Concord is approximately the same portion of the same way that was the subject of a 1932 discontinuance by the County Commissioners of the County of Middlesex upon the petition of the Road Commissioners of the Town of Concord. The span and extent of that discontinued portion of the way is described in the County Commissioners’ Final Return, executed and filed as of July 9, 1932, as follows:

This discontinuance extends from a point on said Estabrook Road at the entrance of the R. Emerson driveway, as indicated by a drill hole in the rock in said way, and shown on the plan annexed to the original petition (which said point is about 2,344.05 feet from the middle of the traveled way of Barnes Hill Road, at its junction with said Estabrook Road), and the discontinuance is to extend from said drill hole to the boundary line between the Town of Concord and the Town of Carlisle, on said Estabrook;

- (3) The northern-most point of Estabrook Trail in Concord (a/k/a the “Northern Discontinuance Point”) is located at the junction of the Concord-Carlisle town line with (a) the parcel of land having a street address of 45C Autumn Lane and shown on the Town Assessor’s Map 2G as Parcel 1531-2 (which is currently owned, on information and belief, by Nina I.M. Nielsen, as Trustee of the Baker Realty Trust; and (b) the parcel of land having a street address of 129B Estabrook Road and shown on the Town Assessor’s Map 2G as Parcel 1422 (which is owned by Harvard), abutting the Concord-Carlisle town line;
- (4) The southern-most point of Estabrook Trail in Concord, which is located to the north of and “about 2,344.05 feet from the middle of the traveled way of Barnes Hill Road, at its junction with Estabrook Road” (a/k/a the “Southern Discontinuance Point”) is a point that lies in close proximity to each and all of the following features and/or structures:
 - (a) the northern endpoint of the currently-maintained Estabrook Road pavement;
 - (b) the white wooden trailhead gate that currently stands across the unpaved trail on the privately-owned residential properties having a street addresses of: 393 Estabrook Road and shown on Town Assessors’ Map 5G at Parcel 1442 (a/k/a the Rasmussens’ property) and 366 Estabrook Road and shown on Town Assessors’ Map 5G as Parcel 1444-1 (a/k/a the Read or Read/Kay property);

- (c) the entrance to the driveway that currently serves the privately-owned residential property having a street address of 393 Estabrook Road and shown on Town Assessors' Map 5G at Parcel 1442 (a/k/a the Rasmussens' property); and
- (d) the entrance to the driveway that currently serves the privately-owned residential property having a street address of 366 Estabrook Road and shown on Town Assessors' Map 5G as Parcel 1444-1 (a/k/a the Read or Read/Kay property).

B. Harvard's Ownership Rights and Interests in Estabrook Trail in Concord. Harvard owns approximately 650 acres of land within Estabrook Woods in the Towns of Concord and Carlisle. All of the Harvard-Owned Parts of Estabrook Trail in Concord are located on the Harvard-owned parcels of land having the following street addresses and shown on the following Town Assessor's Maps, with the following parcel identification numbers, as shown on the site plan attached as Exhibit A:

Street Address	Assessor's Map	Parcel No.
129B Estabrook Road	2G	1422
122B Estabrook Road	2G	1423
115B Estabrook Road	2G	1424
108B Estabrook Road	3G	1429
90X Estabrook Road	3G	1431
77B Estabrook Road	4G	1432
68B Estabrook Road	4G	1439
60B Estabrook Road	5G	1440
97A Estabrook Road	3G	1527
110A Estabrook Road	2G	1528
116A Estabrook Road	2G	1529

The above-listed parcels (the "Harvard-Owned Estabrook Trail Parcels in Concord") contain all, and the only, portions of Estabrook Trail in Concord that are owned by Harvard. There is no paving on any part of the Harvard-Owned Estabrook Trail Parcels in Concord. The Town and Harvard expressly acknowledge that for some stretches of Estabrook Trail in Concord, Harvard's ownership rights and interests include the land on one side of the unpaved trail and up to the mid-point of the trail only, while for other stretches of Estabrook Trail in Concord, Harvard's ownership rights and interests encompass the entire width of the unpaved trail, as well as the land on both sides of the trail, as shown on the site plan attached as Exhibit A.

C. Harvard's Concord Field Station. In addition to the above-listed Harvard-Owned Estabrook Trail Parcels in Concord, Harvard owns numerous other parcels of land within Estabrook Woods, in the Towns of Concord and Carlisle, that are directly or indirectly contiguous to one or more of the above-listed Harvard-Owned Estabrook Trail Parcels in Concord, but that do not themselves include any portion of Estabrook

Trail in Concord which is the subject of the Estabrook Trail Litigation. All of the Harvard-Owned Estabrook Trail Parcels in Concord and all of Harvard’s other land holdings in Estabrook Woods in the Towns of Concord and Carlisle, together with other Harvard-owned land in the Town of Bedford, jointly comprise Harvard’s Concord Field Station. Harvard’s Concord Field Station is held, managed, and maintained for purposes of field studies and research by Harvard’s Museum of Comparative Zoology, in affiliation with the Department of Organismic and Evolutionary Biology within Harvard’s Faculty of Arts and Sciences.

D. Other Parties’ Ownership Rights and Interests in Estabrook Trail in Concord. Harvard does not own those parts of Estabrook Trail in Concord that lie on any of the parcels of land having the following street addresses in the Town of Concord and shown on the following Town Assessor’s Maps, with the following parcel identification numbers (the “Non-Harvard-Owned Parts of Estabrook Trail in Concord”). According to the Town Assessor’s records, these parcels (some but not all of which are shown on the attached Exhibit A) are owned by the following property owners:

Street Address	Assessor’s Map	Parcel No.	Property Owner(s)
45C Autumn Lane	2G	1531-2	Nina I.M. Neilsen, as Trustee of the Baker Realty Trust
1285 Estabrook Road	2G	1531-1	John K. Baker, as Trustee of the Nielsen Realty Trust
393, 42A, and 39X Estabrook Road	5G	1442, 1442-3, & 1442-1	Neil E. Rasmussen and Anna Rasmussen
47Y Estabrook Road	5G	1438	Russell Robb III, Leslie Robb, and Thomas Wray Falwell, as Trustees of the Pippin Tree Land Trust
366 Estabrook Road	5G	1444-1	Brooks S. Read

E. The Parties’ Contentions Regarding Public Use of the Harvard-Owned Parts of Estabrook Trail. The Town contends that there is an existing public right to use the Harvard-Owned Parts of Estabrook Trail in Concord, and that such public right does not depend upon any grant of permission by Harvard. Harvard contends to the contrary, that there is no public right to use the Harvard-Owned Parts of Estabrook Trail in Concord, although Harvard voluntarily permits such public use on terms and conditions that are acceptable to Harvard, in Harvard’s sole discretion. The parties’ competing contentions on this issue are among the subjects of the Estabrook Trail Litigation. Harvard is prepared to continue to allow members of the public to make appropriate limited and low-impact recreational uses of the Harvard-Owned Parts of Estabrook Trail in Concord, subject to the terms and conditions set forth in this Agreement, which are acceptable to the Town. Accordingly, the Town and Harvard now agree that there is no immediately pressing dispute between them that requires active litigation and prompt resolution of the claims asserted by the Town against

Harvard in the Estabrook Trail Litigation, and the Town's claims against Harvard can and should be dropped from the case, as detailed below.

- F. Other Harvard-Owned Trails Within Estabrook Woods in Concord. There are other trails on Harvard-owned land within Estabrook Woods in Concord, in addition to the Harvard-Owned Parts of Estabrook Trail. The Town makes no claim that there is any public right to use any of these other trails on Harvard-owned land in Concord, and Harvard affirmatively denies that there is any public right to use any of these other trails on its land. Accordingly, the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord provided by Section II of this Agreement does not pertain and shall have no application to any trail on any Harvard-owned land other than the Harvard-Owned Parts of Estabrook Trail as described in Sections I.A and I.B of this Agreement. Harvard does and/or may voluntarily permit limited and low-impact public recreational use of such other unpaved trails on its land in Estabrook Woods, on terms and conditions that are acceptable to Harvard, in Harvard's sole discretion.

II. Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord. In consideration for and effective upon the Town's dismissal of all of the claims asserted by it against Harvard in the Estabrook Trail Litigation, as provided for in Section IV of this Agreement, Harvard hereby grants to the public a temporary and limited right to use those parts of Estabrook Trail in Concord that lie, entirely or in part, on Harvard-owned land within the Town of Concord (the "Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord," or the "Limited Grant"), on the following terms and conditions, and subject to the reservations of rights set forth in Section III of this Agreement.

- A. Effective Term. This Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord is effective only for a limited term, from and upon the execution and filing of the stipulation of dismissal of Harvard from the Estabrook Trail Litigation, and until sixty (60) days after the earliest to occur of any the following three events, subject to the proviso below:
- (1) the delivery of written notice by one party to the other, confirming that the five-year period running from the effective date of this Agreement has expired, and specifying the date which is 60 days following such notice, on which date the Limited Grant will automatically expire unless otherwise extended;
 - (2) the delivery of written notice by one party to the other, confirming that a stipulation of dismissal with prejudice of all remaining claims in the Estabrook Trail Litigation has been filed with the court, and specifying the date which is 60 days following such notice, on which date the Limited Grant will automatically expire unless otherwise extended; and
 - (3) the delivery of written notice by one party to the other, confirming the exhaustion or waiver of all rights of appeal following the entry of final judgment of all remaining claims in the Estabrook Trail Litigation, and specifying the date which

is 60 days following such notice, on which date the Limited Grant will automatically expire unless otherwise extended;

Provided, however, that upon the written request of either the Town or Harvard made no later than thirty (30) business days prior to the automatic expiration date as specified in the pertinent notice, or within such other time period to which the Town and Harvard may agree in writing, the Town and Harvard shall confer in good faith as to whether to amend or replace this Agreement rather than allowing it to terminate according to its terms.

- B. Permitted Purposes. The Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord is made only for low-impact recreational purposes that Harvard, in its sole discretion, deems from time to time to be consistent with the maintenance of its property “as a nature preserve for purposes of field studies and research by the Museum of Comparative Zoology of Harvard University,” in accordance with the terms of the gifts by which the Concord Field Station property was acquired by Harvard from 1966 through 1968 (the “Permitted Purposes”).
- C. Scope of the Limited Grant. The Limited Grant authorizes members of the public to enter and be present only on the Harvard-Owned Parts of Estabrook Trail in Concord, and only in accordance with and subject to all of the terms and conditions set forth in Section II of this Agreement. In addition:
- (1) Nothing in the Limited Grant shall be construed as implying, assuming, or creating the existence of any established right or legally enforceable means of getting to or from the Harvard-Owned Parts of Estabrook Trail in Concord from any other Harvard-owned land. For the avoidance of doubt, the parties expressly acknowledge and confirm that **the Limited Grant does not authorize any member of the public to enter or use any part of the Harvard-owned land that is located on either side of Estabrook Trail in Concord.** If and to the extent that members of the public use any other trails that run over Harvard-owned land for access to or egress from the Harvard-Owned Parts of Estabrook Trail in Concord, the parties expressly acknowledge and confirm that they do so solely on the basis of permission granted voluntarily by Harvard, on terms and conditions that are acceptable to Harvard, in Harvard’s sole discretion, and not pursuant to the contractually enforceable Limited Grant established by this Agreement. Harvard expressly reserves the right to prohibit use of any such other trails at any time or from time to time; and
 - (2) Nothing in the Limited Grant shall be construed as implying, assuming, or creating the existence of any established right or legally enforceable means of getting to or from the Harvard-Owned Parts of Estabrook Trail in Concord from any of the Non-Harvard-Owned Parts of Estabrook Trail in Concord, or any other land owned by any other private landowner. In particular, but without limitation, nothing in the Limited Grant shall be construed as implying, assuming, or creating the existence of any established right or legally enforceable means of getting to or from the Harvard-Owned Parts of Estabrook Trail in Concord by entering and

crossing over any of the privately owned land of (i) Neil E. Rasmussen and Anna W. Rasmussen; (ii) Brooks S. Read and/or Susannah Kay; and/or (iii) Russell Robb III, Leslie Robb, and Thomas Wray Falwell, as Trustees of the Pippin Tree Land Trust. The Town and Harvard understand and acknowledge that the Town has asserted in the Estabrook Trail Litigation that the public has legally enforceable rights to access the Estabrook Trail crossing over the land of the above-referenced persons, and that those persons have denied the existence of any currently established right or legally enforceable means for any member of the public, to get to or from the Harvard-Owned Parts of Estabrook Trail in Concord by entering and crossing over any of their respective properties. For the avoidance of doubt, the parties expressly acknowledge and confirm that:

- (a) the Limited Grant does not authorize any member of the public to enter or use the disputed southern entrance to and the southern-most stretch of Estabrook Trail in Concord, which lies between the Southern Discontinuance Point and the southern-most point of the Harvard-Owned Part of Estabrook Trail in Concord, on Parcel 1440;
- (b) the Limited Grant does not authorize any member of the public to enter or use any part of Estabrook Trail in Concord that lies on any of the privately-owned parcels of land that are identified in Section I.D, above; and
- (c) the Limited Grant does not authorize any member of the public to enter or use any side of Estabrook Trail in Concord that lies on land owned by private parties other than Harvard, in any area where the Harvard-Owned Parts of Estabrook Trail in Concord extend only to the midpoint of the trail's width.

D. Assumption of the Risk; No Representations; Disclaimer of Maintenance Obligations.

The following understandings apply to and shall govern any and all access by any person(s) to the Harvard-Owned Parts of Estabrook Trail in Concord pursuant to the Limited Grant:

- (1) Any person who enters upon and uses the Harvard-Owned Parts of Estabrook Trail in Concord pursuant to the Limited Grant does so at his/her own risk. Harvard makes no representations or warranties that any or all of the Harvard-Owned Parts of Estabrook Trail in Concord are safe or suitable for any public uses, including without limitation the Permitted Purposes. Harvard affirmatively disclaims any and all responsibility to inspect, improve, maintain, repair, or restore any or all of the Harvard-Owned Parts of Estabrook Trail in Concord so that they will be safe or suitable for the Permitted Purposes; and
- (2) The parties recognize and acknowledge that weather events and other natural occurrences and/or conditions may, from time to time, render some or all of the Harvard-Owned Parts of Estabrook Trail in Concord unsuitable for the Permitted Purposes, either permanently or temporarily. Nothing in this Agreement is intended or shall be construed to create, by implication or otherwise, any duty or

obligation on the part of Harvard to inspect, improve, maintain, repair, or restore any or all of the Harvard-Owned Parts of Estabrook Trail in Concord, either in response to weather events and other natural occurrences and/or conditions, or otherwise, or to provide any public notice of the condition of any or all of the Harvard-Owned Parts of Estabrook Trail in Concord, as they may be affected from time to time by weather events and other natural occurrences and/or conditions, or otherwise.

- E. Applicable Rules. Subject to the reservation of rights detailed in Section III.C below, the following rules (“Rules”) shall apply to any and all persons making use of the Limited Grant of Access to the Harvard-Owned Parts of Estabrook Trail in Concord and the following bold-faced text shall be included on the signage referenced in Section II.F of this Agreement:

You are now entering the Harvard-Owned Parts of Estabrook Trail. Access to the Harvard-Owned Parts of Estabrook Trail does not imply the existence of any right of access to or from any other land, and is permitted solely at your own risk, and subject to the following RULES:

- (1) **The permitted public access to the Harvard-Owned Parts of Estabrook Trail is limited to the established trail on Harvard’s property only.**
- (2) **Entry upon and use of the Harvard-Owned Parts of Estabrook Trail is permitted only from dawn to dusk;**
- (3) **Dogs may be walked on the Harvard-Owned Parts of Estabrook Trail but must remain on a leash no longer than eight-feet in length at all times. No more than two (2) leashed dogs per person are permitted on the Harvard-Owned Parts of Estabrook Trail;**
- (4) **Dog waste must be collected, carried away and properly disposed of;**
- (5) **Trash must be collected, carried away and properly disposed of;**
- (6) **No hunting or weapons are permitted;**
- (7) **No fires are permitted;**
- (8) **No motorized vehicles, except emergency vehicles or with the express permission of Harvard, are permitted;**
- (9) **No cutting, pegging, or removal of vegetation, except with the express permission of Harvard, is permitted; and**
- (10) **Bicycles must be walked through muddy areas of the Harvard-Owned Parts of Estabrook Trail.**

- F. Posting and Maintenance of Signage. The Town shall be responsible for posting signage in a prominent and visible location at or near the northern-most point of Estabrook Trail in Concord, at the junction of the Concord-Carlisle town line, which shall contain the text set forth in boldface in Section II.E of this Agreement, in a size, form, and style reasonably acceptable to Harvard. In addition, upon receiving notice that such signage is in need of replacement or repair, the Town shall be responsible for promptly undertaking the necessary replacement or repair.
- G. Enforcement of the Rules. Upon receiving notice from Harvard or any other source of reported or suspected trespassing on Harvard's land in Concord (including without limitation any presence on or use of the Harvard-Owned Parts of Estabrook Trail in Concord that is inconsistent with the terms and conditions of the Limited Grant), the Town shall investigate such reported or suspected trespassing, and shall provide such response and take such enforcement action, if any, as the Town, in its reasonable discretion, deems appropriate in light of the circumstances presented.
- H. No Recording of Notice of the Limited Grant. Harvard shall not be required, and the Town shall not be permitted, to record any notice or other information about the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord in the chain of title for any of the parcels of land owned by Harvard.
- I. Public Notice and Communications. Harvard and the Town shall each be permitted to publicize information about the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord, *provided, however*, as follows:
- (1) The Town shall avoid and refrain from actively promoting any increased usage of Estabrook Trail in Concord for dog-walking and bicycling, in recognition of Harvard's expressed concern that such increased usage could be detrimental to the preservation and use of Harvard's property for purposes of field studies and research. As part of this obligation, the Town shall remove from its website any active link or other informational direction to a third-party promotion or publication of the availability of Estabrook Trail in Concord for dog-walking and/or bicycling, within a reasonable time after the Town's receipt of a written request for such action from Harvard, together with reasonable evidence of the objected-to promotion and publicity;
 - (2) The Town shall affirmatively communicate the message that any member of the public who enters upon and uses the Harvard-Owned Parts of Estabrook Trail in Concord may do so during the term of the Limited Grant only at his/her own risk and pursuant to the specified rules, in each of the following forums or contexts:
 - (a) on the Town's website; (b) in any Town-sponsored written publication (e.g., press release, trail map, etc.) that refers to the availability of public access to the Harvard-Owned Parts of Estabrook Trail in Concord; and/or (c) in any formal or planned oral presentation, announcement, or statement made by the Concord Natural Resources Director, Town Manager, and/or any member(s) of the Select Board at any public meeting about the availability of public access to the Harvard-Owned Parts of Estabrook Trail in Concord; and

- (3) Harvard and the Town shall cooperate in good faith regarding any public communication about the fact, nature, and extent of the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord. Such cooperation shall include, without limitation:
 - (a) the Town's provision of a reasonable pre-publication opportunity for Harvard to review and comment on any information about the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord that will be published on the Town's website or included in any trail maps that are sponsored, supported, or approved by the Town;
 - (b) the Town's affirmative undertaking to show and label clearly all parts of the Estabrook Woods land owned by Harvard in Concord, other than the Harvard-Owned Parts of Estabrook Trail in Concord, as "private property; access by permission only; no right of public access" on any Town website-posted or otherwise Town-published plan(s) or map(s) that illustrate, label, refer to the availability of public access to the Harvard-Owned Parts of Estabrook Trail in Concord; and
 - (c) Harvard's provision of a reasonable pre-publication opportunity for the Town to review and comment on any information about the Limited Grant that will be published on Harvard's website.

III. Reservations of Rights. In addition to the specific reservations of rights, qualifications, and limitations that are set forth in other provisions of this Agreement, this Agreement is subject to the following general caveats and reservations of rights:

- A. The Town's Police Power and General Governmental Authority. Nothing in this Agreement is intended or shall be construed as limiting, expanding, or derogating from the Town's existing police power and general governmental authority as it pertains to any Harvard-owned land in Concord, including without limitation the power and authority of the Town to respond to reports or information, if any, of suspected unlawful conduct, fires, dangerous wild animals, and/or any other kind of danger or emergency at or near the Harvard-Owned Parts of Estabrook Trail in Concord, and/or the land owned by Harvard on one or both sides of the Harvard-Owned Parts of Estabrook Trail in Concord.
- B. Harvard's Uses of Its Own Land. Nothing in this Agreement is intended or shall be construed to require or prohibit Harvard from making any uses of its own land, or allowing any activities upon its own land, as Harvard may deem appropriate from time to time, in its sole discretion.
- C. Modification of the Rules by Harvard. Harvard expressly reserves the right, in its sole discretion, to modify the Rules set forth in Section II.E above, and/or to limit the volume or extent of, and/or prohibit, any uses or activities otherwise permitted by the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord, permanently or temporarily, in the following circumstances:

- (1) if and to the extent that such uses or activities, or the volume or extent of such uses or activities, in Harvard's judgment, interfere(s) or threatens to interfere with the maintenance and use of Harvard's Concord Field Station property for purposes of field studies and research and/or interferes or threatens to interfere with the terms of the gifts by which Harvard acquired such property;
- (2) if and as Harvard may deem necessary and appropriate for purposes of trail maintenance; and/or
- (3) if and as Harvard may deem necessary and appropriate to avoid or mitigate any perceived risk or threat to (i) the health, safety, or security of any animal or human life; (ii) any environmental or other natural resource; and/or (iii) the condition, existing characteristics, or value of Harvard's property;

provided, however, that

- (4) any such modification of the Rules, and/or any such limitation or prohibition of uses or activities otherwise permitted by the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord, shall be promptly communicated by Harvard to the Concord Natural Resources Director, Town Manager, and Select Board, together with a statement of the reason for the same;
- (5) to the extent reasonably practicable, prior to imposing any such modification, limitation, or prohibition, or promptly thereafter, Harvard shall confer with the Town's Natural Resources Director about the substance of and reason(s) for the modification, limitation, or prohibition. As part of any such conference, Harvard shall in good faith consider and provide a response to any comments or concerns expressed by the Town's Natural Resources Director with respect to the same, including without limitation any such comments or concerns regarding the degree, if any, to which the modification of the Rules, or other limitation or prohibition may (a) impose upon the Town additional enforcement and/or public communication responsibilities; (b) derogate from the terms of the gifts by which Harvard acquired such property; and/or (c) adversely affect public safety; and
- (6) with respect to any such modification, limitation, or prohibition of uses or activities otherwise permitted by the Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord, Harvard shall be responsible for providing such public notice as it deems necessary and appropriate.

IV. Dismissal Without Prejudice; Form of Stipulation. The parties, through their counsel, shall promptly arrange for the execution and filing of a stipulation to dismiss all of the Town's claims against Harvard in the Estabrook Trail Litigation, without prejudice and without costs, fees, or interest. The stipulation shall include the substance of the following points, and the parties shall jointly request a judicial endorsement on the stipulation of dismissal, for the purpose of confirming the Land Court's acceptance and endorsement of the following points:

- A. No Waiver of Claims or Defenses By the Town. The Town does not waive its contention that there is a public right to enter and use the Harvard-Owned Parts of Estabrook Trail in Concord, and that such public right does not depend upon any grant of permission by Harvard. The Town expressly reserves all of its claims and defenses vis-à-vis Harvard with respect to such contention, *provided, however*, that in no event will the Town later seek to bring Harvard back into the Estabrook Trail Litigation as a party in the absence of Harvard's express consent.
- B. No Waiver of Claims or Defenses by Harvard. Harvard does not waive its contention that there is no public right to enter and use the Harvard-Owned Parts of Estabrook Trail in Concord, unless and except as Harvard may voluntarily permit from time to time, on terms and conditions that are acceptable to Harvard, in Harvard's sole discretion. Harvard expressly reserves all of its rights, claims, and defenses with respect to that contention, *provided, however*, that in no event will Harvard later seek to re-join the Estabrook Trail Litigation as a party in the absence of the Town's express consent.
- C. No Pursuit of Any Rulings Affecting Harvard's Land. Following Harvard's dismissal from the Estabrook Trail Litigation, the Town shall cease and desist from requesting or pursuing in the Estabrook Trail Litigation any ruling, decision, judgment, or judicial relief of any kind that would concern, affect, or apply to any land owned by Harvard, including without limitation any Harvard-Owned Parts of Estabrook Trail in Concord.
- D. No Res Judicata or Collateral Estoppel, As Against Harvard. Consistent with all of the foregoing, following Harvard's dismissal from the Estabrook Trail Litigation, the parties agree and stipulate that no ruling, decision, judgment, or judicial relief of any kind in the Estabrook Trail Litigation can or will be binding on Harvard or have any *res judicata* or collateral estoppel effect against Harvard.
- V. **Dispute Resolution.** In the event of any dispute concerning the interpretation and application of this Agreement and/or the implementation of Harvard's Limited Grant of Public Access to the Harvard-Owned Parts of Estabrook Trail in Concord, the Town and Harvard shall use reasonable efforts to resolve the dispute without litigation, by seeking to confer reasonably in advance of any litigation in a good-faith effort to eliminate or narrow the areas of disagreement. The parties shall do the same, prior to commencing any litigation, in the event of either party's determination to seek a binding resolution of their dispute as to whether or not there is any public right to use the Harvard-Owned Parts of Estabrook Trail in Concord, apart from any grant of permission by Harvard.
- VI. **Notice.** Any notice required to be given under this Agreement shall be given in writing and made either by hand delivery, by overnight courier, or by email with a confirmation copy by first-class U.S. mail, to the following representatives, or to such other representative(s) as the Town and/or Harvard, respectively, may later designate in writing.

For the Town:

To: **Concord Town Manager**
(978) 318-3000

Physical Address

Concord Town Hall
22 Monument Square
Concord, MA 01742

Mailing Address

P.O. Box 535
Concord, MA 01742

E-Mail Address

khodges@concordma.gov

-and-

Concord Select Board

Attention: Senior Administrative Assistant
(978) 318-3000

Physical Address

Concord Town Hall
22 Monument Square
Concord, MA 01742

Mailing Address

P.O. Box 535
Concord, MA 01742

E-Mail Address

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And: **Director, Concord Field Station**
Harvard University
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Boston, MA 02114

E-Mail Address
goodheart@sugarmanrogers.com

VII. General Provisions. The parties further agree as follows:

- A. Interpretation. This Agreement shall be interpreted in accordance with its terms and neither for nor against either party, as both parties have actively participated in the drafting of this Agreement.
- B. Severability. If any provision of this Agreement is determined to be invalid or unenforceable by any court of competent jurisdiction, it is the intention of the parties that (a) the remainder of this Agreement is to be enforced to the extent that enforcement in such circumstances is consistent with the purposes of this Agreement; and (b) a new provision, which is as similar in meaning and effect to the invalid or unenforceable provisions as is possible while still remaining valid and enforceable under

Massachusetts law, shall be devised and substituted for the invalid or unenforceable provision, if and to the extent it is practicable to do so.

- C. Enforcement of Agreement. A complete copy of this fully-executed Agreement shall be admissible in any proceeding and enforceable to the same extent as any complete original of this fully-executed Agreement. The parties acknowledge and agree that if, at any time, a violation of any term of this Agreement is asserted by any party hereto, that party shall have the right to seek specific performance of that term and/or any other necessary and proper relief, including without limitation injunctive and declaratory relief as well as damages, litigation costs, attorneys' fees, and interest.
- D. Entire Agreement. This Agreement contains the entire agreement between the parties with regard to the matters set forth herein.
- E. Advice of Counsel. The parties acknowledge and agree that they have been represented by counsel in connection with the preparation and execution of this Agreement. Each signatory to this Agreement represents and warrants that he/she has read this Agreement in its entirety and fully understands its contents and its binding legal effect, and that he/she has had the opportunity to consult with the pertinent party's counsel regarding the same, prior to executing this Agreement.
- F. Authority to Execute. Each signatory to this Agreement represents and warrants that he/she has been duly authorized to execute this Agreement on behalf of the party for which he/she has signed.
- G. Counterparts. This Agreement may be executed in counterparts, all of which constitute one agreement. Each signatory shall execute at least two (2) originals of this Agreement, so that when all signed counterparts are delivered and assembled, the Town and Harvard shall each have at least one (1) complete, fully-executed original Agreement.
- H. Amendments. This Agreement shall not be amended or modified except by a writing signed by the duly authorized representatives of all Parties to be bound thereby.

[SIGNATURE PAGES FOLLOW]

TOWN OF CONCORD

By: _____
Name:
Title:




-and-

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

By: _____
Name:
Title:

4840-7325-8639, v. 1

Exhibit A to Draft Terms of Agreement Between Harvard and Town of Concord - Page 1 of 2

-  Harvard-Owned Estabrook Trail Parcels in Concord
-  Estabrook Trail on Harvard-Owned Parcels
-  Portion of Estabrook Trail on Harvard and Non-Harvard-Owned Property - Harvard Ownership Rights to mid-point of Trail only

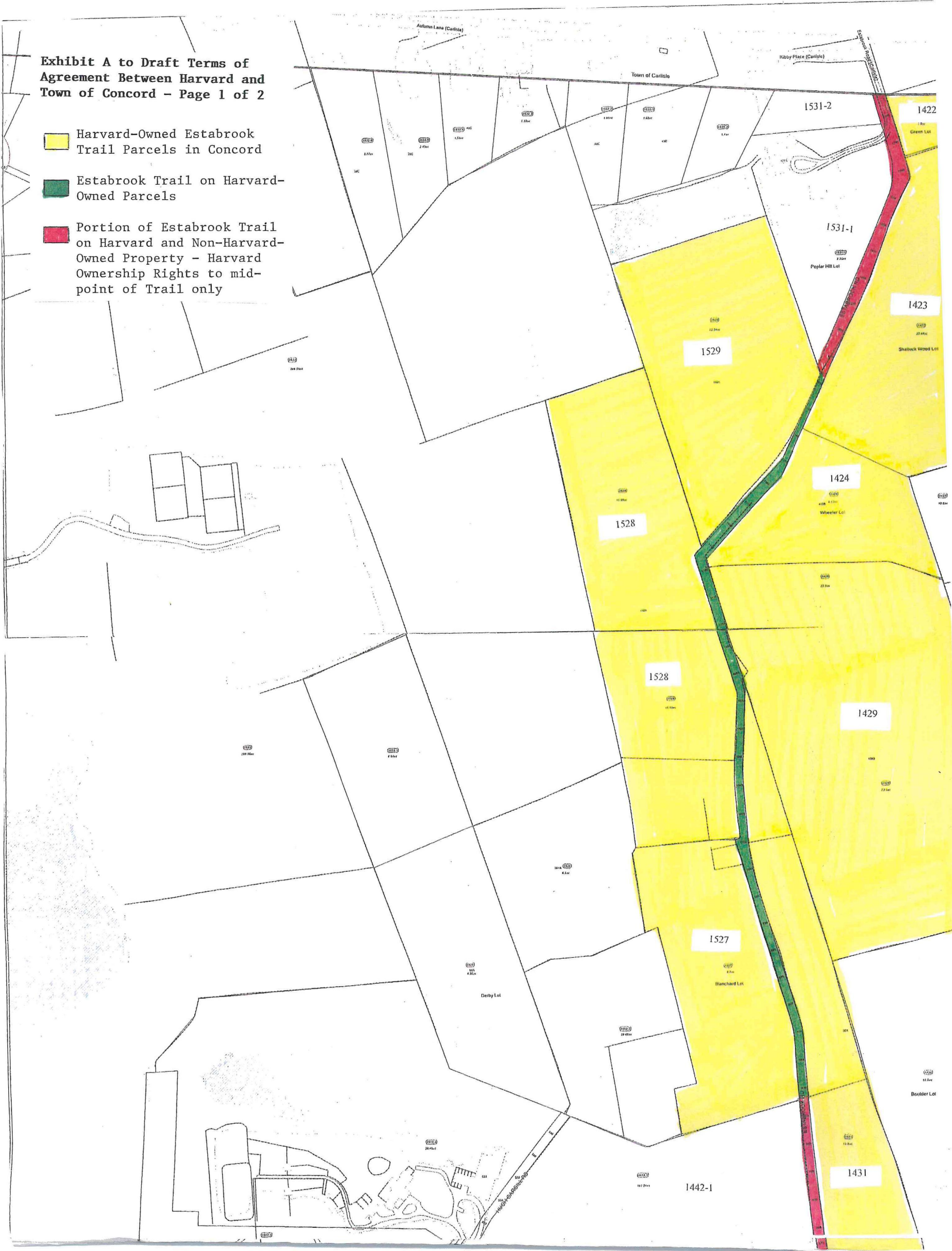


Exhibit A to Draft Terms of Agreement Between Harvard and Town of Concord - Page 2 of 2

- Harvard-Owned Estabrook Trail Parcels in Concord
- Estabrook Trail on Harvard-Owned Parcels
- Portion of Estabrook Trail on Harvard and Non-Harvard-Owned Property - Harvard Ownership Rights to mid-point of Trail only

Converted to GIS from Aerial Photography of 1995.
 Parcel information updated on an as needed as needed basis.
 All data is Massachusetts State Plane Meters/Coordinate System (NAD 83) North American Datum (NAD 83) of 1983.
 Map data current as of date shown on Cover Sheet.

Zoning
 Wetlands (DEP/WCD Combined)
 Rivers & Ponds
 Easements
 Dirt Roads & Cart Paths
 Stone Walls
 Fences
 Treaties

Town of Concord Assessor's Maps
 Middlesex South District, Commonwealth of Massachusetts

100 0 100 Feet

Indexing Adjuring Sheets
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