

Model

# Stewardship Funding Covenant

with Commentary

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# Preface

## Conservation Easements Create Obligations

Land trusts partner with landowners to conserve farmland, forest, and other green spaces that help to ensure healthy, prosperous, and secure communities. Often this is accomplished using a conservation easement, a tool that limits certain uses on a property for conservation purposes while keeping the property in the landowner's ownership and control. The conservation easement is a powerful, dynamic, and flexible conservation tool. However, it places on land trusts a tremendous obligation—the responsibility to regularly monitor eased properties, maintain relationships with landowners, review proposals that can potentially impact a property's conservation values, and, ultimately, enforce the easement's terms by whatever means necessary. This responsibility never ends; thus, land trusts have the daunting task of finding sufficient funds to cover this ongoing, wide-ranging, and impossible to fully quantify *stewardship* obligation.

## Obligations Are Challenging to Fund

Land trusts typically seek funding from an array of sources to meet stewardship obligations. However, the most practical and reliable source is to be found in the land being conserved and the people who choose to own the land. Traditionally, land trusts have asked landowners for contributions in conjunction with the landowners' donation of an easement.

This approach often fails:

- (1) The lump sum required to assure that funds are available to cover both foreseeable and unforeseeable circumstances arising from the land trust's stewardship obligation is likely to be too large to be palatable to or feasible for most landowners. There may be little worry that the landowner who donates the conservation easement will violate or challenge the easement but what about the second or 22<sup>nd</sup> generation landowner? And who can predict the escalation in costs of enforcement over such an indefinite

period? A land trust must be financially prepared to grapple with the unknowable.

- (2) Some stewardship obligations may never materialize. For example, subdivision into two lots can nearly double a land trust's long-term costs, but many landowners do not want to double their upfront stewardship contributions to cover the potential of future subdivision—a subdivision that might never occur.

Consequently, rather than relying strictly on upfront cash payments, it makes sense to structure arrangements that enable landowners to stretch out their financial commitment over time and even extend the commitment to people who in the future take ownership of the conserved land.

The Pennsylvania Land Trust Association has crafted guidance and a model legal document to assist land trusts and landowners in structuring conservation easement transactions that ensure that a land trust has the financial means to enforce the protections in perpetuity, both by securing a landowner's commitment to future contributions and extending financial obligations to future landowners.

## Variety of Goals Can Be Achieved

The [\*Model Stewardship Funding Covenant\*](#) may be customized to enable land trusts and landowners to achieve a variety of project goals:

- Structure future stewardship funding arrangements customized to the particular goals and needs of the owners and land trust.
- Ensure notice to a land trust that a property subject to an easement is being transferred to a new owner.
- Guard against claims of feigned ignorance of the contents of a recorded conservation easement.
- Bind the *owners conveying the conservation easement* to a pledge for future stewardship funding arrangements, enabling the land trust to responsibly meet its obligations and ensuring the long-term stewardship of the land.

- Bind *future owners* to abide by agreed upon stewardship funding arrangements.
- Tie the payment of stewardship funding to triggering events, ensuring that payments don't have to be made without cause. For example, increased costs associated with subdivision only occur if the subdivision, in fact, occurs.

## Why Record a Separate Covenant?

A freestanding stewardship funding covenant provides distinct advantages over the alternative of incorporating the covenant content into the grant of conservation easement.

- (1) The stewardship funding covenant may be used to grant to the easement holder a security interest in the conserved property (the Mortgage Lien in Section 3), which reduces the risk of non-payment by landowners.
- (2) The covenant can be freely amended without any effect whatsoever on the conservation easement.
- (3) The covenant can be released from portions of the property (for example, releases of lots upon remittance of a payment due on subdivision) and the public records will clearly show by the filed releases which lots have or have not satisfied the payment obligation.
- (4) The covenant can be subordinated without running afoul of IRS regulations for charitable deductions.
- (5) Separating the covenant from the conservation easement reduces the potential for error; for example, a release of the covenant filed in the public records will never be mistaken as a release of the easement.

## Guidance for Land Trusts and Landowners

The Pennsylvania Land Trust Association developed the guide [Introduction to Stewardship Funding Arrangements](#) to describe the many arrangements available to a landowner and holder for ensuring that the holder receives the level of financial support necessary to responsibly manage its stewardship

obligation in the long term. The Association developed [Legal Considerations for Stewardship Funding Arrangements](#) to explain the challenges, both legal and practical, of collecting contributions over time from owners of conserved land. The research and analysis behind the guides informed the development of the [Model Stewardship Funding Covenant with Commentary](#). The model is available to land trusts and landowners, as well as their respective counsels, to assist in structuring arrangements to ensure that land trusts have adequate means to meet their long-term stewardship obligations. The commentary explains the purpose of each provision of the [Model Stewardship Funding Covenant](#); refers the user to pertinent portions of *Legal Considerations* for deeper or more expansive analysis of legal issues; and provides alternative and optional provisions for a wide array of possible fee structures.

## Improve the Model

The Pennsylvania Land Trust Association welcomes suggestions for improving its models. Please email your comments to [info@conserveland.org](mailto:info@conserveland.org).

## Acknowledgements

Patricia L. Pregmon, Esq., and Andrew M. Loza are the authors.

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Prepared by:

Name:

Address:

Telephone:

Return to:

Name:

Address:

Tax parcel(s):

# Model Stewardship Funding Covenant

v. 2012.08.14c

Published by the Pennsylvania Land Trust Association at

[ConservationTools.org](http://ConservationTools.org).

## Stewardship Funding Covenant

*If using Section 3, add "and Grant of Mortgage Lien"*

THIS STEWARDSHIP FUNDING COVENANT (this "Covenant") dated \_\_\_\_\_ (the "Closing Date") is made by \_\_\_\_\_ (the "undersigned Owner or Owners") in favor of \_\_\_\_\_ ("Holder").

### 1. Background

#### 1.1 Property

The undersigned Owner or Owners own the land described below (together with any and all improvements thereon, the "Property") and more fully described in Exhibit "A" attached to and incorporated into this Covenant.

Street Address:

Municipality:

County:

State: Pennsylvania

Parcel Identifier:

Acreage:

#### 1.2 Conservation Easement

By a certain Grant of Conservation Easement, Holder has been granted the right and duty to protect certain natural and scenic resources within the Property (the "Conservation Easement"). This Covenant evidences the arrangements ("Stewardship Funding Arrangements") accepted by Holder to fund Holder's stewardship of the Conservation Easement and other conservation purposes described in Section 2.

#### 1.3 Definitions

1.3.1 **Capitalized Terms.** Initially capitalized terms used and not otherwise defined in this Covenant are to be given their respective definitions in the Grant of Conservation Easement.

1.3.2 **Transfer.** "Transfer" is defined as follows: a) the direct or indirect sale, agreement to sell, assignment, devise or conveyance of the Property or any portion of the Property; and b) if a majority ownership interest in, or control of, the Property is changed as a result, the transfer of stock, partnership or other ownership interests in any one or more of the Owners. The occurrence of any of these events is a Transfer whether or not it is voluntary, involuntary, by operation of law, or otherwise.

1.3.3 **Exceptional Transfer.** "Exceptional Transfer" means any one or more of the following:

- (a) Transfers to spouses or lineal descendants of one or more of the undersigned Owner or Owners or a trust for the benefit of such spouse or lineal descendants.
- (b) Any Transfer identified as an "Exceptional Transfer" under §2.1.

## 2. Covenant

### 2.1 Stewardship Funding Arrangements

INTENDING TO BE LEGALLY BOUND, the undersigned Owner or Owners, on behalf of themselves and all future Owners, covenant to Holder, as a covenant running with the land, to make the payments ("Payments") required under the Stewardship Funding Arrangements described below on the terms set forth in this Section 2.

*Delete inapplicable stewardship funding arrangements. See commentary for additional and alternative arrangements.*

- **Deferred Payment**

- **Single Payment**

- A Payment of \$\_\_\_\_\_ is due not later than \_\_\_\_\_ or, if earlier, at the time of Transfer. [The outstanding balance of this Stewardship Funding Arrangement bears interest at the annual rate of \_\_%, compounded annually, from the Closing Date through the date of payment in full. The purpose of this Stewardship Funding Arrangement is to defer all, or a portion, of the amount required by Holder to fund long-term stewardship of the Conservation Easement past the Closing Date.]

- **Periodic Installment Payments**

- The sum of \$\_\_\_\_\_ is payable in installment Payments of \$\_\_\_ each, together with accrued but unpaid interest. Installment Payments are due on the \_\_\_ and \_\_\_ anniversaries of the Closing Date. The outstanding balance, together with interest due thereon, is due and payable in full on the earlier to occur of Transfer or the \_\_\_ anniversary of the Closing Date. *Note: Repeat bracketed material from the Single Payment example above.*

- **Installment Payments Extending over a Number of Transfers**

- The sum of \$\_\_\_\_\_ is payable in installment Payments of \$\_\_\_\_\_ each, together with accrued but unpaid interest. An installment Payment is due upon each Transfer until payment in full is received. If not earlier paid, the outstanding balance, together with interest due thereon, is due and payable in full on the \_\_\_ anniversary of the Closing Date. *Note: Repeat bracketed material from the Single Payment example above.*

- **Regular Payment**

- A Payment of \$\_\_\_\_\_ is due on the first anniversary of the Closing Date and each anniversary thereafter. The purpose of this Stewardship Funding Arrangement is to defray Holder's investment in time, costs and expenses to monitor and otherwise ensure compliance of the Property with the Conservation Easement and to make itself available for consultations with Owners on issues pertaining to Conservation Objectives. Payments not paid when due bear interest at the annual rate of \_\_%, compounded annually. If not earlier paid as and when due, Holder has the right to collect the outstanding balance of Payments, together with interest thereon, at the time of Transfer. Also due at the time of Transfer is the portion of the annual Payment allocable to the period from the last anniversary of the Closing Date to the Transfer date.

- **Conveyance Payment**

A Payment of \$\_\_\_\_\_ is due at the time of each Transfer. The purpose of this Stewardship Funding Arrangement is to defray Holder's costs and expenses of inspection and other activities typically arising when conserved property changes ownership.

- **Conditional Payment**

**Generic Provision**

A Payment of \$\_\_\_ is due upon the occurrence of the following: \_\_\_\_\_. [The purpose of this Stewardship Funding Arrangement is to defray additional monitoring and enforcement burdens that may arise in the future due to the identified activity.] *Note: Repeat bracketed material in the examples below.*

**Transfer of Separate Lot(s)**

A Payment of \$\_\_\_ per Lot is due upon the first Transfer of each transferable Lot separate from the remainder of the Property. [Upon payment to Holder of the Payment due for such Lot, the Lot is released from any further obligation for this Stewardship Funding Arrangement and, at the request of the Owners of such Lot, Holder will deliver documentation of the release in form for recording in the Public Records.]

**Subdivision into Additional Lot(s)**

A Payment of \$\_\_\_ per Lot is due upon, and as a condition of, Holder's approval, after Review, of a plan of Subdivision or, if earlier, upon the first Transfer of any Lot separate from the remainder of the Property, whether or not Holder's approval of such Transfer was required or obtained. *Note: Repeat bracketed release provision from the above example.*

**Establishment of Additional Minimal Protection Area(s)**

A Payment of \$\_\_\_ for each Minimal Protection Area designated by Owners after the Easement Date is due upon Owner's designation notice to Holder or, if earlier, upon the commencement, outside of any established Minimal Protection Area, of any use or Construction permitted only within a Minimal Protection Area. *Note: Repeat bracketed release provision as in above example, substituting "Minimal Protection Area" for "Lot".*

**Percentage of Proceeds [timbering example]**

A Payment equal to \_\_\_% of the proceeds of timber sales or other compensation payable to Owners derived from commercial Forestry operations within the Property or the leasing of the Property for such purposes is due to Holder at the time the proceeds of such activities are due to, or otherwise received by, Owners. After application to costs and expenses arising from or incurred in connection with the Forestry operation, the balance of this Payment is to be used to support projects, in consultation with Owners, to promote reforestation, prevent soil erosion and otherwise further the goals of the Resource Management Plan for such activity and other Conservation Objectives.

2.2 **Limited Waiver for Exceptional Transfers**

Holder agrees to waive its right to Payment upon an Exceptional Transfer if Holder is notified at least 30 days in advance of the Exceptional Transfer; and, at the time of the Exceptional Transfer:

- (a) no default in Payments has occurred and is continuing uncured;
- (b) the Owners following the Exceptional Transfer assume the obligation to make Payments coming due during their period of ownership including any Payments that arose prior to, and remain unpaid as of the date of, the Exceptional Transfer; and
- (c) accrued but unpaid interest through the date of the Exceptional Transfer is paid in full.

### 2.3 **Tender of Payment**

Payments are to be made in cash, electronic funds transfer, bank check or other check drawn on good funds to the Holder and, unless otherwise directed by such Holder, at the address for notices to Holder provided in the Conservation Easement.

### 2.4 **Rights and Remedies**

- 2.4.1 **Adjustment of Fixed Sums.** If the relative value of the U.S. dollar has changed between the Closing Date and the payment date, a Payment stated at a fixed amount, and not calculated as a percentage, shall be adjusted to the extent reasonably necessary to maintain equivalent value.
- 2.4.2 **Interest.** Payments not paid as and when due bear interest at an annual rate, compounded annually, equal to two (2%) percent above (a) the annual rate set forth in §2.1 or, (b) if no annual rate is set forth therein, the “prime rate” announced from time to time in The Wall Street Journal. Interest continues to accrue at the applicable rate until paid in full, including any judgment obtained on account of non-payment.
- 2.4.3 **Condition of Holder's Obligations.** If any Payment is not paid as and when due, Holder reserves the right to withhold issuance or delivery of any approval, inspection report or other document requested or required under the terms of the Conservation Easement until such time as past-due obligations are satisfied. This provision supersedes anything to the contrary contained in the Conservation Easement.
- 2.4.4 **Notice and Opportunity to Cure.** Holder will use commercially reasonable efforts to notify Owners if a Payment has not been made as and when due in accordance with applicable terms for giving of notice under the Conservation Easement. If not cured within the applicable time period set forth in Holder's notice, or if no time period is given, ten (10) days following the date of Holder's notice, Holder may take any action permitted to Holder under Applicable Law, the Conservation Easement or this Covenant.

*Delete Section 3 if not using the mortgage lien. See the commentary and the guide Legal Considerations for Stewardship Funding Arrangements for guidance.*

## **3. Mortgage Lien**

### 3.1 **Grant of Mortgage Lien**

By signing this Covenant and delivering it to Holder, the undersigned Owner or Owners grant and convey to Holder a mortgage upon the Property (the “Mortgage Lien”) as security for the Payments described in Section 2, together with any costs and expenses, including reasonable attorneys' fees and court costs, arising from the failure to make Payments as and when due. This Mortgage Lien is separate from and shall not merge into any other interest or estate of Holder in the Property including, without limitation, its interest as Holder of the Conservation Easement.

### 3.2 **Defeasance**

When no Payments, and no obligation to make future Payments, remain outstanding or may arise in the future, Holder shall record in the public records of the county in which the Property is located a document evidencing the satisfaction of this Covenant and the Mortgage Lien and, upon recordation of such satisfaction, neither this Covenant nor the Mortgage Lien shall have any further force and effect. Any release or satisfaction of this Covenant or the Mortgage Lien has no effect whatsoever on the validity, priority or enforceability of the Conservation Easement.

3.3 **Priority**

3.3.1 **Subordinate to Conservation Easement.** The Mortgage Lien is subject and subordinate in all respects to the Conservation Easement.

3.3.2 **Owners' Election to Subordinate.** The Mortgage Lien may, at the election of Owners, be subordinated to one or more liens on the Property securing, in the aggregate, indebtedness that does not exceed 90% of the fair market value of the Property. The value of the Property is to be established subject to the Conservation Easement by appraisal performed in accordance with Uniform Standards of Professional Appraisal Practice obtained by Owners and delivered to Holder. Owners must reimburse Holder the costs and expenses reasonably incurred by Holder in connection with any requested subordination. This option to subordinate is not available to Owners if and for so long as any violation of the Conservation Easement has occurred and is continuing uncured or any Stewardship Funding Arrangements remain outstanding.

IN WITNESS WHEREOF and INTENDING TO BE LEGALLY BOUND, Owners have signed this instrument, under seal, as of the Closing Date and delivered it to Holder for recording in the public records of the county in which the Property is located.

WITNESS:

\_\_\_\_\_ (Seal)  
Print Name:

\_\_\_\_\_ (Seal)  
Print Name:

[NAME OF HOLDER]

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

This document is based on the  
**Model Stewardship Funding Covenant** (v. 2012.08.14c)  
provided by the Pennsylvania Land Trust Association  
and published at [ConservationTools.org](http://ConservationTools.org).

The model on which this document is based should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. 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.

Print Name: \_\_\_\_\_, Notary Public

COMMONWEALTH OF PENNSYLVANIA:

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.

Print Name: \_\_\_\_\_, Notary Public

Certification of Address of Mortgage Holder

\_\_\_\_\_  
\_\_\_\_\_

By: \_\_\_\_\_

# Commentary

## General Instructions

**When in Doubt, Check the Commentary.** The purpose of each provision is explained and, sometimes, alternative approaches are described and optional provisions provided.

**Guides and Models.** Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by the Pennsylvania Land Trust Association. Thanks to the Association's financial supporters, these are available free of charge at [ConservationTools.org](http://ConservationTools.org).

**Structure Tracks Model.** The model follows a simple outline structure and the commentary follows the same pattern to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to the same section in the models.

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

**Disclaimer Box.** Once a document based on a model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the applicable state, you may delete the box at the end of the model that begins "The model on which this document is based should not be construed or relied upon as legal advice...."

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

**Updates.** Check [ConservationTools.org](http://ConservationTools.org) periodically for updates to the models.

## Recording

**Space for Recording Information.** The top of the first page of the model 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. (However, 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 models are formatted to conform to these specifications.

**Preparer Information.** Pennsylvania law does not require that a lawyer or law firm be identified as the preparer of the document; however, legal review is nevertheless important. *See* the note “Get Legal Counsel” 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* made to the document.

## Opening Recital

**Purpose.** The purpose of the opening recital is to identify the parties to the document and the effective date of the document.

## Closing Date

**Closing Date and Easement Date.** The Closing Date will typically be identical to the date the conservation easement is granted. However, Owners and Holder can agree to sign and record a Covenant at any time as discussed in §1.2 of this Commentary.

**Handwritten Date.** The date can be added in hand writing at the time of signing.

**Date of Acknowledgment.** 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), substitute for “dated as of \_\_\_”: “signed \_\_\_\_\_ but delivered \_\_\_\_\_.” The date of delivery is the effective “Closing Date.”

## Undersigned Owner or Owners

**Clarify Gaps.** Insert names exactly as set forth in the deed by which the undersigned Owner or Owners acquired the Property. If there is a discrepancy, for example, because one of the Owners named in the deed has since died, recite the facts needed to clear up any apparent gap in title. If those facts have been recited in the grant of conservation easement, then it is not necessary to repeat again.

**Tenants by the Entirety.** If the undersigned Owners are married, they must both join in the document to create a valid mortgage on the land, or the interest in the land, owned by them as a married couple.

**All Co-Owners Bound.** If the Property is owned by tenants-in-common (for example, the children or other heirs of a deceased former owner) or by joint tenants with right of survivorship, all must join in the Covenant to be binding upon all outstanding ownership interests in the land.

**Not All Bound.** Unlike a grant of conservation easement, signatures from all of the Owners are not necessary for the Covenant to be effective. The Covenant will bind the Owners who sign it and future Owners of their percentage undivided interest. If the Mortgage Lien is granted, as provided under Section 3, the Mortgage Lien can also attach to less than all of the interests in the land. This feature can be useful in cases where some of the Owners want to satisfy their stewardship funding obligations when the easement is granted and others elect to defer payment to a later date. Neither the Covenant nor the Mortgage Lien will bind the interests of those Owners who did not sign the Covenant. To

make that clear, it is good practice to identify after each of the undersigned Owners, their respective proportionate undivided interests. For example:

John Jones and Mary Jones, husband and wife, as to a 25% undivided interest;  
and Cindy Jones, as to a 25% undivided interest.

**Clarification.** At the end of the opening recital, further clarification can be added, such as:

Neither the 25% undivided interest held by Anna Jones as of the Closing Date,  
nor the 25% undivided interest held by Betty Jones as of the Closing Date is  
subject to this Covenant.

## Holder

The full legal name of the Holder (including Inc. or Incorporated if part of the legal name) should be inserted here.

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

## I. Background

**Purpose.** The purposes of Section 1 “Background” are to inform 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.

### 1.1 Property

**Purpose.** To identify the Property that will be encumbered by the Covenant. Ordinarily the description of the Property in the grant of conservation easement will be identical to §1.1 of the Stewardship Funding Covenant.

**Ownership Interests.** If fewer than all of the Owners are signing the Covenant, change the first sentence as follows: “The undersigned Owner or Owners own the undivided percentage interests set forth above in the land described below...”

**Less than Entire Property.** If less than all of the Property is subject to the grant of conservation easement, the subject area (the “Conservation Area”) may or may not constitute a “Lot” approved for separate transfer under applicable law. For purposes of a conservation easement, transfer of the Conservation Area separate from the remaining Property may be unimportant but not so for purposes of a Mortgage Lien. The fundamental purpose of a Mortgage Lien is to empower Holder to exercise the remedy of foreclosure: to order a judicial sale of the land that is subject to the Mortgage Lien. If the Conservation Area is not, itself, a Lot, then the remainder of the Lot of which it is a part must be included as the “Property” for purposes of §1.1 of the Covenant.

**Only Certain Lots.** In certain cases, such as a Payment triggered by conveyance of Transferable Lots or a Subdivision increasing the in number of Lots, Owners and Holder may agree that certain Lots (not the entire Property) are subject to the Covenant, including the Mortgage Lien.

- If, as of the Closing Date, the Lots constitute legally recognized parcels separate from the remainder of the Property, then §1.1 may describe only those Lots as the “Property.”
- If the Lots have *not* been separated as of the Closing Date, then the Covenant must apply to the entire Property. Once Subdivision has occurred, the remainder of the Property (other than the Lots subject to the Payment) can be released from the Covenant.
- See the [Model Grant of Conservation Easement and Declaration of Covenants](#) for useful definitions of the terms “Lot,” “Subdivision,” etc.

## 1.2 Conservation Easement

**Purpose.** To identify the conservation easement and the Stewardship Funding Arrangements supporting that conservation easement.

**Order of Recording.** The grant of conservation easement must always be recorded prior to the Covenant.

**Timing of Covenant.** The Covenant may be signed at the same time as the grant of conservation easement or at a later date – even years after the easement is granted.

## 1.3 Definitions

**Purpose.** To define terms used more than once in the Covenant.

### 1.3.1 Capitalized Terms

**Purpose.** To eliminate the need to include definitions of terms already on the public record and to assure consistency of defined terms between the conservation easement and the Covenant.

### 1.3.2 Transfer

**Purpose.** Transfer is a time to settle accounts between Owners and Holder. But besides that, Holder needs to know of impending Transfers for all of the reasons discussed in the commentary to article 2 of the [Model Grant of Conservation Easement and Declaration of Covenants](#). An important function of the Covenant is to be sure that everyone involved in the Transfer is aware that the Property is subject to a conservation easement and the arrangements made to fund the operation of the conservation easement. For these reasons, it furthers the interest of Holder to define the term “transfer” broadly to include not only transfers by deed but also other events, such as sales of stock or other ownership interests, which accomplish the same ends.

### 1.3.3 Exceptional Transfer

**Purpose.** Some Owners request exceptions from the general rule that Payments are due on Transfer. These requests may be accommodated by identifying exclusions to the defined term “Transfer”; however, the result is that an excluded conveyance is not considered a Transfer at all. If not a Transfer, Holder gives up a number of benefits: advance notice of the change of ownership; the ability to communicate to the new Owners the accrued but unpaid balance of Payments that will remain outstanding when they

accept ownership; and the ability to obtain from the new Owners their personal commitment to make Payments as and when due during their period ownership. For these reasons, the approach taken by the model is to substitute for exclusions a limited waiver of Holder's right to collect Payments upon certain Exceptional Transfers. *See, commentary to §2.2 below.*

**Included in Defined Term.** The model includes two specific Exceptional Transfers which, if not desired, may be deleted. If there are no Exceptional Transfers, then delete both the definition in §1.3.3 and the "Limited Waiver" provision in §2.2.

- (a) **Exception for Intra-Family Transfers.** The scope of the "family" exception extends to spouses and lineal descendants (children, grandchildren, etc.) and trusts for the benefit of any of them. The identified relationships may be expanded to include others such as siblings, ancestors and persons who have become family members by adoption.
- (b) **Exception for Exceptional Transfers Identified in §2.1.** This allows one or more Payment arrangements identified §2.1 to continue past Transfer. *See, for example, the provision discussed below allowing periodic installment payments to extend beyond Transfer.*

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**OPTION: ADD ADDITIONAL EXCEPTIONAL TRANSFERS**

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**Additional Exceptions.** The list of Exceptional Transfers may be expanded by adding one or more of the following or other exceptions crafted by counsel to address particular situations:

- (c) Transfer to a Qualified Organization.

**Purpose.** To allow Owners the opportunity to contribute all or a portion of the Property to a Qualified Organization without liability for Payments otherwise coming due on such Transfer.

- (d) The first Transfer made by the undersigned Owner or Owners but only if such Transfer occurs before the \_\_\_ anniversary of the Closing Date.

**Purpose.** If Owners have conserved the Property in anticipation of a Transfer, they sometimes request an exception for that Transfer. Holder may be willing to allow that exception if a stewardship contribution has been received on the Closing Date and if the Transfer occurs within the anticipated time frame.

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## 2. Covenant

### 2.1 Stewardship Funding Arrangements

**Purpose of Opening Recital.** To meet the threshold requirements under applicable law to create a legally valid, binding, and enforceable obligation on the part of Owners. To provide a defined term, "Payments," that includes any one or more of the financial arrangements described in §2.1.

**Purpose of §2.1.** To furnish in the model document a wide variety of possible Stewardship Funding Arrangements to support Holder in carrying out its duties and

exercising its rights under the conservation easement and upholding the easement's conservation objectives over time.

**Delete Unused Options.** Options that do not reflect the agreed upon Stewardship Funding Arrangements must be deleted. If more than one option remains under §2.1, replace the bullet preceding each Payment structure with "2.1.1," "2.1.2" and so on for ease of reference.

**Customization.** Stewardship Funding Arrangements may be structured in a variety of ways—more than listed here—and the purpose behind any particular structure may also vary. The possibilities listed in the model and commentary are intended to provide users with a starting point for customizing their Stewardship Funding Covenant to circumstances rather than restricting the possible structures and purpose behind each.

**Nexus.** The model provides a brief description of a conservation-based purpose for each type of Stewardship Funding Arrangement offered in §2.1. If desired, a more detailed or expanded description of the use of funds to the advantage of the Property can be added. The guide [Legal Considerations for Stewardship Funding Arrangements](#) (referred to as "[Legal Considerations](#)" in this commentary) explains the importance of the connection—the nexus—between the promise to make future Payments and some advantage to the land that is bound by the Covenant. Absent a reasonable relationship between the Payments and the land, Pennsylvania courts may find that a promise to pay did not meet the threshold requirements for enforceability against subsequent Owners as a covenant running with the land.

**No Nexus.** The optional Mortgage Lien granted in Section 3 empowers the Holder to seek repayment from the land subject to the Mortgage Lien. The Payments secured by the Mortgage Lien may have no connection at all to the land or may provide some advantage to the land. If there is no nexus to support a covenant running with the land, the Mortgage Lien is still valid and binding; however, as to subsequent Owners who did not, themselves, promise to make Payments, Holder's remedies for non-performance of Owners' obligations are limited to the land. For discussion, see [Legal Considerations](#).

**Due Earlier on Transfer.** The guide [Legal Considerations](#) explains the risks of extending the time when Payments are due beyond the period of ownership of the original grantors own the Property. To avoid these risks, the model, as a general rule, requires Payment in full at the time of Transfer. This requirement may be altered but, as discussed in [Legal Considerations](#), Holder will want to explore other avenues for mitigating the risks: a Mortgage Lien to secure Payments and an assumption binding the next Owners to make Payments as and when due.

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## OPTIONS FOR STEWARDSHIP FUNDING ARRANGEMENTS

### Deferred Payment

**Purpose.** To allow Holder to accept the conservation easement on the Closing Date when the amount (if any) that Owners are willing and able to contribute on the date the easement is granted is not sufficient to fully fund stewardship over the long-term. A reliable promise to make future Payments, whether in a single Payment or a sequence of

installment Payments, sufficient to fully fund long-term stewardship may induce Holder to accept the grant of conservation easement.

**Interest.** Interest immediately begins to accrue because, but for Holder's accommodation of Owners' need for additional time, the entire sum would have been due on the Closing Date.

**Secure by Mortgage Lien.** Deferred Payments (like other debt obligations where the expected source of repayment, if not earlier paid, is the proceeds of sale of the Property), whether structured as a single or installment payments, should be secured by the Mortgage Lien in Section 3 to assure that Holder is ultimately paid in full. As discussed in [Legal Considerations](#), Holder takes a substantial risk of non-payment if the promised Payments are not secured by a Mortgage Lien and the next Owners have not personally obligated themselves to honor the promise.

### ***Deferred Single Payment***

**Applications.** Sometimes Owners want to defer payment for a certain time. They may anticipate being in a better financial position in five years. They may anticipate receiving a financial benefit, such as a tax refund attributable to their charitable donation of conservation easement, within a year. They may be planning a sale of the Property or a Lot and will be in a better position to satisfy the Stewardship Funding Arrangements from the proceeds of sale. The single-payment option may be selected for any of these situations. Always set an outside date for the Payment. This date may be keyed to the probable occurrence of the event but the Payment is due whether or not the event occurs. If no Payment is due *unless* the event occurs, use the Conditional Payment structure discussed below.

### ***Periodic Installment Payments***

**Flexibility in Structuring Periodic Installments.** Payment may be deferred by dividing the unpaid balance on the Closing Date into a number of periodic Payments due in installments over time. The model's approach spreads payment over a number of years following the Closing Date; for example, installment Payments might be due on the 2nd, 4th, 6th, and 8th anniversaries of the Closing Date with the balance due on the 10th anniversary. An installment plan not only allows Owners additional time but also imposes the discipline of setting aside resources to make regular Payments. Installments do not have to be equal. For example, Holder may be willing to accept installment payments of \$500 per year (to assure Holder of a source of funding routine administration) with a final Payment of \$5,000 due in 10 years or earlier upon Transfer.

**Extending Periodic Installment Payments Beyond Transfer.** Sometimes the installment payment structure is intended to continue for some time regardless of Transfers in the interim. For example, annual Payments of \$1,000 may be due until such time as the promised Stewardship Funding Arrangement (\$25,000) has been met. In that case add to the end of the model provision: "A Transfer occurring before the scheduled date for final Payment is considered an Exceptional Transfer."

***Installment Payments Extending over a Number of Transfers***

**Payment Due on Sequential Transfers.** Installment Payments may be deferred over a number of Transfers rather than a number of years. The model provision may be used, for example, to spread a \$30,000 commitment over five Transfers by requiring a \$6,000 Payment per Transfer.

**Reducing Risk.** Setting an outside date for Payment lessens the uncertainty as to when Holder can reasonably expect payment in full. That feature plus the fixed amount owing to Holder lessens, but does not altogether eliminate, the risk that the arrangement might be characterized as a private transfer fee subject to the problems discussed in [Legal Considerations](#).

**Regular Payment**

**Purpose.** To establish a funding mechanism primarily to defray Holder's costs and expenses to discharge its duties under the grant of conservation easement, although the Payment need not be limited to that purpose. The Payment may be in addition to, or wholly or partly in lieu of, any stewardship contribution received as of the Closing Date.

**Outstanding Balance.** A regular Payment may be due each year or other regular time interval. If promptly paid, no interest accrues and no balance needs to be brought current at the time of Transfer. If not paid when due, the balance accrues interest compounded annually until collected. Under the model provision, Holder may elect to take action to collect one or more unpaid Annual Payments at any time or may elect to allow them to remain outstanding, accruing interest, until a Transfer.

**Election to Defer Collection.** If Holder elects to defer collection for some period of time, perhaps until a Transfer, Holder may want to deliver periodically to Owners a statement of the amount owing on account of outstanding Payments, including accrued interest, so as to avoid misunderstandings and encourage prompt collection.

**Agreement to Defer Collection.** If the understanding of Owners and Holder is that these Payments may, at *Owner's* election, remain outstanding until a Transfer, then the following may be added to the model provision:

Holder waives the right to collect Payments prior to Transfer if, and for so long as: the outstanding balance of Payments, including interest, is less than \$\_\_\_\_; Payments are fully secured by a Mortgage Lien or other assurance of payment satisfactory to Holder; and no Payment is, or may become within one year, subject to a bar on collection under applicable law.

**Notice of Transfer.** The requirement of a Payment, collected, if not earlier paid, on Transfer may promote compliance with pre-Transfer requirements of the grant of conservation easement.

**Statute of Limitations.** Any Payment not paid within twenty (20) years from the due date becomes uncollectible due to the running of the statute of limitations applicable to a covenant to pay money under a sealed document (42 Pa. C.S.A. §5529). Although the principle applies generally, the issue is more likely to arise with annual or other regular Payments, which can first become due long before a Transfer occurs. Holder is well

advised to commence a civil action for collection of the outstanding balance of Payments before that time has passed.

### Conveyance Payment

**Purpose.** To ensure that Holder can responsibly carry out its stewardship obligations in association with all or a portion of the Property being transferred to new Owners. Holder's expenses associated with Transfer include the time and costs of educating brokers and prospective purchasers about the conservation easement, inspecting the Property prior to Transfer, and other activities. (See the commentary to article 2 of the [Model Grant of Conservation Easement and Declaration of Covenants](#) for more information.). The fixed sum creates certainty regarding costs in the real estate transaction for each party; however, there is a risk that this recurring Payment may be viewed as a private transfer fee subject to the problems discussed in [Legal Considerations](#). For users of the [Model Grant of Conservation Easement and Declaration of Covenants](#), the fixed sum also eliminates the need for Holder to tally up and seek reimbursement for actual costs and expenses as provided under §5.05 of the model.

**Backup Notice to Holder.** Even if, for some reason, Holder is not aware of the date of Transfer, the title company or other settlement agent can collect and set aside the Payment.

**Backup Notice to New Owners.** Title companies or other settlement agents are likely to note and collect the Payment, which may have the beneficial effect of alerting the new Owners to the existence of the conservation easement and the Covenant if, for some reason, they were not already aware.

### Conditional Payment

**Purpose.** To address Holder's concern that if and when certain changes permitted under the conservation easement take place in the future, Holder's administrative burden will increase. From Owners' perspective, this Stewardship Funding Arrangement defers to a later date the outlay of cash for items that may not occur for a long time, if at all.

**Typical Events Triggering Conditional Payments.** The Holder's administrative burden will increase if Owners Transfer a Lot separate from the remainder of the Property, subdivide the Property to create a new Lot, designate a new Minimal Protection Area, or sell timber off the Property. The model furnishes sample provisions to trigger Payments conditioned upon the occurrence of each of these potential events.

**Release.** A release mechanism is needed when certain Lots (for example, those newly created by Subdivision) bear a one-time Payment due on the first Transfer but not thereafter. The model includes sample language requiring the Holder to provide the release upon payment.

**Holder Oversight.** The category of "Conditional Payments" is intended to be available to address any future activity or occurrence permitted under a particular grant of conservation easement that Holder reasonably anticipates will increase its investment of time and resources in the continuing conservation of the Property. These costs and expenses may include engaging professional support to review and comment on plans or

monitor the activities for compliance with the terms of the grant of conservation easement, best management practices, and applicable law. The “purpose” clause for the selected arrangement can, and should, be expanded to include these as appropriate.

**Fixed Sum.** The Payment can be a fixed sum; for example (and in contrast to the percentage approach presented in the model for forestry operations):

The sum of \$\_\_\_\_\_ is due upon each commencement of commercial Forestry operations or, if earlier, upon completion of each Review of a lease or other agreement permitting Sustainable Forestry operations within the Property.

**Percentage.** The Payment can be based on a percentage. For example, the Payment due upon Transfer of a Lot could be set at a percentage of the proceeds of sale of the Lot.

**Offsetting Negative Outcomes.** When the triggering activity has the potential to result in negative impacts on natural resources, a portion of the economic benefit to be derived from the sale or extraction of natural resources within the Property (e.g., coal, natural gas, or timber) can be paid over to Holder to support offsetting activities and to assure that Owners’ obligations under the approved plan for the activity will be carried out. The “Timbering Example” in the model allows Holder to collect a Payment from the proceeds of a timber harvest for reinvestment in conservation projects within the Property furthering conservation goals. For example, these funds might be used to enhance the restoration otherwise provided in the approved resource management plan for the activity. The aim of the enhancement is to not only bring the forest back to its condition before the activity but to achieve a qualitative improvement in resource values.

**Direct Pay.** The percentage of proceeds for a timber sale example furnished in the model can be expanded to direct Persons paying funds to Owners to pay Holder’s proportionate share directly to Holder. To do so, add the following after the first sentence of the model provision:

By signing this Covenant and recording it in the Public Records, Owners irrevocably and unconditionally (a) assign and convey their right to receive the Payment to Holder and (b) direct Persons paying such amounts to remit Payment to Holder and the balance to Owners. If, for any reason, Owners receive the entirety of such proceeds or other compensation, Owners must remit the Payment to Holder within \_\_\_ days after receipt.

**Alternative to Conditional Payment for Resource Extraction.** Another alternative is to record in the Public Records a deed conveying to Holder a percentage interest in the coal, minerals, or natural gas extracted from the Property and any royalties produced from such extraction. That assures Holder of direct remittance of the Payment; however, it also necessitates Holder’s participation in any lease or other conveyance of extraction rights, which may concern Owners.

### **Transfer Payment**

**Purpose.** To establish a funding mechanism to support Holder in carrying out its duties and exercising its rights under the conservation easement and other conservation activities and programs described in the Covenant.

**History.** As practiced by many land trusts since 1990, the Payment (often called a transfer fee) is based upon a percentage of the fair value of the Property. More recently, private transfer fees (whether based on a percentage of proceeds or a fixed rate) have come under scrutiny for reasons discussed in [Legal Considerations](#): first, the negative impact on marketability of the Property arising from the Federal Housing Finance Agency’s 2012 regulation prohibiting Fannie Mae, Freddie Mac, and Federal Home Loan Banks from investing in residential mortgages on properties subject to certain private transfer fee covenants; second, restrictions imposed on private transfer fees by a number of states; and, third, if a strong nexus is not established between the payments and the eased property, the Holder may have difficulty enforcing the payment obligation.

**Sample Provision.** If desired, the following provision may be inserted into §2.1:

A Payment equal to \_\_\_% of the Fair Value of the Transfer is due upon each Transfer of the Property. The term “Fair Value of the Transfer” means the actual sales price or, if greater, the fair value imputed for purposes of assessment of real estate tax in the county in which the Property is located.

**Cap.** The aggregate amount to be collected may be subject to an agreed-upon maximum by adding the following sentence to the above provision.

This obligation continues until an aggregate of \$\_\_\_ in Payments has been received by Holder.

## 2.2 Limited Waiver for Exceptional Transfers

**Purpose.** To balance Owners’ desire to create exceptions from the general rule that the outstanding balance of Payments is due on Transfer with Holder’s interest in establishing a satisfactory relationship with the new Owners.

**Conditions on Waiver.** Holder has legitimate interests to protect when a Transfer is about to occur whether the Transfer is to a family member or anyone else. Prior notice is important both under the Covenant and the conservation easement. Future disputes are avoided if defaults are cured and, unless otherwise agreed by deleting §2.2.3, accrued interest is paid to the date of Transfer. Delivery of an assumption agreement assures Holder that the new Owners understand that they are legally obligated to honor the obligation to make Payments as and when due.

## 2.3 Tender of Payment

**Purpose.** To define acceptable modes of payment. Checks are not acceptable unless drawn on good funds.

## 2.4 Rights and Remedies

### 2.4.1 Adjustment of Fixed Sums

**Purpose.** Fixed sums, even if reasonable as of the Closing Date, can become outdated due to changes in the buying power of the U.S. dollar. This provision provides for adjustment but only to the extent reasonably necessary to maintain equivalent value.

**Rule of Reasonableness.** Would anyone seriously dispute that the buying power of the U.S. dollar changes over time? Probably not. But reasonable people may differ on how much the relative value has changed over a span of years. The default provision in the model does not specify how to calculate the change; it only requires that the selected method be reasonable.

**Methods to Calculate Change.** The website [Measuring Worth](#) provides seven different ways to compute the relative value of a U.S. dollar amount over time.

**Selecting Standard.** The default provision does not specify which party gets to select the method for calculating adjustments. To specify, add the following:

Holder must notify Owners of the adjusted amount, and the method used to calculate the adjustment. If Owners dispute the reasonableness of the method selected by Holder to adjust the Payment, they must notify Holder of the dispute, setting forth in the notice the reasons in support of their position. Owners must promptly pay the amount not in dispute and negotiate in good faith with Holder a reasonable settlement of the disputed portion.

**Greater Specificity.** Some users may prefer to establish greater specificity in the Covenant regarding how adjustments are to be made. The most familiar method for accomplishing this specificity is likely to be based on changes in the Consumer Price Index (CPI). The following is a sample CPI adjustment clause that may be added to the end of §2.4.1:

The following adjustment is agreed to maintain equivalent value:

- a. Multiply the Payment by a factor equal to 100% plus the difference, expressed as percentage points, between (A) the CPI last published prior to the due date of the Payment less (B) the CPI last published prior to the Closing Date.
- b. "CPI" means the Consumer Price Index identified as CPI-U (All Items for All Urban Consumers) published by the Bureau of Labor Statistics of the United States Department of Labor (1982-84 = 100). If a substantial change is made in the manner of computing that index, then CPI is to be adjusted to the figure that would have been used had the manner of computing the index not been altered. If the index (or a successor or substitute index) is not available, a reliable governmental or other non-partisan publication evaluating the information used in determining the index is to be substituted.

**Advance Notice.** Owners may want to provide for advance notice of adjustments and a regular period for such adjustment. For example, the following may be added to §2.4.1:

Holder must furnish Owners with not less than \_\_\_ days notice of any applicable adjustment and the basis on which such adjustment was made.

## 2.4.2 Interest

**Purpose.** To set a default interest rate that will apply if Owners do not make Payments as and when due. The default rate is consistent with the [Model Grant of Conservation Easement](#)

[and Declaration of Covenants](#): two percentage points over “prime” or, if another interest rate applies, over that rate.

#### 2.4.3 Condition of Holder’s Obligations

**Purpose.** To afford a remedy to Holder that incentivizes Owners to settle accounts with Holder promptly at key points in time.

**Consistency.** The second sentence is needed to protect Holder from a claim that, if Holder exercises its remedy under this section, Holder has violated its duties under the grant of conservation easement for failure to timely deliver an approval after Review. The limited purpose of the override is to resolve that potential conflict.

#### 2.4.4 Notice and Opportunity to Cure

**Purpose.** To furnish Owners reasonable notice and opportunity to cure a Payment default.

### 3. Mortgage Lien

**Purpose.** To vest in Holder the rights of a secured creditor in the Property and incentivize new Owners, and title companies insuring title, to see that Payments relating to periods prior to the Transfer have been brought current.

#### INCLUDE MORTGAGE LIEN OR NOT?

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**Using the Mortgage Lien.** There are important advantages, discussed in *Legal Considerations*, provided by the Mortgage Lien. For many circumstances, use of the Mortgage Lien provides the Holder with assurance of payment that is essential for the Holder to be able to proceed responsibly in taking on a conservation project. The model structures the Mortgage Lien so that it does not present an undue obstacle to Owners seeking future bank loans.

**Not Using the Mortgage Lien.** Users who do not want to use the Mortgage Lien option can easily adapt the Stewardship Funding Covenant to eliminate the Mortgage Lien by deleting Section 3.

**Add Mortgage Lien Caption.** If Section 3 is included, change the title of the document as follows to assure proper recording and recognition that the Covenant operates to grant to Holder security in the Property:

## Stewardship Funding Covenant and Grant of Mortgage Lien

#### OPEN-END MORTGAGE OR NOT?

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**Variables.** The amount secured by the Mortgage Lien may be fixed or variable and may be owing from the Closing Date or may arise in the future. Depending upon these variables, the Mortgage Lien may or may not benefit from the open-end mortgage statute discussed below.

**What Is an Open-End Mortgage?** Under Pennsylvania’s [open-end mortgage statute](#), an open-end mortgage (a) identifies Holder as holding a vested interest (identified as the

Mortgage Lien in Section 3) in certain land (identified as the Property in Section 1) as collateral security for certain financial obligations owing to Holder (identified as Payments in Section 2); (b) that the Payments secured and prioritized by the Mortgage Lien may be, at any time, any amount from zero to the maximum set forth in the caption required by the statute (*see below*); and (c) if the outstanding balance is zero at any time, the Mortgage Lien remains in operation to secure Payments or other secured obligations that may come into existence in the future.

**Deferred Payments Are Not Open-End.** All of the Deferred Payment arrangements (whether single payment or installments) have a fixed amount owing from the Closing Date. A Mortgage Lien securing any of these Payment structures does not need to be documented as an open-end mortgage.

**Other Stewardship Funding Arrangements Benefit from Use of the Open-End Mortgage.**

- **Example: Regular Payments.** The outstanding balance of a Mortgage Lien securing regular Payments will start at zero, rise if unpaid Payments accumulate, then be paid down to zero again on Transfer, and so on. As an open-end Mortgage Lien, the fluctuating balance is secured and prioritized whether or not paid down to zero from time to time.
- **Example: Conditional Payments.** If documented as an open-end mortgage, the Mortgage Lien preserves the priority and security of a Payment that is only a possibility until such time as a triggering event (for example, Transfer of a Lot following Subdivision) occurs.

**Add Open-End Mortgage Notice.** If the Payments secured by the Mortgage Lien are variable as described above, insert the following caption at the top of the document or on a cover page:

NOTICE: This is an Open-End Mortgage securing up to \$ \_\_\_\_\_

**CAPTION AMOUNT**

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**Priority.** Under the Open-End Mortgage Statute, the amount inserted into the caption is afforded priority over later recorded liens. To optimize the benefits of the statute, the amount should be equal or greater to the amount of Payments that are likely to be owed to Holder at any point in time.

**Security; Priority.** The caption amount does not limit the Payments *secured* by the Mortgage Lien. It preserves the *priority* (as of the recording date of the Mortgage Lien) of Payments up to the maximum whether or not a later lien is recorded. The statute removes the possibility that the holder of the later lien can challenge the priority of Payment obligations first arising after recording of the later lien.

**Involuntary Sales.** Lien priority is often critical when a property is sold at a bankruptcy, foreclosure, tax, or other involuntary sale. When the proceeds of sale are insufficient for all liens to be paid in full, payment is made based upon priority and, when proceeds are exhausted, junior liens are released from the property whether or not any payment has been received.

**Voluntary Sales.** Lien priority is less critical when a property is sold at a voluntary sale. Seller must, as a general rule, remove liens from the property whether or not the proceeds of sale are sufficient to pay all liens. If that is the case, Seller must satisfy liens from funds other than the sales price or, often, negotiate with the holders of liens to accept less than full payment. Often, the holders of junior liens are willing to accept partial payment in exchange for a release because the alternative may be a bankruptcy or involuntary sale, at which they may—and probably will—receive nothing.

### 3.1 Grant of Mortgage Lien

**Purpose.** To grant and convey to Holder a mortgage as security for the Payments described in the Stewardship Funding Arrangements agreed to by Owners and Holder.

### 3.2 Defeasance

**Purpose.** The hallmark of a mortgage is a defeasance clause: the interest of Holder is extinguished upon payment in full of the secured obligations.

### 3.3 Priority

#### 3.3.1 Subordinate to Conservation Easement

**Purpose.** To assure that, even if a mistake were made in the order of recording, the conservation easement would, nonetheless, take priority over the Mortgage Lien established by the Covenant.

**Priority.** The provision assures that the conservation easement survives an involuntary sale of the Property upon foreclosure of the Mortgage Lien established by the Covenant.

#### 3.3.2 Owners' Election to Subordinate

**Purpose.** To assure that the Covenant does not unreasonably hinder future financing needs of the Owners. Holder's primary objective is not to obtain repayment from the proceeds of foreclosure. Rather, Holder wants to be sure that, when a Transfer occurs, outstanding Payments will be settled and not ignored. For those purposes, the question of whether stewardship obligations are fully secured is less of an issue than whether the Mortgage Lien is a title matter that must be cleared or settled upon Transfer.

**Subordinate to First Mortgage.** The 90% loan-to-value ratio was selected since it would not preclude Owners access to most residential mortgage loans. Holders may prefer a more conservative 80% loan-to-value ratio, which is a classic benchmark for a well-secured residential mortgage loan. Holder in its reasonable judgment may agree to subordinate to indebtedness greater or lesser than that provided in the model based upon its knowledge of the Owners, their creditworthiness, the likely outstanding balance of Payments, and other factors.

**Subordinate to All Future Mortgages.** If Owners are concerned that the Mortgage Lien may inhibit their ability to freely encumber the Property, the Holder could agree to take a super-subordinated position—inferior to all liens. In that case, the following could be substituted for the text of §3.3.2 of the model:

**Subordinate to All Future Mortgages.** The purpose of the Mortgage Lien is to assure that Holder is notified of an impending Transfer and that outstanding

obligations of the pre-Transfer Owners to make Payments attributable to their period of ownership are satisfied as of the date of Transfer. The Mortgage Lien is agreed to be inferior in priority to all existing and future liens on the Property without the need for any subordination to be delivered by Holder.

**Subordinate to No Mortgages.** When the Mortgage Lien secures Payments that Holder has relied upon in accepting the grant of conservation easement, the Holder may want, and need, to be in a first priority position to assure payment when due and, if not earlier paid, upon Transfer. In that case, substitute the following for §3.3.2 of the model:

**First Priority Lien.** The Mortgage Lien is a first priority lien superior to all other mortgages and liens upon the Property.

The above provision can be varied to reflect different circumstances, for example:

**Second Priority Lien.** The Mortgage Lien is a second priority lien subject only to [identify first mortgage].

## Closing Matters

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

**Signature Lines.** Space has been provided for signature by two individual Owners and the conservation organization as Holder. 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.

**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 Closing Date.

**Address Certification.** The certification is required only if the Mortgage Lien provided by Section 3 is used. The certification is required by Pennsylvania statute (21 Pa. Stat. 625) to notify taxing authorities of the address where tax sale notices are to be sent. Anyone may sign the certification.