

Model Trail Easement Agreement and Commentary

Prepared by the
Pennsylvania Land Trust Association

with support from the

William Penn Foundation



and the

Pennsylvania Department of Conservation and
Natural Resources Bureau of Recreation and
Conservation “Growing Greener” Program



*Find the most recent edition of this document as well as other models
and guidance at ConserveLand.org and ConservationTools.org.*



Third edition of the model – 9/11/2010
Commentary last updated – 9/11/2010

Introduction

This *Model Trail Easement Agreement & Commentary* is a state-of-the-art easement agreement for use by landowners, municipalities, authorities, trail groups, conservation organizations and other civic and government bodies. It includes an expansive commentary covering alternative and optional agreement provisions and the reasoning behind it all. The model uses plain language and careful formatting to improve readability. Users can easily customize the agreement to handle a variety of potential trail types and uses.

The model is widely used by those seeking to establish and maintain public trails. Users outside of Pennsylvania customize the model to account for differences in state laws.

The Pennsylvania Department of Conservation and Natural Resources strongly encourages use of the model for DCNR grant projects.

Other Trail Resources

See the topics [Trail Easements](#) (the “Trail Easement Guide”) and [Reducing Liability Associated with Trails](#) as well as [Mortgage Subordination](#) at [ConservationTools.org](#) for information on practical and legal issues associated with easements for public access to private land.

Other Models

The Pennsylvania Land Trust Association provides other model documents and commentaries to assist with conservation, recreation and environmental projects. The models are available at [ConserveLand.org](#) and [ConservationTools.org](#).

Comments Requested

The Pennsylvania Land Trust Association welcomes suggestions for improvement of its models and commentaries to further the goals of clarity, flexibility and effectiveness.

Please suggest optional and alternative provisions and other improvements as well as issues in need of further investigation. Comments may be directed to Andy Loza at aloza@conserveland.org.

Notes on the New Edition

This is the third edition of the *Model Trail Easement Agreement and Commentary*. Previous editions were published as follows:

2nd edition – September 2008

1st edition – September 2007

The commentary to this edition includes new optional and alternative provisions as well as additional explanatory content. Changes to the model itself are minimal and limited to Sections 3.01(a), 4.02(b) and 5.01.

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Patricia L. Pregmon, Esq., is the principal author of this edition.

Andrew M. Loza is the project manager, editor and contributing author.

Debra Wolf Goldstein, Esq., provided content and critical thinking in the formative stages of the project.

COMMENTARY

to the Pennsylvania Land Trust Association's Model Trail Easement Agreement

General Instructions

- **Read the Commentary.** Users of the model are encouraged to read through the commentary at least once. The purpose of each Section is explained and, oftentimes, variations are provided to address alternatives that may be useful in particular situations.
- **Structure.** The commentary follows the same Article and Section structure as the model to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to sections of the same title in the model. Bullets preceding text indicate a comment. Text without bullets varies with the context, covering alternative or optional text to add as well as excerpts from other documents.
- **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 under the guidance of legal counsel.
- **Best Practices.** Any organization considering acquiring land or easements for recreational purposes should be aware of the guidelines contained in [*Land Trust Standards and Practices*](#) (referred to in this commentary as "S&P"). Last updated by the Land Trust Alliance in 2004, these voluntary standards and practices draw on the decades of experiences and lessons learned by organizations across the country. Standard 9, Practice A calls for land trusts to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.
- **Disclaimer Box.** Once a document based on the model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the applicable state, the box following the signature area that begins "The model on which this document is based should not be construed or relied upon as legal advice ..." may be deleted.
- **Other States.** Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.
- **Updates.** Check ConserveLand.org or ConservationTools.org periodically for updates to the model.

Preliminary Matters

Margins

- Several counties require a minimum 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. Many counties require type size not less than 10-point. The model has been formatted to conform to these requirements.

Recording Office Information

- There is a trend for County recording offices to require information identifying the preparer (including both address and telephone number), the name and address of the person to whom the document is to be returned, and the tax parcels of the real estate to which the document pertains. The model is formatted to conform to these requirements. If 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.
- Pennsylvania law does not require that a lawyer or law firm be identified as the preparer of the document; however, legal review is required for conformance with S&P. See note "Get Legal Counsel" above. Users

should 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. Lawyers and other professionals, such as architects and engineers, are legally and professionally responsible for the work they produce for clients. It is legally and ethically improper to represent to the public that a legal document, survey plan or architectural drawing is the work product of a professional if it has been changed without the knowledge or consent of that professional.

Opening Recital

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

Agreement Date

- The date can be added in hand writing 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), substitute for “dated as of ____”: “signed _____ but delivered _____”. The date of delivery is the effective “Agreement Date”.

Undersigned Owner or Owners

- Insert names exactly as set forth in the deed by which the undersigned Owners acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into the Owners, it is good practice to recite the off-record facts to clear up the apparent gap in title. The customary practice is to recite these facts either in the Background Section or at the end of the legal description attached as Exhibit “A”.
- All owners as of the Agreement Date must join in the Agreement to be effective under applicable law.
- The relationship of multiple Owners to each other may be added here but is not necessary for recording or other purposes. Example: X and Y, husband and wife or X and Y, as joint tenants with rights of survivorship.
- If a Person other than an individual is entering the Agreement, a phrase identifying the type of entity and state in which the entity was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania limited partnership.
- The model uses the term “Owners” rather than “Grantor” or “Grantors”. This term was chosen to avoid any 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 individuals or entity 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.

Holder

- The full legal name of the Holder (including Inc. or Incorporated if part of the legal name) should be inserted in the blank.
- 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 non-profit 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 organization 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 be confusing.

- Other parties to the document can be added here, if desired; however, the model has been constructed to name an additional Beneficiary (if any) at the end of the Agreement. The term “Beneficiary” is defined in Article II of the Agreement. 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 I. Background

- **Purpose.** The purposes of Article I 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.
- **Articles and Sections.** The model has been structured in Articles and Sections rather than a list of paragraphs. There are several practical reasons for this. One reason is to encourage additional provisions to be clustered with similar provisions instead of adding them to the end where they may be missed in a quick review. Another reason is to avoid wherever possible cross-references to specific paragraphs. A common drafting error is to add or delete paragraphs and not check whether cross-references are still correct. This structure seeks to minimize the opportunities for that error to occur.
- **Whereas Clauses.** The content of Article I can be restated as a series of “Whereas” clauses; however, modern legal practice is to state the facts supporting the intentions of the parties in a “Background” Section. The facts are set out as simple declarative sentences rather than as a series of “whereas” clauses conjoined with a series of “ands”.

1.01 Property

- **Purpose.** The purpose of this Section is to identify the “Property” (the entirety of the tax parcel or parcels owned by Owners).
- **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 vesting title in the undersigned Owner or Owners.
- **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 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 town 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).

1.02 Easement Area

- **Purpose.** The purpose of this Section is to identify the “Easement Area” (the portion of the Property within which the Trail and other Trail Facilities (if any) will be located). *See* Article II for definitions of Trail and Trail Facilities. *See also* discussion of “Easement Location” in the [Trail Easement Guide](#).
- **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 bound 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 ____foot 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."*
- **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. The relocation would have to be evidenced by amendment of the easement document. Notice 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 Trail Easement 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, not to exceed ____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 be 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 on the public record by a supplement to the Trail Easement.
- **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 ____"* or *"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 II 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 Purposes

- **Purpose.** The purpose of this Section is to set 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 II. The second is an easement for public access to use the Trail Facilities for the activities described in Article III. The two easements are granted separately because they differ not only as to who can exercise the rights but where the rights can be exercised.

1.04 Consideration

- **Purpose.** The purpose of this Section is to set forth the amount of consideration (if any) being paid for the grant of easement to Holder. 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.
- **Conservation Easement.** 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 the following to the beginning of the section:

This Agreement has been executed and delivered in connection with a 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 V 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).

See also “Two easements -- access and conservation -- in one transaction” in the [Trail Easement Guide](#).

- **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.”

Supplemental provision: Items Needed for Federal Tax Benefits

- 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 the Agreement a new §1.05 captioned “Federal Tax Items” containing subsections (a) through (i) set forth below.
- **Code §2703.** Even if the undersigned Owner or Owners do not desire to take a charitable deduction under §170(h) of the Code or it is not available to them for some reason, they should nevertheless add §1.05 if they intend the Property to pass to one or more of their children upon their deaths. The reason is that restrictions imposed by one or more of the parents on property passing at death will be disregarded for estate tax purposes under §2073 of the Code unless the restrictions were imposed by a conservation easement qualified under §170(h) of the Code. To avoid that unfortunate situation, steps should be taken to insure that the Conservation Easement qualifies as a Qualified Conservation Contribution even if no charitable deduction is being sought.
- 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 should be encouraged to review pertinent information provided by the Pennsylvania Land Trust Association on its website ([ConserveLand.org](#)) or the Land Trust Alliance on its website ([www.lta.org](#)).

- Commentary as to the content of this Section is provided in endnotes for clarity and should not be included in the text of the Agreement.

1.05 Federal Tax Items

(a) *Qualified Conservation Contribution*ⁱ

The rights granted to Holder under this Agreement have been donated in whole or in part by the undersigned Owner or Owners. This Agreement is intended to qualify as a charitable donation of a partial interest in real estate (as defined in §170(f)(3)(B)(iii) of the Internal Revenue Code of 1986, as amended (the “Code”)) to a qualified organization (a “Qualified Organization”) as defined in §1.170A-14(c)(1) of the regulations promulgated under the Code (the “Regulations”).

(b) *Public Benefit*ⁱⁱ

This easement is given for public outdoor recreation and education and is for the substantial and regular use of the general public. This Agreement provides significant public benefit as defined in §1.170A-14(d)(2)(i) of the Regulations. Public policies and programs that illustrate and support the significant public benefit of this Agreement include:

- (i) The Open Space Plan of _____ Township, adopted in 200_, which _____.*
- (ii) The _____ County Greenways Plan, adopted in 200_, which _____.*

(c) *Mineral Interests*ⁱⁱⁱ

No Person has retained a qualified mineral interest in the Easement Area of a nature that would disqualify the Agreement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the Agreement Date, the grant of any such interest is prohibited and Holder has the right to prohibit the exercise of any such right or interest if granted in violation of this provision.

(d) *Notice Required under Regulations*^{iv}

To the extent required for compliance with §1.170A-14(g)(5)(ii) of the Regulations, Owners agree to notify Holder before exercising any reserved right that may have an adverse impact on the conservation interests or public recreational purposes associated with the Easement Area.

(e) *Baseline Documentation*^v

The undersigned Owner or Owners and Holder have signed for identification purposes the report (the “Baseline Documentation”), to be kept on file at the principal office of Holder, that contains an original, full-size version of the Easement Plan together with other pertinent information regarding the conservation and public recreational interests served by the Agreement, including photographs depicting existing conditions of the Easement Area as of the Agreement Date. Whether or not attached to this Agreement, the Baseline Documentation is incorporated into this Agreement by this reference.

(f) *Property Right*^{vi}

In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that the easement granted under this Agreement gives rise to a property right, immediately vested in the Holder, that entitles the Holder to compensation upon extinguishment of the easement. The fair market value of the property right is to be determined in accordance with the Regulations; i.e., it is at least equal to the proportionate value that this easement as of the Agreement Date bears to the value of the Property as a whole as of the Agreement Date. Holder must use any funds received by application of this provision for conservation purposes (as the term is defined in the Regulations).

(g) *Qualified Organization*^{vii}

Holder declares that it is a Qualified Organization and promises not to assign its interest under this Agreement to any Person other than a Qualified Organization.

(h) Perpetuity^{viii}

Holder has the right and duty to enforce the terms of this Agreement in perpetuity. If Holder fails to enforce this Agreement, a court of competent jurisdiction is authorized to appoint another Qualified Organization to enforce this Agreement in perpetuity.

(i) Qualification under §2031(c) of the Code^{ix}

To the extent required to qualify for exemption from federal estate tax under §2031(c) of the Code, and only to the extent such activity is not otherwise prohibited or limited under this Agreement, Owners agree that commercial recreational uses are not permitted within the Easement Area.

(j) Acknowledgment of Donation^x

Except for such monetary consideration as is set forth in Article I, the undersigned Owner or Owners have received no money, goods or services in consideration of the grant of this easement. The value of the donation is to be established by appraisal performed by an appraiser engaged by the undersigned Owner or Owners.

(k) No Representation of Tax Benefits^{xi}

The undersigned Owner or Owners represent, warrant and covenant to Holder that:

- (i) The undersigned Owner or Owners have not relied upon any information or analyses furnished by Holder with respect to either the availability, amount or effect of any deduction, credit or other benefit to Owners under the Code, the Regulations or other Applicable Law; or the value of this easement or the Property.*
- (ii) 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 any 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.*
- (iii) The donation of this easement is not conditioned upon the availability or amount of any deduction, credit or other benefit under the Code, Regulations or other Applicable Law.*

Optional provision: No Charitable Deduction:

- If the undersigned Owner or Owners are certain that they will not be pursuing federal tax benefits, or the Holder has reason to believe the easement does not qualify as a charitable contribution, then an alternative Section 1.05 ("No Charitable Deduction") should be added to confirm the understanding of the parties. The following text could be used:

The undersigned Owner or Owners and Holder confirm that the grant to the Holder of the 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.

Article II. Grant of Easement for Trail Facilities

- **Purpose.** The purpose of this Article is to set 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. This provides the opportunity for both Owners and Holder to define carefully what rights are or are not being granted to Holder by the easement document. Options to define the scope of the easement more narrowly or broadly are explained in the section captioned "Easement Purpose" of the [Trail Easement Guide](#).

2.01 Grant of Easement

- **Unconditional.** The grant to the Holder is unconditional. Conditional delivery is not sufficient; for example, if a signed document is delivered in escrow to a third party (a title company, for example) the document is not effective until released from escrow.

- **Perpetual.** The model has been constructed to extend for a perpetual term. If the Owners intend to qualify for a charitable contribution under §170(h) of the Code, the term must be perpetual. The Pennsylvania Land Trust Association and many others generally and strongly advise Holders against entering easement agreements for a term of less than perpetuity.
- **Recording.** Recording in the public land records of the county in which the Property is located is necessary to make the covenants binding upon future owners who do not otherwise know about the terms of the Agreement but the grant is complete once the document is signed and unconditionally delivered.
- **Consideration.** The phrase “intending to be legally bound” is a valid substitute for consideration (that means it makes a promise to make a gift as enforceable as other contracts) under the Uniform Written Obligations Act, 33 Pa. Stat. §6.
- **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 property (or interest in the property) being conveyed in fee simple and has a right to convey the property.
- **Trail Facilities.** The items described in subparagraphs (a) and (b) are both included in the term “Trail Facilities”. The difference is that Holder has an absolute right to create the Trail and install the items described in (a) while Owners would have to consent to the installation of the items listed in (b). This arrangement is intended to provide flexibility to the document. For example, the undersigned Owner or Owners may be willing to allow picnic facilities on a trial basis, but, if that proves to be objectionable, Owners can withdraw their consent and, in that case, those Trail Facilities must be removed. Items can be moved from the (b) category to the (a) category and, less likely, from the (a) category to the (b).
- **Consistency between Permitted Facilities and Permitted Uses.** The Trail Facilities described in §2.01 (a) or (b) should be consistent with uses permitted in §3.01(a) or (b). For example, there would be no point in having the right to install benches or bicycle racks under §2.01(a), if stationary activities or bicycling were not permitted under §3.01(a). Benches imply a right for the public to sit there for some period of time, which may conflict with the approach taken in §3.01 that the public access easement is for passage across the Easement Area - not stationary activities unless Owner consents. 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 remain subject to the consent of Owners under §3.01(b); if so, drafters may need to add that understanding; for example: *"benches incidental to Permitted Trail Uses. The right to install benches does not imply an easement for stationary activities unless and to the extent permitted in §3.01"*.
- **Grant of License.** Owners' consent to installation of Trail Facilities in §2.01(b) or to allow the Permitted Trail Uses in §3.01(b) can be withdrawn at any time. Using legal terminology, Holder has a license rather than easement to install Trail Facilities in §2.01(b) and allow public access for the purposes described in §3.01(b). Circumstances in which licenses may sometimes be helpful to expand basic easement purposes are more fully discussed in the section captioned "Easement Purpose" of the [Trail Easement Guide](#). If Owners and Holder desire to make an arrangement in §2.01(b) or §3.01(b) permanent (in other words change the license into an easement), they should do so by amendment recorded in the public records.
- **Discontinuance of Consent.** Before Holder invests in any Trail Facilities that are subject to Owners' consent, Holder may want to have a written understanding with Owners that there is a minimum period before Owners have the right to demand the removal of objectionable Trail Facilities in the (b) category. Alternatively or in addition, users may add the following to the end of §2.01:

As to _____ or other items in paragraph (b), the minimum term of Owners' consent with respect to such Trail Facilities is _____ months due to Holder's expense in installing such items.
- **Parking.** To address parking needs, users may add the following to the end of §2.01(a):

(iv) 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..
- **Trail.** To avoid misunderstandings, it is good practice to mark the Easement Area on the ground prior to the Agreement 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, language can be added as follows:

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

- **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 any Beneficiary. See §6.01 of the model.

2.02 Exercise of Rights

- **Purpose.** The purpose of this section to clarify that the Trail may be created by any number of means which may or may not involve construction activities or installation of any materials within the Easement Area.
- **Materials.** The model does not give Owners the right to limit the Holder to any particular means to create the Trail. A list of possible coverings is included to assure that there is a meeting of the minds on that issue. Paving should be listed as a choice in case it is required for compliance with the Americans with Disabilities Act.
- **Wilderness Experience.** Limitations on the surface materials of the Trail might be included in the Agreement for enforcement by a Beneficiary as a condition of funding. However, if the Trail Easement is being granted in conjunction with a Conservation Easement, limitations of that kind would be more appropriately handled there. If the Trail is intended to provide a wilderness experience, the following language from the Wisconsin Dept. of Natural Resources standard easement might be useful.

A primitive hiking trail is one that blends with the natural surroundings and follows the natural contours of the land. It is made of local natural materials, with native surface tread (mineral, soil, grass, or rock). Asphalt, limestone, gravel or other imported, non-naturally occurring, non-site specific material is not acceptable tread material. Trail facilities such as bridges or boardwalks are for site protection only. The tread of a primitive trail should not exceed 24 inches wide.

Optional Section: Required Trail Facilities

- **Purpose.** To set forth the understandings of Owners and Holder, if any, as to Trail Facilities that Holder *must* install. Typically, Owners do not have any right to require Holder to install particular Trail Facilities; however, that could occur if Holder offered, for example, to provide fencing along the Easement Area as an inducement to Owners to grant the easements described in the Agreement. See, discussion of confined location in the section of the [Trail Easement Guide](#) captioned "Addressing Owners' Concerns". If fencing, gated entry, or other improvement is required as a condition of the grant of easement, an additional Section could be added to Article II identifying those Trail Facilities that Holder has agreed to furnish. Example:

2.03 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.

Optional Section: Initial Installation

- **Purpose.** To address Owners' concerns pertaining to construction activities within the Property. Example:

2.04 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.

Article III. Grant of Easement for Public Access

3.01 Grant of Easement

- **Purpose.** The purpose of this Section is to establish the easement for public access to the Trail and other Trail Facilities, if any, for the Permitted Trail 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 *not* a direct grant of a right vested in the public. 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 [Trail Easement Guide](#).
- **Permitted Uses.** The term Permitted Trail Uses includes both those in paragraph (a) that Owners must permit and those in paragraph (b) that Owners may or may not permit. *See* §2.01 in this Commentary for further discussion. Some activities within paragraph (a), for example, bicycling or horseback riding, may be moved to paragraph (b) if the Owners do not want to permit those activities absolutely. *See* discussion in §2.01 of this Commentary pertaining to consistency of Trail Facilities with Permitted Trail Uses.
- **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 non-profit 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 of licenses and easements under §2.01(b) of this Commentary. 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 [Trail Easement Guide](#).
- **Other Possible Uses.** Users may add other uses such as camping as appropriate.
- **Americans with Disabilities Act.** In July 2010, the U.S. Department of Justice issued final regulations revising Americans with Disabilities Act (ADA) standards of relevance to trail providers. The new rule provides direction regarding wheelchairs and "other power-driven mobility devices", broadening previous requirements for accessibility. The permitted trail uses in §3.01(a) are intended to provide for conformance with this new ADA rule. For discussion of the new rule, *see* the [Accessible Trails](#) section of the [American Trails website](#).

3.02 No Charge for Access

- **Purpose.** To set forth the meeting of the minds of Owners and Holder with respect to this issue and to comply with the requirements for immunity under the Pennsylvania Recreation Use of Land and Water Act, 68 P.S. §§ 477-4 and 477-6. *See* discussion of that Act in Article V of this Commentary.

Article IV. Rights of Owners

- **Purpose.** The purpose of this Article is to assure Owners of their rights with respect to the Easement Area. Under Applicable Law, Owners retain all of the rights and benefits of their ownership of the Property but for those rights that have been granted exclusively to Holder or those rights which, if exercised, would conflict with the rights Owners have granted on a non-exclusive basis to the Holder or which have been granted for the benefit of the public. This section is intended to avoid situations where exercise of ownership rights in the Property might conflict with the rights of Holder or the safety of the public using the Trail. Both Owners and Holder should consult the [Trail Easement Guide](#) for further information on Owners' continuing rights and concerns.

4.01 Owner Improvements

- **Purpose.** The purpose of subsection (a) is to assure Owners that (i) they don't have to remove any improvements situated within the Easement Area as of the Easement Date; (ii) they can install fencing to separate the Easement Area from the remainder of the Property to control trespassing; and (iii) 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. All other items require Holder's approval which may or may not be given. If there is no Conservation Easement providing applicable limitations and Holder wants to exercise control over the kind of fencing installed by Owners, the following may be added to this section:

Fencing must not to exceed four (4) feet in height and constructed of post-and-rail or other open weave construction that preserves scenic views from the Trail.

- **Schedule of Permitted Owner Improvements.** Owners' rights to cross an Easement Area for access to the public right-of-way or other portions of the Property should be identified in the Schedule. If the Trail Easement is being granted in conjunction with a Conservation Easement, the item may be stated on the Schedule simply as: Construction of the Access Drive (as defined in the Conservation Easement) in the location permitted under Article III of the Conservation Easement. Otherwise, language might be as follows:

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 thirty (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.

- **No Owner Improvements.** If the understanding is that Owners do not have any of the rights described above, then substitute the following for the text of §4.01: The right to construct facilities and improvements within the Easement Area is exclusive to Holder. Owners have no right to construct or maintain any temporary or permanent facilities or improvements within the Easement Area.

4.02 Owner Uses and Activities

(a) Mitigating Risk

- **Purpose.** To assure Owners that, even if Holder has 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 rock slide across the Trail. The Agreement does not require Owners to take action but they are permitted to do so in the interest of public safety.

(b) Hunting; Forestry

- **Purpose.** To assure Owners that the Trail can be closed for a specific period of time to accommodate Owners' desire to engage in activities (hunting and forestry) that could unintentionally result in harm to persons using the Trail.
- **Alternative Hunting Provision.** Users might instead choose to specify the hunting season or seasons for which the trail will be closed:

Close access to the Easement Area for public safety reasons (i) from the Monday after Thanksgiving through the month of December so as to accommodate hunting by or under control of Owners...

- **Optional Agricultural Provision.** If the trail is to pass through farm land, "Agriculture" might be added to the title of the section and the following text added to the end of the section:

... and (iii) for up to seven (7) days per year to accommodate spraying and other agricultural activities.

(c) Resource Management.

- **Purpose.** To provide a mechanism for Owners to perform certain activities affecting vegetation within the Easement Area that are important to them without the need for any further approval by Holder. Examples might be mowing hay or planting and harvesting field crops. Other activities may be listed in the Permitted Resource Management schedule on condition that they are conducted in accordance with applicable requirements for that activity under the Conservation Easement. For example, forestry or agricultural activities might be permitted if conducted in accordance with the forest management plan, soil conservation plan or other applicable resource management plan approved by the holder of the Conservation Easement. If there is no Conservation Easement, and Holder wants to control forestry or agricultural activities affecting the Easement Area, either or both of the following could be listed in the Permitted Resource Management schedule:

Owners may engage in forestry activities in accordance with a resource management plan approved by Holder and designed to foster and sustain healthy forest and healthy soil. Owners must submit a timber harvest plan to Holder for approval at least sixty (60) days in advance of timber harvest for financial profit or at a scale that alters the character of the woodland. Holder's approval of plans must not be unreasonably withheld. Holder's approval or objection must be made within sixty (60) days of receipt of a plan or the plan will be deemed approved.

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; provided, however, that Holder is not responsible for any damage to such crops by exercise of Holder's rights under this Agreement.

(d) Grants to Others

- **Purpose.** To clarify 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 Owner Improvement, then Owners can enter into an easement with a public or private company with respect to that Permitted Owner Improvement. Otherwise, Holder has a right to review to determine whether the exercise of those rights would conflict with the purposes of the easements granted in this Agreement.

(e) Enforcement Rights

- **Purpose.** To assure 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 Trail Uses. Anyone who wanders off the Trail or engages in activities other than Permitted Trail Users 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 §4.02(e). 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, all of which are excluded from the term "Permitted Trail Uses". [Holder agrees to assist Owners in enforcement of items ____ by posting of appropriate signage and referrals to local officials.]

- (i) Use other than during daylight hours*
- (ii) Use by persons with unleashed pets or who do not remove pet feces.*
- (iii) Excessive speed (whether by horse or vehicle) of more than seven (7) miles per hour (the approximate speed of a trotting horse)*
- (iv) Smoking; consumption of alcoholic beverages*
- (v) Trapping, hunting or use of firearms*

- (vi) *Swimming*
- (vii) *Camping, lighting of fires*

Article V. Enforcement; Liability Issues

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

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 an Owner refused to remove a barrier to access, the Holder may need to obtain a court order requiring him to do so. Sometimes the Holder may want the power 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 Warranty

- **Purpose.** The purpose of this Section is to evidence the assumptions under which Holder is willing to enter into this Agreement with the undersigned Owner or Owners.

(a) Subordination of Liens

- Subordination of any mortgage or other lien affecting the Property as of the Agreement Date is important because Holder needs assurance that the Agreement could not be extinguished by foreclosure of a mortgage or other lien prior in right to the Agreement.
- **Code.** A qualified conservation contribution must be enforceable in perpetuity under §170(h)(5)(A) of the Code. Under Regulation §1.170A-14(g)(2) this requirement is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.
- **Time.** Owners should be advised of this requirement early in the process. Satisfaction of this requirement frequently requires substantial time and effort.
- **Form.** PALTA has made available a [model form of subordination](#). No particular form is required by the Regulations.
- **Best Practices.** The Holder should investigate title to each property for which it intends to acquire title or an easement to be sure that it is negotiating with the legal owners and to uncover liens, mortgages, mineral or other leases, water rights and/or other encumbrances or matters of record that may affect the transaction. (See S&P Standard 9. Practice H.)

(b) Existing Agreements

- **Existing Agreements.** If there are existing agreements affecting the Easement Area, they can be incorporated by reference in this subsection and further described in an attached exhibit. Existing agreements are entitled to priority over the easement to be executed under Applicable Law.
- 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, it is prudent to request confirmation that the Owners do not know of any environmental problems associated with the Easement Area.

5.03 Immunity under Applicable Law

- **Purpose.** The purpose of this Section is to 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 the Recreational Use of Land and Water Act. For further information on the protections available to Owners and Holder, and the steps they can take to minimize liability, see [Reducing Liability Associated with Trails](#) at [ConservationTools.org](#).
- **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 the 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 the 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 the Sovereign Immunity Act and the Political Subdivision Tort Claims Act.

5.04 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. This does not mean that Owners or Holder should not try to act responsibly; its only purpose is to warn anyone relying upon this Agreement for rights of entry that they must take responsibility for their own safety. See "Protection from Liability" in the [Trail Easement Guide](#).

5.05 Costs and Expenses

- **Purpose.** To assure Owners that they are not responsible for costs and expenses associated with Trail Facilities.

5.06 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 this Agreement 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.

- The Commonwealth of Pennsylvania and its Departments and instrumentalities do not offer any indemnity to others for claims as to which it is 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, Section 3.05 should be deleted.

Optional Provision: Insurance

- The following provision can be inserted as subsection (d) under §5.06 to require policies of public liability insurance to be maintained as a source of funding the respective indemnity obligations of Owners and Holder described in §5.06(b). For the Holder, this coverage would be provided under its policy of commercial general liability insurance. For the Owner, this coverage would be provided under its policy of homeowner's 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.

Optional Provision: Owners' Rights to Terminate

- 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 on account of Holder's default (the reasonable cost of repair of the footbridge). If the Holder is not able to perform its obligations -- financially or otherwise -- then commencing an action for damages may be a futile effort and, in that case, Owners may want the ability to replace Holder with another entity who is willing and able to perform or, if no such Holder can be found, to terminate the easement. To address that possibility, the following new section could be added to Article V:

5.07 Termination 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 commence 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 identified in this Agreement or, if no Beneficiary is identified, then to a non-profit organization that has both the mission and means to carry out the terms of this Agreement or, if no such non-profit is identified, then to a governmental entity. If there is no such Beneficiary or other organization willing to accept Holder's responsibilities under this Agreement, then this Agreement and the easements granted under this Agreement, may be terminated by a court of competent jurisdiction.

Article VI. Miscellaneous

- **Purpose.** The purpose of this Article is to group together a variety of provisions pertaining to both Owners and Holder or pertaining to the administration or interpretation of the Agreement.

6.01 Beneficiaries and Agents

- **Purpose.** To clarify that Holder's rights under this Agreement can be exercised by certain Persons other than Holder.
- **Beneficiary has rights.** The model provides that the beneficiary has all of the rights but none of the responsibilities of a Holder.

- **Limits on Beneficiary.** If desired, the universe of possible beneficiaries can be limited. For example, the following sentence can be added to the Section: *"Only nonprofit or governmental entities can be named as beneficiaries of this Agreement."*
- **Beneficiary not necessarily a qualified organization.** Section 6.01 of the model 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 obtaining the Agreement could be identified as a beneficiary even if not a qualified organization.

Optional Sections: Adding Beneficiaries with Fewer Rights than the Holder:

- As shown below, 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. To follow this option, add to this Section one or more of the alternatives presented below.
- Here is a generic beneficiary provision that can be customized for many different situations:

(a) _____ Beneficiary

_____ is a beneficiary of this Agreement with limited rights. Owners and Holder grant and convey to _____ the following rights with respect to this Agreement: [select all that apply]

- (i) *The right to compel transfer of Holder's rights and duties under this Agreement to another Qualified Organization should Holder fail to make the Trail available for public recreation.*
- (ii) *The right to exercise Holder's rights and duties under this Agreement should Holder fail to make the Trail available for public recreation.*
- (iii) *The right of prior approval of any amendment of this Agreement.*
- (iv) *The right of prior approval of any transfer of Holder's rights under this Agreement.*
- The specific rights set forth in the Agreement supplement rather than replace the rights and remedies of state or local agencies under applicable programs and grant contracts. For example, if a grant contract requires prior approval by county of any amendment to the Agreement, then the Holder is contractually bound to seek county approval whether or not county has recorded an acceptance.
- If DCNR will be providing funding to acquire the easement in whole or in part, the agency will require the insertion of language concerning their interests. Check with the agency to confirm that the following provision is current and adequate:

(b) *Pennsylvania Department of Conservation and Natural Resources*

This easement was either acquired with, or donated as a match for, funds provided by the Pennsylvania Department of Conservation and Natural Resources under the [Environmental Stewardship and Watershed Protection Act, the act of December 15, 1999, P.L. 949, No. 68, as amended (27 Pa.C.S.A. §§ 6101 et seq.) OR Keystone Recreation, Park and Conservation Fund Act, the act of July 2, 1993, P.L. 359, No. 50 (32 P.S. §§ 2011 et seq.) OR other grant legislation]. This easement is a conservation servitude over the property in perpetuity and as such is binding on all current and subsequent easement holders and their personal representatives, successors and assigns. The Department and its successors have the following rights with respect to this easement: a) the right to compel transfer of the easement holder's rights and duties under this easement to another Qualified Organization if the easement holder fails to uphold and enforce the provisions of the easement, b) the right of prior approval of any amendment of this easement, c) the right of prior approval of any transfer of the easement holder's rights or interests under this easement, and d) the right to exercise the easement holder's rights and duties under this easement if the easement holder fails to uphold and enforce the provisions of the easement.

- **County/Township Supplement.** Some County or Township funding programs require certain terms to be incorporated into each easement. If an exhibit is to be incorporated, add the following:

Attached as Exhibit "____" (the "County/Township Supplement") is a rider to this Agreement containing certain provisions that must be incorporated into this Agreement as a condition of funding the

County/Township contribution under the County/Township program. The terms and provisions of the County/Township Supplement supersede, to the extent of any inconsistency, the provisions of this Agreement.

6.02 Binding Agreement

- **Purpose.** To set 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.** Section 6.02 of the model 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. See also rights to approve assignment set forth in grant of rights to Beneficiaries.
- **Limit on Assignment.** If desired, a limitation on assignment can be added to §6.02. For example:

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

6.03 Governing Law

- In case the undersigned Owner 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 or the choice of law rules of the Commonwealth of Pennsylvania apply.

6.04 Definition and Interpretation of Capitalized and Other Terms

- **Purpose.** The purpose of this Section is to avoid needless repetition of phrases and define all capitalized terms used but not defined elsewhere in the Agreement.

6.05 Incorporation by Reference

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

6.06 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 it can simply be a 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.

6.07 Severability

- **Purpose.** If the provisions of a document are dependent on each other, then if one fails they all fail. The provision set forth in this Section is intended to avoid application of that rule.

6.08 Counterparts

- **Purpose.** There are several purposes for this provision. First, it makes clear that more than one counterpart of the Agreement can be signed. Second, it allows the undersigned Owner or Owners and Holder to exchange signature pages signed separately rather than circulate original documents back and forth to collect necessary signatures.

6.09 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 [Reducing Liability Associated with Trails](#) topic at [ConservationTools.org](#) notes circumstances in which Owners and Holder may want to have a written understanding between themselves but 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.

6.10 Notices

- **Purpose.** The purpose is to provide 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 telephone.

Optional Provision: Assigning Easement to Government

- If a nonprofit is initially identified as the intended Holder when seeking a Department of Conservation and Natural Resources (DCNR) grant, and it subsequently becomes preferable to have a governmental entity take a lead role, an assignment provision such as the one below might be appropriate. For a discussion of the reasons why this may be appropriate, see the [Reducing Liability Associated with Trails](#) topic at [ConservationTools.org](#). If an assignment clause is used, the assignee must sign the Agreement in order to assume responsibility. The Department of Conservation and Natural Resources requires that the assignee sign the document and that the Holder remain responsible for enforcement should the beneficiary fail to do so.

By signing this Agreement, Holder assigns to Township, and Township assumes, all of Holder's rights, powers and responsibilities with respect to the public access granted under this Easement. Holder reserves the right, power and responsibility to enforce the grant of public access under this Agreement should Township fail to do so.

Closing Matters

- **Closing:** The phrase "INTENDING TO BE LEGALLY BOUND" is especially important where there is no consideration being given for the donation because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania. The term "consideration" means something of value given in return for a promise.
- **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.
- **Signature lines.** Add as many signature lines as are necessary to accommodate the number of Owners and Beneficiaries who will be signing the Agreement. It is good practice to sign in black ink rather than blue ink so that signatures are legible on microfilm or microfiche.

- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Agreement Date. *See* Commentary to opening recitals of Agreement.
- **Exhibits.** Check that all exhibits and schedules referenced in the Agreement are attached before it is signed and recorded in the Public Records.

Disclaimer

Nothing contained in this or any other document available at ConserveLand.org or ConservationTools.org is intended to be relied upon as legal advice. The authors disclaim any attorney-client relationship with anyone to whom this document is furnished. Nothing contained in this document is intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to any person any transaction or matter addressed in this document.

ⁱ The purpose of this subsection is to set forth the intention of the parties that the Agreement is intended to qualify for tax deductibility as a charitable donation under §170 of the Internal Revenue Code. In the case of a bargain-sale of an Agreement, the donation is being made “in part”. The amount of the donation is the diminution in value (if any) of the Property resulting from the Agreement as determined by an independent appraiser in accordance with applicable Regulations. In the case of a bargain-sale, the purchase price received by the Owners reduces dollar for dollar the amount of the donation.

ⁱⁱ The terms of the Agreement must further a significant public benefit of a kind recognized in the Regulations to qualify for tax deductibility. One type of public benefit is making land available for public outdoor recreation and education for the substantial and regular use of the general public or the community. Another public benefit is preservation of open space to preserve scenic views or further public policies. Reference to county or municipal policies furthered by the protections afforded in the Agreement can be added to subsection (b).

ⁱⁱⁱ If someone other than Owner has the right to extract or remove minerals by surface mining, the Agreement will be disqualified for charitable contribution purposes unless the probability of extraction or removal is so remote as to be negligible.

^{iv} The Regulations specifically mention the right to extract certain minerals as an example of a reserved right for which notice under the Regulations is required.

^v The Baseline Documentation is intended to serve as an objective information baseline for monitoring compliance with the terms of the Agreement. The Baseline Documentation is incorporated into the text of the Agreement under this subsection even though it is not attached to the recorded documentation. Because it is not attached to the recorded document, it is imperative that the definitive baseline report be signed by the undersigned Owners and the Holder with a notation identifying the report as the Baseline Documentation referred to in the Agreement between Owners and the Holder dated _____. Whether or not tax deductibility is an issue, it is good practice for the Holder to keep on file a record of the existing improvements on or about the Easement Area as of the Agreement Date. This information will assist the Holder in enforcing the terms of the Agreement should enforcement become necessary.

^{vi} If the original Owners entering into the Agreement claim on their federal income tax return that the value of the Property was diminished by 20% due to the Agreement, the Owners as of the date of condemnation must turn over 20% of the proceeds of any condemnation affecting the Easement Area to the Holder.

^{vii} A “qualified organization” is either a governmental entity or a non-profit entity that (a) has a perpetual existence; (b) is established as a public charity for the purpose of preserving and conserving natural resources, natural habitats, environmentally sensitive areas and other charitable, scientific and educational purposes; (c) has the funds and commitment to enforce this conservation easement in perpetuity; and (d) is duly authorized to acquire and hold conservation easements under applicable law.

^{viii} Note that enforcement is not optional with the Holder – it must be a duty in order for the Agreement to qualify for tax deductibility as a charitable donation. The Holder must have the right to enforce the conservation restrictions by appropriate legal proceedings.

^{ix} The purpose of this subsection is to assure that, for purposes of qualifying the easement for favorable estate tax treatment under §2031(c) of the Code, the prohibition on commercial recreational use applies to the entirety of the Easement Area.

^x All donations (whether cash or non-cash) of \$250 or more must be acknowledged contemporaneously in accordance with the requirements of §170(f)(8) of the Internal Revenue Code. This includes donations of real property interests (whether ownership interests or conservation easements) and cash donations received in connection with acceptance of real property interests. The amount of cash received must be specified; however, as to non-cash property (for example, an easement) a description (but not value) of the donation will suffice. The acknowledgment will be considered to be contemporaneous if received on or before the date the taxpayer files a return for the taxable year in which the contribution was made. PALTA recommends that Holders acknowledge the donation by separate letter; acknowledgment within the Agreement guards against inadvertent failure to provide acknowledgment by separate letter.

^{xi} It is good policy to evidence in a writing signed by undersigned Owner or Owners prior to or at the time of the donation, that the Holder has not promised any particular tax treatment of the donation. The recommendation of PALTA is to document that understanding as soon as possible in an engagement letter or donation agreement. This subsection has been included in addition to, and not in substitution for, an earlier agreement.