

MODEL

Declaration of Public Trust for Conservation Easements with Commentary



Model updated 4/26/2024
Commentary updated 4/26/2024

Preface

Tools for Local Government to Formalize Intentions and Create Certainty

A variety of legal protections stand in defense of parks and other public open spaces. Among them are the Donated or Dedicated Property Act (the “DDPA”) and Article 1, Section 27 of the Pennsylvania Constitution (the “Environmental Rights Amendment”). Depending on the facts and circumstances associated with any particular parcel of land, that parcel may be more or less protected for park or other open space purposes or available for other uses.

If officials do not make their intentions clear regarding the real property interests acquired by the local government, this can bring uncertainty as to what park and open space protections, if any, apply to those interests. Land may not be as protected as thought or, conversely, land better suited to non-park and open space uses may be inadvertently put out of bounds for those uses. Lack of clarity on these matters coupled with different expectations by different people regarding appropriate use of the land can result in misunderstanding, confusion, and conflict amongst officials and between officials and residents when a plan or actions on the land are proposed that run counter to some expectations. Protracted disputes, ill will, and expensive litigation may result.

WeConservePA publishes a [*Model Declaration of Public Trust*](#) with supporting commentary to provide the leaders of Pennsylvania’s political subdivisions a well-vetted tool for formalizing understandings, providing clarity, and preventing contentious disputes *in regard to land* acquired by the local government for park or other purposes. The [*Model Declaration of Public Trust for Conservation Easements*](#), as its name implies, is a tool for accomplishing the same in regard to easements acquired by a local government.

Buttressing Conservation Easements Held by Government

The Model Declaration of Public Trust for land held by government provides local officials flexibility in setting the rules for the land subject to the declaration including reserving portions of the land for non-park and open space uses. A conservation easement held by the political subdivision presents a different matter as the grant that establishes the easement sets forth the conservation purposes of the easement and covenants—rules—governing what is and isn’t allowed to occur on the land. As such, the purpose of the declaration for easements is solely to buttress the long-term conservation protections provided by an easement (rather than introduce any new rules) and ensure that, in the event that all or a portion of the easement is extinguished for whatever reason, the proceeds from the extinguishment are reinvested in the advancement of conservation.

Addressing Gray Areas of the Law

There is gray area in the application of the DDPA, the Environmental Rights Amendment, and other legal constructs to government-held conservation easements and the associated rights conveyed in the easement granting documents.

- Regarding the DDPA, its text, which describes “land or buildings,” might be an awkward fit for conservation easements (an innovation in real property which had not yet been introduced to Pennsylvania or much of the nation at the time of enactment of the DDPA); on the other hand, conservation easements are real property interests that may be acquired and divested in the same manner as any other real property interest, so it is reasonable to believe that the public trust doctrine, and

the statute that codifies it (i.e., the DDPA), should apply.

- The Pennsylvania Supreme Court has interpreted the Environmental Rights Amendment as imposing fiduciary trust administration responsibilities upon the Commonwealth and its political subdivisions to steward public natural resources. But existing decisions defining the doctrine's application have not squarely addressed its contours for local decisions affecting parks and open space.
- Other common law remedies may be available in special instances, such as the possibility of public trust doctrine claims not encompassed by the DDPA, or other equitable claims. The applicability of common law doctrines is highly fact-sensitive and therefore an unreliable source of long-term protection.

In the absence of a clear determination by legislators or courts, recording a declaration of public trust can clarify intentions and avoid uncertainty.

The WeConservePA guide *Ensuring the Permanence of Parks and other Public Open Spaces: Safeguards for Lands Entrusted to Local Government* provides additional background and analysis on this subject.

Improve the Guidance

WeConservePA welcomes suggestions for improving its guidance. Please email your comments to info@WeConservePA.org.

Acknowledgements

WeConservePA produced this guidance with financial assistance from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation.



Colcom Foundation



DRAFT

Prepared by and return to:

Model Declaration of Public Trust for Conservation Easements

WeConservePA publishes this model and its commentary
at library.weconservepa.org

Parcel identification:

Declaration of Public Trust

THIS DECLARATION OF PUBLIC TRUST is made by _____,
("Declarant") on this ____ day of _____, 20__.

Background

Conservation Easement. On [insert date of the grant of easement], [insert names of the grantors] executed and delivered to Declarant a [insert title of the granting document] (the "Grant"), which was recorded on [insert recording date] in the [insert name of recording office] in [insert recording information]. The resulting easement (the "Conservation Easement"), which burdens the real property identified briefly below and more fully described in exhibit A (that real property, the "Land"), is the subject of this declaration.

Parcel identification:

Street address:

Acreage:

Municipality and county:

Declarant. Declarant is a _____ of the _____ class of the Commonwealth of Pennsylvania.

Public Trust. Declarant desires to formally declare a public trust containing the Conservation Easement and to affirm its role and duty as trustee in service of the purposes (the "Public Purposes") described in the Grant.

Constitution. Article 1, Section 27 of the Pennsylvania Constitution states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Action. This declaration is made pursuant to resolution _____ of Declarant on the ____ day of _____, 20__.

Declaration

Declaration of Public Trust. Declarant formally and unequivocally declares that the Conservation Easement and Declarant's rights under the Grant are the body of a public trust in service of the Public Purposes and of which Declarant is the trustee..

Clarifications

Rights and Remedies. Rights and remedies arising out of this declaration are cumulative; they neither limit nor are limited by any rights or remedies arising from any other applicable authority available for upholding the Public Purposes.

No Effect on Landowner Rights. Nothing in this Declaration should be construed to limit or otherwise affect the rights of the owner of the Land.

Easement Administration. This declaration is intended to ensure that the administration of the Conservation Easement, including its potential amendment, transfer, or termination, as well as waiver of any of its terms, is subject to public trust principles. This declaration is not intended to confer upon the public any rights to administer the easement.

Proceeds of Disposal. In the event that the Conservation Easement or any portion thereof is extinguished or otherwise disposed of, all proceeds derived from the disposal must be reinvested in service of the Public Purposes.

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Use the following paragraph ONLY IF the easement was acquired using open space tax dollars.

Potential Disposal Pursuant to Referendum. This declaration is not intended to obviate the possibility of Declarant disposing of those open space property interests acquired all or in part with open space tax revenue, following the assent of the electorate in a referendum pursuant to the act of January 19, (1968) 1967, P.L. 992, No.442, as amended.

INTENDING TO BE LEGALLY BOUND, Declarant has signed and delivered this declaration as of the date set forth in the opening recital of this document.

By: _____(Seal)

By: _____(Seal)

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF :

ON THIS DAY _____ before me, the undersigned officer, personally appeared _____, who acknowledged themselves to be the _____ of _____, a _____ of the _____ class of the Commonwealth of Pennsylvania, and that they as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by themselves as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Print Name: _____, Notary Public

**This document is based on the
Model Declaration of Public Trust for Conservation Easements
(v. 2024.04.26)
provided by WeConservePA.**

Nothing contained in the model, which was prepared in the context of Pennsylvania law, is intended to be relied upon as legal advice or to create an attorney-client relationship. There is no guarantee that it is up to date or error free. It should be revised under the guidance of legal counsel to reflect the specific situation.

Commentary to the Model Declaration of Public Trust for Conservation Easements

Preliminary Matters

Additional Commentary. This commentary is streamlined to address only the matters most likely to benefit readers. For a more expansive commentary, albeit one that also covers provisions and issues not relevant to this model, see the commentary to the [*Model Declaration of Public Trust*](#) used for putting land in trust.

Is Recording of the Declaration Necessary? Recording is necessary for the declaration to be fully effective. While an unrecorded declaration is better than no declaration, recording maximizes its utility and avoids various problems that can arise in the absence of recording. Recording ensures that a declaration will not be lost with time. A declaration that is only filed in a local government's business files is more likely to be forgotten and harder to find than one recorded in the real property records of the county.

Background

Conservation Easement. This section identifies the granting document for the conservation easement that is the subject of the declaration and follows with identifying information for the land encumbered by the easement. If an easement has multiple holders, this section should be adapted to clarify that the declaration applies only to the easement interest held (or subsequently acquired) by the Declarant.

Public Trust. The body of the trust established with this model consists of the easement itself and all of Declarant's rights established by its granting document. The purposes of the trust—the "Public Purposes"—are defined as the purposes of the easement. Importantly, the declaration has no impact whatsoever on the allocation of rights and responsibilities—and the resulting relationship between landowner and easement holder—created by the grant of conservation easement; the declaration only bears on the holder's obligation to exercise and retain its rights established by the grant.

Declaration

Declaration of Public Trust. While a deed conveying title to a government entity rarely contains great detail about the purposes for which the land may be used, a conservation easement typically states the conservation purposes of the easement. For this reason, unlike the Model Declaration for land, this model does not include a "Dedication" section for defining the public purposes. Instead, it includes a single operative provision that explicitly establishes a public trust containing the declarant's interest in the easement. The

effect is to enshrine Declarant's fiduciary duty to make easement administration decisions consistent with the public's interest in the conservation purposes of the easement.

No DDPA Reference. The model passes on invoking the DDPA to avoid the risk of confusing landowners and the public with a declaration that might be falsely construed as characterizing *the eased land* as a "public facility" (rather than the easement) within the language of the DDPA. And while without further developments in the law we can't know for certain whether the DDPA applies to conservation easements, inclusion of reference to the DDPA is unlikely to be a determinative factor in a court deciding whether disposition of an easement must follow DDPA procedures.

Clarifications

Rights and Remedies. This provision evidences that the declaration affords a means to preserve the public trust that does not diminish or block other rights and remedies available for upholding the Public Purposes.

To contest a proposed change in or termination of the public trust, one recourse may be found in the procedures set forth in the DDPA. Another recourse is to petition a court to enforce the fiduciary duty of the declarant arising under the declaration.

No Effect on Landowner Rights. This provision makes clear the proposition discussed above—that the execution and recording of the declaration effects no restrictions on the owner of the land. (The owner continues to be constrained only by those restrictions they agreed to in granting the conservation easement.)

Easement Administration. This provision answers a possible question arising from the operative provision of the declaration—does establishing a public trust containing the holder's interest in the grant invite members of the public into the role of direct administration of the grant? While the declaration necessarily affirms the right of the public to challenge government actions that contradict the public's interest in seeing the easement retained and enforced, it does not give any member of the public the right to directly enforce or administer the easement.

Proceeds of Disposal. Though unlikely, it is conceivable that a court could, at some point in the future, approve a divestment of the easement. Trust law generally requires that proceeds from the sale of trust assets remain trust property. This provision is included to ensure that the reader understands that this will be the case in regard to the conservation easement.

Potential Disposal Pursuant to Referendum. Pennsylvania's Open Space Law (Act of January 19, 1968, P.L. 992, No. 442, as amended) allows local governments to impose a special tax to fund acquisition, improvement, and maintenance of public open space. Conservation easements are among the interests which may be acquired pursuant to the act. The statute requires approval of the electorate by referendum to establish or repeal an open space tax, or to divest any property interest acquired with revenues generated by the open space tax. This optional model provision clarifies that the declaration is not intended

to present an obstacle to a properly executed divestment of a real estate interest by referendum in accordance with the statute.

Omit this provision if the desire is to use the declaration to preclude the possibility of disposal approved via referendum.

Note that if a property were to be disposed of per voter approval by referendum, the Proceeds of Disposal provision ensures that the proceeds from disposal are applied consistent with the Public Purposes (an outcome that the Open Space Law requirements on their own do not guarantee).

Closing Matters

Closing. When a person making a promise gets nothing of value in return—receives no *consideration*—the law may not require the promise to be kept. The phrase *intending to be legally bound* is a valid substitute for consideration in the Commonwealth of Pennsylvania (but not necessarily other states).

Signature Lines. Space has been provided for one person to sign on behalf of the Declarant. More than one signature may be required depending upon the governance rules of the local government.

Witness/Attest. If desired or required by the governance rules of the local government, additional signature lines may be added to evidence that the secretary or assistant secretary attests to the validity of the document.

Acknowledgment. The date of the acknowledgment should not be earlier than the date of the declaration.