

**MODEL**

# **Trail Easement Agreement**

**with Commentary**



**Fourth Edition**

Model updated 8/15/2022  
Commentary updated 8/15/2022

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# Preface

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The *Model Trail Easement Agreement with Commentary* provides users with a state-of-the-art legal document and guidance to customize it to nearly any situation. The model is used across America by those seeking to establish and maintain public trails.

The model is informed by more than 15 years of use and feedback from trail groups, conservation organizations, and governments.

The model's expansive commentary explains the reasoning behind every provision, instructs on applying the model to particular circumstances, and provides alternative and optional provisions to address a variety of variables.

The model uses plain language and careful formatting to improve readability. Its flexible structure helps users avoid drafting errors when adapting it to particular projects.

The Pennsylvania Department of Conservation and Natural Resources strongly encourages its use for DCNR grant projects. Since the model, as presented, is tailored to Pennsylvania law, users outside of Pennsylvania must customize it to account for differences in state laws.

## One of Two Models for Trail Easements

WeConservePA publishes an alternative model—the *Model Grant of Trail Easement*, a simple, one-page (exclusive of signatures) easement document—for use in situations where brevity is paramount. Both models are available at the [WeConservePA.org](https://www.WeConservePA.org) library.

## Notes on Versions

WeConservePA posts its models at the [WeConservePA.org](https://www.WeConservePA.org) library and updates them to address changes in the law and new understandings in the field. Check the website for the most up-to-date material.

With the addition of new optional provisions and explanatory material, the commentary has expanded by 54% for the fourth edition.

The model's publication history is as follows:

1 <sup>st</sup> edition – 2007	3 <sup>rd</sup> edition – 2010
2 <sup>nd</sup> edition – 2008	4 <sup>th</sup> edition – 2018

## Improve the Guidance

WeConservePA welcomes suggestions for improving its guidance. Please email your comments to [info@WeConservePA.org](mailto:info@WeConservePA.org).

## Other Resources

WeConservePA has published many guides addressing legal and policy considerations pertaining to trail easements and trails. Find them at the [WeConservePA.org](http://WeConservePA.org) library.

## Acknowledgements

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*Colcom Foundation*



Nothing contained in the model and commentary is intended to be relied upon as legal advice or to create an attorney-client relationship. The material presented is generally provided in the context of Pennsylvania law and, depending on the subject, may have more or less applicability elsewhere. There is no guarantee that it is up to date or error free.

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**Prepared by:**

Name:

Address:

Telephone:

**Return to:**

Name:

Address:

**Tax parcel(s):**



**Model Trail Easement  
Agreement, 4<sup>th</sup> edition**

WeConservePA also publishes an alternative document, the *Model Grant of Trail Easement*, whose chief advantage is brevity.

## **TRAIL EASEMENT AGREEMENT**

THIS TRAIL EASEMENT AGREEMENT dated \_\_\_\_\_ (the "Easement Date") is by and between \_\_\_\_\_ ("the undersigned Owner or Owners") and \_\_\_\_\_ (the "Holder").

### **Article 1. Background**

**1.01 Property**

The undersigned Owner or Owners are the sole owners in fee simple of the property described in exhibit A (the "Property"). The Property is also described as:

Street address:

Municipality:

Parcel identifier:

County:

State: Pennsylvania

**1.02 Easement Area**

The portion of the Property that is subject to this agreement (the "Easement Area") is shown on the plan attached as exhibit B (the "Easement Plan").

**1.03 Purpose**

This agreement establishes the easements (collectively, the "Trail Easement") described in articles 2 and 3, details rules regarding the Trail Easement, and identifies rights and responsibilities of Holder and Owners.

**1.04 Consideration**

The undersigned Owner or Owners acknowledge receipt of the sum of \$1.00 in consideration of the grant of easements to Holder under this agreement.

### **Article 2. Grant of Easement for Trail Facilities**

**2.01 Grant**

The undersigned Owner or Owners grant and convey to Holder the perpetual right to create the Trail identified below; to enter the Easement Area at any time to construct, install, maintain, and repair the items (collectively, with the Trail, the "Trail Facilities") described in paragraph (a) below and, subject to the prior written consent of Owners, those described in paragraph (b) below.

**(a) Permitted Trail Facilities**

- (1) A trail not to generally exceed approximately \_\_\_\_ feet in clear tread width (the "Trail").
- (2) Signs to mark the Trail, to provide information related to the Trail, and for interpretive purposes.
- (3) Fencing, gates, and barriers to control access.

**(b) Trail Facilities Requiring Prior Written Consent of Owners**

Benches, picnic tables, wastebaskets, and bicycle racks.

**2.02 Exercise of Rights**

Construction, installation, maintenance, and repair of the Trail may include trailblazing; grading; building retaining walls, steps, railings, boardwalks, and bridges; cutting vegetation; application of gravel, crushed stone, wood chips, or paving; and identifying the Trail's path. These activities may include vehicular use.

## Article 3. Grant of Easement for Public Access

### 3.01 Grant

The undersigned Owner or Owners grant and convey to Holder the right to make available to the public a perpetual easement and right-of-way over the Trail and the right to use Trail Facilities for the purposes described in paragraph (a) below and, subject to the prior written consent of Owners, those described in paragraph (b) below:

- (a) **Permitted Trail Uses.** Use of the Trail as a right-of-way for (1) walking, hiking, jogging, bicycling, horseback riding, bird watching, nature study; (2) power-driven mobility devices for use by persons who have mobility impairments; and (3) emergency vehicles in the case of emergency within the Easement Area.
- (b) **Uses Requiring Prior Written Consent of Owners.** Recreational vehicular use such as snowmobiling; events such as charity runs or competitive races; programmatic use by schools, clubs, or other groups; or use of Trail for purposes other than as a right-of-way for passage over the Property such as picnicking or other stationary activities.

### 3.02 No Charge for Access

No Person is permitted to charge a fee for access to the Trail or use of the Trail Facilities.

## Article 4. Rights of Owners

### 4.01 Owner Improvements

Owners must not construct, install, or maintain facilities or improvements within the Easement Area except:

- (a) **Existing Items.** Items existing within the Easement Area as of the Easement Date and listed in the attached schedule (if any) entitled “Existing Improvements.”
- (b) **Potential Items.** Items listed in the attached schedule (if any) entitled “Permitted Other Improvements.”
- (c) **Fencing.** Fencing along the boundary of the Easement Area not impeding access to the Easement Area for the purposes of such access described in articles 2 and 3.
- (d) **Other.** Items to which Holder, without any obligation to do so, gives its consent in writing.

### 4.02 Owner Uses and Activities

Except as limited under this article, Owners have all the rights recognized under applicable law to use the Easement Area for purposes consistent with and not interfering with the easement rights granted to Holder. Owners’ rights include those set forth below:

- (a) **Mitigating Risk.** Cut trees or otherwise disturb resources to the extent reasonably prudent to remove or mitigate against an unreasonable risk of harm to Persons on or about the Easement Area.
- (b) **Grants to Others.** Grant leases, licenses, easements, and rights-of-way affecting the Easement Area to Persons other than Holder but only for those facilities, improvements, activities, and uses permitted to Owners under this article.
- (c) **Enforcement Rights.** Remove or exclude from the Property Persons who are (1) in locations other than the Trail or other Trail Facilities or (2) not engaged in permitted trail uses.

## Article 5. Enforcement; Liability Issues

### 5.01 Enforcement

Holder may, in addition to other remedies available at law or in equity, compel Owners to make the Easement Area available for the purposes set forth in articles 2 and 3 by exercising any one or more of the following remedies, without need to show that a civil action for damages is not available to furnish compensation:

- (a) **Injunctive Relief.** Seek injunctive relief to specifically enforce the terms of this agreement; to restrain present or future violations of this agreement; or to compel restoration of Trail Facilities or other resources destroyed or altered as a result of the violation.



- (b) **Self Help.** Enter the Property to remove any barrier to the access provided under this agreement and do such other things as are reasonably necessary to protect and preserve the rights of Holder under this agreement.

**5.02 Public Enters at Own Risk**

Use of any portion of the Easement Area by members of the general public is at their own risk. Neither Holder nor Owners by entering into this agreement assume duty to or for the benefit of the general public for defects in the location, design, installation, maintenance, or repair of the Trail Facilities; for unsafe conditions within the Easement Area; to inspect for or warn against possibly unsafe conditions; or to close the Trail Facilities to public access when unsafe conditions may be present. Holder will endeavor to repair damaged Trail Facilities but has no duty to do so unless and until Holder receives notice given in accordance with article 6 of the need to repair an unreasonably dangerous condition.

**5.03 Costs and Expenses**

All costs and expenses associated with Trail Facilities are to be borne by Holder except for items included in Owner Responsibility Claims (defined below in this article).

**5.04 Responsibility for Losses and Litigation Expenses**

- (a) **Public Access Claims; Owner Responsibility Claims.** If a claim for any Loss for personal injury or property damage occurring within the Easement Area after the Easement Date (a "Public Access Claim") is asserted against either Owners or Holder, or both, it is anticipated that they will assert such defenses (including immunity under the Recreational Use of Land and Water Act) as are available to them under applicable law. The phrase "Public Access Claim" excludes all claims (collectively, "Owner Responsibility Claims") for Losses and Litigation Expenses arising from, relating to or associated with (1) personal injury or property damage occurring prior to the Easement Date; (2) activities or uses engaged in by Owners, their family members, contractors, agents, employees, tenants, and invitees, or anyone else entering the Property by, through, or under the express or implied invitation of any of the foregoing; or (3) structures, facilities, and improvements within the Easement Area (other than improvements installed by Holder).
- (b) **Indemnity.** If immunity from a Public Access Claim is for any reason unavailable to Owners, Holder agrees to indemnify, defend, and hold Owners harmless from any Loss or Litigation Expense if and to the extent arising from a Public Access Claim. Owners agree to indemnify, defend, and hold the Holder harmless from any Loss or Litigation Expense if and to the extent arising from an Owner Responsibility Claim.
- (c) **Loss; Litigation Expense**
- (1) The term "Loss" means any liability, loss, claim, settlement payment, cost and expense, interest, award, judgment, damages (including punitive damages), diminution in value, fines, fees, and penalties or other charge other than a Litigation Expense.
  - (2) The term "Litigation Expense" means any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting any claim of violation or for indemnification under this agreement including, in each case, attorneys' fees, other professionals' fees, and disbursements.

## **Article 6. Miscellaneous**

**6.01 Binding Agreement**

This agreement is a servitude running with the land binding upon the undersigned Owner or Owners, and, upon recordation in the Public Records, all subsequent Owners of the Easement Area or any portion of the Easement Area are bound by its terms whether or not the Owners had actual notice of this agreement and whether or not the deed of transfer specifically referred to the transfer being under and subject to this agreement. This agreement binds and benefits Owners and Holder and their respective personal representatives, successors, and assigns.

**6.02 Governing Law**

The laws of the Commonwealth of Pennsylvania govern this agreement.

### **6.03 Definition and Interpretation of Capitalized and Other Terms**

The following terms, whenever used in this agreement, are to be interpreted as follows:

- (1) "Owners" means the undersigned Owner or Owners and all Persons after them who hold an interest in the Easement Area.
- (2) "Person" means an individual, organization, trust, or other entity.
- (3) "Public Records" means the public records of the office for the recording of deeds in and for the county in which the Easement Area is located.
- (4) "Including" means "including, without limitation."
- (5) "May" is permissive and implies no obligation; "must" is obligatory.

### **6.04 Incorporation by Reference**

Each exhibit or schedule referred to in this agreement is incorporated into this agreement by this reference.

### **6.05 Amendments; Waivers**

No amendment or waiver of any provision of this agreement or consent to any departure by Owners from the terms of this agreement is effective unless the amendment, waiver, or consent is in writing and signed by an authorized signatory for Holder. A waiver or consent is effective only in the specific instance and for the specific purpose given. An amendment must be recorded in the Public Records.

### **6.06 Severability**

If a provision of this agreement is determined to be invalid, illegal, or unenforceable, the remaining provisions of this agreement remain valid, binding, and enforceable. To the extent permitted by applicable law, the parties waive any provision of applicable law that renders any provision of this agreement invalid, illegal, or unenforceable in any respect.

### **6.07 Counterparts**

This agreement may be signed in multiple counterparts, each of which constitutes an original, and all of which, collectively, constitute only one agreement.

### **6.08 Entire Agreement**

This is the entire agreement of Owners and Holder pertaining to the subject matter of this agreement. The terms of this agreement supersede in full all statements and writings between Owners and Holder pertaining to the transaction set forth in this agreement.

### **6.09 Notices**

Notice to Holder under this agreement must be in writing and given by one of the following methods: (1) personal delivery; (2) certified mail, return receipt requested and postage prepaid; or (3) nationally recognized overnight courier, with all fees prepaid. In an emergency, notice may be given by phone (\_\_\_\_\_) or electronic communication (\_\_\_\_\_) followed by one of the methods in the preceding sentence.

### **6.10 Warranty**

The undersigned Owner or Owners warrant to Holder that:

- (a) **Liens and Subordination.** The Easement Area is, as of the Easement Date, free and clear of all liens or, if it is not, that Owners have obtained and attached to this agreement as an exhibit the legally binding subordination of any lien affecting the Easement Area as of the Easement Date.
- (b) **Existing Agreements.** No one has the legally enforceable right (for example, under a lease, easement, or right-of-way agreement) to prevent the installation or public use of Trail Facilities.
- (c) **Hazardous Materials.** To the best of their knowledge, the Easement Area is not contaminated with hazardous or toxic materials, and no such materials have been stored or generated there.

INTENDING TO BE LEGALLY BOUND, the undersigned Owner or Owners and Holder, by their respective duly authorized representatives, have signed and delivered this agreement as of the Easement Date.

Witness/Attest:

\_\_\_\_\_  
Owner's name: \_\_\_\_\_ (SEAL)

\_\_\_\_\_  
Owner's name: \_\_\_\_\_ (SEAL)

[NAME OF HOLDER]

\_\_\_\_\_  
By: \_\_\_\_\_ (SEAL)  
Name of signatory:  
Title of signatory:

This document is based on the  
**Model Trail Easement Agreement** (v. 2022.08.15)  
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.

COMMONWEALTH OF PENNSYLVANIA:

COUNTY OF \_\_\_\_\_ :

ON THIS DAY \_\_\_\_\_, before me, the undersigned officer, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged that he/she/they executed the same for the purposes therein contained.

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

\_\_\_\_\_, Notary Public

Print Name:

COMMONWEALTH OF PENNSYLVANIA:

SS

COUNTY OF \_\_\_\_\_ :

ON THIS DAY \_\_\_\_\_ before me, the undersigned officer, personally appeared \_\_\_\_\_, who acknowledged him/herself to be the \_\_\_\_\_ of \_\_\_\_\_, a Pennsylvania non-profit corporation, and that he/she 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 her/himself as such officer.

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

\_\_\_\_\_, Notary Public

Print Name:

# Commentary to the Model Trail Easement Agreement

## General Instructions

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**When in Doubt, Check the Commentary.** The purpose of each provision is explained and, often, variations are provided to address alternatives that may be useful in particular situations.

**Guides and Models.** Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by WeConservePA and, thanks to the Association's donors, made available free-of-charge at the [WeConservePA.org](https://www.weconservepa.org) library.

**Structure Tracks Model.** The main body of the commentary follows the same article and section structure as the model. Captions preceded by numbers or letters refer to articles or sections of the same title in the model.

**Supplemental Provisions.** The supplemental provisions following the main body of the commentary address content that: (1) if placed under a particular section of the commentary might be lost to the casual reader, (2) is too large and unwieldy to place in the main body, or (3) applies to multiple sections of the model.

**Style Guide.** Many of the style choices shaping the look and content of the model and commentary are described in the style guide that precedes the supplemental provisions.

**Start from a Model.** Each organization should feel free to create its own version of the model by incorporating additional or alternative provisions (from the commentary or otherwise) that reflect the policies and preferences of that organization. That version or the then-current version of the model available at the [WeConservePA.org](https://www.weconservepa.org) library should be used as the starting point for each project. Avoid using a document prepared for another project as a starting point

for a new easement. A model serves in part to remind users of the issues that need to be considered in the drafting process. The value of a model is lost, and errors and omissions become virtually guaranteed, when a document prepared for another property is used as a starting point for a new easement.

**Standards and Practices.** [Land Trust Standards and Practices](#) are voluntary guidelines for the responsible operation of a land trust. They are maintained by the Land Trust Alliance and draw on decades of experiences and lessons learned by conservation organizations across the country. References in the commentary to these guidelines are abbreviated as "S&P" and use the 2017 edition.

**Get Legal Counsel.** The model and commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. Any document drafted with assistance of this model should be completed with the guidance of legal counsel to ensure that the document accomplishes what the parties intend without unintended consequences.

**Disclaimer.** Once a document based on the model has been prepared or reviewed by an attorney licensed to practice law in the applicable state, you may delete the disclaimer at the bottom of the model's signature page that begins "Nothing contained in the model ..."

**Other States.** Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.

**Updates.** Check the [WeConservePA.org](https://www.weconservepa.org) library periodically for updates to the model.

# Preliminary Matters

## Recording

**Recording is Necessary.** Recording in the Public Records is necessary to make the easement binding upon future Owners who do not otherwise know, or have reason to know, of its terms. (For the Owners granting the easement, the easement is binding upon them (and Holder) once the document is signed and unconditionally delivered.)

**Space for Recording Information.** The top of the model's first page provides space for information required by some county recording offices: the name and address of the preparer, the person to whom the document is to be returned, and the tax parcels of the real estate to which the document pertains. If the information is unneeded or undesirable in a particular county, delete the text but keep the lines in order to preserve a 3-inch margin at the top of the first page.

**Margins.** Minimum margin requirements vary among counties; however, a typical requirement is a 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right, and bottom margins. (Page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5-inch by 11-inch paper. The model is formatted to conform to these specifications.

**Preparer Information.** Pennsylvania law does not require that a licensed attorney or law firm prepare or be identified as the preparer of the document; however, non-lawyers preparing easement documents must take care to comply with applicable legal and ethical standards.

**Staff.** A non-lawyer employed as staff by the Holder or Owners (i.e., a party to the transaction) may prepare the easement document and be named as the preparer.

**Non-staff.** Non-lawyers who are not staff of one of the parties with an interest in the transaction may not provide legal documents for transactions. Producing such documents for others constitutes the unauthorized practice of law.

**Ethical standards.** Legal review is required for conformance with S&P. See "Get Legal Counsel" in the General Instructions above. Do not identify a lawyer as the "preparer" if the lawyer did not, in fact, prepare the particular document or was not given the opportunity to review all of the changes to the document. Lawyers and other professionals, such as architects and engineers, are legally and professionally responsible for the work they produce for clients.

**Date for Tax Purposes.** The date the document was recorded in the Public Records establishes the year in which the donation (if any) of the easement was made for federal tax purposes.

## Title of Document

**The Paper is Not the Property Interest.** The document could be shortened to "Trail Easement" to make for easier reading, but an easement is not a stack of paper; it is a real property interest. The granting document and the property interest conveyed by it are not the same thing, but confusion can arise on the distinction when they share a name.

**Conveyance, Not Contract.** "Trail Easement Agreement" is an attractive, marketing-friendly title for the document, but it is imperfect in describing the nature of the easement document. The document is at its core an instrument that transfers a real property interest and sets forth the understandings of the parties about how they intend their relationship, as holders of interests in the same property, to work. The word "agreement" can connote a contract rather than a conveyance, thus causing confusion.

**Grant of Trail Easement.** "Grant of Trail Easement" is an accurate title for the document and is often used for trail easements. If you wish to use it, replace all instances of "this agreement" in the model's text with "this grant."

## Opening Recital

**Purpose.** The opening recital identifies the parties to the document and the effective date of the document.

## Easement Date

The date can be added in handwriting at the time of signing.

The date should not be earlier than the date of the earliest acknowledgment (notary signature) attached to document. In situations in which the document is being signed earlier than the desired effective date (for example, because it is being delivered into escrow pre-closing), replace "dated \_\_\_\_\_" with the phrase:

signed \_\_\_\_\_ but delivered \_\_\_\_\_.

The date of delivery is the effective "Easement Date."

## Undersigned Owner or Owners

**Identify Persons Granting the Easement.** Insert names exactly as set forth in the deed by which the Persons granting the easement acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into those Persons, it is good practice to recite the off-record

facts to clear up the apparent gap in title. Recite these facts either in §1.01 or at the end of the legal description attached as exhibit A.

**All Owners Must Join.** All Owners as of the Easement Date must join in the agreement for the agreement to be effective under the law.

**Relationship of Owners.** The relationship of multiple Owners to each other may be added here but is not necessary for recording or other purposes. Examples:

X and Y, husband and wife

and

X and Y, as joint tenants with rights of survivorship

**Not an Individual.** If a Person other than an individual is granting the easement, a phrase identifying the type of entity and state in which the Person was created is desirable but not necessary for recording or other purposes. Example:

X, a Pennsylvania limited partnership

**Rationale for Terms.** The model uses the term “Owners” rather than “Grantor” or “Grantors.” This choice avoids potential confusion about whether specific provisions were intended to apply only to the Persons signing the document or to subsequent owners of the Property as well. If a provision is intended to apply only to the Persons signing the agreement, the phrase “the undersigned Owner or Owners” is used. In all other cases, the term “Owners” (always plural) is used. This arrangement of setting apart the undersigned Owner or Owners from all Owners present and future also has the practical advantage of not

requiring conversion of plural to singular or vice versa throughout the document depending upon whether one or more than one person signed the document.

**“Grantor.”** If desired, you may substitute the term Grantor or Grantors for “undersigned Owner or Owners.”

## Holder

Insert the full legal name of Holder (including Inc. or Incorporated if part of the legal name) here.

A phrase identifying the type of entity and state in which Holder was created is desirable but not necessary for recording or other purposes. Example:

X, a Pennsylvania nonprofit corporation.

“Grantee” may be substituted for “Holder” but is not recommended for several reasons. First, the term “Holder” avoids any possible confusion in the future between the land trust or government unit that signed the document and a subsequent transferee who becomes the “Holder” but was never the “Grantee” of the original document. The second reason is that the terms Owners and Holder are more distinctive and recognizable than Grantor and Grantee whose similarity in spelling can sometimes lead to confusion.

Other parties to the document may be added here, if desired; however, the model has been constructed to name additional “Beneficiaries” (if any) later in the document. It is not necessary for purposes of giving public notice of the content of the document to name additional Beneficiaries in the opening paragraph.

# Article 1. Background

**Purpose.** Article I informs the reader of:

- the factual information necessary to understand the subject matter of the document; and
- the intentions of the parties in entering into a legally binding relationship.

**Whereas Clauses.** Most of the content of article I could be restated in a series of “whereas clauses” conjoined with a series of “ands”; however, modern legal practice, which the model follows, is to state the facts supporting the intentions of the parties in a background section with the facts set out as simple declarative sentences.

## OPTION: ADD SECTIONS TO ARTICLE 1

The supplemental provisions contain information and instructions for adding additional sections to this article under the headings of:

- “Provide for Federal Tax Benefits”
- “Clarify No Federal Tax Benefits”
- “Provide Easement Rights to Partners, i.e., Establishing Beneficiaries”

## 1.01 Property

**Purpose.** The section identifies the land that will be bound by the terms of the agreement.

**Property.** The legal description of the Property must be attached as exhibit A. It can be a photocopy of the

legal description in the deed that vests title to the Property in the Owners that are granting the easement.

**Street Address.** Insert a street address if available; otherwise, try to identify by acreage and frontage along a certain road or roads. Example:

100 acres more or less on the north side of \_\_\_\_  
Road west of the intersection of \_\_\_\_ Road and \_\_\_\_  
Road.

**Municipality.** Insert the city, township, or borough in which the Property is located. This may or may not be the name of the “city” used for mailing address purposes.

**County.** Identification of the county is required for recording purposes. If the Property is located in more than one county, it is important to have multiple originals signed so as to permit recording to occur simultaneously in both counties.

**Parcel Identifier.** The Tax Parcel Identification number for the Property is required for recording in most if not all counties. Some counties also require a Uniform Parcel Identification number. See Uniform Parcel Identifier Law (21 Pa. Stat. §§331-337). Some counties charge additional recording fees to note the tax parcel number or uniform parcel identifier number on the document presented for recording if not furnished in the document itself or the legal description attached as exhibit A.

## 1.02 Easement Area

**Purpose.** This section identifies the “Easement Area” (the portion of the Property within which the Trail and other Trail Facilities (if any) will be located). See article 2 for definitions of Trail and Trail Facilities. See *also* discussion of “Easement Location” in the guide [Trail Easements](#).

**Easement Plan.** The model calls for attachment of a boundary or topographical survey, drawing, annotated aerial photograph or other graphic description of the location of the Easement Area to be identified as “Easement Plan” and attached as exhibit B. Although it is recommended to have a reasonably accurate depiction of the Easement Area attached to the agreement for clarity, the Easement Plan may be omitted in the following circumstances or, if it is available, may be in addition to any of the following means of identifying the Easement Area:

**Legal Description.** The Easement Area can be described with a metes and bounds description incorporated into the Agreement as exhibit B instead of the Easement Plan. In that case, substitute for “shown on the plan” the phrase “described by metes and bounds in the description.” If both an Easement Plan and a survey description are available, the survey description can be incorporated as exhibit C in addition to the Easement Plan attached as exhibit B. In that case, add

the following to the end of the section: “and is more fully described in exhibit C attached to this agreement.”

**Relationship to Boundary.** The Easement Area can be clearly identified in relationship to a boundary of the Property; for example, substitute the following in the section:

The portion of the Property that is subject to this agreement (the “Easement Area”) is a corridor situated within \_\_\_\_ feet from the northerly boundary of the Property along the ultimate right-of-way line of \_\_\_\_ Road.

If an Easement Plan is also available, add:

and is shown on the Easement Plan attached as exhibit B.

**Relationship to Stream or Other Physical Monument.** The Easement Area can be clearly identified in relationship to a physical feature of the Property such as a stream; for example, substitute the following in the section:

The portion of the Property that is subject to this agreement (the “Easement Area”) is the area \_\_\_\_ feet landward from the center of \_\_\_\_ Creek that traverses the Property.

or

...is the area within \_\_\_\_ feet from the top of the bank on the northerly side of \_\_\_\_ Creek.

If an Easement Plan is also available, add:

and is shown on the Easement Plan attached as exhibit B.

### Clarification Regarding Stream Movement.

Drafters may want to note that the Easement Area is intended to move consistent with any movement of the stream. Example:

If the location of the stream changes, the Easement Area will likewise change location to maintain the same position in relation to the stream. In any event, the Easement Area is limited to the Property.

**Tax Issue with Changing Easement Area.** If the land included in the Easement Area as of the Easement Date can subsequently drop out of the Easement Area due to a waterway (or other physical feature) shifting, this could eliminate the potential for a donation of the easement to qualify for a federal tax deduction. (See *B. V. Belk, Jr.; Harriet C. Belk v. Commissioner of Internal Revenue*, United States Court of Appeals for the Fourth Circuit, No. 13-2161, December 16, 2014, for an example of the tax issues that can arise with moving Easement Areas.)

**Location to be Determined.** Sometimes Owners and Holder are willing to enter into an agreement with the location of the Easement Area to be determined by mutual agreement in the future. Although the high



degree of trust and confidence between Owners and Holder is admirable, conventional wisdom in the law is that an agreement to agree is no agreement at all. The recommended option when multiple locations are under consideration is to locate at least one mutually agreeable Easement Area and provide for the ability to relocate the Easement Area to another location identified by the Holders to which Owners have no reasonable objection. Any relocation would then be evidenced by recording an amendment to the easement document. Note that one party (the Holder in this example) is given the option to designate the path subject to reasonable objection of the other. That is preferable to a vague stipulation of “mutual agreement,” which becomes problematic if Owners have one preferred alternative and Holder has another.

**Entrance and Exit Points Known.** If Owners and Holder have not gotten so far as to have an identifiable Easement Area but there is at least an understanding of the approximate locations of the entrance and exit points for the trail at the boundaries of the Property, then the document may provide for the right of Holder to determine the exact location of the trail connecting the two points. For example, the “Easement Area” could be defined as”

a corridor \_\_\_\_ feet wide, connecting the point identified as “East Entrance” and the point identified as “West Entrance,” the exact location to be determined by Holder subject to the approval of Owners, not to be unreasonably withheld or delayed.

The parameters of the discretionary location could also be included, such as:

Holder will use best efforts to avoid steep slopes and damage to mature trees when plotting the final location of the Easement Area.

When the final location is determined, good practice is to evidence that by recording a supplement to the agreement in the public records.

**Plan Identification Information.** Since recorded versions of plans are sometimes reduced to the extent that not all the notes are legible, it is good practice to identify the plan with some specificity so that there is no question as to the plan that was intended as the Easement Plan. Examples:

The Easement Plan was prepared by \_\_\_\_, dated \_\_\_\_, entitled \_\_\_\_, plan number \_\_\_\_

and

The Easement Plan was prepared by the Holder, dated \_\_\_\_, and based upon a survey prepared by \_\_\_\_, dated \_\_\_\_, entitled \_\_\_\_\_. A full-size copy of the plan is kept on file by the Holder.

**Location of Trail.** If the Easement Plan shows the location of the Trail, add:

The [approximate] location of the Trail described in article 2 is also shown on the Easement Plan.

**DCNR Funding.** If a grant from the Pennsylvania Department of Conservation and Natural Resources (DCNR) is used to acquire the trail easement, check with DCNR to determine whether the boundary of the Easement Area may be referenced using setback descriptions or whether a metes and bounds description will be required.

### 1.03 Purpose

**Purpose.** This section sets forth the nature of the easements being granted. The first is an easement granted to the Holder to create the Trail and install other Trail Facilities as described in article 2. The second is an easement for public access to use the Trail Facilities for the activities described in article 3. The two easements are granted separately because they differ as to where the rights can be exercised and who can exercise them.

### 1.04 Consideration

**Purpose.** This section sets forth the amount of consideration (if any) being paid for the easement. The model denotes nominal consideration by listing \$1.00 as the consideration. If the actual amount of consideration is more than \$1.00, change the amount accordingly. While not strictly necessary in Pennsylvania, nominal consideration is often inserted in legal documents to be sure an agreement to make a gift is legally binding.

#### OPTION: ADDRESS A CONTEMPORANEOUS CONVEYANCE OF A CONSERVATION EASEMENT

**Review Guidance.** See “Two easements—access and conservation—in one transaction” in the guide [Trail Easements](#) and “Providing for Public Access” in the supplemental provisions to the [Model Grant of Conservation Easement and Declaration of Covenants](#).

**Describe Relationship of Easements.** If Owners are delivering this agreement in connection with a donation, sale, or bargain-sale of a conservation easement, change the caption of this section to “Consideration; Conservation Easement” and add a description of the relationship between the easements to the beginning of the section. Example:

This agreement has been executed and delivered in connection with a grant of conservation easement (the “Conservation Easement”) dated as of the Easement Date between the undersigned Owner or Owners and [the Holder or, if not the Holder under this agreement, identify that entity]. The Conservation Easement is intended to be recorded prior to this agreement and the rights of Owners and Holder under this agreement must be exercised under and subject to applicable restrictions

contained in the Conservation Easement. Article 6 of the Conservation Easement incorporates this agreement into the Conservation Easement as a single transaction—if a donation, a single donation, and, if a sale in whole or in part, a single sales transaction. In addition to the Holder identified above in this agreement, the rights of Holder to enforce this agreement may be exercised by the holder of the Conservation Easement and any

Beneficiaries (as defined in the Conservation Easement).

**Sale or Bargain-Sale.** Clarify that the purchase price inserted into this section applies to both this agreement and the Conservation Easement by adding to the end: “*and the Conservation Easement*” or, if the purchase price is for this agreement only, add an additional sentence: “*None of this consideration is attributable to or allocable to the Conservation Easement.*”

## Article 2. Grant of Easement for Trail Facilities

**Purpose.** This article sets forth the nature and extent of the rights granted to Holder within the Easement Area to create the Trail and, if desired by Holder, to install Trail Facilities. Within this article, Owners and Holder can carefully define what rights are or are not being granted to Holder.

### OPTION: PROVIDE FOR SCENIC OR NATURAL RESOURCE PROTECTION

The model does not provide for the protection of the Easement Area’s scenic and natural resources (if any). If this is of interest, the section entitled “Provide for Scenic or Natural Resource Protection” in the supplemental provisions provides guidance.

### 2.01 Grant

**Grant and Convey.** The words “grant and convey” have a special meaning in real estate law. When an Owner grants and conveys, that automatically means that the Owner warrants that he or she owns the land (or interest in the land) being conveyed in fee simple and has a right to convey it.

**Perpetual.** The model explicitly states the perpetual nature of the easement; strictly speaking, this is unnecessary in Pennsylvania because Pennsylvania law provides that an easement is perpetual unless otherwise provided in the easement document. If the Owners intend to qualify for a charitable contribution under §170(h) of the Code, the term must be perpetual. WeConservePA and many others generally and strongly advise Holders against entering easement agreements for a term of less than perpetuity.

**Tax Deductibility.** To qualify a grant of a trail easement as a qualified conservation contribution under §1.170A-14(b)(2) of the regulations to the Internal Revenue Code, the easement must be both perpetual and unconditional. If any conditions are placed on the easement, those conditions must be satisfied before the contribution can qualify.

**PA Assumes Unconditional.** Under Pennsylvania law, an easement is unconditional unless the easement document or circumstances of delivery provide otherwise. For example, a signed document delivered in escrow to a third party (a title company, for example) is conditional until released from escrow.

**Permitted Trail Facilities.** The Holder has an absolute right to create the Trail and install the facilities described in the (a) list.

**Not Permitted.** The (b) category serves to clarify that the agreement does not provide Holder the right to install (b) list items. Holder has no right to install (b) list items *unless and only as long as the Owners provide written consent*. This arrangement brings clarity where clarity often is absent in easement documents.

**Customize.** In customizing the model to a project, move items from the (b) list to the (a) list and, though unlikely, from the (a) list to the (b) list as appropriate.

**Consistency between Permitted Facilities and Permitted Uses.** The Trail Facilities permitted in §2.01(a) should be consistent with uses permitted in §3.01(a). For example, there would be no point in having the right to install bicycle racks under §2.01(a) if bicycling was not permitted under §3.01(a).

**Default Approach Emphasizes Passage.** Unless customized, the model takes the approach that the easement’s central aim is to provide the public with the opportunity to pass through the Easement Area, not to engage in stationary activities. Thus, while structures facilitating passage are permitted in the (a) list, facilities supporting stationary activities, such as picnic tables, are not (unless Owners consent).

**Clear Tread Width.** “Clear tread width” means the width of the trail surface on which people travel (as contrasted with shoulders and the like), a width that lacks obstacles to passage both on and above the ground.

**No Need to Specify Width.** If desired, delete the limitation on trail width. There is no need to specify a limit, but some Owners take comfort that the trail

they are allowing can't eventually grow into a "bicycle superhighway" or the like.

**Providing for Passing Spaces.** If the agreement will limit the trail to a relatively narrow clear tread width, it becomes especially important to provide passing spaces along the trail to allow people to pass each other safely and comfortably. It is primarily for this reason that the word "generally" is used to qualify the model's limitation on clear tread width. Alternatively, §2.01(a) could be written as follows:

A trail not to exceed \_\_\_\_ feet in clear tread width together with passing spaces placed as needed (the "Trail").

**Benches.** Moving benches to the (a) list implies a right for the public to sit on them for some period of time. Some Owners may not object to installing benches incidental to use of the Trail as a right-of-way for passage even if stationary activities generally remain subject to the consent of Owners under §3.01(b); if so, you may want to clarify that understanding; for example by expanding the (a) list to include benches but adding a caveat as follows:

(\_) Benches. The right to install benches does not imply an easement for stationary activities beyond accommodating people who would like to rest temporarily before continuing to traverse the Easement Area.

**Parking.** To address parking needs, you may expand §2.01(a) with a provision such as the following:

(\_) Parking spaces to accommodate up to \_\_\_\_ passenger vehicles, the exact location, if not identified on the Easement Plan, to be determined by Holder subject to the approval of Owners, not to be unreasonably withheld or delayed.

## OPTION: FURTHER SPECIFY THE NATURE OF THE TRAIL

You may wish to further specify the nature of the trail in §2.01(a).

**Hiking Trail.** Holder may want to establish a primitive hiking trail, and this may be the extent of facilities and access that the Owners find acceptable. In this case, you can add a statement to §2.01(a)(1) such as the following:

The Trail must be designed as a hiking trail that largely blends into the natural surroundings and that is surfaced (if at all) with local, natural materials. Major improvements such as bridges and boardwalks must only be used to the extent necessary to protect the Easement Area's natural resources and avoid erosion.

**Universal Access Considerations.** Primitive hiking trails can be entirely consistent with laws regarding

universal accessibility (e.g., the Americans with Disabilities Act). To better ensure that these laws are respected (and to avoid prematurely discounting accessibility possibilities) as the trail is designed and developed, you may want to consult the guide [Trails for All People](#).

**Article 3 Also Defines Trail Character.** Note that article 3, by stating what types of trail usage are and aren't permitted, also helps define the character of the trail that is to be allowed.

## OPTION: GRANT A LICENSE FOR (B) LIST ITEMS

**Default Approach.** Unless customized, the model does not provide the Holder with a license (or any right) to install facilities listed on the (b) list.

(Circumstances in which licenses may be helpful to expand basic easement purposes (for example, allowing picnic facilities on a trial basis) are discussed in the section captioned "Easement Purpose" of the guide [Trail Easements](#).)

**Granting Owners' Consent in the Agreement.** If the Owners want to provide consent—in legal terms, a "license"—for the installation of some or all of the (b) list facilities, modify (b) to include a provision such as the following:

As of the Easement Date, Owners grant permission for installation and maintenance of the following items until such permission is withdrawn at the election of Owners upon \_\_\_\_ (90 if not otherwise specified) days' notice to Holder: ...

**Consent Is Not Permanent.** Owners' consent for facilities (other than those listed in §2.01(a)) can be withdrawn at any time and, if this occurs, the objectionable facilities must be removed.

**Lengthening Notice Period.** The notice period may be lengthened to ensure that Holder can achieve enough benefit over time from an improvement to justify the cost of installation.

**Consent After Recording.** Owners may also provide consent for facilities any time after the easement is recorded. (The Holder will want this consent in writing to ensure there is no misunderstanding.)

**Amendment Brings Permanence.** If Owners and Holder desire to make the Owners' consent for an item permanent (in other words, change the license into an easement), they should do so by an amendment recorded in the public records that places the item in the (a) list.

**Trail.** To avoid misunderstandings, it is good practice to mark the Easement Area on the ground prior to the Easement Date and to install permanent markers prior to construction of the Trail. If the Easement Area is wide and the Owners want to have a buffer

area between the edge of the Easement Area and the Trail, you can add language as follows to §2.01(a):

The Trail must be located at least \_\_\_\_\_ feet from the Easement Area boundary, excepting where the Trail enters and exits the Property.

## 2.02 Exercise of Rights

**Purpose.** This section clarifies that the Trail may be created by any number of means which may or may not involve construction activities or installation of materials within the Easement Area.

**Materials.** The model does not limit the Holder to any particular means to create the Trail. A list of possible coverings is included to assure that the Owners and Holder understand one another on the issue. Paving should be listed as a choice in case it is required for compliance with the Americans with Disabilities Act or other law.

**Persons Who Can Exercise Holder's Rights.** Any of Holder's rights under §2.01 can be exercised by contractors, agents, and employees of Holder or, depending on the rights granted, a beneficiary (if any).

# Article 3. Grant of Easement for Public Access

## 3.01 Grant

**Purpose.** This section serves to establish the easement for public access to the Trail Facilities for the permitted uses. The granting language has been carefully drafted so that the right is vested in the Holder to make the Trail available to the public; there is no right of access directly granted to the public. The intent is to ensure that the Holder will own the easement and have a lot of flexibility in making management decisions rather than holding the easement in trust for the public and thus subject to public trust law. For an in-depth discussion of public access and the application of the public trust doctrine, see "Public access rights" under "Identifying the grantee of the easement" in the guide [Trail Easements](#).

**Permitted Uses.** Section 3.01 copies the set-up of §2.01: The Holder has an absolute right to provide to the public the use of the Trail Facilities as described in paragraph (a). In contrast, Holder has no rights in regard to uses listed in paragraph (b) *unless and only as long as the Owners provide written consent* for those uses. This arrangement brings clarity where clarity is often absent in easement documents.

**Customize.** In customizing the model to a project, move items from the (b) list to the (a) list and, though unlikely, from the (a) list to the (b) list as appropriate.

**Consistency between Permitted Facilities and Permitted Uses.** As noted in the commentary to article 2, the Trail Facilities permitted in §2.01(a) should be consistent with uses permitted in §3.01(a).

**Limits on Permitted Uses.** Some Owners may want to place limits on permitted trail uses, for example, restricting use of the trail to daylight hours. The preferred placement for such limitations is under §4.02(e). See examples of optional limitations in §4.02(e) of this commentary.

**Discretionary Uses.** Since Owners can give or withhold their consent to the activities described in paragraph (b), Owners can also condition their consent on

such terms and conditions (other than receipt of money or other consideration) as are satisfactory to Owners. For example, Owners might agree to allow a school or nonprofit club to engage in a Permitted Trail Use such as snowmobiling if the group takes responsibility for managing access by their members, provides evidence of insurance coverage, and furnishes Owners with releases of liability. This discretion, however, must not be abused. Owners are not permitted to discriminate against Persons on basis of race, religion, ethnicity, disability, or other unlawful classification. For a more detailed discussion of the differences between §§3.01(a) and (b), see the discussion in the commentary to §2.01. Granting licenses may protect Owners from claims of dedication to public use or adverse use as discussed in "License trumps claim of easement" in the "Easement Purpose" section of the guide [Trail Easements](#).

**Other Possible Uses.** You may add other uses such as camping as appropriate.

**Universal Access Considerations.** The inclusion of "power-driven mobility devices" as a permitted trail use in §3.01(a) is intended to assist with conformance with the federal accessibility law (e.g., the Americans with Disabilities Act). Depending on a number of factors, this inclusion may or may not be desirable or necessary. For a review of federal accessibility laws and other accessibility considerations, see the guide [Trails for All People](#).

## OPTION: GRANT A LICENSE FOR (B) LIST ITEMS

See the option of this same title under §2.01 for guidance.

## 3.02 No Charge for Access

**Purpose.** The prohibition on charging fees helps Owners and Holder meet the requirements for im-



munity from liability under the Pennsylvania Recreation Use of Land and Water Act, 68 P.S. §§ 477-4 and

477-6. See the discussion of that Act in the section entitled “Acknowledge Immunity under Applicable Law” in the supplemental provisions.

## Article 4. Rights of Owners

**Purpose.** This article both assures Owners of their rights with respect to the Easement Area and clarifies the extent of those rights. This clarification helps prevent situations where Owners’ exercise of ownership rights in the Property might conflict with the rights of Holder or the safety of the public using the Trail.

**The Law.** When an easement is granted, the easement holder has the right to take such actions as are within the scope of the easement. At the same time, Owners retain all of the rights and benefits of their ownership of the Property but for the rights granted to Holder. When more than one person holds an interest in real estate at the same time, it is good practice to anticipate areas of potential misunderstanding or lack of clarity to protect the interests of the parties and avoid future disputes or misunderstandings.

Consult the guide [Trail Easements](#) for more information on Owners’ continuing rights and concerns.

### 4.01 Owner Improvements

**Purpose.** This section assures Owners that: (a) they don’t have to remove improvements situated within the Easement Area as of the Easement Date; (b) they can install certain improvements that they can foresee needing in the future—these will be listed in a schedule to be attached to the agreement; and (c) they can install fencing to separate the Easement Area from the remainder of the Property to control trespassing. All other items require Holder’s approval, which may or may not be given.

**Fencing.** If Holder wants to exercise control over the kind of fencing installed by Owners (and there is no conservation easement providing applicable limitations), a provision such as the following may be added to §4.01(c):

Fencing must not exceed five feet in height and must be constructed of post-and-rail or other open weave construction that preserves scenic views from the Trail.

**Schedule of Permitted Other Improvements.** If the Owners are to have rights to cross the Easement Area for access to the public right-of-way or other portions of the Property by means of a future improvement, identify this in the schedule. For example, language such as the following might be used:

One driveway, with a driving surface not to exceed \_\_\_\_ feet in width, from the public right-of-way of

\_\_\_\_, which crosses the Easement Area in a location mutually agreed upon by Owners and Holder. Owners must submit a plan to Holder for approval at least 60 days in advance of construction. Holder’s approval of plans must not be unreasonably withheld. Holder’s approval or objection must be made within 30 days of receipt of the plans or the plans will be deemed approved.

Access for agricultural or forestry equipment across the Easement Area in one or more locations approved by Holder subject to Owners’ responsibility to (a) arrange for such crossings without interfering with Trail use; and (b) restore any damage to Trail Facilities promptly after each crossing.

If the trail easement is being granted in conjunction with a conservation easement, the item might be stated on the schedule as simply as:

Construction of the Access Drive (as defined in the Conservation Easement) in the location permitted by the Conservation Easement.

**No Owner Improvements.** If the understanding is that Owners will not have any of the rights described in §4.01, then replace the full text of the section with:

The right to construct facilities and improvements within the Easement Area is exclusive to Holder. Owners have no right to construct or maintain temporary or permanent facilities or improvements within the Easement Area.

### 4.02 Owner Uses and Activities

#### OPTION: RESERVE OTHER OWNER RIGHTS

The supplemental provisions explore other rights that may be appropriate to reserve to the Owners in sections with the following titles:

- Allow Owners to Temporarily Close Access
- Clarify and Limit Resource Management Rights Within the Easement Area
- Provide Owners the Right to Relocate the Trail and Easement Area

## OPTION: CLARIFY AND FURTHER LIMIT THE EXERCISE OF OWNER RIGHTS

Section 4.02 states that Owner Rights may not interfere with easement rights granted to the Holder (reinforcing what applicable law already provides). Nevertheless, it may be prudent to describe in some detail the limitations on Owner activities and uses. For example, you could add to the end of §4.02 the following:

Clarifying or further limiting Owner rights set forth above, Owners are subject to the following limitations: [Insert limitations]

The supplemental provisions section entitled “Provide for Scenic or Natural Resource Protection” notes the potential desirability of modifying §4.02, such as by adding the above provision, if the model is to be customized to provide protection of scenic or natural resources. It may also be desirable to require notice to Holder or Holder approval prior to Owners engaging in certain activities.

### (a) Mitigating Risk

**Purpose.** This item assures Owners that, even if the model is customized to give Holder the exclusive right to manage vegetation and other resources within the Easement Area, Owners can still take such action as is reasonably prudent whenever they observe a potentially dangerous condition; for example, a tree about to fall on the Trail or a rockslide across the Trail. The agreement does not require Owners to act, but they are permitted to do so in the interest of public safety.

**Notice.** Holders may want to be informed if Owners find it necessary to exercise rights to mitigate risk. In this case, you may add a sentence, such as the following to the end of this provision:

Owners must notify Holder of plans to take such actions or, if circumstances prevent advance notice, notify Holder of actions taken as soon as reasonably possible.

### (b) Grants to Others

**Purpose.** This item clarifies that Owners may not grant to other Persons rights with respect to the Easement Area that would, if exercised, conflict with Holder’s rights in the Easement Area. If Owners are permitted to engage in agricultural activities within the

Easement Area, then they can enter into a lease or other agreement for that activity. If Owners have reserved in §4.01 the right to install an electric or sewer line across the Easement Area by listing it as a Permitted Other Improvement, then Owners can enter into an easement with a public or private company with respect to that improvement.

**Notice.** Holders may want to be informed if Owners intend to grant rights to other Persons. In this case, you may add a sentence, such as the following to the end of this provision:

Owners must give Holder at least 30 days’ notice before making such grants.

### (c) Enforcement Rights

**Purpose.** This item assures Owners that they have the right to exclude persons who are either not on the Trail or other Trail Facilities or, if they are, are not using Trail Facilities for permitted uses. Anyone who wanders off the Trail or engages in activities other than permitted uses is a trespasser and can be dealt with like any other trespasser, including calling the assistance of the local police. Some Owners may want to clarify these rights to be sure that they do not have to tolerate specific activities or behaviors. The following is an example of language that may be added to this Enforcement Rights provision. (Holder may or may not want to assume any responsibility for enforcement of these items. If it is willing to commit to enforcing any one or more of the items, add the bracketed language.)

Owners’ enforcement rights include the removal of persons engaging in any one or more of the activities below, none of which are permitted trail uses. [Holder agrees to assist Owners in enforcement of items \_\_\_\_ by posting of appropriate signage and referrals to local officials.]

- (1) Use other than during daylight hours
- (2) Use by persons with unleashed pets or who do not remove pet feces
- (3) Excessive speed (whether by horse or vehicle) of more than seven (7) miles per hour (the approximate speed of a trotting horse)
- (4) Smoking; consumption of alcoholic beverages
- (5) Trapping, hunting, or use of firearms
- (6) Swimming
- (7) Camping, lighting of fires

## Article 5. Enforcement; Liability Issues

**Purpose.** This article groups together provisions dealing with legal issues arising from the relationship of Owners and Holder.

### OPTION: HIGHLIGHT PROTECTIONS AVAILABLE TO OWNERS AND HOLDER

The supplemental provisions in a section entitled “Highlight Immunity Under the Law” provide optional sections that can be added to article 5 to remind and give Owners and Holder comfort that, should a claim be asserted by someone injured within the Easement Area, there are protections available to them under the law.

#### 5.01 Enforcement

**Purpose.** To give the Holder assurance that, besides its right to commence a civil action in a court of competent jurisdiction for damages, the Holder has the right to obtain relief in the nature of a court order forcing the Owners to do or refrain from doing certain activity. For example, if the Owners refused to remove a barrier to access, the Holder may need to obtain a court order requiring them to do so. Sometimes the Holder may want to enter the Property so as to stop a violation while a court order is being sought to restrain further activity. In that case, the Holder (if not otherwise vested with police power) is urged to consult with counsel and, if circumstances suggest that entry is unwelcome, to consider requesting police escort. The power of self-help (for Holders not vested with police power) should be used only if the entry can be made without violence and without harm to persons or property.

#### 5.02 Public Enters at Own Risk

**Purpose.** The agreement does not expressly burden either Owners or Holder with responsibility for the safety of the public using the Trail. The purpose of this section is to disavow any implied duties to the general public to inspect, repair, or warn against possibly unsafe conditions; it clarifies that people relying upon this agreement for rights of entry need to take responsibility for their own safety.

**Guidance on Liability.** The section’s disavowal of responsibility does not mean that Owners or Holder should not try to act responsibly and otherwise seek to reduce risk. See “Protection from Liability” in the guide [Trail Easements](#) for more information.

#### 5.03 Costs and Expenses

**Purpose.** This section serves only to provide *explicit assurance* to Owners that they are not responsible for costs and expenses associated with Trail Facilities. It could be deleted without placing any cost burden on the Owners.

#### 5.04 Responsibility for Losses and Litigation Expenses

**Purpose.** Unlike a typical conservation easement where the Holder does not have care, custody, or control of the eased property, Holders of an easement granting the public a right of access across Owners’ property generally assume management responsibilities for the Easement Area (and the model is drafted with that assumption). The Owners need to be protected from claims that are the responsibility of the Holder so that Holder (or its insurer) will defend those claims without the need for the Owners to furnish their own defense and incur Litigation Expenses.

**Unwilling to Indemnify.** The Commonwealth of Pennsylvania and its departments and instrumentalities do not offer indemnity to others for claims as to which they are immune from liability under the doctrine of sovereign immunity. Counties, local governments, and private organizations acting as Holder may or may not be willing to indemnify Owners from such claims. If a Holder is unwilling to indemnify Owners from liability resulting from Public Access Claims, delete this section and the reference to Owner Responsibility Claims in the preceding section.

### OPTION: REQUIRE INSURANCE

The supplemental provisions in a section entitled “Require Insurance” provide text to establish a requirement that both Holder and Owners carry insurance to back their indemnities.

## Article 6. Miscellaneous

**Purpose.** This article groups together a variety of provisions pertaining to the administration and interpretation of the agreement.

### 6.01 Binding Agreement

**Purpose.** This section sets forth the understanding of Owners and the Holder that the agreement is not just the agreement of the undersigned persons but binds and benefits all persons who succeed to their respective interests.

**No Limit on Assignment.** This section does not limit the universe of Persons to whom Holder can assign its interest in the agreement except for such limitations (if any) as may be set forth elsewhere in the agreement. If the agreement is intended to qualify as a charitable donation of a partial interest in real estate (as defined under §170(f)(3)(B)(iii) of the Internal Revenue Code), the “Federal Tax Items” section added to the agreement will limit Holder’s right to assign to another qualified organization.

**Limit on Assignment.** If desired, a limitation on assignment can be added. Example:

Holder may assign its rights under this agreement only to a governmental entity or a nonprofit organization meeting the standards of a qualified organization under §170(h) of the Internal Revenue Code.

#### OPTION: PROVIDE OWNERS WITH NOTICE OF ASSIGNMENT

You may wish to require that Holder provide notice if Holder at some future date decides to transfer the easement and that Holder identify the proposed assignee. Such notice would give Owners the opportunity to contact Holder for additional information and, perhaps, suggest other choices. A provision, such as the following, could be appended to the section to establish a requirement for notice:

The assigning Holder will seek to notify Owners, not less than 30 days prior to the assignment, of the identity and address for notices of the entity that has agreed to accept the obligations of Holder under this agreement.

**Rights of Approval of Transferee?** The question sometimes arises whether Owners also should be given a right of prior approval of a proposed transferee. The rationale in support of such a right is that the Owner selected a particular Holder anticipating a good working relationship with that Holder. If Holder can transfer at will to another organization, the expecta-

tations of Owner regarding that good working relationship may not be met. The argument against that position is that it is inappropriate to bind Holder to continuing to hold an easement that may not be consistent with its mission in the future; the situation has arisen where a Holder is undergoing major restructuring with another organization and Owners, who were not the granting Owners but who are hostile to the easement, endeavor to block a reasonable assignment in an effort to force a renegotiation of the easement terms. Alternatives can be negotiated that provide a mechanism for Owners to object to a particular transferee and suggest another organization willing to accept the transfer of the easement without binding Holder to Owners’ preferences.

### 6.02 Governing Law

**Purpose.** In case an Owner granting the easement or a future Owner is an out-of-state resident, this provision makes it clear that only the laws of the Commonwealth of Pennsylvania apply. This avoids a dispute about whether the laws of another jurisdiction apply.

### 6.03 Definition and Interpretation of Capitalized and Other Terms

**Purpose.** This section assists readers in interpreting the document correctly. Also, by defining certain terms, it reduces the needless repetition of longer phrases in the agreement.

### 6.04 Incorporation by Reference

**Purpose.** The purpose is to avoid needless repetition of phrases.

### 6.05 Amendments; Waivers

**Purpose.** This provision has several purposes. First, it puts Owners on notice that they should never rely on an oral statement of an employee or other representative of the Holder that is contradictory to the terms of the agreement. Second, it puts the Holder on notice of their need to inform staff or other persons performing monitoring or administrative duties of the limits of their authority.

**Authorization.** Holder must establish what authorization is needed for amendments, waivers, or consents.

**Amendment.** Ordinarily, an amendment needs to be approved by the same official or governing body that approves acceptance of the agreement. An amendment is signed with all of the formalities required of the original agreement and is intended to be recorded in the public records just as the original agreement. An



amendment permanently changes the terms of the agreement.

**Consent or Waiver.** A discretionary consent or waiver (even if in writing) does not constitute an amendment. It is granted for a particular purpose and only for a limited time due to extraordinary circumstances not contemplated under the agreement. For example, a fire or extended drought may necessitate Owners taking extraordinary measures not specifically permitted under the terms of the agreement. The terms of the agreement remain unchanged, but the Holder waives its right to invoke its remedies. A consent or waiver should always be memorialized in writing, but this can be in the form of a simple letter from the Holder to Owners in response to a written request from Owners to the Holder requesting a waiver to permit specified activities for a specific period of time.

## 6.06 Severability

**Purpose.** If the provisions of a document are dependent on each other, the failure of one means the failure of them all. This section ensures that if one provision fails, the others remain in full force.

## 6.07 Counterparts

**Purpose.** There are multiple purposes for this provision. First, it makes clear that more than one counterpart of the agreement can be signed. Second, it allows the Persons granting the easement and Holder to exchange signature pages signed separately rather than circulate original documents back and forth to collect necessary signatures.

## 6.08 Entire Agreement

**Purpose.** The written text of the agreement signed by Owners and the Holder is final and definitive. Whatever was proposed in previous drafts and said in previous negotiations is of no further consequence in interpreting the intentions of the parties.

**Off-record Document.** The guide [Reducing Liability Associated with Public Access](#) notes circumstances in which Owners and Holder may want to have a written understanding between themselves that is not part of the publicly recorded document so as not to incentivize claims by persons allegedly injured while using the Trail. These off-record agreements should be mentioned here as not being superseded by the terms of this agreement.

**Representations in Prior Agreement.** You may want to modify this section if there are representations, warranties, or agreements contained in earlier communications that are intended to survive this agreement.

## 6.09 Notices

**Purpose.** This section provides a means for notice to Holder of any defective or dangerous condition in the Easement Area so that prompt action can be taken to protect public safety. Holder may want to furnish in its telephone answering system an emergency means of contact on weekends and holidays by text message or phone call.

**Electronic Option.** Electronic mail can be added as well if Holder is confident this means of communication will be duly noted. The customary practice is to require that notices by electronic means be followed promptly by notice delivered by one of the methods listed above.

**Street Address.** A street address should be furnished because commercial couriers (such as FedEx or UPS) cannot deliver to P.O. boxes.

## 6.10 Warranty

**Purpose.** This section evidences the understandings which Holder has relied upon in entering into the agreement.

### (a) Liens and Subordination

**Risk of Foreclosure.** Foreclosure of a mortgage or other lien *prior in right* to the Trail Easement can extinguish the easement. Subordination of liens eliminates the risk of foreclosure.

**Title Search.** A title search will disclose the identities of all the current Owners of the Property and whether any liens affect the Property and thus require subordination. It will also disclose whether other persons (for example, a utility or an extractor of coal or natural gas) have rights in the Property adverse to the interests of Holder.

**Obtaining Subordination.** The guide [Pre-Existing Mortgages in Easement Transactions](#) offers advice on how to approach mortgage lenders and mortgage servicing companies to obtain subordination and a discussion of Tax Court opinions on the issue. The [Model Consent, Non-Disturbance, and Subordination Agreement with Commentary](#) is designed to address the issues identified in the guide.

**Time.** Owners should be advised of the need to subordinate liens early in the process. Satisfaction of this requirement frequently requires substantial time and effort.

**Acceptance of Lien.** A Holder could exercise its business judgment to accept an easement under and subject to an outstanding lien provided that no tax benefit was being sought. Some of the factors influencing the decision to take that risk would be: the relative value of the lien to the value of the Property; the creditworthiness of the Owners; and the financial resources of Holder if, in a worst case scenario, Holder

had to purchase the outstanding lien so as to prevent extinguishment of the easement upon foreclosure.

**Code Requirement if Deduction Desired.** A qualified conservation contribution must be enforceable in perpetuity under §170(h)(5)(A) of the Internal Revenue Code. Under Regulation §1.170A-14(g)(2), if a holder of a mortgage affecting the Easement Area has not subordinated its rights, this perpetuity requirement is not satisfied.

**S&P.** Practice 9.F.2 calls for land trusts to:

Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values.

## (b) Existing Agreements

**First in Priority.** Existing agreements are entitled to priority over the easement to be executed under applicable law.

**If Agreements Exist.** If there are existing agreements affecting the Easement Area, reference them in this subsection and, if appropriate, describe them in greater detail in an exhibit.

**Title Search.** Organizations should obtain title information to determine what rights Persons have to disturb the Easement Area by exercise of rights under existing agreements. The Holder wants assurance that, for example, the Owners have not given a tenant farmer a lease that would prevent Holder from building the Trail in a certain area.

At a minimum, organizations should request a copy of Owners' title policy and inquire whether Owners have granted any easements or other servitudes during their period of ownership.

## (c) Hazardous Materials

Before taking an interest in land, a prudent Holder requests confirmation that the Owners do not know of any environmental problems.

# Closing Matters

**Consideration in Pennsylvania.** The phrase "INTENDING TO BE LEGALLY BOUND" is a valid substitute for consideration in the Commonwealth of Pennsylvania as provided by the Uniform Written Obligations Act, 33 Pa. Stat. §6. (The term "consideration" means something of value given in return for a promise.) Use of the phrase is important in circumstances where the easement is being donated with no consideration being given. Note that *only in Pennsylvania* is the phrase "intending to be legally bound" recognized by statute as a valid substitute for consideration.

**Signature Lines.** Add as many signature lines as are necessary to accommodate the number of Persons who will be signing the agreement.

The signature lines assume that the Owners are individual people. If an Owner is a corporation, partnership, or other entity, signature lines similar to those provided for Holder should be substituted. Likewise, a form of acknowledgment similar to that provided for Holder should be substituted for the form provided in the model, which is appropriate only for individual Owners.

**Joinder/Acceptance.** If a Beneficiary desires to join in the agreement to evidence its acceptance, an additional signature line should be added as follows:

Acceptance by Beneficiary:

[NAME OF BENEFICIARY]

\_\_\_\_\_ By: \_\_\_\_\_  
Name:  
Title:

**Witness/Attest:** It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.

**Acknowledgment.** The date of the acknowledgment should not be earlier than the Easement Date. (See the commentary to the opening recitals.)

**Exhibits.** Check that all exhibits and schedules referenced in the agreement are attached before it is signed and recorded in the Public Records.

# Style Guide

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## Style Guide to the Model

### Fonts

The fonts used in the fourth edition of the model are 10.5 pt. Garamond for the main body of text and 12 and 10.5 pt. Garamond bold for article and 1<sup>st</sup> level section headings.

Italics are generally avoided due to the risk that if formatting is inadvertently lost during the drafting process, the error might be missed and the intended meaning lost. With that said, italics do appear in the use of Latin terms.

### Capitalization

Words with the first letter capitalized signify a term defined either upon its first usage in the document or in §6.04 “Definition and Interpretation of Capitalized and Other Terms.”

To reinforce the role of capitalization in signifying defined terms, superfluous capitalization is generally avoided outside its use in headings. The words *article*, *section*, and *exhibit*, for example, appear in small case.

### Numbers

When a number is used, it appears only in a single form, either spelled out or Arabic numeral—not both. Whole numbers from zero to nine are spelled out. Whole numbers of 10 or greater use Arabic numerals.

### Punctuation

Commas and periods are placed inside of a closing quotation mark as per the illogical but exceedingly popular American style.

The model uses the Oxford comma, sometimes called the serial comma. The Oxford comma appears before the *and* or *or* in a list of three or more items. (Robust endorsements and contrary opinions concerning the Oxford comma can be found at many websites.)

### Cross-Referencing

References to other provisions, when needed or desired for clarity, refer to articles or “this agreement” rather than specific sections and subsections wherever this can be done without loss of meaning. A common drafting error is to add or delete paragraphs but not catch all the changes that are consequently necessary for cross-references; the model’s approach seeks to minimize the opportunities for that error to occur.

### Other

“Headings” and numbering must be read in context to understand whether one is reading an actual heading, a

full provision, or an item on a list that is part of a larger provision.

Blanks in the text (shown as \_\_\_\_\_) are intended to be filled in by the user and the parenthetical default content (e.g., “500 if not otherwise noted”) deleted.

The article *the* is not used before *Holder*.

## Style Guide to the Commentary

The stylistic practices used in the model generally carry into the commentary.

### Fonts

The font Gil Sans is used for comments. The font Garamond is used for optional and sample provisions that could be used to customize the model; these fonts match those used in the model. Oswald Medium is used for commentary section headings and the captions of material addressing options for customizing the model.

### Italics and Quotation Marks

Italics are generally used for the following purposes:

- For emphasis or contrast, titles of major works (including guides and model documents published by WeConservePA), and foreign words.
- When words or terms are referred to within a sentence as words or terms. Examples: (1) “The term *Oligarchy* is defined in the supplemental provisions.” (2) “At the beginning of sentences, rather than using a symbol, *Section* is spelled out.” (3) There is a clear distinction between the *under-signed Owner or Owners* (those who sign the document) and *Owners* (the signers and all those who hold an interest in the Property after them).” Note that quotation marks may serve this purpose in particular instances where they seem to better serve readability and understanding.

Quotation marks are generally used for the following purposes:

- For referencing the headings and content falling under those headings in the commentary. For example, “See the supplemental provision’s “Adding Conservation Objectives” for suggestions on how to protect cultural resources associated with conservation projects.”
- For their standard uses with titles of small works, direct quotations, euphemisms, and content that shouldn’t be taken at face value.

### Terminology

The word *model* signifies the *Model Trail Easement Agreement*.

A reference to a guide followed by the guide's name with no further identifying information signifies that the guide is published by WeConservePA and is available for viewing and download at [WeConservePA.org/tools](https://weconservepa.org/tools).

A reference to a model legal document with no further identifying information signifies that the model is published by WeConservePA and is available for viewing and download at [WeConservePA.org/tools](https://weconservepa.org/tools).

S&P means [\*Land Trust Standards and Practices\*](#).

In the model, the phrase “this agreement” is used to communicate that the only document referred to is itself—the definitive instrument signed by the parties. The commentary instead refers to “*the agreement*” to signify that it is not limited to one and only one definitive document but to many instruments derived from the model and tailored for specific transactions.

Terms defined in the model that appear in optional or sample text in the commentary that could be inserted into the model are always capitalized consistent with the model's capitalization practice. Those same terms generally appear with capitalization throughout the commentary to indicate that their meanings as defined in the model continue to hold wherever they appear. However, there are exceptions and complexities:

- In the model, there is a clear distinction between the *undersigned Owner or Owners* (those who sign the document granting the conservation easement) and *Owners* (the signers and all those who hold an interest in the Property after them). In the commentary, the word *Owners* is used in a more general sense and, depending upon the context, includes not only the *Owners* and the *undersigned Owner or Owners* identified in a particular Grant but also landowners subject to trail easements generally and landowners who are contemplating a grant of easement.
- Similarly, the word *Holder* in the commentary is used in a more general sense than the defined term in the model. Depending upon the context, it includes organizations and governments who currently hold or may hold easements in the future.

References to the *commentary*, *supplemental provisions*, *style guide*, and *model* do not receive initial capitalization.

The symbol “§” followed by a number or a number-letter combination generally denotes a specific section or subsection of the model. At the beginning of sentences, *Section* or *Subsection* is spelled out. In commentary headings that track the model sections and subsections, the symbol is omitted.

# Supplemental Provisions for the Model Trail Easement Agreement

## Provide for Federal Tax Benefits

### (add section to article 1)

If the undersigned Owner or Owners intend to claim the donation of easement under the agreement as a charitable donation of a partial interest in real estate (as defined under §170(f)(3)(B)(iii) of the Internal Revenue Code) to a qualified organization (as defined in §1.170A-14(c)(1) of the regulations promulgated under the Internal Revenue Code), add to article 1 a new section captioned “Federal Tax Items” containing the subsections set forth below.

This commentary does not attempt to explain all of the requirements for qualification of the agreement as a *qualified conservation contribution* under the provisions of §170(h) of the Internal Revenue Code. Owners should be advised to seek legal counsel and review pertinent information at [WeConservePA.org/tools](http://WeConservePA.org/tools) and other reputable sources.

**Refer to Other Commentary.** See §1.05 and §1.07 of the commentary to the [Model Grant of Conservation Easement and Declaration of Covenants](#) for an explanation of the reasoning behind each of the provisions in this Federal Tax Items section.

**Special Cases: People with High Value Estates and Farmers.** The supplemental provisions to the [Model Grant of Conservation Easement and Declaration of Covenants](#) contain guidance and special provisions that address tax code benefits specific to (1) farmers and (2) people with high value estates that will be subject to the federal estate tax.

### New Section:

#### 1.0\_ Federal Tax Items

The provisions of this section supplement and, to the extent of an inconsistency, supersede provisions set forth elsewhere in this agreement.

(a) **Qualified Conservation Contribution.** The undersigned Owner or Owners intend this grant of

Trail Easement, a transfer of a partial interest in real estate without consideration except as set forth in this article, to qualify as a qualified conservation contribution (as defined under §170(h)(1) of the Code). If the Trail Easement is transferred to any Person, that Person must commit to hold it exclusively for conservation purposes as defined in the Regulations.

(b) **Public Benefit.** The undersigned Owner or Owners have granted the Trail Easement to provide a significant public benefit (as defined in §1.170A-14(d)(4) of the Regulations). Public policies and programs that illustrate and support the significant public benefit of this agreement include:

- (1) The Open Space Plan of \_\_\_\_\_, adopted in \_\_\_\_\_, which \_\_\_\_\_.
- (2) The \_\_\_\_\_ County Greenway Plan, adopted in \_\_\_\_\_, which \_\_\_\_\_.

(c) **Mineral Interests.** The undersigned Owner or Owners represent that no Person has retained a qualified mineral interest in the Property of a nature that would disqualify the Trail Easement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the Easement Date, the grant of such an interest is prohibited, and Holder has the right to prohibit the exercise of such a right or interest if granted in violation of this provision.

(d) **Notice Required under Regulations.** To the extent required for compliance with §1.170A-14(g)(5)(ii) of the Regulations, Owners agree to notify Holder before exercising reserved rights that may have an adverse impact on the conservation interests or public recreational purposes associated with the Property.

(e) **Extinguishment.** In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner



or Owners agree that (1) the grant of the Trail Easement gives rise to a real estate right, immediately vested in Holder, that entitles Holder to compensation upon extinguishment of the easement; and (2) extinguishment for unexpected changes that make impossible or impractical the continued use of the Property for conservation purposes (as defined in the Regulations) can only be accomplished by judicial proceedings. The fair market value of the right is to be determined in accordance with the Regulations; i.e., it is at least equal to the proportionate value that the Trail Easement as of the Easement Date bears to the value of the Property as a whole as of the Easement Date (the “Proportionate Value”). If the Proportionate Value exceeds the compensation otherwise payable to Holder under this Grant or applicable law, Holder is entitled to payment of the Proportionate Value. Holder must use funds received on account of the Proportionate Value for conservation purposes (as defined in the Regulations).

**(f) Acknowledgment of Donation.** Except for such monetary consideration (if any) as is set forth in this article, Holder acknowledges that no goods or services were delivered to the undersigned Owner or Owners in consideration of this Grant.

**(g) No Representation of Tax Benefits.** The undersigned Owner or Owners represent, warrant, and covenant to Holder that:

- (1) The undersigned Owner or Owners have not relied upon information or analyses furnished by Holder with respect to either the availability, amount, or effect of a deduction, credit, or other benefit to Owners under applicable law; or the value of the Trail Easement or the Property.
- (2) The undersigned Owner or Owners have relied solely upon their own judgment and/or professional advice furnished by the appraiser and legal, financial, and accounting professionals engaged by the undersigned Owner or Owners. If a Person providing services in connection with this agreement or the Property was recommended by Holder, the undersigned Owner or Owners acknowledge that Holder is not responsible in any way for the performance of services by these Persons.
- (3) This agreement is not conditioned upon the availability or amount of a deduction, credit, or other benefit under applicable law.

**(h) Baseline Documentation.** As of the Easement Date, the undersigned Owner or Owners and Holder have signed an acknowledgment of the accuracy of the report (the “Baseline Documentation”) to be kept on file at the principal office of Holder. The Baseline Documentation contains an original, full-size version of the Easement Plan and

other information sufficient to identify the conservation and public recreational interests served by this agreement; and includes, among other information, photographs depicting existing conditions of the Easement Area as of the Easement Date. Whether or not attached to this agreement, the Baseline Documentation is incorporated into this agreement by this reference.

## Federal Tax Benefits Specific to Farmers

**Add Qualification for Treatment under Pension Protection Act of 2006.** Add the following subsection to the Federal Tax Items section if one or more of the Owners donating the easement otherwise qualifies as a “qualified farmer or rancher” under the Pension Protection Act of 2006, i.e., a taxpayer who earns more than 50% of his or her gross income from the business of farming in the taxable year in which the conservation contribution is made. A qualified farmer or rancher may deduct the easement value up to 100% of their Adjusted Gross Income for up to 15 years.

**Qualification under Pension Protection Act of 2006.** To the extent required to qualify the undersigned Owner or Owners as a “qualified farmer” or “qualified rancher” under applicable provisions of the Pension Protection Act of 2006 and subject to applicable limitations set forth in this agreement, the Trail Area must be used, or available for use, for agricultural or livestock production.

## Federal Estate Tax Benefits

**Add Qualification for Treatment under Code §2031(c).** §2031(c) of the Code provides potential federal estate tax benefits to conservation easement donors. Donors should consult with their tax and legal advisors to determine whether these benefits may be advantageous and whether the benefits outweigh the disadvantages of drafting the agreement to conform with the §2031(c) requirements. If the §2031(c) election is determined to be a useful option to the donors, add the following subsection to the Federal Tax Items section:

**Qualification Under §2031(c) of the Code.** To qualify for exemption for federal estate tax under §2031(c) of the Code, the undersigned Owner or Owners agree that more than a *de minimis* use of the Property for commercial recreational activity is prohibited.

**Applicability of Estate Tax.** There is an \$11.2 million individual exemption from federal estate tax for tax year 2018 with a couple able to exclude \$22.4 million. The exemption is indexed to inflation. (The exemption amount, absent Congressional action, will halve in 2026.)

**Commercial Recreation and Conservation Objectives.** A prerequisite for utilizing §2031(c)'s potential tax benefits is a restriction on commercial recreation:

... the restriction on the use of such interest described in section 170(h)(2)(C) shall include a prohibition on more than a *de minimis* use for a commercial recreational activity. [§2031(c)(8)(B)]

Commercial recreation, depending on its nature, potentially can be compatible with Conservation Objectives and Owners (and Holders) may or may not want to prohibit commercial recreation unless taking advantage of the exclusion provided in 2031(c) would be potentially advantageous to their estate planning.

## Clarify No Federal Tax Benefits

### (add section to article 1)

If the transaction will not qualify as a qualified conservation contribution or the Owners that are granting the Trail Easement are certain that they will not be pursuing federal tax benefits, you could add a section, such as the following to confirm this understanding of the parties:

#### 1.0\_ Not Intended as a Qualified Conservation Contribution

The undersigned Owner or Owners and Holder confirm that the grant to the Holder of the Trail Easement under this agreement is not intended to be a qualified conservation contribution under the Internal Revenue Code of 1986, as amended through the applicable date of reference.

## Provide Easement Rights to Partners, i.e., Establishing Beneficiaries

### (add section to article 1)

#### Basic Provision

**Rights, Not Duties.** You may want the option of providing a Holder's partner in a trail project with rights *but not obligations* in regard to the easement and to do this either at the time of the easement's establishment or at some later date. To provide for this possibility, you can add a new section to the model providing for a beneficiary of the easement. Example:

#### 1.0\_ Beneficiaries

The rights of Holder under this agreement may be exercised by any Person identified by Holder as a beneficiary of this agreement and who accepts this designation by recordation in the Public Records of a joinder to this agreement.

Typical beneficiaries include partnering nonprofits and government funders of easement projects.

**Timing.** Beneficiaries may be named in the agreement (as described below) or the Holder may name one or more at some later date.

**Beneficiary Not Necessarily a Qualified Organization.** The section does not require a beneficiary to be a qualified organization (as defined in §1.170A-14(c)(1) of the Internal Revenue Code regulations regarding tax deductions for donations of conservation interests). For example, a trail group or bird watching club that was instrumental in establishing the easement could be identified as a beneficiary even if not a qualified organization.

**Limit Universe of Beneficiaries.** If desired, you can limit the universe of possible beneficiaries. For example, the following sentence can be added to the section:

Only nonprofit or governmental entities can be named as beneficiaries of this agreement.

**Customize Rights.** The rights given to a beneficiary can be customized to the circumstance. Sometimes it will be desirable to give the beneficiary many rights; sometimes one or two rights will be more appropriate.

## Naming Beneficiaries and Rights in the Agreement

**Name Beneficiary.** If a beneficiary is to be named in the agreement (rather than at some later date by the Holder), add the following text to the new section:

[NAME OF BENEFICIARY] has been granted the following rights under this agreement:

**List Rights.** Following this text, list the rights to be given to the beneficiary. Use the following list of potential rights to guide you in determining which rights are most appropriate to grant to a particular beneficiary. (For each possibility, ask whether the beneficiary is willing and able to exercise the right if and when needed.)

1. The right to exercise Holder's rights and duties under this agreement should Holder fail to make the Trail available for public recreation.
2. The right to compel transfer of Holder's rights and duties under this agreement to a qualified organization under §170(h) of the Internal Revenue Code should Holder fail to make the Trail available for public recreation.
3. The right to prior approval (not to be unreasonably withheld or delayed) of an amendment to the agreement.
4. The right to approve transfer of Holder's interests in the Trail Easement (such approval not to be unreasonably withheld or delayed).

**Beneficiary Rights Do Not Replace Contractual Rights.** The specific rights set forth in the agreement supplement rather than replace the rights and remedies of grantors under applicable programs and grant contracts. For example, if a grant contract requires prior approval by the county of any amendment to the agreement, then the Holder is contractually bound to seek county approval whether or not the county has recorded an acceptance of beneficiary rights.

**Relationships.** The guide [Holders, Beneficiaries and Backup Grantees](#), although written to address conservation easements, provides insights into the roles and relationships beneficiaries may have to a Holder and the land. It also describes the advantages of establishing Beneficiaries rather than setting up easement co-holder relationships.

**S&P.** Practice 8.E of S&P states that when land trusts engage in a partnership to acquire or steward a conservation easement, they should "create written agreements to clarify:

- a. The goals of the project
- b. The roles and responsibilities of each party
- c. Legal and financial arrangements
- d. Communications to the public and between parties"

The sample provisions provided in these supplemental provisions for placement in article I are intended to document the rights of each beneficiary. Other arrangements between Holder and beneficiaries covering matters described in Practice 8.E may be documented in agreements separate from the trail easement agreement or, less preferably, within the agreement. (See "Separate Agreement Versus in the Grant" in the guide [Holders, Beneficiaries and Backup Grantees](#) for guidance on this point.)

## Special Content Required by Funders

**Pennsylvania Department of Conservation and Natural Resources.** If DCNR funds have been used to acquire the easement, insert *DCNR-approved language for the specific funding program* in the section.

**Local Government.** Some local governments require certain terms to be incorporated into easement documents as a condition of funding a project.

**Basic Statement.** Set forth below is an example of a provision that can be added to the section if local government funds have been used to acquire the conservation easement in whole or in part. This provision is offered *in the absence of any specific requirements of a local government program or mandate contained in a grant contract with the local government.*

The Trail Easement vested in Holder by this agreement has been purchased in whole or in part by funds provided to Holder by the Township of \_\_\_\_\_ (the "Township") [acting under the authority granted by \_\_\_\_\_].

**Local Government Contribution.** Some local governments require a recitation of the funding contributed by the local government towards the acquisition. The following provision may be added for those purposes:

The purchase price or portion of the purchase price funded by Township for the Trail Easement is the sum of \$\_\_\_\_\_ (the "Township Contribution").

**Local Government Supplement.** Some local government programs require the incorporation of certain terms or information into each local government-funded easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all local government-funded easements.

Attached as exhibit \_\_\_\_ is a rider to this agreement containing certain provisions that must be incorporated into this agreement as a condition of funding by the Township. The terms and provisions of the rider supersede, to the extent of any inconsistency, any other provisions of this agreement.

**Local Government as "Co-holder."** Whether or not a local government contributes funding towards acquisition of an easement, it may be desirable for Owners' tax purposes to appoint a local government as a



beneficiary for purposes of qualifying the local government as co-holder of the easement:

- Act 153 of 1995 requires county assessors to take into consideration “any change in market value of the property which may result from [a local government’s] acquisition of open space property interests.”
- Act 153 of 1995 also authorizes (but doesn’t require) local tax bodies to exempt “property in which the open space property interests have been acquired by a local government unit” from real estate millage increases.

If the local government will be named as a beneficiary for this purpose, add the following provision to the section:

As a beneficiary of the Trail Easement, the Township agrees to be a co-holder of the Trail Easement for purposes of qualifying the Property subject to the easement for preferential tax treatment under the Preserving Land for Open Air Spaces Act (Act of Jan. 19, (1968) 1967, P.L. 992, No. 442).

## Acceptance of Beneficiary Rights

Section 4(c) of the [Conservation and Preservation Easements Act](#) requires beneficiaries to sign the agreement (or record a separate document of acceptance) to evidence their acceptance of the rights and duties:

No right or duty of a holder, successive holder named in the conservation or preservation easement or person having a third-party right of enforcement may arise under a conservation or preservation easement before the acceptance of the easement by the holder, successive holder or third party with right of enforcement and recordation of the acceptance.

Whether or not the Trail Easement will be viewed as a conservation easement under the Act, having the beneficiary sign and record an acceptance is a good practice.

The acceptance does not have to be made a part of the initial agreement but can be recorded later if and when the need arises for the beneficiary to enforce its rights independent of Holder, for example, the beneficiary wants to replace Holder for failure to exercise its rights.

## Require Particular Trail Facilities

### (add section to article 2)

The model does not require Holder to install Trail Facilities. However, there are situations where this might be desired, for example, if Holder offered to install fencing along the Easement Area to induce Owners to grant the easement. (See discussion of confined location in the section of the guide [Trail Easements](#) captioned “Addressing Owners’ Concerns.”)

If Owners want to require Holder to provide fencing, gated entry, or other improvement as a condition of the grant of easement, add an additional section to article 2 to identify those Trail Facilities that Holder has agreed to furnish. Example:

### 2.0\_ Required Trail Facilities

Within \_\_\_\_ days after opening the Trail to the public, Holder must install fencing along the boundary of the Easement Area with a gate for access to the Trail. The purpose of the fencing is to keep livestock from entering the Easement Area. The materials and design of the fence are to be in the discretion of the Holder [so long as the fence complies with applicable restrictions of the Conservation Easement.] The cost of the fencing and any repairs and replacement is to be borne \_\_\_\_% by Holder and \_\_\_\_% by Owner.

## Address Owners’ Concerns Regarding Initial Construction

### (add section to article 2)

You may add a section to article 2 to address concerns, if any, that Owners have regarding the initial installation of the Trail. Example:

### 2.0\_ Initial Installation

Prior to installation of the Trail within the Easement Area, Holder must (a) provide Owners with at least 30 days notice of its intent to install; (b) mark the approximate location of the Trail and consider suggestions of Owners as to reasonable adjustments

of Trail location; (c) obtain certificates evidencing liability insurance coverage with respect to Holder and all Persons entering the Property for the purpose of construction or installation activities; and

(d) obtain, at Holder's cost and expense, all permits and approvals required for construction or installation activities.

## Provide for Scenic or Natural Resource Protection

### (potentially add content to article 2 and article 4)

The model does not provide for the protection of scenic and natural resources in the Easement Area, because this is a task best accomplished through the establishment of a separate conservation easement via a legal instrument specifically crafted for the purpose. The considerations involved in providing for public access are quite different from those involved in blocking activities to protect scenic and natural resources. As such, the use of separate documents is generally optimal.

However, there will be circumstances where the resource protection objectives are so relatively modest, or applicable to such a small area, that Owners or Holder may not want to go to the trouble of preparing two separate documents. In this case you may add a section to article 2 granting a conservation easement for resource protection. Example:

#### 2.0\_ Grant of Conservation Easement

The undersigned Owner or Owners grant and convey to Holder the perpetual right to block activities and uses (including the construction and installation of improvements and facilities) in the Easement Area that are inconsistent with providing the public

with scenic views of the Easement Area from the Trail and public access points outside the Property.

The resource protection could be further extended, for example, by adding to the end of the preceding provision:

or inconsistent with principles of sustainable forestry and sustainable agriculture or detrimental to nesting or migrating birds or other native wildlife.

If you choose to grant such a conservation easement, it will be important to review and adjust the Rights of Owners in article 4 as appropriate to ensure that the Owner rights are consistent with the purpose of the conservation easement granted. (The commentary to §4.02 provides introductory text for clarifying and further limiting Owner rights.)

You will also want to ensure that the easement takes advantage of state laws supportive of conservation easements (for Pennsylvania, the [Conservation and Preservation Easements Act](#)). See the supplemental provisions section entitled "Bring Under the Conservation Easement Statute" for instructions to accomplish this.

## Allow Owners to Temporarily Close Access

### (add item to section 4.02)

You may add an item to the Owner rights listed in §4.02 to address Owners' concerns about public safety in relation to hunting or timber management. Example:

**(c) Temporarily Closing Access.** Close access to the Easement Area for public safety reasons:

- (1) for up to \_\_\_\_ (40 if not noted otherwise) days per year to accommodate hunting by or under control of Owners; and
- (2) for up to \_\_\_\_ (60 if not noted otherwise) days within any ten-year period to accommodate forestry.

**Purpose.** This item assures Owners that the Trail can be closed for a specific period of time to accommodate

activities without risk of unintentional harm to Trail users.

**Alternative Hunting Provision.** You might instead choose to specify the hunting season or seasons for which the trail will be closed. Example:

from the Monday after Thanksgiving through the month of December to accommodate hunting by or under control of Owners.

**Agricultural Provision.** If the trail is to pass through farmland instead of forest, you might replace the forestry provision with the following item:

for up to seven days per year to accommodate spraying and other agricultural activities.

# Clarify and Limit Resource Management Rights Within the Easement Area

(add item to section 4.02)

## Add Provision Providing Right to Manage and Use Natural Resources Subject to Limitations

**Narrow Easement Area.** If the Easement Area is relatively narrow, perhaps not much wider than the Trail itself, the Owners will probably have little or no need or desire to manage vegetation or take advantage of natural resources within the area.

**Wider Easement Area.** If the Easement Area is relatively wide and potentially useful for agriculture, forestry, or other uses, Owners may want to clarify their right to farm, log, or otherwise use the natural resources to the extent the area is not used for Trail Facilities or public access, and the Holder may want to place clear limitations on these activities. If such is the case, add a provision such as the following to §4.02:

( ) **Resource Management.** Farm, harvest timber, and otherwise manage and use natural resources within the Easement Area but only in accordance with guidelines set forth in the attached schedule (if any) entitled “Permitted Resource Management” and any additions to or modifications of that schedule agreed to by Owners and Holder in writing, or in the absence of a schedule, in accordance with guidelines approved by Holder in writing.

**Limitation.** This provision affirms that Owners are permitted to manage vegetation within the Easement Area—for example, cutting trees, mowing hay, or planting and harvesting crops—but conditions this on the activities being performed consistent with the guidelines set forth in the schedule or, if the schedule wasn’t completed for the agreement, the Holder’s guidelines. Below is sample text that might be used for the schedule.

## Place Guidelines for Resource Management in Schedule

**Addressing Agriculture in the Schedule.** You might place text such as the following in the Permitted Resource Management schedule to provide Holder some control over agricultural activities in the Easement Area:

Owners may plant and harvest crops and engage in other agricultural activities in the Easement Area so long as it does not materially impair the Trail and occurs at least \_\_\_\_ feet from the Trail centerline. Owners agree that Holder is not responsible for any damage to such crops by exercise of Holder’s rights under this agreement.

**Addressing Forestry in the Schedule.** You might place text such as the following in the Permitted Resource Management schedule to provide Holder some control over forestry activities in the Easement Area:

Logging and other forestry activities within or affecting the Easement Area may only be conducted in accordance with a resource management or timber harvest plan approved by Holder. Holder’s approval of plans must not be unreasonably withheld. Holder’s approval or objection must be made within sixty days of receipt of a plan or the plan will be deemed approved.

The guidelines, whether contained in a schedule or in a separate Holder policy, should, in the absence of other changes to the model, center on the potential impact of the forestry activities on the Trail Facilities and public access. Impacts on wildlife habitat and other ecological considerations are legitimate concerns, but they are not generally relevant to the recreational rights provided to Holder under the model. If they are to be a concern, see “Provide for Scenic or Natural Resource Protection” in these supplemental provisions.

# Provide Owners the Right to Relocate the Trail and Easement Area

(add section to article 4)

## Relocating Trail Facilities

Owners may be supportive of allowing a trail on their land in principle but, not being sure of their future plans, may be reluctant to forever commit to having a trail in a particular location. They may want, as a condition of granting an easement, the right to change the location of the Trail—perhaps more than once—to accommodate their future needs. If this is the case, you may add a section such as the following to article 4: (The example presupposes that the Easement Area to be established is of sufficient size to accommodate relocations. The next section addresses the potential need to provide for the relocation of the Easement Area.)

### 4.0\_ Relocation of Trail

#### (a) Owners' Election; Plan

Owners may elect to relocate the Trail Facilities within the Easement Area by providing notice to Holder. Owners and Holder will then collaborate in good faith to plan the relocation and sign a memorandum summarizing the plan.

#### (b) Relocation Cost

Owners are responsible for all expenses associated with the relocation, which must result in Trail Facilities substantially similar in quality to those replaced. Expenses include Holder's in-house expenses incurred in planning the relocation. Holder may elect to have substantial upgrades made for the replacement Trail Facilities but must bear the marginal additional costs of these upgrades. Owners must pay Holder in advance for the reasonably projected costs of the relocation; Owners must make subsequent additional payment or will receive refund following completion of the relocation and a full accounting of the work.

If it's not appropriate for Owners to bear the full cost, an alternative would be for Owners and Holder to share the costs of relocation. The following alternative text for subsection (b) provides for sharing the costs of the first relocation initiated by Owners:

In the first instance of a relocation initiated by Owners, Owners and Holder will equally share the relocation costs, which must result in Trail Facilities substantially similar in quality to those replaced; Owners

and Holders will each be responsible for their respective personal or in-house planning expenses. For subsequent relocations initiated by Owners, Owners must bear all the expenses of the relocation, including in-house expenses incurred by Holder in planning the relocation. In any case, Holder may elect to have substantial upgrades made for the replacement Trail Facilities but must bear the marginal additional costs of these upgrades.

In unusual circumstances, you may want to have the Holder bear the full cost of the first relocation. In this case, the following text may be inserted at the beginning of subsection (b) as first presented:

Holder is responsible for all expenses associated with the first relocation elected by Owners, excepting Owners' planning costs, if any. For subsequent relocations elected by Owners, *[continue with the text of subsection (b) as first presented]*

## Relocating the Easement Area

If the Easement Area is not of sufficient size to accommodate a Trail relocation and will likewise need to be relocated, then you may provide for this by adding a section such as the following to the document.

### 4.0\_ Relocation of Easement Area

If a Trail Facilities relocation initiated by Owners per their rights under this article must, in Owners' judgment, occur on a portion of Property beyond the Easement Area, then Owners and Holder will collaborate in good faith to identify a new location for the Easement Area. Holder may reasonably reject any relocation that would result in a breaking of continuity of the Trail from the Property to beyond the Property or that would change the character and length of the Trail to the substantial detriment of Trail users. The new Easement Area will be documented via a recorded amendment to this agreement. Owners must bear all costs of the amendment.

If costs are to be shared, replace the last sentence with the following:

Owners and Holder will share equally all costs of the amendment in the first instance of a relocation. Owners must bear all amendment costs associated with any subsequent Owner-initiated relocations.

**Tax Concern.** Owners intending to claim a charitable deduction for the grant of the Trail Easement are advised to consult with their tax counsel as to whether the possibility of relocation of the Easement Area may

have adverse tax consequences. An alternative may be to expand the Easement Area to allow for greater flexibility to relocate the Trail without relocating the Easement Area.

## Provide for Termination and Release if Trail Project Doesn't Proceed

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### (add section to article 4)

Sometimes, Owners may be agreeable to a trail on their land but only if development of the trail will proceed in a timely manner. And the Holder may need trail construction funding from a funder who wants the Holder to actually hold the trail easement before considering a grant. In this case, the Owners could grant an easement that includes a release and termination clause. For example, you could add the following section to article 4:

#### 4.0\_ Termination and Release

If Holder does not receive firm written commitments of at least \$\_\_\_\_\_ in total for development of the Trail Facilities through the Easement Area by \_\_\_\_\_, 20\_\_\_\_, then either Holder or Owners may terminate the Trail Easement and, upon such termination, Holder and Owners must sign and deliver a release of the recorded document.

## Require Insurance

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### (add subsection to section 5.04 "Responsibility for Losses and Litigation Expenses")

You may insert a provision to require the Owners and Holder to maintain liability insurance to be maintained as a source of funding for their respective indemnity obligations described in §5.04(b). For example, insert the following as subsection (d) of §5.04:

**Insurance.** Owners and Holder must maintain commercially reasonable policies of public liability

insurance with contractual liability endorsement to provide insurance coverage for that Person's indemnity under this section.

For the Holder, this coverage would be provided under its policy of commercial general liability insurance. For the Owners, this coverage would be provided under their policy of homeowner's insurance.

## Provide Owners the Right to Replace Holder

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### (add section to article 5)

A grant of an easement is a conveyance, not a contract; however, Pennsylvania courts have provided landowners with remedies in the nature of a civil claim for damages if Owners sustain loss or injury because of Holder's failure to perform. For example, if maintenance of a footbridge was the responsibility of Holder and Holder failed to do so, Owners would have the right to commence a civil action to recover compensation from Holder for the costs and expenses incurred by Owners in repairing the bridge. But, if the Holder is not able to pay, then commencing an action for dam-

ages may be futile and Owners may want to pursue another remedy: replacement of Holder with another entity who is willing and able to perform. If Owners want assurance that the agreement allows them to do so, you could add, for example, the following section to article 5:



## 5.0\_ Transfer of Easement Rights

If Holder fails to fulfill its obligations under this agreement and such failure causes loss, cost, or damage to Owners that is not compensable by damages under a civil action or, if it is compensable, Holder is not financially capable of discharging its obligations, then Owners have the right to com-

mence an action in a court of competent jurisdiction to compel the transfer of the rights and responsibilities of Holder under this agreement to a Beneficiary or, if no Beneficiary is identified, then to a nonprofit organization that has both the mission and means to carry out the terms of this agreement or, if no such nonprofit is identified, then to a governmental entity.

# Highlight Immunity under the Law

## (add section to article 5)

**Provide Comfort.** You may add a section to article 5 to remind and give Owners and Holder comfort that, should a claim be asserted by someone injured within the Easement Area, they can, to the extent available, assert the defense of statutory immunity under (in Pennsylvania) the Recreational Use of Land and Water Act. Example:

## 5.0\_ Immunity under Applicable Law

Nothing in this agreement limits the ability of Owners and Holder to avail themselves of the protections offered by any applicable law affording immunity to Owners and Holder including, to the extent applicable, the Recreational Use of Land and Water Act, Act of February 2, 1966, P.L. (1965) 1860, No. 586, as amended, 68 P.S. §477-1 *et seq.* (as may be amended from time to time).

(This sample section was included as §5.03 in the third edition of the model. It was moved to the commentary because it served only as a reminder of the immunity available to Owners and Holder rather than operating to actually provide the immunity. Its relocation to the commentary is not intended to imply that Owners or Holders are relinquishing any claims to immunity that they may have under the law.)

**More Guidance.** For further information on the protections available to Owners and Holder, and the steps they can take to minimize liability, see the guide [Reducing Liability Associated with Public Access](#).

**RULWA.** The Recreation Use of Land and Water Act states that:

an owner of land who ... invites or permits without charge any person to use such property for recreational purposes does not thereby ... [a]ssume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.

However, an owner may be open to liability:

[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity” or “in any case where the owner of land charges [an admission price or fee to] the person or persons who enter or go on the land for the recreational use thereof.

(Pennsylvania Recreation Use of Land and Water Act, 68 P.S. §§ 477-4 and 477-6.)

**Rails-to-Trails.** When the trail at issue is a Rail Trail acquired under Pennsylvania’s Rails-to-Trails Act, the following limitation on liability also applies:

an owner or lessee who provides the public with land under this act shall not ... become liable for any injury to persons or property caused by an act or an act of omission of a person who goes on that land.

However, an owner may be open to liability “if there is any charge made or usually made for entering or using the trail[.]” Pennsylvania Rails to Trails Act, 32 P.S. § 11. In appropriate cases, reference to the Rails-to-Trails Act should be added to §4.03 as follows:

and the Pennsylvania Rails to Trails Act, 32 P.S. § 5611 *et seq.*

**Equine Immunity.** When horseback riding is permitted, Owners and Holder should also avail themselves of the protections afforded by Pennsylvania’s Equine Immunity Act (Act of Dec. 22, 2005, P.L. 42 No. 93) including placement of appropriate signage in accordance with that Act (i.e., two signs stating: “You assume the risk of equine activities pursuant to Pennsylvania law.”) In appropriate cases, reference to the Equine Immunity Act should be added to §4.03 as follows:

and the Pennsylvania Equine Immunity Act, \_\_\_\_ P.S. §\_\_\_\_ *et seq.*

**Political Subdivision Tort Claims Act.** Nonprofits and governmental entities can both assert immunity under the Recreational Use of Land and Water Act, but governmental entities can also assert immunity under Pennsylvania’s Sovereign Immunity Act and the Political Subdivision Tort Claims Act.

# Bring Under the Conservation Easement Statute

## (add section to article 6)

**Affirmative Versus Negative.** Access easements are not the same as conservation easements. Different legal rules apply. Like other access easements, a trail easement is an affirmative easement; its holder has the right to use the land in the ways specified in the granting document. A typical conservation easement, in contrast, is a negative easement; its holder has the right to block certain uses of the land but does not generally have the right to use the land.

**Validity Under Common Law.** The common law for real property has long recognized the validity of affirmative easements as well as negative easements running to the benefit of an adjacent property. This is not the case for negative easements in gross (Pennsylvania being an exception). The phrase “in gross” means the easement is held by someone not an adjoining landowner.

**Conservation Easement Statutes Reverse Common Law.** Most states have enacted conservation easement statutes to eliminate the common law prohibition on negative easements in gross and other impediments to conservation easements. However, since trail easements are affirmative easements, they are not necessarily advantaged by these conservation easement statutes.

**Sometimes Advantageous.** There may be instances where it is advantageous to have the easement document interpreted and managed within the framework of the state’s conservation easement statute—in Pennsylvania, the [Conservation and Preservation Easements Act](#)—rather than under the common law. Examples:

- If the model is customized to include provisions that block the Owners from taking actions that harm scenic or natural values along the Trail—above and beyond what is necessary to provide basic quality public access—then it may be desirable to ensure that those restrictions are backed by the conservation easement statute. See “Provide for Scenic or Natural Resource Protection” in these supplemental provisions.
- In some states, an easement holder may be able to freely assign a conservation easement to qualified holders but restricted in doing so for an access easement that isn’t for utility-type purposes. (In Pennsylvania, it appears likely that trail easements, whether or not interpreted under the state’s conservation easement statute, are assignable. See *Miller v. Lutheran Conference and Camp Association*, 331 Pa. 241, 200 A. 646 (1938), which held that a fishing

and boating easement over Lake Naomi in favor of Lutheran Camp could be assigned. This case was cited in a 2010 federal case.)

**Directing to the Conservation Easement Statute.** In Pennsylvania, you can increase the likelihood that courts and others will interpret the Trail Easement under the Conservation and Preservation Easements Act by adding a provision such as the following in article 6:

### 6.1 Conservation and Preservation Easements Act

This agreement is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation easement under the Conservation and Preservation Easements Act.

For any land underlain by coal, include the coal notice required under §9(d) of the [Conservation and Preservation Easements Act](#). The Act requires the notice to be in at least 12-point type and be preceded by the word “Notice” in at least 24-point type. A sample notice and appropriate preamble to the notice is as follows:

The following notice is given to Owners solely for the purpose of compliance with the Conservation and Preservation Easements Act:

**NOTICE:** The Trail Easement may impair the development of coal interests including workable coal seams or coal interests that have been severed from the Property.

See “Statutory Notice of Potential Impairment of Coal Mining” in the [Guide to the Conservation and Preservation Easements Act: Pennsylvania Act 29 of 2001](#) for more information regarding Pennsylvania’s coal notice requirement.

**Coal Distribution.** To see the map of *Distribution of Pennsylvania Coals* published by the Pennsylvania Department of Conservation and Natural Resources, go to [http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr\\_016203.pdf](http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_016203.pdf) or, if that link fails, search for the terms *DCNR* and *coal distribution*.