

# Model Grant of Conservation Easement and Commentary Sixth Edition

Prepared by the  
**Pennsylvania Land Trust Association**

with support from the

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William Penn Foundation

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and other generous contributors

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Find the most recent edition of this  
document at [ConservationTools.org](http://ConservationTools.org)

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## Introduction

The *Model Grant of Conservation Easement and Commentary* provides users with a model state-of-the-art easement together with an expansive commentary covering alternative and optional new provisions and the reasoning behind it all. User-friendliness, flexibility and best practices are key design elements.

The model uses plain language and careful formatting to improve readability. It is structured to help users avoid drafting errors when adapting it to their particular projects. The model provides for three levels of protection to deal with differing needs across a property, but one or two levels can easily be removed for simple projects.

The model is tailored to Pennsylvania state law, and the Pennsylvania Department of Conservation and Natural Resources has approved its use for DCNR grant projects. It is the standard of choice for most land trusts, local governments and landowners in Pennsylvania and is used by many conservationists outside the Commonwealth.

## Notes on the New Edition

This is the sixth edition of the *Model Grant of Conservation Easement and Commentary*. Previous editions were published as follows:

1 <sup>st</sup> ed. – Jul. 2005	4 <sup>th</sup> ed. – Apr. 2008
2 <sup>nd</sup> ed. – Apr. 2006	5 <sup>th</sup> ed. – Sep. 2008
3 <sup>rd</sup> ed. – Sep. 2007	

User feedback suggested a variety of improvements to be found in this new edition of the model. Additional optional provisions and explanatory material have expanded the commentary by twelve pages and a table of contents has been added to aid in navigation. Differences between editions can be viewed at [ConservationTools.org](http://ConservationTools.org).

## Use the Latest Edition

The Pennsylvania Land Trust Association posts its model documents



at [ConservationTools.org](http://ConservationTools.org). Please check the website to ensure that you are using the most recent edition of the model.

## Help Improve the Next Edition!

The Pennsylvania Land Trust Association welcomes suggestions for improving the effectiveness of the model and commentary. Please direct your comments to Andy Loza via [phone, email or web form](#).

## Acknowledgements

**Patricia L. Pregmon, Esq.**, is the principal author.

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

**Debra Wolf Goldstein, Esq.**, as a project advisor, provided content and critical thinking for the creation of the model.

The following individuals contributed suggestions that shaped the sixth edition:

Tom Ford  
Debra Wolf Goldstein  
Bill Hilshey  
Steve Schiffman  
Charlie Schwartz  
David Shields  
Dave Skellie  
Stephen Squibb  
Salyn Stover  
Lauren Pregmon Tetrault  
Susan Wood

Apologies to anyone else who contributed but whom the authors inadvertently omitted.

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Prepared by:

Name:

Address:

Telephone:

Return to:

Name:

Address:

Tax Parcel(s):

## GRANT OF CONSERVATION EASEMENT

THIS GRANT OF CONSERVATION EASEMENT (this "Grant") dated as of \_\_\_\_\_ (the "Easement Date") is by and between \_\_\_\_\_ ("the undersigned Owner or Owners") and \_\_\_\_\_ (the "Holder").

### Article I. Background

#### 1.01 Property

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

Street Address:

Municipality:

County:

Parcel Identifier:

State: Pennsylvania

Acreage:

#### 1.02 Conservation Plan

Attached as Exhibit "B" is a survey or other graphic depiction of the Property (the "Conservation Plan") showing, among other details, the location of one or more of the following areas – the Highest Protection Area, the Standard Protection Area and the Minimal Protection Area.

#### 1.03 Conservation Objectives

By this Grant, the undersigned Owner or Owners impose a conservation servitude (the "Conservation Easement") on the Property that provides different levels of protection for the areas shown on the Conservation Plan so as to achieve the goals and resource protection objectives (collectively, the "Conservation Objectives") for the Property set forth below:

##### (a) Resource Protection Objectives

- (i) **Water Resources.** To maintain and improve the quality of water resources, both surface and groundwater, within, around and downstream of the Property.
- (ii) **Forest, Woodland and Other Vegetative Resources.** To perpetuate and foster the growth of a healthy and unfragmented forest or woodland; to maintain a continuous canopy of vegetation with multi-tiered understory of trees, shrubs, wildflowers and grasses; to support healthy ecosystem processes; and to trap air pollution particulates for healthier air and sequester carbon in trees and soil in order to mitigate rising atmospheric carbon levels.
- (iii) **Wildlife Resources.** To maintain and improve the quality of wildlife habitat; to protect breeding sites; to promote biodiversity and Native Species; to preserve large intact areas of wildlife habitat, connect patches of wildlife habitat and secure migration corridors. Large habitat patches typically support greater biodiversity than small patches; migration corridors enable wildlife to move to meet nutritional and reproductive needs and facilitate the migration of species in response to changes in environmental conditions.

- (iv) **Scenic Resources.** To preserve the relationship of scenic resources within the Property to natural and scenic resources in its surrounds and to protect scenic vistas visible from public rights-of-way and other public access points in the vicinity of the Property.
- (v) **Sustainable Land Uses.** To ensure that Agriculture, Forestry, and other uses, to the extent that they are permitted, are conducted in a manner that will neither diminish the biological integrity of the Property nor deplete natural resources over time nor lead to an irreversible disruption of ecosystems and associated processes. Agricultural and Forestry activities are regulated so as to protect soils of high productivity; to ensure future availability for Sustainable uses; and to minimize adverse effects of Agricultural and Forestry uses on water resources described in the Conservation Objectives.
- (vi) **Compatible Land Use and Development.** Certain areas have been sited within the Property to accommodate existing and future development taking into account the entirety of the natural potential of the Property as well as its scenic resources.

**(b) Goals**

- (i) **Highest Protection Area.** To protect natural resources within the Highest Protection Area so as to keep them in an undisturbed state except as required to promote and maintain a diverse community of predominantly Native Species.
- (ii) **Standard Protection Area.** To promote good stewardship of the Standard Protection Area so that its soil and other natural resources will always be able to support Sustainable Agriculture or Sustainable Forestry.
- (iii) **Minimal Protection Area.** To promote compatible land use and development within the Minimal Protection Area so that it will be available for a wide variety of activities, uses and Additional Improvements subject to the minimal constraints necessary to achieve Conservation Objectives outside the Minimal Protection Area.

**1.04 Baseline Documentation**

As of the Easement Date, 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 Conservation Plan and other information sufficient to identify on the ground the protection areas identified in this Article; that describes Existing Improvements; that identifies the conservation resources of the Property described in the Conservation Objectives; and that includes, among other information, photographs depicting existing conditions of the Property as of the Easement Date.

**1.05 Structure of Grant**

In Articles II, III and IV, the undersigned Owner or Owners impose restrictive covenants on the Property in support of the Conservation Objectives. Then, in Article V, they vest in Holder a number of rights for the purpose of advancing the Conservation Objectives. Article VI addresses potential violations and remedies. Article VII addresses miscellaneous other matters. Initially capitalized terms not defined in this Article I are defined in Article VIII.

**1.06 Federal Tax Items**

**(a) Qualified Conservation Contribution**

The Conservation Easement has been donated in whole or in part by the undersigned Owner or Owners. The donation of the Conservation Easement by this Grant 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 Code) to a qualified organization (a “Qualified Organization”) as defined in §1.170(A-14(c)(1) of the Regulations. If the Conservation Easement is transferred to any Person, that Person must commit to hold the Conservation Easement exclusively for conservation purposes as defined in the Regulations.

**(b) Public Benefit**

The undersigned Owner or Owners have granted the Conservation Easement to provide a significant public benefit (as defined in §1.170A-14(d)(4) of the Regulations). In addition to the public benefits described in the Conservation Objectives, the Baseline Documentation identifies public policy statements and other factual information supporting the significant public benefit of the Conservation Easement.

**(c) Mineral Interests**

No Person has retained a qualified mineral interest in the Property of a nature that would disqualify the Conservation Easement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the

Easement 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**

To the extent required for compliance with §1.170A-14(g)(5)(ii) of the Regulations, and only to the extent such activity is not otherwise subject to Review under this Grant, Owners agree to notify Holder before exercising any reserved right that may have an adverse impact on the conservation interests associated with the Property.

**(e) Property Right**

In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that the grant of this Conservation Easement 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 the Conservation Easement as of the Easement Date bears to the value of the Property as a whole as of the Easement Date (the "Proportionate Value"). If the Proportionate Value exceeds the compensation otherwise payable to Holder under Article VI, Holder is entitled to payment of the Proportionate Value. Holder must use any funds received on account of the Proportionate Value for conservation purposes (as that phrase is defined in the Regulations).

**(f) Qualification under §2031(c) of the Code**

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 Grant, Owners agree that commercial recreational uses are not permitted within the Property.

**(g) Acknowledgment of Donation**

Except for such monetary consideration (if any) as is set forth in this Article, Holder acknowledges that no goods or services were received in consideration of this Grant.

**(h) No Representation of Tax Benefits**

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 Applicable Law; or the value of the Conservation 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 Grant 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) This Grant is not conditioned upon the availability or amount of any deduction, credit or other benefit under Applicable Law.

**1.07 Beneficiaries**

This Grant does not confer any rights or remedies upon any Person other than Owners, Holder, and Persons (the "Beneficiaries"), if any, specifically named in this Grant. No other Persons are vested with any rights, whether arising under this Grant or otherwise under Applicable Law. No Beneficiary is identified in this Grant.

**1.08 Consideration**

The undersigned Owner or Owners acknowledge receipt, as of the Easement Date, of the sum of \$1.00 in consideration of this Grant.

## **Article II. Transfer; Subdivision**

**2.01 Transfer**

**(a) Notice Required**

Not less than thirty (30) days prior to transfer of the Property or any Lot, Owners must notify Holder of the name(s) and address for notices of the Persons who will become Owners following the transfer.

**(b) Prior to Transfer**

Owners authorize Holder to (i) contact the Persons to whom the Property or Lot will be transferred, and other Persons representing Owners or the prospective transferees, to discuss with them this Grant and, if applicable, other pertinent documents; and (ii) enter the Property to assess compliance with this Grant.

**(c) Ending Continuing Liability**

Owners prior to transfer are liable, on a joint and several basis with the Owners following the transfer, for the correction of violations and discharge of other obligations of Owners under this Grant. This provision continues to apply until Holder has been notified of the transfer, inspects the Property, and reports no violations observed during such inspection.

**2.02 Prohibitions**

No transfer of a Lot independent of the remainder of the Property; no change in the boundary of any Lot; and no other Subdivision is permitted, except as set forth below.

**2.03 Permitted Changes**

The following changes are permitted:

**(a) Lots within Property**

If the Property contains more than one Lot, Subdivision to (i) merge two or more Lots into one; or (ii) subject to Review, reconfigure any one or more of the boundaries of such Lots except a boundary of the Property as described in Exhibit "A".

**(b) Transfer to Qualified Organization**

Subject to Review, creation of a Lot for transfer to a Qualified Organization for park, nature preserve, public trail or other conservation purposes approved by Holder after Review.

**(c) Transfer of Rights of Possession or Use**

Subject to Review, transfer of possession or use (but not ownership) of one or more portions of the Property, including subsurface portions of the Property, for purposes permitted under, and subject to compliance with, the terms of this Grant. Leases of space within Improvements are not subject to Review.

**2.04 Requirements**

**(a) Establishment of Lots; Allocations**

Prior to transfer of a Lot following a Subdivision, Owners must (i) furnish Holder with the plan of Subdivision approved under Applicable Law and legal description of the each Lot created or reconfigured by the Subdivision; (ii) mark the boundaries of each Lot with permanent markers; and (iii) allocate in a document recorded in the Public Records those limitations applicable to more than one Lot under this Grant. This information will become part of the Baseline Documentation incorporated into this Grant.

**(b) Amendment**

Holder may require Owners to execute an Amendment of this Grant to reflect any change to the description of the Property set forth in Exhibit "A" or any other changes and allocations resulting from Subdivision that are not established to the reasonable satisfaction of Holder by recordation in the Public Records of the plan of Subdivision approved under Applicable Law.

## **Article III. Improvements**

**3.01 Prohibition**

Improvements within the Property are prohibited except as permitted below in this Article.

**3.02 Permitted Within Highest Protection Area**

The following Improvements are permitted within the Highest Protection Area:

**(a) Existing Improvements**

Any Existing Improvement may be maintained, repaired and replaced in its existing location. Existing Improvements may be expanded or relocated if the expanded or relocated Improvement complies with requirements applicable to Additional Improvements of the same type.

**(b) Existing Agreements**

Improvements that Owners are required to allow under Existing Agreements are permitted.

**(c) Additional Improvements**

The following Additional Improvements are permitted:

- (i) Fences, walls and gates, not to exceed four (4) feet in Height or such greater Height as is approved by Holder after Review.
- (ii) Regulatory Signs.
- (iii) Habitat enhancement devices such as birdhouses and bat houses.
- (iv) Trails covered (if at all) by wood chips, gravel, or other highly porous surface.
- (v) Subject to Review, footbridges, stream crossing structures and stream access structures.
- (vi) Subject to Review, Access Drives and Utility Improvements to service Improvements within the Property but only if there is no other reasonably feasible means to provide access and utility services to the Property.
- (vii) Subject to Review, Extraction Improvements and Improvements for generating and transmitting Renewable Energy but only if located wholly beneath the surface at a depth at which there can be no impairment of water or other resources described in the Conservation Objectives. No Access Drives to service any such Improvements are permitted.

**3.03 Permitted Within Standard Protection Area**

The following Improvements are permitted within the Standard Protection Area:

**(a) Permitted under Preceding Sections**

Any Improvement permitted under a preceding section of this Article is permitted.

**(b) Additional Improvements**

The following Additional Improvements are permitted:

- (i) Agricultural Improvements.
- (ii) Site Improvements reasonably required for activities and uses permitted within the Standard Protection Area.
- (iii) Subject to Review, Site Improvements servicing other areas of the Property, if not reasonably feasible to install entirely within Minimal Protection Area.
- (iv) Subject to Review, Improvements for generating and transmitting Renewable Energy that Holder, without any obligation to do so, determines are consistent with maintenance or attainment of Conservation Objectives.

**(c) Limitations on Additional Improvements**

Additional Improvements permitted within the Standard Protection Area are further limited as follows:

- (i) The Height of Improvements must not exceed thirty-five (35) feet except for, subject to Review, silos and Improvements for generating Renewable Energy.
- (ii) Fences remain limited as in the Highest Protection Area.
- (iii) Impervious Coverage must not exceed a limit of 500 square feet per roofed Improvement. Impervious Coverage must not exceed a limit of 1500 square feet in the aggregate for all Improvements within the Standard Protection Area. The limitation on aggregate Impervious Coverage excludes Impervious Coverage associated with ponds and Access Drives.
- (iv) Access Drives are limited to a driving surface not to exceed fourteen (14) feet in width and are further limited, in the aggregate, to 500 feet in length.
- (v) Ponds are limited, in the aggregate, to 1500 square feet of Impervious Coverage.
- (vi) In addition to Regulatory Signs, signs are limited to a maximum of eight (8) square feet per sign and twenty-four (24) square feet in the aggregate for all signs within the Property.
- (vii) Utility Improvements must be underground or, subject to Review, may be aboveground where not reasonably feasible to be installed underground.
- (viii) The following Improvements are not permitted unless Holder, without any obligation to do so, approves after Review: (A) exterior storage tanks for petroleum or other hazardous or toxic substances (other than reasonable amounts of fuel for activities and uses within the Property

permitted under this Grant); and (B) Site Improvements servicing activities, uses or Improvements not within the Property.

- (ix) Improvements in connection with recreational and open-space activities and uses are limited to Site Improvements not exceeding nine (9) feet in Height and 500 square feet of Impervious Coverage in the aggregate.

#### **3.04 Permitted Within Minimal Protection Area**

The following Improvements are permitted within Minimal Protection Area:

**(a) Permitted under Preceding Sections**

Any Improvement permitted under a preceding section of this Article is permitted.

**(b) Additional Improvements**

The following Additional Improvements are permitted:

- (i) Residential Improvements.
- (ii) Site Improvements servicing activities, uses or Improvements permitted within the Property. Signs, fences, storage tanks and other Site Improvements remain limited as set forth for the Standard Protection Area.

**(c) Limitations on Additional Improvements**

Additional Improvements permitted within the Minimal Protection Area are further limited as follows:

- (i) Not more than one (1) Improvement (whether an Existing Improvement or Additional Improvement) may contain Dwelling Units (if any) permitted under Article IV.
- (ii) Additional Improvements are subject to a Height limitation of thirty-five (35) feet. Subject to Review, Improvements for generating Renewable Energy may exceed this Height limitation.

## **Article IV. Activities; Uses; Disturbance of Resources**

#### **4.01 Prohibition**

Activities and uses are limited to those permitted below in this Article and provided in any case that the intensity or frequency of the activity or use does not materially and adversely affect maintenance or attainment of Conservation Objectives.

#### **4.02 Density Issues under Applicable Law**

**(a) Promoting Development outside the Property**

Neither the Property nor this Grant may be used under Applicable Law to increase density or intensity of use or otherwise promote the development of other lands outside the Property.

**(b) Transferable Development Rights**

Owners may not transfer for use outside the Property (whether or not for compensation) any development rights allocated to the Property under Applicable Law.

#### **4.03 Permitted Within Highest Protection Area**

The following activities and uses are permitted within the Highest Protection Area:

**(a) Existing Agreements**

Activities, uses and Construction that Owners are required to allow under Existing Agreements.

**(b) Disturbance of Resources**

- (i) Cutting trees, Construction or other disturbance of resources, including removal of Invasive Species, to the extent reasonably prudent to remove, mitigate or warn against an unreasonable risk of harm to Persons, property or health of Native Species on or about the Property. Owners must take such steps as are reasonable under the circumstances to consult with Holder prior to taking actions that, but for this provision, would not be permitted or would be permitted only after Review.
- (ii) Planting a diversity of Native Species of trees, shrubs and herbaceous plant materials in accordance with Best Management Practices.
- (iii) Removal and disturbance of soil, rock and vegetative resources to the extent reasonably necessary to accommodate Construction of Improvements within the Highest Protection Area with restoration as

soon as reasonably feasible by replanting with a diversity of Native Species of trees, shrubs and herbaceous plant materials in accordance with Best Management Practices.

- (iv) Vehicular use in the case of emergency and, subject to applicable limitations (if any), in connection with activities or uses permitted within the Highest Protection Area.
- (v) Except within Wet Areas, cutting or removing trees, standing or fallen, but only if the aggregate inside bark diameter of stumps (one foot above ground on the uphill side) does not exceed 200 inches per year and only for use within the Property.
- (vi) Subject to Review, removal of vegetation to accommodate replanting with a diversity of Native Species of trees, shrubs and herbaceous plant materials.
- (vii) Subject to Review, extraction of natural gas (regardless of source) or oil, and injection or release of water and other substances to facilitate such extraction, but only at subterranean depths at which there can be no impairment of water or other resources described in the Conservation Objectives. No surface activities or uses, including Construction activities, incident to such extraction are permitted.
- (viii) Generation of Renewable Energy and transmission of such energy if and to the extent Improvements for that purpose are permitted under Article III.
- (ix) Other resource management activities that Holder, without any obligation to do so, determines are consistent with maintenance or attainment of Conservation Objectives and are conducted in accordance with the Resource Management Plan approved for that activity after Review.

**(c) Release and Disposal**

- (i) Application of manure and plant material, both well composted, and, subject to compliance with manufacturer's recommendations, other substances to promote the health and growth of vegetation. (These permitted substances do not include sludge, biosolids, septic system effluent and related substances.)
- (ii) Piling of brush and other vegetation to the extent reasonably necessary to accommodate activities or uses permitted within the Highest Protection Area.

**(d) Other Activities**

Activities that do not require Improvements other than trails and do not materially and adversely affect maintenance or attainment of Conservation Objectives such as the following: (i) walking, horseback riding on trails, cross-country skiing, bird watching, nature study, fishing and hunting; and (ii) educational or scientific activities consistent with and in furtherance of the Conservation Objectives. Vehicular use is not permitted in connection with the activities permitted under this subsection, unless Holder, without any obligation to do so, approves the use after Review.

**4.04 Permitted Within Standard Protection Area**

The following activities and uses are permitted within the Standard Protection Area so long as no Invasive Species are introduced:

**(a) Permitted under Preceding Sections**

Activities and uses permitted under preceding sections of this Article are permitted within the Standard Protection Area.

**(b) Agricultural Uses**

Sustainable Agricultural uses and activities that maintain continuous vegetative cover and, if conducted in accordance with a Soil Conservation Plan furnished to Holder, Sustainable Agricultural uses that do not maintain continuous vegetative cover. In either case, the limitations set forth below apply:

- (i) Within Wet Areas, grazing is permitted only if Holder approves after Review.
- (ii) Within Steep Slope Areas, the Soil Conservation Plan is subject to Review by Holder to determine that measures have been included to minimize adverse effects on natural resources such as a conservation tillage system, contour farming or cross slope farming.
- (iii) Agricultural uses that involve removal of soil from the Property (such as sod farming and ball-and-burlap nursery uses) are permitted only if conducted in accordance with a Resource Management Plan approved by Holder after Review that provides for, among other features, a soil replenishment program that will qualify the activity as a Sustainable Agricultural use.

- (iv) Woodland Areas may not be used for or converted to Agricultural uses unless Holder, without any obligation to do so, approves after Review.
- (c) Forestry Uses**  
Sustainable Forestry in accordance with a Resource Management Plan approved after Review.
- (d) Other Disturbance of Resources**
  - (i) Subject to Review, removal or impoundment of water for activities and uses permitted within the Property but not for sale or transfer outside the Property.
  - (ii) Removal of vegetation and other Construction activities reasonably required to accommodate Improvements permitted within the Standard Protection Area.
  - (iii) Mowing, planting and maintenance of lawn, garden and landscaped areas.
- (e) Release and Disposal**
  - (i) Piling and composting of biodegradable materials originating from the Property in furtherance of Agricultural Uses within the Property permitted under this Article. Manure piles must be located so as not to create run-off into Wet Areas.
  - (ii) Subject to Review, disposal of sanitary sewage effluent from Improvements permitted within the Property if not reasonably feasible to confine such disposal to Minimal Protection Area.
- (f) Other Activities**  
Recreational and open-space activities and uses that (i) do not require Improvements other than those permitted within the Standard Protection Area; (ii) do not materially and adversely affect scenic views and other values described in the Conservation Objectives; and (iii) do not require motorized vehicular use other than for resource management purposes.

#### **4.05 Permitted Within Minimal Protection Area**

The following activities and uses are permitted within the Minimal Protection Area:

- (a) Permitted under Preceding Sections**  
Activities and uses permitted under preceding sections of this Article are permitted within the Minimal Protection Area.
- (b) Disturbance of Resources**  
Disturbance of resources within the Minimal Protection Area is permitted for purposes reasonably related to activities or uses permitted within the Minimal Protection Area. Introduction of Invasive Species remains prohibited.
- (c) Release and Disposal**
  - (i) Disposal of sanitary sewage effluent from Improvements permitted within the Property.
  - (ii) Other piling of materials and non-containerized disposal of substances and materials but only if such disposal is permitted under Applicable Law; does not directly or indirectly create run-off or leaching outside the Minimal Protection Area; and does not adversely affect Conservation Objectives applicable to the Minimal Protection Area including those pertaining to scenic views.
- (d) Residential and Other Uses**
  - (i) Residential use is permitted but limited to not more than one (1) Dwelling Unit.
  - (ii) Any occupation, activity or use is permitted if wholly contained within an enclosed Residential or Agricultural Improvement. The phrase “wholly contained” means that neither the primary activity or use or any accessory uses such as parking or signage, are visible or discernable outside the Improvement; however, subject to Review, exterior vehicular parking and signage accessory to such uses may be permitted by Holder.



## **Article V. Rights and Duties of Holder and Beneficiaries**

### **5.01 Grant to Holder**

#### **(a) Grant in Perpetuity**

By signing this Grant and unconditionally delivering it to Holder, the undersigned Owner or Owners, intending to be legally bound, grant and convey to Holder a Conservation Easement over the Property in perpetuity for the purpose of advancing the Conservation Objectives and administering and enforcing the restrictions and limitations set forth in Articles II, III, and IV in furtherance of the Conservation Objectives.

#### **(b) Superior to all Liens**

The undersigned Owner or Owners warrant to Holder that the Property is, as of the Easement Date, free and clear of all Liens or, if it is not, that Owners have obtained and recorded in the Public Records the legally binding subordination of any Liens affecting the Property as of the Easement Date.

### **5.02 Rights and Duties of Holder**

The items set forth below are both rights and duties vested in Holder by this Grant:

#### **(a) Enforcement**

To enter the Property to investigate a suspected, alleged or threatened violation and, if found, to enforce the terms of this Grant by exercising Holder's remedies in Article VI.

#### **(b) Inspection**

To enter and inspect the Property for compliance with the requirements of this Grant upon reasonable notice, in a reasonable manner and at reasonable times.

#### **(c) Review**

To exercise rights of Review in accordance with the requirements of this Article.

#### **(d) Interpretation**

To interpret the terms of this Grant and, at the request of Owners, furnish Holder's explanation of the application of such terms to then-existing, proposed or reasonably foreseeable conditions within the Property.

### **5.03 Other Rights of Holder**

The items set forth below are also rights vested in Holder by this Grant; however, Holder, in its discretion, may or may not exercise them:

#### **(a) Amendment**

To enter into an Amendment with Owners if Holder determines that the Amendment is consistent with and in furtherance of the Conservation Objectives; will not result in any private benefit prohibited under the Code; and otherwise conforms to Holder's policy with respect to Amendments.

#### **(b) Signs**

To install one or more signs within the Property identifying the interest of Holder or one or more Beneficiaries in the Conservation Easement. Any signs installed by Holder do not reduce the number or size of signs permitted to Owners under Article III. Signs are to be of the customary size installed by Holder or Beneficiary, as the case may be, and must be installed in locations readable from the public right-of-way and otherwise reasonably acceptable to Owners.

#### **(c) Proceedings**

To assert a claim, defend or intervene in, or appeal, any proceeding under Applicable Law that (i) pertains to the impairment of Conservation Objectives; or (ii) may result in a transfer, Improvement or use that violates the terms of this Grant.

### **5.04 Review**

The following provisions are incorporated into any provision of this Grant that is subject to Review:

#### **(a) Notice to Holder**

At least thirty (30) days before Owners begin or allow any Construction, activity or use that is subject to Review, Owners must notify Holder of the change including with the notice such information as is reasonably sufficient to comply with Review Requirements and otherwise describe the change and its potential impact on natural resources within the Property.

**(b) Notice to Owners**

Within thirty (30) days after receipt of Owners' notice, Holder must notify Owners of Holder's determination to (i) accept Owners' proposal in whole or in part; (ii) reject Owners' proposal in whole or in part; (iii) accept Owners' proposal conditioned upon compliance with conditions imposed by Holder; or (iv) reject Owners' notice for insufficiency of information on which to base a determination. If Holder gives conditional acceptance under clause (iii), commencement of the proposed Improvement, activity, use or Construction constitutes acceptance by Owners of all conditions set forth in Holder's notice.

**(c) Failure to Notify**

If Holder fails to notify Owners as required in the preceding subsection, the proposal set forth in Owners' notice is deemed approved.

**(d) Standard of Review**

- (i) The phrase "unless Holder, without any obligation to do so," in relation to an approval or determination by Holder, means that, in that particular case, Holder's approval is wholly discretionary and may be given or withheld for any reason or no reason.
- (ii) In all other cases, Holder's approval is not to be unreasonably withheld. It is not unreasonable for Holder to disapprove a proposal that may adversely affect natural resources described in the Conservation Objectives or that is otherwise inconsistent with maintenance or attainment of Conservation Objectives.

**5.05 Reimbursement**

Owners must reimburse Holder for the costs and expenses of Holder reasonably incurred in the course of performing its duties with respect to this Grant other than monitoring in the ordinary course. These costs and expenses include the allocated costs of employees of Holder.

## **Article VI. Violation; Remedies**

**6.01 Breach of Duty**

If Holder fails to enforce the terms of this Grant, or ceases to qualify as a Qualified Organization, then the Conservation Easement may be transferred to another Qualified Organization by a court of competent jurisdiction.

**6.02 Violation**

If Holder determines that the terms of this Grant are being or have been violated or that a violation is threatened or imminent then the provisions of this section will apply:

**(a) Notice**

Holder must notify Owners of the violation. Holder's notice may include its recommendations of measures to be taken by Owners to cure the violation and restore features of the Property damaged or altered as a result of the violation.

**(b) Opportunity to Cure**

Owners' cure period expires thirty (30) days after the date of Holder's notice to Owners subject to extension for the time reasonably necessary to cure but only if all of the following conditions are satisfied:

- (i) Owners cease the activity constituting the violation promptly upon receipt of Holder's notice;
- (ii) Owners and Holder agree, within the initial thirty (30) day period, upon the measures Owners will take to cure the violation;
- (iii) Owners commence to cure within the initial thirty (30) day period; and
- (iv) Owners continue thereafter to use best efforts and due diligence to complete the agreed upon cure.

**(c) Imminent Harm**

No notice or cure period is required if circumstances require prompt action to prevent or mitigate irreparable harm or alteration to any natural resource or other feature of the Property described in the Conservation Objectives.

### **6.03 Remedies**

Upon expiration of the cure period (if any) described in the preceding section, Holder may do any one or more of the following:

**(a) Injunctive Relief**

Seek injunctive relief to specifically enforce the terms of this Grant; to restrain present or future violations of the terms of this Grant; and/or to compel restoration of resources destroyed or altered as a result of the violation.

**(b) Civil Action**

Recover from Owners or other Persons responsible for the violation all sums owing to Holder under applicable provisions of this Grant together with interest thereon from the date due at the Default Rate. These monetary obligations include, among others, Losses and Litigation Expenses.

**(c) Self-Help**

Enter the Property to prevent or mitigate further damage to or alteration of natural resources of the Property identified in the Conservation Objectives.

### **6.04 Modification or Termination**

If the Conservation Easement is or is about to be modified or terminated by exercise of the power of eminent domain (condemnation) or adjudication of a court of competent jurisdiction sought by a Person other than Holder the following provisions apply:

**(a) Compensatory Damages**

Holder is entitled to collect from the Person seeking the modification or termination, compensatory damages in an amount equal to the increase in Market Value of the Property resulting from the modification or termination plus reimbursement of Litigation Expenses as if a violation had occurred.

**(b) Restitution**

Holder is entitled to recover from the Person seeking the modification or termination, (i) restitution of amounts paid for this Grant (if any) and any other sums invested in the Property for the benefit of the public as a result of rights vested by this Grant plus (ii) reimbursement of Litigation Expenses as if a violation had occurred.

### **6.05 Remedies Cumulative**

The description of Holder's remedies in this Article does not preclude Holder from exercising any other right or remedy that may at any time be available to Holder under this Article or Applicable Law. If Holder chooses to exercise one remedy, Holder may nevertheless choose to exercise any one or more of the other rights or remedies available to Holder at the same time or at any other time.

### **6.06 No Waiver**

If Holder does not exercise any right or remedy when it is available to Holder, that is not to be interpreted as a waiver of any non-compliance with the terms of this Grant or a waiver of Holder's rights to exercise its rights or remedies at another time.

### **6.07 No Fault of Owners**

Holder will waive its right to reimbursement under this Article as to Owners (but not other Persons who may be responsible for the violation) if Holder is reasonably satisfied that the violation was not the fault of Owners and could not have been anticipated or prevented by Owners by reasonable means.

### **6.08 Multiple Owners; Multiple Lots**

If different Owners own Lots within the Property, only the Owners of the Lot in violation will be held responsible for the violation.

### **6.09 Multiple Owners; Single Lot**

If more than one Owner owns the Lot in violation of the terms of this Grant, the Owners of the Lot in violation are jointly and severally liable for the violation regardless of the form of ownership.

## **Article VII. Miscellaneous**

### **7.01 Notices**

#### **(a) Requirements**

Each Person giving any notice pursuant to this Grant must give the notice in writing and must use one of the following methods of delivery: (i) personal delivery; (ii) certified mail, return receipt requested and postage prepaid; or (iii) nationally recognized overnight courier, with all fees prepaid.

#### **(b) Address for Notices**

Each Person giving a notice must address the notice to the appropriate Person at the receiving party at the address listed below or to another address designated by that Person by notice to the other Person:

If to Owners:

If to Holder:

### **7.02 Governing Law**

The laws of the Commonwealth of Pennsylvania govern this Grant.

### **7.03 Assignment and Transfer**

Neither Owners nor Holder may assign or otherwise transfer any of their respective rights or duties under this Grant voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law or any other manner except as permitted below. Any purported assignment or transfer in violation of this section is void.

#### **(a) By Holder**

Holder may assign its rights and duties under this Grant, either in whole or in part, but only to a Qualified Organization that executes and records in the Public Records a written agreement assuming the obligations of Holder under this Grant. The assigning Holder must deliver the Baseline Documentation to the assignee Holder as of the date of the assignment. Holder must assign its rights and duties under this Grant to another Qualified Organization if Holder becomes the Owner of the Property.

#### **(b) By Owners**

This Grant vests a servitude running with the land binding upon the undersigned Owners and, upon recordation in the Public Records, all subsequent Owners of the Property or any portion of the Property are bound by its terms whether or not the Owners had actual notice of this Grant and whether or not the deed of transfer specifically referred to the transfer being under and subject to this Grant.

### **7.04 Burdens; Benefits; Exclusive to Holder**

Subject to the restrictions on assignment and transfer set forth in the preceding section, this Grant binds and benefits Owners and Holder and their respective personal representatives, successors and assigns. Except for rights of Beneficiaries (if any) under Article V, only the Holder has the right to enforce the terms of this Grant and exercise rights of Review, Waiver, Amendment or other discretionary rights of Holder. Owners of Lots within the Property do not have the right to enforce the terms of this Grant against Owners of other Lots within the Property. Only the Owners of the Lot that is the subject of a request for Review, Waiver, Amendment, interpretation or other decision by Holder have any right to notice of, or other participation in, such decision.

### **7.05 Requirement of Writing**

No Amendment, Waiver, approval after Review, interpretation or other decision by Holder is valid or effective unless it is in writing and signed by an authorized signatory for Holder. This requirement may not be changed by oral agreement. The grant of an Amendment or Waiver in any instance or with respect to any Lot does not imply that an Amendment or Waiver will be granted in any other instance.

### **7.06 Severability**

If any provision of this Grant is determined to be invalid, illegal or unenforceable, the remaining provisions of this Grant remain valid, binding and enforceable. To the extent permitted by Applicable Law, the parties

waive any provision of Applicable Law that renders any provision of this Grant invalid, illegal or unenforceable in any respect.

#### **7.07 Counterparts**

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

#### **7.08 Indemnity**

Owners must indemnify and defend the Indemnified Parties against all Losses and Litigation Expenses arising out of or relating to: (a) any breach or violation of this Grant or Applicable Law; and (b) damage to property or personal injury (including death) occurring on or about the Property if and to the extent not caused by the negligent or wrongful acts or omissions of an Indemnified Party.

#### **7.09 Guides to Interpretation**

##### **(a) Captions**

Except for the identification of defined terms in the Glossary, the descriptive headings of the articles, sections and subsections of this Grant are for convenience only and do not constitute a part of this Grant.

##### **(b) Glossary**

If any term defined in the Glossary is not used in this Grant, the defined term is to be disregarded as surplus material.

##### **(c) Other Terms**

- (i) The word “including” means “including but not limited to”.
- (ii) The word “must” is obligatory; the word “may” is permissive and does not imply any obligation.

##### **(d) Conservation and Preservation Easements Act**

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

##### **(e) Restatement (Third) of the Law of Property: Servitudes**

This Grant is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation servitude under the Restatement (Third) of the Law of Property: Servitudes.

#### **7.10 Entire Agreement**

This is the entire agreement of Owners, Holder and Beneficiaries (if any) pertaining to the subject matter of this Grant. The terms of this Grant supersede in full all statements and writings between Owners, Holder and others pertaining to the transaction set forth in this Grant.

#### **7.11 Incorporation by Reference**

Each exhibit attached to this Grant is incorporated into this Grant by this reference. The Baseline Documentation (whether or not attached to this Grant) is incorporated into this Grant by this reference.

#### **7.12 Coal Rights Notice**

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

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

## **Article VIII. Glossary**

#### **8.01 Access Drive(s)**

Roads, drives or lanes providing vehicular access and located within the Property.

#### **8.02 Additional Improvements**

All buildings, structures, facilities and other improvements within the Property, whether temporary or permanent, other than Existing Improvements.

**8.03 Agricultural Improvements**

Improvements used or usable in furtherance of Agricultural uses such as barn, stable, silo, spring house, green house, hoop house, riding arena (whether indoor or outdoor), horse walker, manure storage pit, storage buildings, feeding and irrigation facilities.

**8.04 Agricultural or Agriculture**

Any one or more of the following and the leasing of land for any of these purposes:

**(a) Farming**

- (i) Production of vegetables, fruits, seeds, mushrooms, nuts and nursery crops (including trees) for sale.
- (ii) Production of poultry, livestock and their products for sale.
- (iii) Production of field crops, hay or pasture.
- (iv) Production of sod to be removed and planted elsewhere.

**(b) Equestrian**

Boarding, stabling, raising, feeding, grazing, exercising, riding and training horses and instructing riders.

**8.05 Amendment**

An amendment, modification or supplement to this Grant signed by Owners and Holder and recorded in the Public Records.

**8.06 Applicable Law**

Any federal, state or local laws, statutes, codes, ordinances, standards and regulations applicable to the Property, the Conservation Easement or this Grant as amended through the applicable date of reference. If this Grant is intended to meet the requirements of a qualified conservation contribution, then applicable provisions of the Code and the Regulations are also included in the defined term.

**8.07 Best Management Practices**

A series of guidelines or minimum standards (sometimes referred to as BMP's) recommended by federal, state and/or county resource management agencies for proper application of farming and forestry operations, non-point pollution of water resources and other disturbances of soil, water and vegetative resources and to protect wildlife habitats. Examples of resource management agencies issuing pertinent BMP's as of the Easement Date are: the Natural Resource Conservation Service of the United States Department of Agriculture (with respect to soil resources); the Pennsylvania Department of Environmental Protection (with respect to soil erosion, sedimentation and water resources) and the following sources of BMP's with respect to forest and woodland management: the Forest Stewardship Council principles and criteria, Sustainable Forestry Initiative standards, Forest Stewardship Plan requirements, American Tree Farm standards and Best Management Practices for Pennsylvania Forests.

**8.08 Code**

The Internal Revenue Code of 1986, as amended through the applicable date of reference.

**8.09 Conservation Easements Act**

The Pennsylvania Conservation and Preservation Easements Act, the act of June 22, 2001 (P.L. 390, No. 29) (32 P.S. §§5051-5059) as amended through the applicable date of reference.

**8.10 Construction**

Any demolition, construction, reconstruction, expansion, exterior alteration, installation or erection of temporary or permanent Improvements; and, whether or not in connection with any of the foregoing, any excavation, dredging, mining, filling or removal of gravel, soil, rock, sand, coal, petroleum or other minerals.

**8.11 Default Rate**

An annual rate of interest equal at all times to two percent (2%) above the "prime rate" announced from time to time in *The Wall Street Journal*.

**8.12 Dwelling Unit**

Use or intended use of an Improvement or portion of an Improvement for human habitation by one or more Persons (whether or not related). Existence of a separate kitchen accompanied by sleeping quarters is considered to constitute a separate Dwelling Unit.

**8.13 Existing Agreements**

Easements and other servitudes affecting the Property prior to the Easement Date that constitute legally binding servitudes prior in right to the Conservation Easement.

**8.14 Existing Improvements**

All buildings, structures, facilities and other improvements, whether temporary or permanent, located on, above or under the Property as of the Easement Date as identified in the Baseline Documentation.

**8.15 Extraction Improvements**

Wells, casements, impoundments and other Improvements for the exploration, extraction, collection, containment, transport and removal (but not processing or refining) of oil or natural gas (regardless of source) from substrata beneath the surface of the Property. The term "Extraction Improvements" includes any Access Drive required for the Construction or operation of Extraction Improvements or the removal of oil or natural gas from the Property. Extraction Improvements (whether or not providing sources of power for the Property) are not included in the defined terms "Utility Improvements" and "Site Improvements".

**8.16 Forestry**

Planting, growing, nurturing, managing and harvesting trees whether for timber and other useful products or for water quality, wildlife habitat and other Conservation Objectives.

**8.17 Height**

The vertical elevation of an Improvement measured from the average exterior ground elevation of the Improvement to a point, if the Improvement is roofed, midway between the highest and lowest points of the roof excluding chimneys, cupolas, ventilation shafts, weathervanes and similar protrusions or, if the Improvement is unroofed, the top of the Improvement.

**8.18 Impervious Coverage**

The aggregate area of all surfaces that are not capable of supporting vegetation within the applicable area of reference. Included in Impervious Coverage are the footprints (including roofs, decks, stairs and other extensions) of Improvements; paved or artificially covered surfaces such as crushed stone, gravel, concrete and asphalt; impounded water (such as a man-made pond); and compacted earth (such as an unpaved roadbed). Excluded from Impervious Coverage are running or non-impounded standing water (such as a naturally occurring lake); bedrock and naturally occurring stone and gravel; and earth (whether covered with vegetation or not) so long as it has not been compacted by non-naturally occurring forces.

**8.19 Improvement**

Any Existing Improvement or Additional Improvement.

**8.20 Indemnified Parties**

Holder, each Beneficiary (if any) and their respective members, directors, officers, employees and agents and the heirs, personal representatives, successors and assigns of each of them.

**8.21 Invasive Species**

A plant species that is (a) non-native (or alien) to the ecosystem under consideration; and (b) whose introduction causes or is likely to cause economic or environmental harm or harm to human health. In cases of uncertainty, publications such as "Plant Invaders of the Mid-Atlantic Natural Areas", by the National Park Service National Capital Region, Center for Urban Ecology and the U.S. Fish and Wildlife Service, Chesapeake Bay Field Office are to be used to identify Invasive Species.

**8.22 Lien**

Any mortgage, lien or other encumbrance securing the payment of money.

**8.23 Litigation Expense**

Any court filing fee, court cost, arbitration fee or cost, witness fee and each other fee and cost of investigating and defending or asserting any claim of violation or for indemnification under this Grant including in each case, attorneys' fees, other professionals' fees and disbursements.

**8.24 Losses**

Any liability, loss, claim, settlement payment, cost and expense, interest, award, judgment, damages (including punitive damages), diminution in value, fines, fees and penalties or other charge other than a Litigation Expense.

**8.25 Lot**

A unit, lot or parcel of real property separated or transferable for separate ownership or lease under Applicable Law.

**8.26 Market Value**

The fair value that a willing buyer, under no compulsion to buy, would pay to a willing seller, under no compulsion to sell as established by appraisal in accordance with the then-current edition of Uniform Standards of Professional Appraisal Practice issued by the Appraisal Foundation or, if applicable, a qualified appraisal in conformity with §1.170A-13 of the Regulations.

**8.27 Native Species**

A plant or animal indigenous to the locality under consideration. In cases of uncertainty, published atlases, particularly *The Vascular Flora of Pennsylvania: Annotated Checklist and Atlas* by Rhoads and Klein and *Atlas of United States Trees, vols. 1 & 4* by Little are to be used to establish whether or not a species is native.

**8.28 Owners**

The undersigned Owner or Owners and all Persons after them who hold an interest in the Property.

**8.29 Person**

An individual, organization, trust, government or other entity.

**8.30 Public Records**

The public records of the office for the recording of deeds in and for the county in which the Property is located.

**8.31 Qualified Organization**

A governmental or 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) meets the criteria of a qualified organization under the Regulations; and (d) is duly authorized to acquire and hold conservation easements under Applicable Law.

**8.32 Regulations**

The provisions of C.F.R. §1.170A-14, and any other regulations promulgated under the Code that pertain to qualified conservation contributions, as amended through the applicable date of reference.

**8.33 Regulatory Signs**

Signs (not exceeding one square foot each) to control access to the Property or for informational, directional or interpretive purposes.

**8.34 Renewable Energy**

Energy that can be used without depleting its source such as solar, wind, geothermal and movement of water (hydroelectric and tidal).

**8.35 Residential Improvements**

Dwellings and Improvements accessory to residential uses such as garage, swimming pool, pool house, tennis court and children's play facilities.

**8.36 Resource Management Plan**

A record of the decisions and intentions of Owners prepared by a qualified resource management professional for the purpose of protecting natural resources described in the Conservation Objectives during certain operations potentially affecting natural resources protected by this Grant. The Resource Management Plan (sometimes referred to as the "RMP") includes a resource assessment, identifies appropriate performance standards (based upon Best Management Practices where available and appropriate) and projects a multi-year description of planned activities for identified operations to be conducted in accordance with the plan.

**8.37 Review**

Review and approval of Holder under the procedure described in Article V.

**8.38 Review Requirements**

Collectively, any plans, specifications or information required for approval of the Subdivision, activity, use or Construction under Applicable Law (if any) plus (a) the information required under the Review Requirements



incorporated into this Grant either as an exhibit or as part of the Baseline Documentation or (b) if the information described in clause (a) is inapplicable, unavailable or insufficient under the circumstances, the guidelines for Review of submissions established by Holder as of the applicable date of reference.

**8.39 Site Improvements**

Unenclosed Improvements such as Access Drives, Utility Improvements, walkways, boardwalks, retention/detention basins and other storm water management facilities, wells, septic systems, bridges, parking areas and other pavements, lighting fixtures, signs, fences, walls, gates, man-made ponds, berms and landscaping treatments.

**8.40 Soil Conservation Plan**

A plan for soil conservation and/or sedimentation and erosion control that meets the requirements of Applicable Law.

**8.41 Steep Slope Areas**

Areas greater than one acre having a slope greater than 15%.

**8.42 Subdivision**

Any division of the Property or any Lot within the Property; and any creation of a unit, lot or parcel of real property, including subsurface portions of the Property, for separate use or ownership by any means including by lease or by implementing the condominium form of ownership. The term "Subdivision" includes any "subdivision" as defined in the Pennsylvania Municipalities Planning Code, Act of 1968, P.L. 805, No. 247, as reenacted and amended as of the applicable date of reference.

**8.43 Sustainable**

Land management practices that provide goods and services from an ecosystem without degradation of biodiversity and resource values at the site and without a decline in the yield of goods and services over time.

**8.44 Utility Improvements**

Improvements for the reception, storage or transmission of potable water, stormwater, sewage, electricity, gas and telecommunications or other sources of power.

**8.45 Waiver**

A written commitment by which Holder, without any obligation to do so, agrees to refrain from exercising one or more of its rights and remedies for a specific period of time with respect to a specific set of circumstances if Holder is satisfied that the accommodation will have no material effect on Conservation Objectives.

**8.46 Wet Areas**

Watercourses, springs, wetlands and non-impounded standing water and areas within 100-feet of their edge.

**8.47 Woodland Areas**

Area(s) within the Property described as "wooded" or "forested" in the Baseline Documentation or identified as such on the Conservation Plan, or if not wooded or forested as of the Easement Date, are designated as successional woodland areas on the Conservation Plan.

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

Witness/Attest:

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

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

[NAME OF HOLDER]

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

*This document is based on the Model Grant of Conservation Easement, 6<sup>th</sup> edition (10/10/2011), provided by the Pennsylvania Land Trust Association.*

<p>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.</p>
--

COMMONWEALTH OF PENNSYLVANIA:

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

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

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

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

COMMONWEALTH OF PENNSYLVANIA \_\_\_\_\_ :

SS

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

ON THIS DAY \_\_\_\_\_ before me, the undersigned officer, personally appeared \_\_\_\_\_, who acknowledged him/herself to be the \_\_\_\_\_ of \_\_\_\_\_, a Pennsylvania non-profit corporation, and that he/she as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by her/himself as such officer.

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

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

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# Commentary to the Model Grant of Conservation Easement

Sixth Edition

## General Instructions

- **Read the Commentary.** Users of the model should 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.
- **Start from the Model.** Avoid using a document prepared for another project as a starting point for a new conservation easement. One of the most important functions of a model is to serve as a reminder of issues that need to be considered. The value of a model is lost, and errors and omissions become virtually guaranteed, when a document prepared for another Property is used as a starting point for a new conservation easement. Each Holder should feel free to create its own version of the model by incorporating additional or alternative provisions (from the commentary or otherwise) that reflect the policies and preferences of that Holder. That version or the then-current version of the model available at [ConservationTools.org](http://ConservationTools.org) and [ConserveLand.org](http://ConserveLand.org) should be used as the starting point for each project. (Of course, it is important to update the Holder's version when changes are made to the model.)
- **Standards and Practices.** Any organization considering holding conservation easements should be aware of the guidelines contained in [Land Trust Standards and Practices](#) (referred to in this commentary as "S&P"). These voluntary standards and practices maintained by the Land Trust Alliance 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 at

the bottom of the signature page 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.
- **Identify Changes and Streamline Review.** A key advantage of the model is the streamlining of reviews. Widely used software enables users to quickly identify modifications in the terms set forth in the model. MS Word provides functions to track modifications that a user makes to the model or compare a modified document to the original document. Search under Word's Help menu for the terms "track changes" or "compare documents" for instructions specific to the particular version of the software.
- **Updates.** Check [ConservationTools.org](http://ConservationTools.org) periodically for updates to the model.

## Preliminary Matters

### 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 model is 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.

## Title of Document

- The 6th Edition adds the words “Grant of” before “Conservation Easement” to emphasize the difference between the granting document (called the “Grant”) and the real estate interest (the “Conservation Easement”) vested in Holder by the Grant. The library document “[What is a Conservation Easement?](#)” analyzes various undesirable consequences that can result when the granting document is mistaken as the conservation easement and, compounding that error, the conservation easement is described as an ongoing contract or agreement between the Owners and the Holder.
- The most accurate title is “Grant of Conservation Servitude” but that has not been adopted in the model because, while the term “conservation servitude” has been advanced by the panel of respected practitioners and scholars compiling the Third Restatement of Servitudes, it remains unfamiliar to the general public and many attorneys. The title “Grant of Conservation Servitude” properly suggests all of the following:
  - The document operates as an instrument conveying a real property interest to Holder. The document is not, itself, the interest that is granted.
  - The interest conveyed is a servitude: an interest that binds the land but does not give the grantee of the interest any rights of possession or ownership.
  - A variety of servitudes may be created by the document: covenants restricting the use of the land; affirmative rights to enter the land for inspection purposes; powers of enforcement to compel compliance with the restrictive covenants (sometimes referred to as a “negative easement”); and, if desired, other affirmative rights to enter the land for conservation, resource management, recreation or other purposes.
  - The law of servitudes, not the law applicable to contracts or trusts, should be applied to interpret the meaning and operation of the document.
- Some users prefer the title “Grant of Conservation Easement and Declaration of Covenants” which is acceptable.
- The title “Deed of Grant of Conservation Easement and Declaration of Covenants” is sometimes used; however, this title may result in confusion with deeds conveying fee simple title and, as it is unnecessary to describe the type of grant, one of the other options is preferable.
- The title “Land Conservation Agreement” is a possible alternative. Avoiding the word “easement” eliminates a potential misinterpretation. Those unfamiliar with conservation easements sometimes mistakenly believe that an easement in the nature of a right-of-way is being granted. On the other hand, substituting the word “agreement” is also problematic. The term suggests that a conservation easement is a contract rather than a conveyance and that mistake can result in a number of unintended consequences. For further information, see “[What is a Conservation Easement?](#)”.
- The addition of the word “Agricultural” before “Conservation Easement” may help to assure preferential tax treatment under certain Preferential Tax Programs. For example, the [Preserved](#)

[Farmland Tax Stabilization Act](#) provides for assessment at the land’s restricted farmland value for lands under agricultural conservation easements whether the agricultural conservation easement was donated or sold and whether the agricultural conservation easement is held by a municipality or a land trust. Land trusts may qualify for reimbursement of up to \$5,000 in costs for completing easements under the [Land Trust Reimbursement Grant Program](#) administered by the Pennsylvania Bureau of Farmland Protection; the Bureau has advised PALTA that while the document does not have to be titled “Agricultural Conservation Easement” to qualify for reimbursement, it is important that it be readily apparent in the document that agricultural lands are in fact being protected. See also the qualification of the model as an Agricultural Conservation Easement in the guide [Reducing Pennsylvania Inheritance Tax](#).

## OPTIONAL: OTHER CAPTIONS

- **Purpose.** A bold caption in the heading of the document that highlights particular features of the Grant lessens the chance that subsequent Owners will claim they were unaware of the features when they purchased the conserved land.
- **Not Legally Necessary.** Pennsylvania law provides that subsequent Owners have notice of every term and provision included in the Grant if it has been properly recorded in the land records of the county in which the conserved land is located. As a legal matter, it does not make any difference whether or not subsequent Owners were actually aware of a particular provision. Nevertheless, as a practical matter, a bold caption may serve to make a purchaser or a settlement agent better aware of particular features of the Grant.
- **Caption re: Notice of Transfer.** The most frequently violated clause in grants of conservation easement appears to be the requirement to notify Holder of the transfer of the Property. To place added emphasis on this requirement, a large, bold caption can be added to the heading of the document, for example, “Notice of Transfer Required: See Article II.”
- **Captions re: Notice of Transfer Fee or Stewardship Contribution.** A growing number of grants of conservation easement provide for transfer fees and other stewardship contributions. (For information on transfer fees and other stewardship contributions, see the guide [An Introduction to Stewardship Funding Arrangements](#) and the accompanying [Model Stewardship Funding Covenant](#).) Examples of succinct notices regarding these fees and contributions include the following:
  - Fee of \$\_\_\_\_\_ is due on transfer of Property.
  - Transfer Fee is waived/reduced by \_\_% upon compliance with Notice of Transfer requirements.
  - This Grant requires payment of Stewardship Contributions. See Stewardship Funding Covenant recorded immediately after this Grant.
- **Caption re: Public Access.** Some grants of conservation easement include a grant of an affirmative right of public access. If so, Holders (and Beneficiaries) may want to accentuate this feature with a caption such as the following:

- Grant of right of public access included. *See* Article V and Trail Easement Agreement recorded immediately after this Grant of Conservation Easement.

### Opening Recital

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

### Easement 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 “Easement 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 Easement Date must join in the Grant to be effective under Applicable Law and to qualify as a Qualified Conservation Contribution under §1.170A-14(b)(1) of the Regulations.
- 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 granting the Conservation Easement, a phrase identifying the type of entity and state in which the Person was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania limited partnership.
- The model has been constructed to use 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 Person signing the Grant, the phrase “the undersigned Owner or Owners” is used. In this limited case, some users may prefer substituting the term Grantor or Grantors for the phrase “undersigned Owner or Owners” where this phrase is used in the model. 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 persons signed the document.

### 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 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 land trust or government unit that signed the document and a subsequent transferee who becomes the “Holder” but was never the “Grantee” of the original document. The second reason is that the terms Owners and Holder are more distinctive and recognizable than Grantor and Grantee whose similarity in spelling can sometimes be confusing.
- Other parties to the document can be added here, if desired; however, the model has been constructed to name additional “Beneficiaries” (if any) in Article I. It is not necessary for purposes of giving public notice of the content of the document to name additional Beneficiaries in the opening paragraph.

## Amendment and Restatement

- A request by Owners for an Amendment can afford the Holder the opportunity to update an older grant of conservation easement by replacing it with an “Amended and Restated Grant of Conservation Easement” based upon the model. If that is desired, title the document “Amended and Restated Grant of Conservation Easement”; substitute “THIS AMENDED AND RESTATED GRANT OF CONSERVATION EASEMENT” for “THIS GRANT OF CONSERVATION EASEMENT” in the opening line; change the caption of §1.01 to “Original Grant; Property”; and add the following *before* the text of §1.01 provided in the model:

On \_\_\_\_\_, [insert name or names of original grantors of the Original Grant or, the “undersigned Owner or Owners” if the ownership has not changed] granted and conveyed to Holder a [insert name of document; for example “Deed of Grant of Conservation Easement and Declaration of Restrictive Covenants”] (the “Original Grant”) on the Property described in Exhibit “A” (the “Property”). The Original Grant was recorded on \_\_\_\_ in the Public Records in Book \_\_\_\_ Page \_\_\_\_\_. The undersigned Owner and Owners and Holder desire by the execution and recordation of this Grant to amend and restate the Original Grant in its entirety commencing as of the Easement Date set forth above. [Follow with text of existing §1.01 in the model.]

- **Reciting Reasoning.** Some users also recite in Amendments (including Amendments and Restatements) of grants of conservation easement the reasons why the Amendment conforms to the Holder’s policy on Amendments; for example, its determination that changes in limitations from the Original Grant

have no material adverse effect on natural and scenic resources identified in Conservation Objectives and, in fact, enhance the protections of significant resources; that amending and restating the Original Grant improves the clarity of restrictions and limitations; and/or that restating the Original Grant enables Holder to administer the Conservation Easement in accordance with its present standards (including, if applicable, Standards and Practices recommended by the Land Trust Alliance). If desired, this material can be added to the beginning of §1.03 captioned “Conservation Objectives”; for example:

Holder has determined that this restated Grant meets the criteria set forth in its policy for Amendment for the following reasons:

- (1) The restated Grant does not diminish in any material way the protections on natural and scenic resources set forth in the Original Grant.
  - (2) The restated Grant strengthens the Conservation Objectives of the Conservation Easement, the restrictive covenants that support the Conservation Objectives and the enforceability of the Grant as compared to the Original Grant.
  - (3) No “private benefit” (as defined in the Code) will accrue to any Person as a result of the amendment and restatement of the Original Grant.
- **Baseline Documentation and Amendment.** Frequently, an Amendment and Restatement of a Grant is a good opportunity to bring older baseline documentation up to present day standards. If such opportunity is taken, change §1.04 (captioned “Baseline Documentation”) to clarify that the defined term “Baseline Documentation” means the [insert name of baseline report as referred to in Original Grant] as of the date of the Original Grant as updated, supplemented and recertified by the undersigned Owner or Owners and Holder to be a true and accurate description of conditions within the Property as of the Easement Date.
  - [ConservationTools.org](http://ConservationTools.org). See the library topic “[Conservation Easement Amendment, Modification and Termination](#)”. (PALTA plans to develop a [guide on amending easements](#).)

## Article I. Background

- **Purpose.** The purposes of Article I “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. The material in the Background section should never be used to set forth enforceable restrictions on the Property.
- **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 then set out as simple declarative sentences rather than a series of “whereas” clauses conjoined with a series of “ands”.

### 1.01 Property

- **Purpose.** The purpose of this section is to identify the land that will be bound by the terms of the Grant.
- **Conservation Area.** If the undersigned Owner or Owners and the Holder intend the Conservation Easement to apply only to a portion of the Property, change the caption of §1.01 to “Property; Conservation Area”; substitute the following for the first two sentences in §1.01; and replace the defined term “Property” with the defined term “Conservation Area” throughout the remainder of the document following §1.01. Note that there are several instances in which automatically replacing all references does not work: §1.06(e) pertaining to “Property Right”, references to property damage in §4.03(b)(i) and §7.09, and references to “real property” in the definition of “Lot” in Article VIII.

The undersigned Owner or Owners are the sole owners in fee simple of the Property described below (the “Property”). A certain portion of the Property (the “Conservation Area”) is the subject of this Grant and is described in Exhibit “A”.

- **Description of Conservation Area.** The Pennsylvania Conservation and Preservation Easements Act imposes a higher standard on describing a “Conservation Area” than a “Property”. Section 4(b) of the Conservation Easements Act provides as follows:

[A] conservation easement may encompass an entire fee simple interest in a parcel of real property as described in the deed to the property, or any portion thereof or estate therein. Except when referencing an easement’s boundary using setback descriptions from existing deed boundaries or natural or artificial features, such as streams, rivers or railroad rights-of-way, a metes and bounds description of the portion of property subject to the easement shall be provided in the easement document.

- **S&P, Practice D** of Standard 9 of S&P requires that the land trust determine the boundaries of every protected property through legal descriptions, accurately marked boundary corners or, if appropriate, a survey.
- **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). Some counties charge additional recording fees to note the tax parcel number and/or uniform parcel identifier number on the document presented for recording if not furnished in the document itself or the legal description attached as Exhibit “A”.
- **Acreage:** Insert the number of acres comprising the Property.

## 1.02 Conservation Plan

- **Purpose.** The purpose of this section is to incorporate a separate document (the Conservation Plan) into the text of the Grant.
- **Protection Areas.** A Conservation Plan must be incorporated into the Grant unless the entirety of the Property is in the “Highest Protection Area” or the “Standard Protection Area”. *See* commentary to §1.03 for a detailed explanation of the three levels of restriction used in the model – the Highest Protection Area, the Standard Protection Area and the Minimal Protection Area.
- **Identification of Areas.** The boundaries of the relevant areas should be identified by permanent markers on the ground or, where appropriate, physical features such as a ridge line or stream bank. These physical reference points can be surveyed or plotted by GPS coordinates to create a permanent record of their locations, which will be maintained in the Baseline Documentation and depicted on the Conservation Plan.
  - Aerial photographs and topographical maps sometimes provide sufficient information from physical features to differentiate the Highest Protection Area from the Standard Protection Area. The test to determine whether a description of land based upon physical features is legally sufficient is whether a surveyor could take the information and plot the line on the ground. Of course, physical features, such as stream banks, can change; thus, a description based upon a moveable feature such as a stream should clarify whether the boundary moves with the stream or not. For a fuller description of riparian descriptions, *see* the [Model Grant of Conservation Easement for Riparian Buffer Protection and Commentary](#).
  - The Minimal Protection Area may require surveying if it is not feasible to establish it by reference to existing natural features or survey points. The Minimal Protection Area should be marked with permanent markers on the ground prior to the Easement Date or, if later, in any event prior to construction of Improvements.
- **Transferrable Lots.** Identify on the Conservation Plan as “transferrable” any Lots (whether existing or to be created) that Owners and Holder agree are separately transferable from the remainder of the Property. *See* §2.03(d) below. The model assumes that, except for the boundaries of lots specifically identified as “transferrable”, any other boundaries shown on the Conservation Plan or mentioned in the legal description of the Property are for information purposes only.
- **DCNR Requirements.** The Pennsylvania Department of Conservation and Natural Resources (the “DCNR”) has advised that, for conservation easements acquired through funding provided by the DCNR, the survey plat constituting the Conservation Plan must show the boundary of the Property (or Conservation Area, as the case may be) by metes and bounds and must provide a calculation of the acreage within the State Program Area. *See* §1.07(b) below for a further description of the State Program Area.
- **S&P.** Standard 9, Practice D of S&P provides that, if an easement contains restrictions that are specific to certain zones or areas within the property, the locations of these areas should be clearly described in the easement and supporting materials and can be identified in the field.
- **Exclusion of Minimal Protection Area.** The question often arises whether a Minimal Protection Area should be included or excluded from the property subjected to the Grant. The Regulations (§1.170A-14(v)) provide that “a deduction will not be allowed for the preservation of open space under §170(h)(4)(A)(iii), if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation. *See* 1.170A-14(e)(2) for rules relating to inconsistent use.” On the one hand, by excluding the area subject to future development, the undersigned Owner or Owners and the Holder avoid falling afoul of this limitation. On the other hand, by excluding the area, the Holder loses the right to exert some control over the future use and development of the Minimal Protection Area so as to protect other conservation values outside the Minimal Protection Area. The model is written to cover the entire Property. If the Minimal Protection Area is excluded from the Property, follow the directions under the commentary to §1.01 for describing a “Conservation Area” that is less than the entirety of the Property.
- **Establishment of Minimal Protection Area after Easement Date.** If one or more of the Minimal Protection Areas permitted under the Grant have not been established as of the Easement Date by reference to the Conservation Plan, add the following to §1.02:

Minimal Protection Area A has been established as of the Easement Date in its location shown on the Conservation Plan. Minimal Protection Area B may be established after the Easement Date [within the area identified as “Designation Area” on the Conservation Plan] under applicable provisions of Article II. *The phrase within the brackets is omitted if a “Designation Area” is not the selected alternative as discussed in Article II of this commentary.*

- **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 in the Background section so that there is no question as to the plan that was intended as the Conservation Plan. Example: “Attached as Exhibit “B” is a plan of the Property prepared by \_\_\_\_ dated \_\_\_\_ entitled \_\_\_\_ plan number \_\_\_\_” or “Attached as Exhibit “B” is a plan of the Property prepared by the Holder dated \_\_\_\_ based upon a survey prepared by \_\_\_\_ dated \_\_\_\_ entitled \_\_\_\_.” A full size copy of the plan will, of course, be kept on file as part of the Baseline Documentation.
- **Multiple Plans.** Some users attach a site plan as well as the Conservation Plan. If that is desired, it is advisable to incorporate them as Exhibits “B-1” and “B-2” so as to keep the identification of subsequent Exhibits uniform.
- **S&P.** Standard 8, Practice G of S&P provides that all land and easement projects should be individually planned so that the property’s important conservation values are identified and protected, the project furthers the land trust’s mission and goals, and the project reflects the capacity of the organization to meet future stewardship obligations.

### 1.03 Conservation Objectives

- **Purpose.** This section serves a number of important purposes. First and most obvious is that it sets out the intentions of the parties with respect to the conservation of the Property. Second, it is intended as an educational tool for future Owners. Third, it will serve as a guide for future Amendment: there may be perfectly acceptable alternative means to achieve the same ends. Fourth, if the Grant becomes the subject of litigation, it will help inform the court of the rationale underpinning particular covenants or higher standards applicable to particular areas. Last, this section (together with public policy statements) will help support (if otherwise applicable) an undersigned Owner’s claim of a charitable deduction for a Qualified Conservation Contribution.
- **S&P.** Standard 8, Practice F of S&P requires the land trust to document the condition of the important conservation values on the property and to reveal potential threats to those values.

#### (a) Resource Protection Objectives

- Subsection (a) explains the rationale for protection of various natural and scenic resources within the Property. If any one or more of the categories is not applicable to the Property, delete the inapplicable subsection.

#### (i) Water Resources

- **Elaborate.** Add a brief description of the water resources on or about the Property to be protected and enhanced by the Grant (and that are more fully described in the Baseline Documentation). Example:

The Property is traversed for approximately \_\_\_\_ feet by \_\_\_\_ Creek. The \_\_\_\_ Creek is classified by the Pennsylvania Department of Environmental Protection as a “high quality” stream. A high quality stream is recognized as having excellent water quality with a minimum of pollutants and contaminants and environmental features that require special water quality protection. The creek is a tributary of \_\_\_\_ River, a source of drinking water for the \_\_\_\_ area.

#### (ii) Forest, Woodland and Other Vegetative Resources

- **Elaborate.** Add a brief description of forest, woodland and vegetative resources on or about the Property to be protected and enhanced by the Grant (and that are more fully described in the Baseline Documentation). Example:

The Highest Protection Area is covered by a canopy of mixed hardwoods primarily of Native Species including the following: \_\_\_\_\_. Layered under the canopy are woody perennials such as \_\_\_\_\_ and herbaceous materials such as \_\_\_\_\_.

- **Specimen Trees.** If the Property contains any “Specimen Trees”, they should be identified on the Conservation Plan, and mentioned here. (Add to Article VIII of the Grant the definition for “Specimen Tree” set forth in Article VIII of the commentary.) Example:

Several trees have been identified on the Conservation Plan as Specimen Trees. The Specimen Trees consist of a \_\_\_\_ approximately \_\_\_\_ years old and a \_\_\_\_ rarely found in the vicinity of the Property.

- **Reductions in Greenhouse Gases.** The Conservation Objectives include the benefits to the environment of the capacity of trees and other vegetation to store carbon. Some Owners and Holders are exploring the possibilities of marketing carbon credits and offsets derived from that capacity.

#### (iii) Wildlife Resources

- **Elaborate.** Add a brief description of the wildlife habitat, migration corridors, biodiversity and Native Species found on or about the Property that are more fully described in the Baseline Documentation and/or the potential of the Property to provide habitat and corridors. Example:

The Highest Protection Area contains approximately \_\_\_\_ acres of unbroken, deep woods habitat within which the following Native Species have been observed: \_\_\_\_\_. The edge between the woodlands and field areas provides cover for species adapted to more sunlight such as \_\_\_\_\_. The following rare or endangered species have been observed on or

about the Property: \_\_\_\_\_. The Property is located within the annual migration corridor of the: \_\_\_\_\_.

(iv) Scenic Resources

- **Elaborate.** Add a brief description of scenic views more fully described in the Baseline Documentation. Example:

From the public right-of-way of \_\_\_\_ Road, the public is afforded scenic views of pastures and cropland interspersed by hedgerows and framed by a heavily forested ridge. Conservation of the Property under the terms of this Grant will extend the panorama of protected open space within the \_\_\_\_ Valley to approximately \_\_\_\_ acres.

(v) Sustainable Land Uses.

- **Elaborate.** Add a brief description of importance of Agricultural and Forestry uses to the community and/or summary of information contained in the Baseline Documentation re: suitability of soils for Sustainable Agriculture or suitability of timber for Sustainable Forestry. Examples:

The Conservation Easement and others applicable to properties in the vicinity of the Property are intended to preserve the availability of agricultural soils for Agricultural production.

Approximately \_\_\_\_% of the Standard Protection Area contains soils classified as \_\_\_\_ as defined by the U.S. Department of Agriculture. Timber within the Standard Protection Area consists predominantly of hardwoods such as \_\_\_\_\_.

- The National Resource Conservation Service of the United States Department of Agriculture has prepared detailed soil maps that can help to determine the capability class of the soils on a particular farm. Briefly, the classes are defined as follows:
  - Classes I-II are considered “prime farmland”, the best in the nation.
  - Class III generally is very productive and worthy of saving. (Watch for Class IIIe land, however. The “e” stands for erosion-prone and this kind of land requires special conservation practices to retain its fertility.)
  - Class IV usually is more steeply sloped and includes lands particularly well suited to orchards. Some land in this category is called “unique farmland”.
  - Class V is wetlands, which generally should not be cultivated.
- The source of this discussion of soil types is *The Conservation Easement Handbook*, page 27.
- Information on soils of statewide importance and local importance may be inserted here as well. For a variety of maps and information, see the NRCS Pennsylvania website in cooperation with the Penn State College of Agricultural Sciences at <http://mcde.cas.psu.edu/usdanrcs.htm>.

(vi) Compatible Land Use and Development

- **Elaborate.** Add brief description of the rationale underlying the size and location of Minimal Protection Areas. Examples:

The Minimal Protection Area has been located around Existing Improvements with additional space for expansion sited so as to minimize intrusion into scenic views from \_\_\_\_ Road.

Minimal Protection Area A has been established around existing Agricultural Improvements and Residential Improvements. Minimal Protection Area B has been established as a site for additional Agricultural Improvements and more intense Agricultural uses in a location that will confine barnyard runoff so as not to endanger water resources.

(b) Goals

- Subsection (b) differentiates the goals for the three levels of protection that may be applied to different portions of the Property. If any one or more of the levels will not be used for this Property, either delete the applicable subsection or leave the heading (for example, (i) Highest Protection Area) and substitute for the text under that heading the following: “None of the Property has been designated as Highest Protection Area on the Conservation Plan”.

(i) Highest Protection Area

- Designate as “Highest Protection Area” those portions of the Property that should remain forever wild or largely undisturbed. If Agricultural use (including grazing) or Forestry use for commercial timbering is contemplated, the area should be designated as “Standard Protection Area” not “Highest Protection Area”. There may or may not be any habitat worthy of being protected as Highest Protection Area within a Property.
- **Riparian Buffer.** Users often designate riparian buffers as Highest Protection Area to help protect water quality; a question often asked is: how much buffer is necessary or sufficient?
  - The USDA Forest Service provides one possible answer in its publication [\*Riparian Forest Buffers\*](#), which recommends a three zone riparian buffer area for agricultural lands within the Mid-Atlantic region: Zone 1, an area of undisturbed forest within 15 feet of the watercourse; Zone 2, an area of managed forest within the next 60 feet; and Zone 3, a runoff control zone within the outermost 20 feet. These zones extend outward from each side of the watercourse; thus, an aggregate of 190 feet plus the streambed is the USDA-recommended riparian buffer width. Applying the USDA zones to the protection areas in the model, Zone 1 would appropriately be designated Highest Protection Area; Zone 2 and Zone 3 could be included in the Standard Protection Area if activities are limited to grazing, haying and woodland management uses that do not

disturb soil; otherwise Highest Protection Area would be the better fit.

- Preservation of water quality is not the only reason to maintain riparian buffer; there are often important habitat values to be conserved. For that reason, users may want to include land within 50 and preferably 100 feet from the edge of a stream or other watercourse on the Property in the Highest Protection Area.

- **Steep Slopes.** Disturbance of steep slopes can cause erosion and landslides that harm water quality, degrade wildlife habitat, endanger lives, and damage property and infrastructure. Disturbance can also damage the aesthetic character of visually prominent hillsides. If the Property is vulnerable to these impacts and depending on the goals of the users, steeply sloped areas should be considered for the protections afforded by designation of Highest Protection Area. (See the guide [Steep Slope Ordinance](#) for background information.)

#### (ii) Standard Protection Area

- Designate as “Standard Protection Area” those portions of the Property that will be available for a variety of open-space uses (such as active recreational, Agricultural and Forestry uses) but will have limited Additional Improvements. As a general rule, the Standard Protection Area is the remainder of the Property that is not within either the Highest Protection Area or the Minimal Protection Area. Some Properties may not have any “Standard Protection Area” – for example, a Property covered entirely with old-growth forest but for a clearing designated as “Minimal Protection Area”.

#### (iii) Minimal Protection Area

- Designate as “Minimal Protection Area” those portions of the Property that will be available for a high degree of human activity including Construction of Additional Improvements. Minimal Protection Areas are sometimes referred to as “building areas”; but the model avoids using that term for several reasons. First, the intent is not to suggest that Construction ought to occur there but to indicate the limited nature of the Holder’s interest in that area. Second, an area could be designated as “Minimal Protection Area” to confine programmatic activities (such as a camp use) irrespective of plans for Construction of existing or future buildings. Users may, if they like, choose to substitute the term Building Area for Minimal Protection Area. Substituting the term “building envelope” is discouraged as that phrase is commonly used in zoning and land use law to mean the area of a lot within setback lines and that is definitely not the meaning intended in the model. Note that some public funding sources may not fund the minimal protections placed on the portion of a Property designated as “Minimal Protection Area” or “building area” for fear of creating a misperception that they are supporting efforts contrary to conservation.

## 1.04 Baseline Documentation

- **Purpose.** The purpose of this section is to incorporate the Baseline Documentation into the text of the Grant 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 Grant between Owners and the Holder dated \_\_\_\_.
- **Necessity.** If Owners want a contribution or bargain sale of a conservation easement to qualify as a charitable donation for federal tax purposes, the Internal Revenue Code and Regulations (see §1.170A-14(g)(5) of the Regulations) require the Owners to provide baseline documentation. However, *whether or not federal tax benefits are involved*, baseline documentation is critical to the soundness of the conservation project.
- **Preparation and Timing.** Common practice is for the Holder to prepare the Baseline Documentation; however, under the Regulations it is the obligation of donor (the undersigned Owner or Owners) to make available to donee (the Holder), prior to the time the donation is made, documentation sufficient to establish the condition of the Property as of the Easement Date.
- **Items Included.** According to the Regulations, the documentation *may* include: (A) USGS maps, (B) map of the area drawn to scale showing Existing Improvements, vegetation and identification of flora and fauna, land use history (including present uses and recent past disturbances) and distinct natural features such as large trees and aquatic areas; (C) aerial photograph at an appropriate scale taken as close as possible to the Easement Date; (D) on-site photographs taken at appropriate locations on the Property. The on-site photographs should be keyed to a location map of the Property and dated and signed by the photographer. To monitor restrictions on the Standard Protection Area properly, Baseline Documentation in support of a donation of a Conservation Easement based upon the model should include a computation (individually and in the aggregate) of Impervious Coverage of Existing Improvements within the Standard Protection Area as of the Easement Date.
- **S&P.** Standard 2, Practice D of S&P provides that land trusts should adopt “a written records policy that governs how organization and transaction records are created, collected, retained, stored and disposed.” Among the critical records covered by the policy are the baseline documentation reports for all conservation easements held by the land trust. Standard 9, Practice G provides that pursuant to its records policy, the land trust must keep originals of all irreplaceable documents essential to the defense of each transaction in one location and copies in a separate location. Original documents should be protected from daily use and secured from fire, floods and other damage. Baseline documentation should also include a report of the steps taken by the land trust to identify and document

whether there are hazardous or toxic materials on or near the property. Land trusts are required to take these steps, as appropriate for the project, to conform to Standard 9, Practice C of S&P. Standard 11 Practice B requires that for every easement, the land trust has a baseline documentation report that includes a baseline map prepared prior to closing and signed by the landowner at closing. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgment of interim data that for donations meets Regulations are signed by landowner at closing.

### 1.05 Structure of Grant

- **Purpose.** The purpose of this section is to give a reader unfamiliar with conservation easements in general or this model in particular, a sense of the organizing principles on which it is based.
- **Order of Articles.** It is important to note that it is the undersigned Owner (not the Holder) who establishes the restrictive covenants on the Property (Articles II, III and IV). Many forms start with the “grant of a conservation easement” and follow with the restrictive covenants but this is illogical. There’s nothing to grant until Owners establish the restrictive covenants. Under the model, Owners grant to the Holder the right to enforce the restrictive covenants under Article V.
- **Glossary.** Another key point in this section is to direct the reader to Article VIII for definitions of initially capitalized terms used in the Conservation Easement that are not defined in Article I. Some users may prefer labeling Article VIII “Other Defined Terms” rather than “Glossary” so as to reaffirm the legally binding nature of the definitions set forth in that Article.

### 1.06 Federal Tax Items

- **Purpose.** All of the requirements for qualification as a Qualified Conservation Contribution have been merged into this section. If there is no donation, the section can be simply deleted or (to be sure there is a meeting of the minds between Owners and the Holder on this issue) retain the caption and replace the text with the following: “The undersigned Owners and Holder confirm that the grant to the Holder of this Conservation Easement is not intended to be a Qualified Conservation Contribution under the Code and Regulations.”
- **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 retain §1.06 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 Qual-

ified Conservation Contribution even if no charitable deduction is being sought.

- **Mandatory.** All of the requirements *must* be satisfied in order to qualify for charitable deduction. Two other requirements are dealt with outside this section because they ought to apply to all conservation easements whether or not donated. These requirements are included in the model as §1.04 (Baseline Documentation) and §5.01(b) (requiring subordination of any liens affecting the Property as of the Easement Date).
- **S&P.** Standard 10 of S&P provides that the land trust must work diligently to see that every charitable gift of a Conservation Easement meets federal and state tax law requirements. However, Standard 10 Practice C. clarifies that the land trust should not make assurances as to whether a particular conservation easement gift will be deductible, what monetary value of the gift the Internal Revenue Service and/or state will accept, what the resulting tax benefits of the deduction will be, or whether the donor’s appraisal is accurate.

#### (a) Qualified Conservation Contribution

- **Bargain Sale.** In the case of a bargain-sale of the Conservation Easement, the donation has been made “in part.” The amount of the donation is the diminution in value (if any) of the Property resulting from the Conservation Easement as determined by an independent appraiser in accordance with applicable Regulations. In the case of a bargain-sale, the purchase price received by the undersigned Owner or Owners reduces dollar for dollar the amount of the donation.

#### (b) Public Benefit

- **Public Benefit Tests.** The conservation values described in the Conservation Objectives should describe facts and circumstances particular to the Property that will serve to substantiate qualification under one or more of the categories of public benefit set forth in §170(h) of the Code and the Regulations; for example, preservation of open space with scenic views visible from a public right-of-way, preservation of open space in furtherance of public policies; or preservation of a relatively natural habitat. For an in-depth discussion, see Small, Stephen J. *The Federal Tax Law of Conservation Easements*. If desired by the undersigned Owner or Owners and Holder, the first sentence of subsection (b) may be expanded to specifically identify the category or categories of public benefit under which the Conservation Easement is intended to qualify; for example by adding the following: “by (i) preserving a relatively natural environment as described in the Conservation Objectives; and (ii) preserving open space in furtherance of the public policies identified in Exhibit “\_\_”.
- **Model Approach.** Recitations of public policy statements have been omitted from Article I of the model because they tend to be lengthy and the approach taken by the model is to focus on resource protection goals and to keep the document as brief and easily readable as possible.



- **Summary as Exhibit.** Users are encouraged to attach a summary of public policy statements into the Grant as an Exhibit. Neither the Code nor the Regulations require inclusion of this material in the body of the Grant; however, public policy statements may be useful for future interpretation of the intentions of the parties.
- **Example.** Add to the end of the “Public Benefit” paragraph: “Attached as Exhibit “\_\_\_” is a summary of the public policy statements and other information supporting the public benefit of the terms of the Conservation Easement in addition to the conservation values described in the Conservation Objectives.”
- **Contribute to [ConservationTools.org](#).** Users of the model are encouraged to [contribute to the library](#) of documents maintained by PALTA recitals of pertinent portions of public policy statements adopted by various federal, state and local governmental bodies that support Conservation Objectives.
- **S&P.** Standard 8, Practice D of S&P provides that the land trust should evaluate and clearly document the public benefit of each land and easement transaction and how the benefits are consistent with the mission of the organization. Standard 8, Practice C provides that, for land and easement projects that may involve federal or state tax incentives, the land trust should determine that the project meets the applicable federal or state requirements, especially the conservation purposes test of the Code and Regulations. Both of these Standards should be read, however, in conjunction with Standard 9, Practice B which provides that the land trust should refrain from giving specific legal, financial and tax advice and should recommend in writing that each party to a land or easement transaction obtain independent legal advice.

#### (c) Mineral Interests

- **Disqualification.** If someone other than Owner has the right to extract or remove minerals by surface mining, the Conservation Easement will be disqualified for charitable contribution purposes unless the probability of extraction or removal is so remote as to be negligible.
- **Factors.** According to §1.170A-14(g)(4)ii(3) of the Regulations, the determination is a question of fact and is to be made on a case-by-case basis. Relevant factors to be considered in determining the probability include geological, geophysical or economic data showing the absence of mineral reserves on the Property or the lack of commercial feasibility at the time of the contribution of surface mining the mineral interest.

#### (d) Notice Required under Regulations

- **Purpose.** The purpose of this subsection is to avoid the possibility of non-compliance with §1.170A-14(g)(5)(ii) of the Regulations, which provides as follows: “In the case of any donation referred to in paragraph (g)(5)(i) of this section, the donor must agree to notify the donee, in writing before exercising any reserved right, *e.g.* the right to extract certain minerals which may have an adverse im-

pact on the conservation interests associated with the qualified real property interest.”

- **Review.** The approach taken by the model is to require Review (which includes both notice and approval) prior to activities with a potential for adverse impact similar to the example given in the Regulations. The Regulations only require notice (not review or approval) but apply to undefined set of activities that *may* adversely impact conservation interests. Accordingly, this provision for notice is included solely for the purpose of assuring strict compliance with the Regulations and not as a substitute for Review where required under Articles II, III and IV.

#### (e) Property Right

- **Application of “Proportionate Value” Rule.** “The rule works like this. Assume a property has a value of 100 before an easement and a value of 80 after an easement. The easement has a value of 20 and therefore is worth 20% of the value of the entire property.” (Small, Stephen J., *The Federal Tax Law of Conservation Easements, Fourth Edition*, 1997, p. 16-5)
- **Application to §6.04.** Under Article VI, the Holder is entitled to compensation in a broader range of circumstances than “extinguishment”. If the undersigned Owner or Owners received a federal tax benefit for the donation, the Proportionate Value is required to be paid to Holder rather than the measure of compensatory damages in Article VI so as to conform to the Regulations. It is good practice for the Holder to keep a record of the Proportionate Value established as of the Easement Date in the Baseline Documentation.
- **Use of Funds.** The Regulations require the Holder to use the funds received on account of Proportionate Value for “conservation purposes”. The term “conservation purposes” as defined in the Regulations is not identical to the term “Conservation Objectives” as defined in the model; accordingly, “conservation purposes” is used for purposes of §1.06(e). Conservation Objectives can include a wider range of intentions than conservation purposes as defined in the Code; for example, enhancement of water quality in a particular waterway might be a Conservation Objective but would not qualify as a conservation purpose unless in the context of preserving a relatively natural environment or preserving open space for scenic view or public policy purposes.

#### (f) Qualification under §2031(c) of the Code

- **Purpose.** The purpose of this subsection is to assure that, for purposes of qualifying the Conservation Easement for favorable estate tax treatment under §2031(c) of the Code, the prohibition on commercial recreational use applies to the entirety of the Property.

#### (g) Acknowledgment of Donation

- **Purpose.** 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 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.

- **ConservationTools.org.** See the guide [Pledges and Donation Agreements](#) and the [Model Preliminary Agreement for Conservation Easement Donation with Commentary](#) for a fuller discussion.
- **Recommendation.** PALTA recommends that Holders acknowledge the donation by separate letter. Acknowledgment within the Grant is intended to guard against inadvertent failure to provide acknowledgment by separate letter.
- For more information, see commentary to §1.08 captioned “Acknowledge Receipt”.

#### (h) No Representation of Tax Benefits

- **Purpose.** It is good policy to evidence in a writing signed by undersigned Owner or Owners that the Holder has not promised any particular tax treatment of the donation of the Conservation Easement. The recommendation of PALTA is to document that understanding as soon as possible in the letter or other writing signed at the inception of the conservation project. This subsection has been included in addition to, and not in substitution for, an earlier writing such as the [Model Preliminary Agreement for Conservation Easement Donation](#).

#### ADDITIONAL SUBSECTION, IF APPLICABLE:

- The following provision should be inserted if the undersigned Owner otherwise qualifies as a “qualified farmer or rancher” under the Pension Protection Act of 2006; i.e., a taxpayer who earns more than 50% of his or her gross income from the business of farming in the taxable year in which the conservation contribution is made. A qualified farmer or rancher may deduct the conservation easement value up to 100% of their Adjusted Gross Income for up to 15 years.
- (i) **Qualification under Pension Protection Act of 2006**  
To the extent required to qualify the undersigned Owner or Owners as a “qualified farmer” or “qualified rancher” under applicable provisions of the Pension Protection Act of 2006 and subject to applicable limitations set forth in this Grant, the Property must be used, or available for use, for agricultural or livestock production.

#### 1.07 Beneficiaries

- **Purpose:** The purpose is to identify (and limit) the universe of Persons having a “third-party right of enforcement” defined in the Conservation Easements Act as follows: “[a] right provided in a conservation easement to enforce any of its terms, granted to a governmental body,

charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.”

- **Rights.** The particular rights each Beneficiary has with respect to the Property are set forth in Article V.
- **No Beneficiary.** The model’s default provision states that: “As of the Easement Date, no Beneficiaries of this Conservation Easement have been identified by the undersigned Owner or Owners and Holder.” This statement clarifies that there is no Person who can claim that the Person was an intended Beneficiary. Should the parties want to name a Beneficiary in the future, all that is needed is a simple Amendment identifying a Beneficiary under Article I and specifying the rights of that Beneficiary under Article V.
- **Acceptance.** The Conservation Easement Act requires Beneficiaries to sign the Grant (or record a separate document of acceptance) to evidence their acceptance of the rights and duties. The text of the relevant provision of the Conservation Easements Act is as follows:

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

- Several points need to be made concerning the statutory provision. First, the acceptance does not have to be made a part of the initial Grant but can be recorded later if and when the need arises for the Beneficiary to enforce its rights under the Grant independent of the Holder. For example, the Beneficiary wants to replace the Holder for failure to exercise its rights vested by the Grant. Second, the specific rights set forth in the Grant 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 a Conservation Easement, then the land trust is contractually bound to seek County approval whether or not County has recorded an acceptance.
- **Identifying Beneficiaries.** If certain Persons are intended to be Beneficiaries, delete the default “no Beneficiaries” language and add the following opening clause to 1.07, then identify in subsections each Beneficiary.

Each of the Persons identified below in this section is a Beneficiary of the Conservation Easement vested in Holder by this Grant. The specific rights vested in each Beneficiary are described in Article V.

#### (a) Land Trust Beneficiary

\_\_\_\_\_, a Qualified Organization (the “Land Trust Beneficiary”) is a Beneficiary of the

Conservation Easement vested in Holder by this Grant.

- **Identification.** Insert the full legal name of the land trust identified as the Land Trust Beneficiary (if any).
- **Rights.** Depending upon the number of rights granted under Article V, the identified Qualified Organization may simply be a “back-up grantee” or may be given all four of the rights listed in §5.01, which essentially constitutes the Land Trust Beneficiary as a “co-holder” of the Conservation Easement.
- **S&P.** Standard 8, Practice I of S&P provides that a land trust should evaluate whether it has the skills and resources to protect the important conservation values of the property effectively, or whether it should refer the project to, or engage in partnership with, another qualified conservation organization. One of the reasons that the model incorporates the concept of “Land Trust Beneficiary” is to facilitate partnerships among land trusts, watershed associations and other qualified organizations for these purposes.

**(b) State Beneficiary**

- **Pennsylvania Department of Conservation and Natural Resources.** If DCNR funds have been used to acquire the Conservation Easement in whole or in part, insert the following provision as §1.07(b) (or §1.07(a) if there is no Land Trust Beneficiary):

The Pennsylvania Department of Conservation and Natural Resources (the “Department”) has provided assistance for the acquisition of this Conservation Easement as it applies to the State Program Area (described below).

- The State Program Area is defined as follows: [insert description such as: “the entirety of the Property”; “the entirety of the Conservation Area”; “the entirety of the Highest Protection Area”; or “that portion of the Property identified as “State Program Area” on the Conservation Plan”].
  - The rights and powers vested in the Department as Beneficiary of this Conservation Easement are set forth in Article V and may be enforced by the Department and its successors, in perpetuity.
- **Other State Programs.** If another Pennsylvania state program is funding the acquisition and the relevant department desires to be named a Beneficiary, the following provision could be used (insert name of Department and name of funding program):

The Conservation Easement vested in Holder by this Grant has been purchased in whole or in part by funds provided to Holder by the Commonwealth of Pennsylvania acting through the Department of \_\_\_\_ (“Department”) under the authority granted by the \_\_\_\_ Act (such statute, with the regulations and program requirements promulgated under the authority of such statute are referred to in this Grant, collectively, as the “State Program”). The portions

of the Property as to which state funds have been used to purchase this Conservation Easement are referred to, collectively, as the “State Program Area”.

- **State Program.** The term “State Program” has been defined expansively to incorporate all of the policies, procedures and guidelines promulgated under the authority of the identified statute. Note that the definition is not fixed in time to those programmatic requirements enacted as of the Easement Date.
- **Multiple Departments.** The model has been structured so as to be adaptable to a number of funding programs. Ideally, a single conservation easement could be used as a funding mechanism for several programs: for example, the Department of Conservation and Natural Resources could fund acquisition of the conservation easement for the acreage included in the Highest Protection Area and the Department of Agriculture could fund acquisition of the conservation easement for the acreage included in the Standard Protection Area. Each Department would be a Beneficiary entitled to the rights specified for that Beneficiary under Article V.
- **Multiple Programs.** If more than one State agency or department is a Beneficiary, the umbrella term “State Program” can be replaced with more specific terms, for example, the “DCNR Program” or the “PDA Program”.

**(c) County as Beneficiary**

- **County Program.** Set forth below is a provision that can be added to §1.07 if County funds have been used to acquire the Conservation Easement in whole or in part.

The Conservation Easement vested in Holder by this Grant has been purchased in whole or in part by funds provided to Holder by the County of \_\_\_\_ (the “County”) acting under the authority granted by \_\_\_\_ (such ordinance, with the regulations and program requirements promulgated under the authority of such ordinance are referred to in this Grant, collectively, as the “County Program”). The portions of the Property as to which County funds have been used to purchase this Grant are referred to, collectively, as the “County Program Area”.

- **County Contribution.** Some counties require a recitation of the funding contributed by County towards the acquisition and want the Public Records to be clear that County funds have not gone towards acquisition of the Conservation Easement with respect to acreage included in any Minimal Protection Area. The following provision may be added for those purposes:

The purchase price or portion of the purchase price funded by County for the Conservation Easement vested in Holder by this Grant is the sum of \$ \_\_\_\_ (the “County Contribution”). The County Program Area does not include any acreage within any Minimal Protection Area. Accordingly, the County Contribution does not include any funding



for acquisition of the Conservation Easement with respect to the Minimal Protection Area.

- **County Supplement.** Some County Programs require the incorporation of certain terms or information into each County-funded Conservation Easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all County-funded conservation easements. If an exhibit is to be incorporated, add the following to the model provision and add the County Supplement to the list of Exhibits incorporated into the Grant under §7.11.

Attached as Exhibit “\_\_\_” (the “County Supplement”) is a rider to this Grant containing certain provisions that must be incorporated into this Grant as a condition of funding the County Contribution under the County Program. The terms and provisions of the County Supplement supersede, to the extent of any inconsistency, the provisions of this Grant as applied to the County Program Area.

#### (d) Township Beneficiary

- **Township Program.** Set forth below is a provision that can be added to §1.07 if Township funds have been used to acquire the Conservation Easement in whole or in part.

The Conservation Easement vested in Holder by this Grant has been purchased in whole or in part by funds provided to Easement Holder by the Township of \_\_\_ (the “Township”) acting under the authority granted by \_\_\_\_\_ (such ordinance, with the regulations and program requirements promulgated under the authority of such ordinance are referred to in this Grant, collectively, as the “Township Program”). The portions of the Property as to which Township Funds have been used to purchase this Conservation Easement are referred to, collectively, as the “Township Program Area”.

- **Township Contribution.** Some Townships require a recitation of the funding contributed by Township towards the acquisition and want the public record to be clear that Township funds have not gone towards acquisition of the Conservation Easement with respect to acreage included in any Minimal Protection Area. The following provision may be added for those purposes:

The purchase price or portion of the purchase price funded by Township for this Conservation Easement is the sum of \$ \_\_\_\_\_ (the “Township Contribution”). The Township Program Area does not include any acreage within any Minimal Protection Area. Accordingly, the Township Contribution does not include any funding for acquisition of the Conservation Easement with respect to the Minimal Protection Area.

- **Township Supplement.** Some Township Programs require the incorporation of certain terms or information into each Township-funded Conservation Easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all Township-funded

conservation easements. If an exhibit is to be incorporated, add the following to the model provision and add the Township Supplement to the list of Exhibits incorporated into the Grant under §7.11.

Attached as Exhibit “\_\_\_” (the “Township Supplement”) is a rider to this Grant containing certain provisions that must be incorporated into this Grant as a condition of funding the Township Contribution under the Township Program. The terms and provisions of the Township Supplement supersede, to the extent of any inconsistency, the provisions of this Grant as applied to the Township Program Area.

- **Township as “Co-holder”.** Whether or not Township contributes funding towards acquisition of the Conservation Easement, it may be desirable to appoint Township as a Beneficiary for purposes of qualifying the Township as “co-holder” of the Conservation Easement under certain Preferential Tax Programs. Act 153 of 1995 authorized school districts to exempt municipally-eased properties from real estate millage increases. The Act also requires County assessors to take into consideration the diminution in fair market value of a conservation easement held by a municipality. If the Township desires to be named as a Beneficiary for those purposes, add the following provision to §1.07 and add to Article VIII of the Grant the definition for “Preferential Tax Programs” provided in Article VIII of this commentary.

As a Beneficiary of this Conservation Easement, the Township is agreed to be a co-holder of this Conservation Easement for purposes of qualifying this Conservation Easement under applicable Preferential Tax Programs.

- **Implementing a Township Program.** For additional information on Township Programs, *see* “Implementing a Municipal Open Space Program” a publication of Heritage Conservancy available at [ConservationTools.org](http://ConservationTools.org).

#### 1.08 Consideration

- **Purpose.** The purpose of this section is to set forth the amount of consideration (if any) being paid for the Grant. 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.
- **Acknowledge Receipt.** In [Randall A. Schrimsher et ux. v. Commissioner, T.C. Memo. 2011-71; No. 945-09 \(28 Mar 2011\)](#), the Tax Court disallowed a charitable deduction of a facade easement because the letter acknowledging the donation failed to recite whether any consideration was received for the donation. The easement donors and recipient both testified that no consideration was received; however, the court found the letter was defective as an acknowledgement because the easement document recited receipt of \$10 and other good and valuable consideration.

Until further guidance, users of the model should select one of the following alternatives: (a) State in the acknowledgement letter that "no goods and services were received on account of this donation other than \$1.00 nominal consideration stated in the Grant"; or (b) change section 1.08 to delete "receipt of \$1.00 in consideration of the grant" and substitute "that no consideration was received for the grant."

- While not strictly necessary because the material is covered in Article VII and the closing recitation of the model, the following recitation can be added to §1.08 to be sure that there is no question that what follows is, and is intended to be, the legally binding agreement of the parties:

The undersigned Owner or Owners and Holder intend to be legally bound by this Grant and agree to its terms.

- For more information, *see* commentary to §1.06(g). Also, *see* "Consideration and Substitutes for Consideration" in the guide [Pledges and Donation Agreements](#).

#### ADDITIONAL SECTION, IF APPLICABLE:

### 1.09 Stewardship Funding Covenant

- **Purpose.** To incorporate into the Grant reference to the Stewardship Funding Covenant recorded immediately after the Grant. For a variety of reasons set forth in the guide [An Introduction to Stewardship Funding Arrangements](#), a separate document that not only evidences, but also secures, the obligation to fund stewardship periodically, or upon triggering events such as transfer, is preferred to inserting terms of commitment to future funding in the Grant. The [Model Stewardship Funding Covenant and Commentary](#) is available at [ConservationTools.org](#). Reference can be inserted into the Grant as follows.

The undersigned Owner or Owners have covenanted to fund stewardship of the Conservation Easement vested in Holder by this Grant after the Easement Date under the terms set forth in the Stewardship Funding Covenant recorded immediately after this Grant.

- **Alternative.** Section 2.01 of the commentary provides options for including future funding commitments in the Grant.

#### ADDITIONAL SECTION, IF APPLICABLE:

### 1.10 Administrative Agent

- **County or Township as Holder; Land Trust as Administrative Agent.** The approach taken by the model is that only one Person should be identified as Holder. Any number of governmental and non-governmental Qualified Organizations can be named as Beneficiaries but, ultimately, when a decision has to be made, the Holder must make the decision and take responsibility for the reasonableness of its decision. If a County or Township is not satisfied with a right of prior consultation and instead requires a veto power on Review, then the County or Township (rather

than the land trust) should be named as the Holder and, in that case, the land trust might be named as an Administrative Agent under the following provision which would be added as §1.08.

The Holder has appointed \_\_\_\_\_, a Qualified Organization (the "Administrative Agent") as the agent of Holder for purposes of administration of this Conservation Easement as more fully described in Article V.

- *See* §5.08 of the commentary to view additional provision necessary to implement the Administrative Agent.

#### ADDITIONAL SECTION, IF APPLICABLE:

### 1.11 Owners' Representations

- **Purpose.** To assure Holder that the undersigned Owner or Owners have not concealed or failed to disclose any pertinent information on which Holder is relying when Holder accepts the Conservation Easement.
- **Timing.** The optimal time to obtain representations about the Property is at the beginning of the relationship before Holder invests time and resources in the project, not at the signing of the Grant.
- **ConservationTools.org.** The [Model Preliminary Agreement for Conservation Easement Donation](#) includes, in the paragraph captioned "Reliance", a list of factual statements that the potential donor verifies are accurate or, if they are not, the donors are given the opportunity to disclose anything known to them that must be disclosed in order to make the statement correct.
- **Reaffirmation.** If the Holder has previously obtained representations from the undersigned Owner or Owners, it may want to reaffirm that the information has not changed as of the Easement Date. That assurance may be furnished by a written certificate signed by the undersigned Owner or Owners and delivered to Holder at the closing or it can be inserted into the Grant as follows:

The undersigned Owner or Owners confirm that the information they or their agents and representatives have furnished to Holder in connection with the preparation of this Grant, including the representations set forth in the [Donation Memorandum] dated \_\_\_\_, is complete and accurate as of the Easement Date.

- **Representations.** Some Holders prefer to include representations in the text of the Grant, which is also acceptable. The list set forth in the Donation Memorandum, or other representations about the Property and its compliance with Applicable Laws, including environmental laws, can be adapted for this purpose. To avoid duplication, note that §1.06 of the model (captioned "Federal Tax Benefits") includes representations pertaining to that subject matter and §5.01(b) includes a representation about the absence of Liens on the Property. It should also be noted that the indemnity furnished in §7.08 includes any Losses or Litigation Expenses suffered by Holder as a result of a

violation of Applicable Laws (including environmental laws) pertaining to the Property.

#### ADDITIONAL SECTION, IF APPLICABLE:

### 1.12 Owners' Control

Owners reserve all rights and responsibilities pertaining to their ownership of the Property except for the rights specifically granted to Holder (and Beneficiaries, if applicable) in this Grant.

- **Purpose.** Applicable rules of law provide that, except for rights specifically granted, all other rights pertaining to the ownership of land remain vested in the Owners. This provision is intended to provide comfort to Owners that they are not relinquishing any control over their Property except as specifically set forth in the Grant.

## Article II. Transfer; Subdivision

### 2.01 Transfer

#### (a) Notice Required

- **Purpose.** The purpose of this section is to regulate transfer of ownership of the Property or Lots within the Property. Holder must be kept informed of the names and address for notices of the then-current Owners so as to be in a position to administer the Conservation Easement properly and, if necessary, exercise the rights granted to Holder by the Grant.
- **S&P.** Standard 11 Practice D. of S&P requires the land trust to establish and implement systems to track changes in land ownership.

#### (b) Prior to Transfer

- **Purpose.** To permit Holder to contact participants in the transaction -- brokers, attorneys, title companies, prospective purchasers -- to be sure they are aware of the Grant, including requirements applicable to transfer and, perhaps, existing uncured violations. This avoids allegations that, by doing so, Holder interfered with Owners' sales transaction.
- **Educational Opportunity.** An important function of the pre-transfer notice is to give Holder the opportunity to contact the prospective post-transfer Owners to explain the terms and operation of the Grant and answer any questions they may have.
- **Pre-transfer Inspection.** All of the participants in the transfer benefit when the written report of Holder's recent inspection is available prior to the transfer:
  - Purchasers typically inspect the physical condition of real property and its compliance with Applicable Laws before committing to acquiring it. They want to know that they will not be taking on a pre-existing liability or defect. Requesting a pre-transfer inspection by Holder serves the same purpose: to assure the prospective Owners, and their

mortgage lenders, that no violations of the Grant have been reported and remain uncured.

- The pre-transfer Owners also benefit by requesting a pre-transfer inspection because, if the report is "clean" or, if not, reported violations are cured prior to transfer, they are in a position to refute allegations of violations commenced or continuing during their period of ownership. The post-transfer Owners must cure but they may want to compel the pre-transfer Owners to bear some or all of the cost to cure if the violation predated their ownership.
- Holder has the opportunity to see that the Property is brought into compliance with the Grant prior to transfer, or satisfactory arrangements for a post-transfer cure are made, and that the pre-transfer Owners satisfy any outstanding financial obligations to Holder on or before the transfer date.

#### (c) Ending Continuing Liability

- **Purpose.** To furnish an incentive to Owners to comply with the notice and other provisions of this section.
- **Joint and Several.** If Holder is not furnished with notice of transfer and an opportunity to inspect, then all of the Owners, both pre-transfer and post-transfer, are "on the hook" for correction of a violation or other failure to comply, whether such non-compliance commenced before or after the date of transfer. The rationale is that, until such time as Holder has been given notice and the opportunity to inspect, Holder has the right to look to either or both the pre-transfer Owners (as shown on Holder's records) and the post-transfer Owners (as shown on the Public Records) for correction of violations. Once that procedure is satisfied, the pre-transfer Owners no longer bear the risk of liability for a violation caused by the post-transfer Owners. This does not mean that the pre-transfer Owners are relieved from liability to Holder for violations occurring or continuing during their period of ownership. If that is desired, and the Holder agrees, the following can be added to the end of §2.01(c):

If Holder's inspection report verifies that the Property was at that the time of transfer, or applicable date of later inspection, in compliance with this Grant, the pre-transfer Owners are thereafter relieved of liability for violations of this Grant discovered after issuance of such inspection report.

- **Other Remedies.** If proper notice of transfer has not been given, should the Holder seek court intervention to delay or, perhaps, even set aside a non-compliant transfer? The risk Holder takes in pursuing that course of action is the high probability that both the pre-transfer and post-transfer Owners will assert a claim against Holder for the losses and litigation expenses incurred as a result of Holder's unwarranted intrusion into their private contractual arrangement. In the likely event that the court finds that Holder did not meet its high standard of urgent necessity to intervene in the transfer, then Holder has not only lost

but has exposed itself to the possibility of a substantial judgment in favor of Owners.

#### ADDITIONAL SECTION, IF APPLICABLE:

##### (d) Stewardship Funding Covenant

- **Purpose.** To evidence the obligation of Owners to fund stewardship over time. For the reasons described in the guide [Legal Considerations for Stewardship Funding Arrangements](#), Holder can face challenges collecting outstanding obligations from subsequent Owners following transfer. The following section is intended to assist Holder in doing so.
- **Alternative.** Section 1.09 of the commentary provides for the *preferred alternative* of addressing future funding obligations in a separate but referenced Stewardship Funding Covenant.
- **ConservationTools.org.** For an explanation of the issues that may arise when Holder seeks to collect financial obligations from the original Owners or Owners who did not, themselves, make the promise to pay or agree to honor the promise to pay, *see* the guide [Legal Considerations for Stewardship Funding Arrangements](#).
- **Terms.** The terms might implement any one or more of the funding strategies discussed in the guide [Introduction to Stewardship Funding Arrangements](#) and the [Model Stewardship Funding Covenant and Commentary](#); for example:

Upon each Transfer, the Owners prior to Transfer must pay the sum of \$\_\_\_\_\_ (the “Conveyance Contribution”) to Holder not later than the date of Transfer. The Conveyance Contribution is intended to compensate Holder for its reasonable costs and expenses typically incurred in making itself available for consultations with prospective purchasers and other Persons pertaining to a Transfer, performing a pre-transfer inspection of the Property, and issuing its report of the results of such inspection. The Conveyance Contribution is to be adjusted as needed to maintain equivalent value with the U.S. Dollar as of the Easement Date. “Transfer” is defined as follows: a) the direct or indirect sale, agreement to sell, assignment 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.

For consistency, add “Conveyance Contribution” and “Transfer” to Article VIII, each with the following cross-reference: “The term is defined in Article II”.

#### ADDITIONAL SECTION, IF APPLICABLE:

##### (e) Financial Obligations

Owners authorize the attorney or other Person handling closing of a transfer of ownership of the Property or any Lot to withhold, from funds otherwise payable to Owners as a result of the transfer, the sums (if any) required to satisfy obligations to Holder then outstanding or which become due upon transfer as set forth above in this section or otherwise itemized by Holder in its statement rendered to Owners.

- **Purpose.** To increase the likelihood of payment to Holder, particularly if no Stewardship Funding Covenant secures these obligations.
- **Costs and expenses.** Holder is entitled to recoup its reasonable costs and expenses incurred in connection with the transfer including the pre-transfer inspection under the terms of §5.05.

#### ADDITIONAL SECTION, IF APPLICABLE:

##### (f) Failure to Timely Inspect

- **Owners’ Concern.** Some Owners want Holder to be responsible for prompt compliance with its duty to inspect upon receipt of Owners’ notice of intended transfer. The following provision can be added to §2.01 to address those concerns:

It is the responsibility of Holder to inspect the Property and report to Owners the results of its inspection within thirty (30) days following receipt of notice from Owners of the intended transfer. If Holder fails to do so within the 30-day period, Owners are deemed to be in compliance as of the date of their notice to Holder.

## 2.02 Prohibitions

- **Purpose.** To regulate the transfer of Lots independent of other Lots and to regulate the number, size and configuration of Lots within the Property for a number of reasons, both administrative and in furtherance of Conservation Objectives, including the following:
  - To avoid the enforcement problems and stewardship costs arising from a multiplicity of owners.
  - To avoid fragmentation of habitat.
  - To maintain sufficient acreage in single ownership to support Sustainable Agriculture and Sustainable Forestry uses.
  - To maintain uniformity in appearance for aesthetic reasons.
  - To control allocation of rights and limitations among Lots.
- **Broad Prohibition.** The broad prohibition (including the definition of Subdivision in Article VIII) is intended to cover any kind of separation of ownership or control of the Property including subsurface separations such as a lease granting the right to install Extraction Improvements.



- **Transfer by Lease.** Transfer of possession and control of land by lease is included as a Subdivision. This is consistent with the definition of Subdivision in the Pennsylvania Municipalities Planning Code and many local ordinances. Separation of possession and control, just like separation of ownership, can result in the potential problems listed above that the provisions of Article II are intended to prevent. The purpose of Review is to allow Holder the opportunity to confirm that the activities and uses permitted under the Lease are no broader than those permitted under the Grant and that Owners retain all requisite power and authority, under the lease arrangements, to require tenant to conform strictly to the terms of the Grant.
- **Transfer by Condominium Unit.** Some Owners attempt to circumvent restrictions on Subdivision by creating condominium units. The definition of Subdivision controls these transfers as well.

### 2.03 Permitted Changes

- **Purpose.** The list in §2.03 should be the universe of permitted exceptions from the general prohibition in §2.02.
- (a) **Lots within Property**
- **Merger.** The model permits Owners to reduce the number of Lots within the Property without any Review.
  - **Reconfiguration.** Changes to boundaries of Lots are permitted subject to Review (as long as the boundary change does not affect the legal description of the Property or Conservation Area that is the subject of the Grant). The rationale for this provision is that Holder should have the opportunity to review changes to the configuration of Lots shown on the Conservation Plan or described in the Base-line Documentation.
  - **Change in Property Description.** Any adjustment affecting the boundary of the Property (even if no additional Lot is created) requires an Amendment to substitute the revised description as Exhibit “A”. Examples of the kinds of occurrences that might justify an Amendment to reflect a boundary line adjustment are: to settle a boundary dispute; to correct a surveying error; or to correct a title or zoning problem (remove an encroachment) arising from the fact that an Improvement is located partly within and partly outside the Property or is located within the minimum distance (setback) required under Applicable Law. Among the facts that Holder would consider in its consideration of Amendment is whether the problem arose because of some fault on the part of Owners or not.
    - **Clarification in 6<sup>th</sup> Edition.** Because an Amendment is always needed to effectuate a change in the boundary of the area subject to the Conservation Easement, even if a minor adjustment, the sixth edition of the model deletes a provision found in previous editions that permitted, subject to Review, minor boundary adjustments that cause no material decrease in the Property’s acreage. Since an Amendment would have been necessary, even with

this provision, it was found less confusing to simply delete the provision.

#### (b) Transfer to Qualified Organization

- **Review.** The model permits transfer to a Qualified Organization subject to Review by Holder. Some users may want to delete “subject to Review”.
- **Conservation Purpose.** The conservation purpose of the transfer is included so that the transfer to the Qualified Organization cannot be used as an intermediate step to circumvent Subdivision controls. The Holder may want to require, as a condition of approval after Review, a mechanism to assure that the conservation purpose of the transfer will be observed. For examples of these mechanisms, see the [ConservationTools.org](http://ConservationTools.org) guide [Reversionary Interests](#).

#### (c) Transfer of Rights of Possession or Use

- **Purpose.** This provision permits the transfer of care, custody and control (but not ownership) of portions of the Property for permitted activities and uses. Examples are transfers of possession of a portion of the Property (field or forest area, for example) by lease and transfers of rights to use a portion of the Property (an access or utility right-of-way, for example). These are permitted subject to Review to confirm that the rights granted are consistent with the Conservation Easement. Greater latitude is provided for division of the Property by lease (but not for transfer of ownership) because Holder’s administrative burden is not increased to the same extent as when Property is divided into multiple parcels with multiple Owners.
- **Interior Space.** Leases of interior space within Improvements are exempted from prior Review; however, this does not mean that tenants do not have to comply with applicable provisions of the Grant. It only reduces Holder’s administrative burden of Review of items with a low probability of adverse consequences to Conservation Objectives.
- **Clarification.** The 6<sup>th</sup> edition clarifies the intent of previous editions -- that transfers of these rights are subject to Review whether in the nature of a lease, easement or other category of real property right or interest.
- **Added Emphasis.** The 6<sup>th</sup> edition adds emphasis that leases of any portion of the Property, whether or not affecting the surface of the land, constitute Subdivisions regulated under Article II.

#### (d) Transfer of Lots Shown on Conservation Plan

- **Purpose.** The following can be added as subsection (d) to §2.03 so as to permit the transfer of Lots specifically identified on the Conservation Plan as transferrable. These may be Lots existing prior to the Easement Date or agreed upon locations of Lots that Owners have reserved the right to create after the Easement Date.

The Lots identified as “Transferrable Lot A” and “Transferrable Lot B” on the Conservation Plan may be transferred and, if not legally separated as of the Easement Date, Subdivision of such Lots is permitted in accordance with the Conservation

Plan. Prior to the first transfer of each Lot, the requirements of §2.04 must be met whether or not following a Subdivision.

**(e) Transfer of Lots not Shown on Conservation Plan**

- **Purpose.** The following provision can be added as subsection (e) to §2.03 to allow, subject to Review, Subdivision and transfer of one or more Lots, the location of which has not been established as of the Easement Date. Request for creation of a Lot often is associated with Owners' interest in separating ownership of Minimal Protection Areas permitted within the Property. Also add to Article VIII of the Grant the definition of "Preferential Tax Programs" provided in Article VIII of this commentary.

Subject to Review, Subdivision to create an additional Lot containing Minimal Protection Area B, limited in size to the minimum size required to conform to Applicable Law and, if applicable, Preferential Tax Programs. The additional Lot containing Minimal Protection Area B must avoid including Highest Protection Area to the extent reasonably feasible. Transfer of the additional Lot is permitted subject to the requirements of §2.04.

- **Rationale:**

- **Zoning Compliance.** One reason to permit separation of Minimal Protection Areas is that many zoning ordinances prohibit more than one dwelling per Lot.
- **Other Considerations.** Frequently a dwelling needs to be on a separate lot so as to accommodate separate mortgage financing or even to lease it with surrounding land under Applicable Law.
- **Planning.** The provision is structured so that substantially all of the acreage of the Property remains attached to "Minimal Protection Area A". This is intended to further Conservation Objectives, in particular, those associated with maintaining viable and Sustainable Agricultural uses within the Property.

**(f) Transfer to Qualified Personal Residence Trust**

- **Purpose.** The following provision can be added to §2.03 so as to permit transfer of that portion of a Property containing the personal residence of Owners to a qualified personal residence trust for estate and tax planning purposes.

Subject to Review, transfer of a portion of the Property to a "qualified personal residence trust" as defined in the Code if and for so long as (i) the Owners transferring to the trust maintain ownership of the remainder of the Property and maintain operational control of the entirety of the Property; and (ii) upon the expiration of the trust the entirety of the Property is unified into a single parcel.

## 2.04 Requirements

- **Purpose.** To provide Holder with the information necessary to administer the terms of the Grant and exercise its rights as applied to multiple Lots.
- (a) Establishment of Lots; Allocations.**
  - Some Holders may want to exercise rights of Review to determine whether allocations determined by Owners are reasonable.
  - The recorded document establishing the allocations among the Lots could be the deed of a Lot (grantor grants the Lot together with the right to use up to \_\_\_\_ feet of Impervious Coverage allowed under the Conservation Easement); a declaration by Owners establishing the allocation among various Lots; or, possibly, notations on the plan of Subdivision.
- (b) Amendment**
  - Most municipalities that have adopted subdivision ordinances require the plan of Subdivision approved under Applicable Law to be recorded and, if that is so, and the Subdivision conforms to the terms of the Grant, an Amendment may not be necessary. Subdivisions that vary from the requirements of the Grant should be documented by Amendment.

### ADDITIONAL SECTION, IF APPLICABLE:

## 2.05 Establishment of Minimal Protection Areas

- Article II may be expanded to incorporate "Establishment of Minimal Protection Areas" in cases where, as of the Easement Date, not all of the Minimal Protection Areas have been definitively established.
- It is not good practice (and risks falling afoul of the Regulations) to leave Minimal Protection Areas to be established in the future totally "floating". Article II should contain some rules to describe where additional Minimal Protection Areas may be established or must not be established.
- A useful tool is to establish a "Designation Area" on the Conservation Plan within which one or more additional Minimal Protection Areas can be established by Owners.
- Another way to limit the discretion of Owners in establishing additional Minimal Protection Areas is to rule out areas which cannot be converted to more intensive use or which would detract from maintenance of scenic views described in the Easement Objectives.
- In either case, a procedure must be established to incorporate the additional Minimal Protection Area(s) into the Grant recorded in the Public Records.
- A sample provision using each alternative is provided below:

**(a) Limitations on Minimal Protection Areas**

In addition to Minimal Protection Area A shown on the Conservation Plan, two (2) additional Minimal Protection Areas (Minimal Protection Area B and Minimal Protection Area C) may be established af-

ter the Easement Date in compliance with this Section.

- (i) Minimal Protection Area B is limited to not more than two (2) acres in the aggregate and must be established (if at all) only within the Designation Area shown on the Conservation Plan.
- (ii) Minimal Protection Area C is limited to not more than one (1) acre in the aggregate and must be established (if at all) outside the Highest Protection Area and outside any Wet Areas or Steep Slope Areas. Minimal Protection Area C must be set back at least \_\_\_\_ feet from the public right-of-way of \_\_\_\_.

#### **(b) Procedure for Establishment of Minimal Protection Areas**

- (i) Owners must (i) furnish Holder for Review an amended Conservation Plan showing the location of Minimal Protection Area B or C, as the case may be, and legal description of each Minimal Protection Area to be established; and (ii) mark the boundaries of each Minimal Protection Area with permanent markers. This information will become part of the Baseline Documentation incorporated into this Grant.
- (ii) The Minimal Protection Area becomes established upon recordation in the Public Records of an Amendment of this Grant that incorporates the amended Conservation Plan into this Grant and, if applicable, allocates limitations on Improvements or intensity of uses within Minimal Protection Areas set forth in Article III or Article IV, as the case may be.

## **Article III. Improvements**

- **Purpose.** To control the size and location of Improvements consistent with Conservation Objectives.

### **3.01 Prohibition**

- **Purpose.** The purpose of the prohibition is to assure that the list of permitted items set forth below in this Article comprise the universe of Improvements permitted within the designated area.
- **Guides to Interpretation.** The definition of Improvements in Article VIII covers all man-made buildings, structures and facilities.
- **Examples.** A man-made pond is an Improvement; a naturally occurring lake is not. A berm created by earth-moving equipment is an Improvement; a naturally occurring feature is not. Dirt roads and riding rings are considered Improvements. Agricultural fields are not considered Improvements even if “man made” by removing vegetation.

### **3.02 Permitted Within Highest Protection Area**

- **No Highest Protection Area.** If there is no Highest Protection Area, there are two drafting alternatives. The first alternative is to leave the caption for §3.02, delete the re-

mainder of the section and state: “No Highest Protection Area has been designated within the Property”. The second alternative (if references to Highest Protection Area have been deleted from Article I), is to delete this section in its entirety. In either case, move “Existing Improvements” and “Existing Agreements” to §3.03.

- **Conformity for Review.** PALTA recommends the first alternative noted above because uniform numbering of sections will streamline administrative review not only for the Holder in the course of monitoring numerous conservation easements but also for Beneficiaries who must review the text of numerous conservation easements based on the model.

#### **(a) Existing Improvements**

- **Purpose.** Existing Improvements are always permitted to remain in their existing locations as of the Easement Date wherever they may be within the Property. If an Existing Improvement (perhaps a dwelling) is located within the Highest Protection Area as of the Easement Date, and the Holder wants to encourage relocation to a less ecologically sensitive area, a sentence along the lines of the following can be added to §3.02(a):

The dwelling identified as an Existing Improvement within the Highest Protection Area may, at the election of Owners by notice to Holder, be removed from the Highest Protection Area and, in that case:

- (i) Owners are not entitled to replace that Existing Improvement within the Highest Protection Area; but
- (ii) will be permitted to replace the Existing Improvement within the Minimal Protection Area or, subject to Review, within the Standard Protection Area without counting against limitations otherwise applicable to Improvements in that area.

#### **(b) Existing Agreements**

- **Purpose.** Existing Agreements are entitled to priority over the Conservation Easement under Applicable Law so there is no point in trying to control the exercise of those rights by Persons who are not a party to the Grant. A prospective Holder must review Existing Agreements to determine whether the exercise of rights under the Existing Agreement will be detrimental to Conservation Objectives and, if so, what the likelihood is of that happening.
- **Modification of Existing Agreement.** A prospective Holder might want to condition its willingness to accept a Conservation Easement upon receipt of a modification or supplement to the Existing Agreement that would bring the exercise of rights under the Existing Agreement into conformity with applicable restrictions contained in the Grant. For example, an easement to install Utility Improvements might include the entire Property in its description of the easement area; however, if Utility Improvements have already been installed in a particular location, the prospective Holder of the Conservation Easement may either (i) exercise its own judgment that it would be unlikely for additional or replacement Utility Improvements to be installed in another location with ma-

terially adverse effect on Conservation Objectives; or (ii) require written confirmation from the utility company that the easement granted in the Existing Agreement is, in fact, limited to a specific corridor within the Property.

- **Surface Use Agreement.** With respect to Existing Agreements for sub-surface rights, such as mineral leases or oil and natural gas leases, Owners retain, under Applicable Law, a right of reasonable use of the surface of the Property even if the Existing Agreement purports to cover the entire Property. The document that sets forth the rights of Owners and limitations on Persons holding sub-surface rights with respect to the surface of the Property is commonly called a “Surface Use Agreement”. A definition of “Surface Use Agreement”, including a list of issues typically addressed in such agreements, has been furnished in Article VIII of the commentary. In many if not most cases, an Existing Agreement does not require a Surface Use Agreement. However, beneficiaries of Existing Agreements may be willing to enter into a Surface Use Agreement to gain assurance that the exercise of their rights within the terms and conditions of the Surface Use Agreement will not be contested. Public and private utility companies may also find it good public relations to work with Owners and Holder to achieve Conservation Objectives.
- **Condition Acceptance on Surface Use Agreement.** At the time a Conservation Easement is being granted, there may have been no exercise of rights under the Existing Agreement and there may not be any plans to do so. In that case, some users may decide to condition their acceptance of the Conservation Easement upon the receipt of a satisfactory Surface Use Agreement consistent with Conservation Objectives. That condition would be set forth in the engagement letter or donation agreement between the prospective Holder and the Owners.
- **Negotiate Surface Use Agreement Later.** Other users may decide to accept the Conservation Easement subject to the Existing Agreement but reserve the right to negotiate a satisfactory Surface Use Agreement when, if ever, the mining or extraction company evidences a desire to install Extraction Improvements within the Property. The reason for doing so may be uncertainty – there may be a fairly good chance that the rights under the Existing Agreement may never be exercised at all and there may be little or no information (i.e., likely locations where drilling may take place) on which to base a Surface Use Agreement prior to acceptance of the Conservation Easement. In that case, the Holder may want to insert the following at the end of §3.02(b) of the model:

Owners grant Holder the right, but not the obligation, to negotiate a Surface Use Agreement or other changes to or clarifications of any Existing Agreement for the purpose of conforming Additional Improvements installed within the Property under the Existing Agreement to applicable limitations set forth in this Article. Owners agree not to unreason-

ably withhold or delay Owners’ approval of any such changes or Surface Use Agreement.

- **S&P.** Standard 9, Practice H of S&P provides that the land trust 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.

(c) **Additional Improvements**

- **Customize.** The model’s list of permitted Additional Improvements and indication of items “subject to Review” are intended to be appropriate to many conservation projects; however, it is not expected to be the perfect match for every project. Users should customize the list to meet their particular circumstances.
- **Expand with Caution.** Additional Improvements within the Highest Protection Area should be limited to those that the Holder has determined are consistent with Conservation Objectives for this highest level of protection. If the list is materially expanded, the Holder should consider whether designation as Highest Protection Area is, in fact, appropriate.
- **Review.** Items that are “subject to Review” are subject to the review and approval process described in §5.04. Different Holders may have different interests and practices regarding which items should and should not be subject to Review. If a Holder judges that a type of Additional Improvement has particularly high potential to be problematic, the Holder may wish to have the document state that Holder, “without any obligation to do so”, must determine that the Additional Improvement is “consistent with the maintenance or attainment of Conservation Objectives”. See the commentary to §5.04 for further discussion.
- **Limitations.** The model is constructed with a very limited list of Additional Improvements in the Highest Protection Area. Because the list of items is so limited, additional limitations such as those provided for the Standard Protection Area were not considered necessary. However, if the list in this section is expanded to include items with the potential for significant Impervious Coverage, then a “Limitations on Additional Improvements” section similar to that provided for the Standard Protection Area should be added as well.
- **Fences.** Fence height restrictions can help maintain scenic views and reduce habitat fragmentation. The model enables the Holder to approve a fence Height greater than four feet if consistent with Conservation Objectives; for example, deer fencing for forest regeneration and habitat improvement purposes. Consider whether further restrictions would be appropriate to maintain scenic views. Example: “Fences must be constructed of post-and-rail or other open weave construction that preserves scenic views described in the Conservation Objectives.” Some users may want to limit fences by adding “but only around the perimeter of the Property or the Highest Protection Area”



so as to permit fencing to accommodate Owners' privacy interests but minimize adverse effects of fragmentation of habitat.

- **Signs.** Some users may want to further limit signage to “a reasonable number of Regulatory Signs along the perimeter of the Property.” If an easement for a Public Trail is being incorporated into the Grant, this provision may need to be expanded to include Regulatory Signs associated with the Public Trail. *See* Article V of this commentary for sample Public Trail provision.
- **Trails.** Frequently limitations are imposed on the width of trails. Some Holders limit to a relatively narrow width (such as 4-6 feet). Other Holders prefer a wider path (particularly when used as a bridle path) so it is less likely to become rutted. If a right-of-way for a Public Trail is being incorporated into the Grant, the restriction on trails may need to permit other surfaces (whether or not pervious or porous) if required for compliance of the Public Trail with Applicable Law. The term “Applicable Law” as defined in Article VIII includes the requirements for compliance with the Americans with Disabilities Act. Links to resources for up-to-date information on trails and ADA accessibility are available at [ConservationTools.org](http://ConservationTools.org).
- **Wet Areas.** The model imposes a Review requirement on Improvements within Wet Areas because of the heightened environmental concerns. Note that including “stream access structures” implies that livestock would be permitted to enter Wet Areas to access the stream. Omit if that is not intended.
- **Extraction Improvements for Oil and Natural Gas.** In areas of the Commonwealth in which deposits of oil and natural gas can be found, Holders are often willing to permit extraction of these sources of energy, particularly if the extraction is implemented by horizontal or lateral extension of Extraction Improvements at substrata depths that pose no likelihood of harm to Conservation Objectives. A definition of Extraction Improvements is provided in Article VIII of the model. References to “natural gas” in that definition as well as in §4.03(b)(vii) of the model clarify that gas emanating from any source is included in the term. The purpose of this clarification is to avoid a source-based interpretation should it be adopted in Pennsylvania.
  - **Subsurface Extraction Improvements.** The model allows wholly subsurface extraction of oil and natural gas from all areas of the Property including the Highest Protection Area. This approach seeks to balance the economic interest of Owners against the possibility, believed to be remote but as yet unknown, that wholly subsurface extraction within the Property results in a material, adverse and direct consequence to Conservation Objectives for resources located a mile or so above the site of the extraction. *If users believe that subsurface Extraction Improvements present a significant risk to a Conservation Objective, then delete “Extraction Improvements and” from 3.02(c)(vii).*

- **Surface Extraction Improvements.** The model treats surface Extraction Improvements as inconsistent with Conservation Objectives within the Highest Protection Area. Once a well is completed, the wellhead and Access Drive may not interfere with scenic and natural resources described in Conservation Objectives; however, the process of exploration and drilling requires clearing of vegetation, the use of heavy industrial equipment, noise, vibration, impoundment of water or other substances, and disposal of spoils. Clearly, these activities, even on a temporary basis, are inconsistent with Conservation Objectives for the Highest Protection Area. Holder may be willing to permit surface Extraction Improvements in the Minimal Protection Area and, perhaps, the Standard Protection Area if the Holder is reasonably assured that measures to protect Conservation Objectives will be implemented and the disturbance will be of limited duration followed by restoration of soil and vegetative resources. Optional new provisions for that purpose are provided in the commentary -- §3.03 with respect to Extraction Improvements in the Standard Protection Area and §3.04 with respect to Extraction Improvements in the Minimal Protection Area.

- **Renewable Energy.** Some Improvements used to generate Renewable Energy (geothermal, for example) could be installed wholly underground by lateral extension from locations outside the Highest Protection Area similar to Extraction Improvements. If Holder concludes, after Review, that Improvements such as these do not impair resources intended to be protected as set forth in Conservation Objectives, they can be permitted. A definition of the term “Renewable Energy” has been provided in Article VIII of the model.

### 3.03 Permitted Within Standard Protection Area

- **No Standard Protection Area.** If there is no Standard Protection Area, elect one of the alternatives described in §3.02 above.
- (a) **Permitted under Preceding Sections**
  - **Purpose.** The model uses a cumulative approach so as to avoid repetition. Anything permitted in the Highest Protection Area is automatically permitted within the Standard Protection Area. Anything permitted in the Standard Protection Area is automatically permitted within the Minimal Protection Area.
- (b) **Additional Improvements**
  - **Interpretation.** Utility Improvements and Site Improvements are limited in this subsection by the requirement in subsection (ii) that the Improvement be related to the uses and activities permitted within the Standard Protection Area. For example, a detention basin or septic system required for residential use of the *Minimal* Protection Area would not be permitted in the *Standard* Protection Area under subsection (ii) of the model provision. Those Improvements would only be permitted under the terms of

subsection (iii); i.e., if, after Review, Holder concluded that it was not reasonably feasible to install them in the Minimal Protection Area; for example, because the soils there were not appropriate for such use and they otherwise met applicable standards for Review pertaining to Conservation Objectives.

- **Renewable Energy.** Improvements generating Renewable Energy may be permitted under §303(b)(iv) at the discretion of Holder. Users of the model may, of course, eliminate the phrase “without any obligation to do so” if the Holder views these Improvements as no more likely to affect Conservation Objectives than other Improvements permitted subject to Review. The approach taken by the model is to reserve discretion inasmuch as we do not know what power sources will constitute “Renewable Energy” in the future. A definition of the term “Renewable Energy” is provided in Article VIII of the model. Power generated from renewable sources of energy may, from time to time, exceed the amount of power consumed within the Property. The excess is often transmitted back to the public utility company servicing the Property for compensation in the form of a credit against the cost of energy provided by the utility company to the Property, issuance of marketable energy credits or other compensation. Accordingly, some Renewable Energy generated inside the Property may be used outside the Property. If the Holder is otherwise satisfied, after Review, that the size, location and operation of the Improvement generating Renewable Energy is consistent with Conservation Objectives, the fact that power generated by it is used outside the Property does not, in itself, violate the terms of the Grant. Appropriate limitations on Height and Impervious Coverage can be imposed by the terms of Holder’s approval after Review or, if agreed upon by the undersigned Owner or Owners and Holder as of the Easement Date, can be listed under §3.03(c). *See* discussion below.
- **Extraction Improvements for Oil and Natural Gas.** An additional subsection set may be added to §3.03(b) to permit aboveground Extraction Improvements within the Standard Protection Area subject to such controls as are necessary or desirable to maintain Conservation Objectives. The commentary to §4.04(d) contains complementary provisions with respect to activities and uses.

Subject to Review, and compliance with Holder’s conditions of approval including, if applicable, compliance with the terms of any Surface Use Agreement accepted by Holder as a condition of approval, Extraction Improvements (including not more than one Access Drive) reasonably required for the Construction of not more than one (1) vertical well for the extraction of oil or natural gas from substrata beneath the Property. The vertical well must be encased in concrete or other impenetrable material for sufficient depth so as not to impair water resources described in Conservation Objectives. Horizontal Extraction Improvements extending from the vertical well or from locations outside the

Property are permitted so long as installed at depths at which there can be no impairment of the water resources described in Conservation Objectives. The Review Requirements for evaluation of proposed Extraction Improvements include the information set forth in the definition of “Surface Use Agreement” in Article VIII.

- **Expansion of List.** Specifically add other Improvements that may be permitted consistent with Conservation Objectives for Standard Protection Area

#### **ADDITIONAL SUBSECTION, IF APPLICABLE:**

- **Notice.** Some users may want to add a requirement to notify Holder of material (for example, 500 square feet or more) increases in Impervious Coverage whether or not Review is required; for example:

Owners must notify Holder of any Construction that increases Impervious Coverage within the Standard Protection Area by 500 square feet or more, whether or not Review is required for such Construction under the terms of this Article.

#### **(c) Limitations on Additional Improvements**

- **Numeric Limits in Model.** The model includes numeric limitations not as recommendations but only as a fail-safe mechanism to eliminate any possibility that a conservation easement based upon the model could be signed and recorded with blanks where appropriate numbers should have been inserted. Each limit needs to be evaluated and tailored as applied to the particular Property and the Conservation Objectives for the particular Property.
- **Height.** Limitations on Height of Improvements serve several purposes – for example, preserving scenic views and protecting the flight paths of birds. Exceptions can be made for silos or Improvements for Renewable Energy in appropriate cases where agricultural or energy needs outweigh other concerns. The maximum Height in the model (35 feet) reflects a typical zoning limitation (2-1/2 stories) and may or may not be appropriate to the Standard Protection Area. The Pennsylvania Land Trust Association, in reviewing easements, found that Height restrictions of 30-35 feet are typical.
- **Fences and Walls.** Users may want to further limit fences and walls to maintain scenic views. Example: “Fences must be constructed of post-and-rail or other open weave construction that preserves scenic views described in the Conservation Objectives. Free-standing walls must be constructed of or faced with natural stone or brick that preserves scenic views described in the Conservation Objectives.”
- **Impervious Coverage.** Impervious Coverage limitations should be set to reflect the size of the Property and the particular Conservation Objectives for the project. Impervious Coverage limitations are aimed primarily at protecting water resources and assuring continued availability of agricultural soils. Limitations per roofed structure are

aimed at avoiding agri-business type installations and to minimize the intrusion of Improvements on scenic views.

- **Hoop houses.** Some Holders may want to except hoop houses from the limitation on Impervious Coverage within the Standard Protection Area. The reason is that hoop houses do not remove soils from availability for agricultural production; thus, hoop houses should not be counted the same as Agricultural Improvements with a permanent floor and footings. On the other hand, hoop houses tend to channelize water run-off and, depending upon the location and size, may interfere with Conservation Objectives pertaining to scenic view. The following provision may be added to §3.03(c)(iii) to permit Hoop houses subject to Review so that Holder can exercise its judgment as to whether Conservation Objectives pertaining to water quality and/or scenic views are maintained. The definition of “Hoop House” included in Article VIII of this commentary should also be inserted into the Grant.

Subject to Review, Hoop Houses are excluded from this Impervious Coverage limitation if Holder is reasonably satisfied that the number, location, size, Height and permanence of the Improvements do not materially impair Conservation Objectives.

- **Utility Improvements.** Above ground Utility Improvements are subject to Review.
- **Recreational Improvements.** The purpose of subsection (ix) is to be sure that there is a meeting of the minds as to whether Improvements related to recreational activities in the Standard Protection Area should be subject to more restrictive Height and Impervious Coverage limitations than other permitted Improvements (Agricultural, for example) in the Standard Protection Area. This subsection can be deleted if the understanding is that there is no reason to treat them differently. If, however, there is a perception that Site Improvements or Utility Improvements related to recreational use may intrude on scenic views or otherwise impair Conservation Objectives, then decisions need to be made as to whether Utility Improvements (including lighting) should be permitted at all for these purposes and whether special limitations on Height and/or Impervious Coverage limitations are needed. In the model provision, only Site Improvements (not Utility Improvements such as water and sewage disposal) are permitted, subject to a Height limitation that would allow the type of goal or net typically used for field hockey, soccer, volleyball or tennis but would exclude bleachers, goal posts, ropes courses, elevated stands and golf practice range netting. (For example, the proper height for a men’s volleyball net is 7’ 11-5/8”). The suggested limits in the model should be tailored to address particular Conservation Objectives and the needs of the Owners. If desired, the Height limitation can be set at a level so low that the only Improvements permitted for recreational use are basically flat (tracks, trails and courts): “Improvements in connection with recreational use are limited to Site Improvements not exceeding two (2) feet in Height. Fencing in connection with a recreational activity remains subject to applicable limitations on

fencing within the Standard Protection Area.” If desired, the Impervious Coverage limit can be adjusted. For example: “Porous material (such as compacted earth, crushed stone, sand or wood chips) covering any such Site Improvement is excepted from the limitation on Impervious Coverage set forth in this subsection (ix).”

### 3.04 Permitted Within Minimal Protection Area

- **No Minimal Protection Area.** If no Minimal Protection Area has been established within the Property, elect one of the alternatives described in the commentary to §3.02.

#### (a) Permitted under Preceding Sections

- **No Standard Protection Area.** If there is no Standard Protection Area, add Agricultural Improvements to the list of Additional Improvements permitted under §3.04(b).

#### (b) Additional Improvements

- **Interpretation.** Besides Residential Improvements, the rule established in the model allows Improvements within the Minimal Protection Area to support Agricultural, Forestry and other activities permitted within the Standard Protection Area and Highest Protection Area. Improvements generating Renewable Energy are permitted whether or not servicing locations outside the Property.
- **Example.** A Minimal Protection Area could serve as a staging area for Forestry uses in more restricted portions of the Property.
- **Example.** A Minimal Protection Area could be established to confine the location of additional Site Improvements needed to support outdoor recreation or camping uses within the Standard Protection Area.
- **Extraction Improvements for Oil and Gas.** If surface Extraction Improvements are permitted only in the Minimal Protection Area, add the provision set forth in the commentary to §3.03(b) with respect to Extraction Improvements in the Standard Protection Area to §3.04(b) instead. Users may also consider adding “Extraction Improvements” to the list of Improvements permitted in the Minimal Protection Area without Review; however, that is not recommended due to the concern that Extraction Improvements and extraction uses and activities may, without appropriate limitations, adversely affect natural and scenic resources outside the Minimal Protection Area. *See*, commentary to §3.02(c), §3.03(b) and the issues identified in the definition of “Surface Use Agreement” in Article VIII.
- **Commercial Improvement.** Sometimes Owners want assurance that an Existing Improvement -- perhaps a store -- that does not fit the definition of either an Agricultural Improvement or a Residential Improvement can be rebuilt within the Minimal Protection Area if needed. Some Owners object to the limitation on Additional Improvements to those that at least appear to be Agricultural Improvements or Residential Improvements. They argue that if it does not violate the terms of the Grant to use the Additional Improvement as an office or studio, then it ought to be designed and constructed for that use. If a Holder is

willing to accommodate Construction of one or more Commercial Improvements within the Minimal Protection Area, add the definition of “Commercial Improvement” furnished in Article VIII of this commentary and the following addition to the list of Additional Improvements:

Subject to Review, not more than one (1) Commercial Improvement [for example, either the antique shop identified as an Existing Improvement or a replacement for such Improvement.] The Commercial Improvement must be designed and located so as not to impair scenic views described in the Conservation Objectives and, unless otherwise approved by Holder, after Review, is limited to a maximum Impervious Coverage limitation of \_\_\_\_ square feet.

#### (c) Limitations on Additional Improvements

- **Purpose.** The limitations listed in the model seek a balance between attaining the Conservation Objective of promoting compatible land uses and maintaining marketability and economic viability of the Property as a whole.
- The model is constructed so that the users may elect from several alternatives:
  - Limit the number of Improvements that can be used for residential purposes whether wholly or partly by limiting the number of Improvements that may contain Dwelling Units under §3.04(c)(i).
  - Limit intensity of residential use by limiting the number of Dwelling Units permitted within the Minimal Protection Area under §4.05(d)(i).
  - Limit both Improvements and use.
  - Not limit numbers of Residential Improvements or Dwelling Units within the Minimal Protection Area. To exercise this election, delete both §3.04(c)(i) and §4.05(d)(i). Also delete the definition for “Dwelling Units” from Article VIII.
- **Intensity of Residential Use.** A limitation on Improvements in §3.04 is a limitation on Construction. The general rule of Applicable Law pertaining to servitudes is that a limitation on Construction is not a limitation on use and vice versa. The Holder may regulate the intensity of residential use (i.e., how many Dwelling Units are permitted per Minimal Protection Area or per Improvement within the Minimal Protection Area), under §4.05.
- **Height.** Height limitations are frequently imposed even in the Minimal Protection Area so as to protect Improvements from intruding on scenic views and to avoid endangering birds in flight. The maximum Height in the model (35 feet) reflects a typical zoning limitation (2-1/2 stories) and may or may not be appropriate to the Property. If a Minimal Protection Area is located within a scenic vista described in the Conservation Objectives, the Holder may want to impose a more restrictive Height limitation within portions of the Minimal Protection Area; for example, “No Improvements greater than four (4) feet in Height are permitted within \_\_\_\_ feet of the public right-of-way of \_\_\_\_.” The model permits Holder to allow, subject to Re-

view, a greater Height for Improvements generating Renewable Energy such as wind turbines.

- **Impervious Coverage.** Impervious Coverage limitations may be added if the Minimal Protection Area is so large that limitation becomes necessary; however, the preferred alternative is to keep the Minimal Protection Area of a reasonable size such that, assuming a high degree of Impervious Coverage within the Minimal Protection Area, the overall Impervious Coverage limitation on the Property would, nevertheless, be in acceptable range. If an Impervious Coverage limitation is desired, tailor the limitation to the Conservation Objective furthered by it. For example, if the Minimal Protection Area is a farmstead and preservation of Agricultural uses is a key Conservation Objective, the Holder may want to add: “Impervious Coverage associated with Residential Improvements must not exceed a maximum of \_\_\_\_ square feet exclusive of driveways and walkways.”
- **Guideline for Acceptable Range.** Guidelines for federal funding programs limit Impervious Coverage on properties of greater than 50 acres to two (2%) percent and, for properties of 50 acres or less, a maximum of 1 acre but not greater than six (6%).
- **Limitation on Habitable Improvements.** Some Holders find limiting Habitable Improvements (Improvements that can be used for human habitation) to be useful. Residential Improvements, the focus of the model, encompasses both Habitable Improvements and accessory residential structures. If a Holder desires to include limitations of this type, a definition of “Habitable Improvements” has been included in Article VIII of this commentary for this purpose. The particular limitations desired by the Holder are to be added under 3.04(c). For example:

Not more than two Habitable Improvements (whether Existing Improvements or Additional Improvements) are permitted within the Minimal Protection Area.

## Article IV. Activities; Uses; Disturbance of Resources

- **Purpose.** To control intensity of use of land and disturbance of natural resources identified in the Conservation Objectives.
- **Focus on Resource Protection.** The model has been constructed so as to focus on resource protection issues rather than enforcement of zoning categories of usage such as residential, commercial, institutional, industrial, agricultural, etc. The rationale for this approach is that in an age of electronic commerce, buying and selling goods and services (i.e. commercial use) can occur with virtually no effect on resource protection values. On the other hand, permitting agricultural uses without good resource protection planning can result in the ruination of soil and water resources by intense agri-business operations. PALTA urges Holders to concentrate their efforts on enforcing

limitations that have a direct connection to achievement of Conservation Objectives.

- **Customize.** As with the lists of permitted Additional Improvements in Article III, the lists in §§4.03-05 of permitted activities, uses and disturbances as well as indication of items “subject to Review” are intended to be appropriate to many conservation projects; however, it is not expected to be the perfect match for every project. Users should customize the lists to meet their particular circumstances.

#### 4.01 Prohibition

- **Purpose.** The purpose of the prohibition is to assure that the list of permitted items set forth in this Article comprises the universe of activities, uses and disturbances permitted within the Property.
- **Dovetail with Conservation Objectives.** This provision is intended to dovetail into the goals set forth in the Conservation Objectives; i.e., to reconcile increasing levels of human activity with the resource protection goals of the Highest Protection Area, Standard Protection Area and Minimal Protection Area. The emphasis on Sustainable Agriculture and Sustainable Forestry is to insure that permitted activities are consistent not only with Conservation Objectives but also with the requirements of §1.170A-14(e) of the Regulations. Under subsection (2) of that section, the phrase “exclusively for conservation purposes” is interpreted to mean that a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a state program for flood prevention and control would not qualify under this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming, if under the circumstances, those uses do not impair significant conservation interests.
- **Intensity or Frequency.** Some Owners object to the further limitation on permitted activities and uses to those that do not, by their intensity or frequency, adversely affect Conservation Objectives. The difficulty in trying to accommodate this objection is that any activity or use can damage natural or scenic resources and there is usually no way to quantify the answer to the question “how much is too much?” Equestrian activities may or may not cause turf to disintegrate and expose bare soil that erodes into the nearby stream. An occasional softball game is quantitatively and qualitatively different from use of the Standard Protection Area for practice and play, all day, every day, by dozens of teams and spectators. In any case, the burden will be on Holder to show that the intensity and/or frequency of the use is the proximate cause of a specific material adverse effect on Conservation Objectives. A statement to that effect could be added, if necessary, to help overcome Owners’ anxiety.

- **Forestry and Growing Greener.** The approach taken by the model is to allow Sustainable Forestry (whether the timbering is commercial or not) within the Standard Protection Area and, on a more limited basis, within the Highest Protection Area – in each case in accordance with a Resource Management Plan approved by the Holder. These provisions are intended to meet applicable statutory requirements for projects funded under Pennsylvania’s Growing Greener grant program.

#### 4.02 Density Issues under Applicable Law

- **Purpose.** PALTA urges Holders to consider and adopt policies concerning whether or not conservation easements granted to the Holder are intended to limit density or intensity of use of other land not included in the Property. The provisions of §4.02 deal with these issues.
- (a) **Promoting Development outside the Property**
  - **Purpose.** This provision is intended to preclude use of the Property to meet open space requirements or other land development ordinance criteria affording a bonus of some sort in exchange for retention of open space. The provision is also intended to prohibit Owners from profiting from the sale of sewage capacity earmarked for the Property by transferring it for use to increase development outside the Property.
  - **Open Space Plan.** In appropriate circumstances, this provision will need to be altered when, in fact, an agreement to vest the Conservation Easement in the Holder is being used in connection with a land-use approval so as to assure governmental agencies (prior to or as a condition of zoning relief) that open space will be protected in perpetuity. For example, a Township may require as a condition of approval of planned residential development that the developer enter into a conservation easement with a non-profit conservation organization to assure administration of the terms by conservation professionals. In those cases, the Township would, presumably, want the rights to enforce the Grant as a Beneficiary and the Grant would be recorded prior to the developer turning over ownership of the community open space to the homeowners’ association.
- (b) **Transferable Development Rights**
  - **Issue.** Holders should consider whether or not, as a matter of policy, conservation easements accepted by the Holder extinguish transferable zoning rights created under a transferable development rights ordinance enacted under the authority granted by the Pennsylvania Municipalities Planning Code.
  - **Zoning Rights.** A transferable rights ordinance allows the municipality to create a scheme that essentially issues licenses for a certain overall limit on density within the municipality; then designates some areas as receiving areas (i.e. targeted for development) and some areas as no development areas. Since there is a limited universe of licenses, a market for such licenses should develop and Owners within an area designated for no development should be able to recoup the negative impact of the restric-

tive zoning ordinance by selling their zoning density to owners within areas targeted for development.

- **Argument for Extinguishment.** A compelling argument for eliminating these rights can be made when the Conservation Easement is being purchased using public funds. Essentially, the Conservation Easement has been purchased once and ought not to be the subject of a subsequent sale. Whether or not a sale is involved, some Holders adopt a policy of extinguishing transferable development rights on the grounds that the purpose of the Grant is both to limit development on the Property and to discourage development wherever else it may occur to the detriment of resources that are the subject of the Conservation Objectives.
- **Argument against Extinguishment.** The potential economic benefit to the Owners by sale of zoning density may help to support Sustainable Agricultural or Sustainable Forestry activities and does no harm to maintenance of Conservation Objectives with respect to the Property subjected to the Conservation Easement.
- **Drafting Alternatives.** If a Holder decides not to extinguish transferable development rights, §4.02(b) can be deleted or replaced with an affirmative statement such as: “This Grant is not intended to extinguish any existing or future rights of Owners to sell or otherwise transfer zoning or density under a transferable development rights ordinance enacted under the authority of the Pennsylvania Municipalities Planning Code.”

#### 4.03 Permitted Within Highest Protection Area

- **No Highest Protection Area.** If there is no Highest Protection Area, and references to Highest Protection Area have been deleted from Article I, then the entirety of §4.03 may be deleted. However, the preferred alternative, for the reasons set forth in the commentary to §3.01, is to retain the caption, delete the remainder of the section, and state: “No Highest Protection Area has been designated within the Property.”
- **Transfer to Standard Protection.** If there is no Highest Protection Area the following items listed in §4.03 of the model need to be added to §4.04 to clarify that these items are always permitted anywhere within the Property:
  - Subparagraph (a) pertaining to Existing Agreements
  - Subparagraph (b)(i) pertaining to hazardous conditions

##### (a) Existing Agreements

- Activities, uses and disturbances of resources that a Person has a right to do under an Existing Agreement are permitted as a matter of right anywhere within the Property. Holders should obtain title information to determine what rights Persons have to disturb natural resources within the Property by exercise of rights under Existing Agreements. See commentary to §3.02(b) for a discussion of the con-

cerns of Holder pertaining to the exercise of rights under Existing Agreements. If the Holder desires the right to negotiate a Surface Use Agreement or other changes or clarifications to Existing Agreements after the Grant is in effect, add the following to §4.02(a):

Owners grant Holder the right, but not the obligation, to negotiate a Surface Use Agreement or other changes to or clarifications of any Existing Agreement for the purpose of conforming activities or uses within the Property under the Existing Agreement to applicable limitations set forth in this Article. Owners agree not to unreasonably withhold or delay Owners’ approval of any such changes or Surface Use Agreement.

##### (b) Disturbance of Resources

- **Purpose.** The purpose of this section is to describe those activities that are consistent with the habitat protection and other Conservation Objectives for the Highest Protection Area.
- **Hazardous Conditions.** The provision in subsection (i) is intended to shield the Holder from liability for personal injury or property damage occurring on or about the Property by trees limbs falling or similar hazards. Holders who are concerned that this provision creates a loophole for unwarranted interference with trees and other resources should consult with their legal counsel and insurance representatives before changing the provision.
- **Review.** Except for the provision pertaining to hazardous conditions in subsection (i) (which should be permitted without Review to avoid liability), Holders may use their discretion whether or not the Holder wants to condition other activities on “subject to Review”.
- **Other Resource Management Activities.** The last category of “other resource management activities in accordance with a Resource Management Plan” is not only subject to Review but is subject to the discretion of the Holder. The reason is that some resource management activities might not be appropriate anywhere in the Highest Protection Area even if performed in accordance with a Resource Management Plan. The last category is also intended as a kind of safety valve to provide latitude for changes in resource management practices over time; for example, changes that may become necessary or desirable due to climate change. If Native Species found in Pennsylvania as of the Easement Date are no longer thriving, Owners may want to replace them with other Native Species adapted to warmer climates. Adaptations such as these can be accomplished by a Resource Management Plan approved by Holder after Review (but without Amendment) under the authority of subsection (ix).
- **Vehicular Use.** The general rule applicable to the entire Property is that vehicular use is permitted in the case of emergency and in connection with a permitted activity or use in that particular area; for example, a tractor could be driven into the Highest Protection Area if needed for a resource management activity there but a tractor crossing

over Highest Protection Area to access fields in Standard Protection Area would not be permitted. Specific limitations take precedence over the general rule. For example, in the Highest Protection Area, vehicular use is permitted in connection with permitted resource management activities; however, see restriction applicable to recreational activities in subsection (d) below.

- **“Minimal” Woodcutting.** Many Owners have an understandable desire to use wood from their own Property for their personal use, and most potential Holders, recognizing that wood is a renewable resource, are willing to accommodate this. The challenge is how to describe this accommodation in such a way to guard against the potential for “too much” cutting -- however that may be defined. §4.03(b)(v)) limits the number of trees that may be cut or removed in a year by placing a cap on the sum of the stump diameters of the trees taken. The model’s default text reads as follows:

Except within Wet Areas, cutting or removing trees, standing or fallen, but only if the aggregate inside bark diameter of stumps (one foot above ground on the uphill side) does not exceed 200 inches per year and only for use within the Property.

- **Quantitative Limitation.** The number “200”, like all numeric limitations in the model, should be changed to reflect what is most appropriate for the size and character of the Highest Protection Area and Property.
- **Outside Property.** If users wish to allow Owners to cut and remove a small amount of wood from the Property each year without a Resource Management Plan, delete “and only for use within the Property.”
- **Monitoring.** This formulation provides for easy compliance by Owners and easy monitoring by Holder. Freshly cut stumps are relatively easy to count and measure.
- **Firewood.** For those concerned with ensuring a supply of firewood, a rough rule of thumb is that it takes ten trees averaging ten inches in diameter at 4-1/2 feet above the ground (DBH) to provide a cord of wood. A 10-inch DBH red oak might have a stump diameter (inside bark) of 12 inches, while a 10-inch DBH white oak might have a stump diameter (inside bark) of 13 inches. Some users suggest that six cords of firewood are needed each year if used as the primary source of heat for a typical residence; one-third this amount or less is needed for a highly efficient residence. (A standard cord is a stack four feet high, four feet deep and eight feet long. These dimensions enclose a volume of wood and air of 128 cubic feet; depending on how tightly the wood is stacked, a cord typically will contain between 80 and 90 cubic feet of wood.)

- **Cord-based Alternative.** An alternative formulation, used in earlier editions of the model, provided that “Except within Wet Areas, cutting trees for use on the Property not to exceed \_\_\_ cords per year.” While this formulation informed Owners that they could burn this quantity of wood, it did not provide useful instruction in the number of trees that could be cut to provide this quantity or provide Holder with an easily measurable standard to monitor. (To estimate the number of cords taken, requires one to measure the diameter of the stumps of cut trees, convert those measurements to diameter at 4 ½ feet above the ground, estimate the height of the trees, use volume tables to estimate the cubic foot volume of individual trees, convert those figures to cords, and thus eventually arrive at the total volume removed.)
  - **Fallen Trees.** Because of extensive use by animals, fungi and other plants, fallen trees are included in the tree removal limit. If this habitat use is not important for maintenance of Conservation Objectives, users may change the model provision to read “Except within Wet Areas, cutting or removing standing trees but only if...” and insert an additional sentence: “Except within Wet Areas, cutting or removing fallen trees.”
  - **Diameter and Circumference.** Diameter is measured from one point on a circle straight through the center of the circle to an opposite point on the circle. The circumference is the distance around the circle. You can easily determine a tree’s (outside bark) circumference by wrapping a measuring tape around it. To calculate a diameter from a circumference, divide the circumference by pi (approximately 3.14).
  - **Extraction of Oil and Natural Gas.** Subsurface oil and natural gas lying beneath the Highest Protection Area are natural resources that, unless disturbance is specifically permitted, may not be extracted. The rationale for permitting, subject to Review, wholly subsurface extraction within the Property (including the Highest Protection Area) under §4.03(b)(vii) of the model is discussed in commentary §3.02(c).
  - **Renewable Energy.** The generation of Renewable Energy, whether for consumption within or transmission outside the Property, and whether or not compensation is received in connection with that activity, is permitted under Article IV whenever Improvements for that purpose are permitted under Article III.
- (c) **Release and Disposal**
- **Application of Substances.** Manure and plant materials must be well composted prior to application. Otherwise, these substances may introduce pathogens, excessive nutrients and weedy seeds to the area of application.
  - **Expansion of List.** Some users may want to expand the permitted list to include herbicides and biological agents,



compost piles and piling of timber or other products derived from Sustainable Forestry activities permitted within the Highest Protection Area. The preferred alternative is to handle these items as “subject to Review” under subsection (b)(ix) so that the Holder is given the opportunity to determine whether the location and intensity of the activity is consistent with Conservation Objectives.

#### (d) Other Activities

- **Passive Recreation.** The model avoids using the phrase “passive recreational use” as there does not appear to be any consensus of opinion on the meaning of that phrase.
- **Permitted Doesn’t Equate with Access.** Hunting, fishing and other uses listed in this paragraph are permitted activities anywhere within the Property. This does not mean that Owners must grant public access for these purposes. If Owners and Holder desire to establish an easement or license vesting a public right of access for these activities, they must either do so by separate agreement or by adding a section to Article V granting public access. *See* commentary to Article V re: “Public Access”. Whether or not formally granted, Owners may want to permit public access for deer hunting purposes on an informal basis. Harvesting the deer herd may be desirable to keep deer population at a level consistent with Conservation Objectives to encourage and maintain the growth of healthy and biologically diverse woodland.
- The model excludes vehicular use in connection with an activity permitted under subsection (d) within the Highest Protection Area unless Holder approves the use after Review. If bicycles and other wheeled vehicles are permitted on trails (including a Public Trail described in Article V of this commentary), add an appropriate exception to the sentence pertaining to vehicles. For example:

Vehicular use is not permitted in connection with the activities permitted under this subsection, unless Holder, without any obligation to do so, approves the use after Review; however, bicycle use within the Public Trail described in Article V is permitted.

#### 4.04 Permitted Within Standard Protection Area

- **No Standard Protection Area.** If there is no Standard Protection Area, and references to Standard Protection Area in Article I have been deleted, then the entirety of §4.04 may be deleted. If not, retain the caption for §4.04, delete the remainder of section, and insert “No Standard Protection Area has been designated within the Property”. *See* discussion in commentary to §3.01.
- **Purpose.** The purpose for the limitations within the Standard Protection Area is to be sure that Agricultural, Forestry and other open space uses preserve quality and quantity of soil and water resources.

#### (a) Permitted under Preceding Sections

- **No Highest Protection Area.** If there is no Highest Protection Area, delete this subsection and substitute “Existing Agreements” (formerly §4.03(a)).

#### (b) Agriculture Uses

- **Continuous Vegetative Cover.** Potential examples of continuous vegetative cover are pasture and fields that are permanently planted with hay or other cover crops. If a field is plowed then it is not under continuous vegetative cover.
- **Grazing.** Rather than relying on the general limitation on intensity and frequency of use in §4.01, some users prefer a specific standard to determine when permitted grazing use becomes overgrazing. Example: Add a new subsection to §4.04(b): “Not more than one Animal Unit per 1.5 acres of fenced pasture is permitted.” A definition of “Animal Unit” has been provided in Article VIII of the commentary for this purpose.
- **Equestrian.** Rather than relying on the general limitation on intensity and frequency of use in §4.01, users may add a provision requiring Review of equestrian uses involving public participation such as shows, clinics and competitive events.
- **Soil Conservation Plan.** The model does not require Review of a Soil Conservation Plan since that is the one type of Resource Management Plan that is prepared under and must conform to the requirements of Applicable Law.
- **Agricultural Management Plan.** Some users may want to impose more rigorous standards on Agricultural activity than conformance with a Soil Conservation Plan. If so, substitute the phrase “Agricultural Management Plan” for Soil Conservation Plan in §4.04(b) and add to Article VIII of the Grant the definition of “Agricultural Management Plan” provided in Article VIII of the commentary.
- Users of the model are encouraged to [submit](#) to the Pennsylvania Land Trust Association their suggestions for improving the description of the necessary or desirable components of an Agricultural Management Plan.
- **Certified Organic.** Some users want to ensure that Agriculture is not only Sustainable but conforms to third party certified organic standards as well. In that case, the provision set forth below may be added to §4.04 (b)(ii).

Agricultural activities for the production of fruits, vegetables, livestock and other items for commercial sale must also conform to generally accepted requirements for organic certification. Such conformity is to be evidenced by delivery to Holder, not less than once per year, of a certificate issued by an agent approved for such purpose by the United States Department of Agriculture or other responsible authority reasonably acceptable to Holder.

- Information about the National Organic Program administered by the United States Department of Agriculture can be found at <http://www.ams.usda.gov/nop>. Other third party certification programs include biodynamic certification by Demeter USA (<http://demeter-usa.org>) and the VeriFlora program of fresh cut flowers and



potted plants by Scientific Certification Systems (<http://www.scs-certified.com>).

- If the administrative costs (in other words, fees paid to certifiers and other costs not resulting from practices in the field) of organic certification are of major concern, the second sentence in the above provision could be deleted. A disadvantage to doing this is that Holder will not be able to rely on the certificate in its monitoring but instead will have to rely on its own resources to judge conformance with organic standards.

- **Woodlands.** The approach taken by the model is that Woodlands within the Standard Protection Area may be the subject of Sustainable Forestry but not converted to Agricultural Uses. Delete if the understanding is that Woodlands within the Standard Protection Area can be converted to Agricultural uses.
- **Conflicts with Scenic Landscapes.** Some Agricultural and Forestry activities, whether or not Sustainable, may not be appropriate for a Standard Protection Area in which preservation of scenic views of landscaped areas is the primary Conservation Objective. In those cases, remove as appropriate references to Agriculture and Forestry in (b) and (c).

#### (c) Forestry Uses

- Users who desire more specificity as to the nature of the Resource Management Plan for Forestry uses may want to substitute “Forest Management Plan” for that phrase in the Grant. The definition of “Forest Management Plan” set forth in Article VIII of the commentary would also be added to Article VIII of the Grant.
- Users of the model are encouraged to [submit](#) to the Pennsylvania Land Trust Association their suggestions for improving the description of the necessary or desirable components of a Forest Management Plan.

#### (d) Other Disturbance of Resources

- **Mature Trees.** Some users want to ensure that Mature Trees are not cut as part of maintenance of landscaped areas. In those cases, add the following sentence to 4.04(d)(iii): “Cutting of Mature Trees is prohibited unless Holder approves after Review; also add to Article VIII of the Grant the definition of “Mature Trees” provided in Article VIII of the commentary.
- **Extraction of Oil and Natural Gas.** If activities and uses associated with mining or extraction of oil and natural gas are intended to be permitted on the surface of the Standard Protection Area, add the following to §4.03(d). See also the commentary to §3.03(b) with respect to surface Extraction Improvements within the Standard Protection Area:

Subject to Review and compliance with Holder’s conditions of approval including, if applicable, any Surface Use Agreement required by Holder as a condition of its approval, extractive use and other activities reasonably required in connection with

exploration, extraction, containment and collection for transport off the Property of oil and/or natural gas; however, no release or spillage of oil or other products is permitted anywhere within the Property whether or not such release or spillage occurs in connection with extraction activities.

#### (e) Release and Disposal

- **Composting.** Some users limit the size of compost piles and further limit the composition – such as no construction materials.

#### (f) Other Activities

- **Purpose.** The purpose of this section is a catchall provision that allows (besides Sustainable Agricultural and Sustainable Forestry uses) a number of active, but non-commercial, open-space and recreational uses within the Standard Protection Area.
- **Vehicular Use.** The approach taken by the model is to allow non-motorized recreational vehicular use (for example, bicycles) in the Standard Protection Area. Holders that do not want to be burdened by the obligation to enforce a restriction on recreational vehicular use should delete subsection (iii) under paragraph (f). The model permits motorized vehicles to be used for resource management purposes; for example, using a tractor to mow a recreational playing field.

### 4.05 Permitted Within Minimal Protection Area

- **Purpose.** The purpose of this section is to permit the widest range of human activity within the Minimal Protection Area consistent with maintenance of Conservation Objectives outside the Minimal Protection Area.

#### (a) Permitted under Preceding Sections

- **No Standard Protection Area.** If there is no Standard Protection Area, Agricultural and/or Forestry uses may need to be included under §4.05(b).

#### (b) Disturbance of Resources

- **General Rule.** The general rule of the model is that any trees, shrubs or herbaceous materials may be cut, mowed, cleared or removed within the Minimal Protection Area.
- **Specimen Trees.** The general rule needs to be modified if Specimen Trees have been identified within the Minimal Protection Area. Example: “No cutting or removal of Specimen Trees is permitted. Subject to Review, pruning of Specimen Trees in accordance with Best Management Practices is permitted.” A definition of “Specimen Trees” has been provided in Article VIII of the commentary for this purpose.
- **Extraction of Oil and Natural Gas.** If surface activities in connection with the extraction of oil and natural gas are permitted only in the Minimal Protection Area, add the provision set forth in the commentary to §4.04(d) to §4.05 (new subsection (e)) instead.

**(c) Release and Disposal**

- **Possible Expansion.** This provision may need to be expanded if herbicides and composting have been limited within the Standard Protection Area.

**(d) Residential and Other Uses**

- **Residential Use.** Subsection (i) creates a limitation on density of residential use. *See* commentary to §3.04 pertaining to the interrelationship of this provision and the limitation on Improvements containing Dwelling Units.
- **Non-Residential Uses.** The approach taken by the model is not to attempt to regulate uses wholly contained within Improvements. Most Holders do not ordinarily inspect the interior of Improvements to determine whether activities are in violation of the terms of the Grant. If that is so, then as long as the use or activity is wholly contained within an Improvement otherwise permitted (such as a dwelling, garage, barn, etc.) there is no reason for it to constitute a violation even if technically not “residential”.
- **Review.** The Review provision in (d)(ii) is intended to give the Holder some discretion as to whether or not external manifestations of non-residential use of Improvements adversely affect Conservation Objectives. In general, if granted at all, the intensity of use (parking, signs) should not exceed that of permitted residential or Agricultural uses.

## Article V. Rights and Duties of the Holder and Beneficiaries

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- **Purposes.** The purposes of Article V are first, to grant to the Holder the right to enforce the restrictive covenants imposed by the undersigned Owners in perpetuity and second, to explain the relationships between the Holder and Owners and the Holder and Beneficiaries (if any).

**5.01 Grant to the Holder****(a) Grant**

- **Purpose.** This section describes the necessary conditions to create a legally binding conveyance of an interest in real property whether or not consideration is present.
- **Unconditional and Perpetual.** The grant to the Holder must be both unconditional and perpetual to qualify as a charitable deduction under §1.170A-14(b)(2) of the Regulations. 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.
- **Recording.** Recording in the Public Records is necessary to make the covenants binding upon future owners who do not otherwise know about the terms of the Grant but the grant is complete once the document is signed and unconditionally delivered. Standard 9, Practice I of S&P requires that all land and easement transactions are legally recorded at the appropriate records office according to local and state law.

- **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.
- **Conservation Servitude.** The Grant operates to vest the Conservation Easement in Holder. The Conservation Easement is a kind of servitude -- a real estate interest that establishes a long-term, land-based, stable arrangement that, as the name suggests, serves a particular purpose. The particular purposes of the Conservation Easement may include retaining or protecting the natural, scenic or open-space value of land, assuring the availability of land for agricultural, forest, recreational or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply. To achieve the goal of establishing long-term, reliable, land-use arrangements, servitudes are binding upon future Owners of the Property whether they agree to the arrangement or not. Unlike contracts, Owners cannot terminate their obligations under a servitude, such as a Conservation Easement, by paying compensatory damages.

**(b) Superior to all Liens**

- **Subordination of Liens.** Subordination of any Lien affecting the Property as of the Easement Date is required for compliance with the Code and Regulations but, even if no charitable contribution is being claimed, Holder would want assurance that the Conservation Easement could not be extinguished by foreclosure of a Lien prior in right to the Conservation Easement. This would certainly be true in the case of a purchased Conservation Easement; the Holder would want the purchase price applied first to satisfy outstanding Liens.
- **S&P.** Standard 9, Practice H of S&P provides that mortgages, liens and other encumbrances that could result in extinguishment of the easement or significantly undermine the important conservation values of the property must be discharged or properly subordinated to the easement.
- **Code Requirement.** 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.

- **ConservationTools.org.** The guide [Mortgage Subordination](#) and accompanying [Model Mortgage Subordination and Commentary](#) offer advice on how to approach mortgage lenders and mortgage servicing companies to obtain subordination; a discussion of recent Tax Court opinions on the issue; and a model document keyed to address those issues.
- **Acceptance of Lien.** A Holder could exercise its business judgment to accept a Conservation Easement under and subject to an outstanding Lien provided that no tax benefit was being sought. Some of the factors influencing the decision to take that risk would be: the relative value of the Lien to the value of the Property; the creditworthiness of the Owners; and the financial resources of the Holder if, in a worst case scenario, Holder had to purchase the outstanding Lien so as to prevent extinguishment of the Conservation Easement upon foreclosure.

## 5.02 Rights and Duties of Holder

- **Standard of Care.** Note that in this section the Holder not only has the right but also the obligation to perform the tasks listed below. Whenever a Person owes a duty to another, the Person has the obligation to perform the duty in good faith and with a standard of care that a reasonably prudent person would use. The following section (§5.03) lists rights that the Holder may but is not obligated to perform.
  - **Rights but No Duty.** Occasionally, a Grant may be prepared outside of a governmental program, charitable donation under the Code, or other circumstance that requires or makes it desirable for the Holder to accept a duty to enforce the terms of the Grant. For example, the Holder could be a downstream neighbor who wants to see the Waterway protected. In that case, §5.02 and §5.03 can be merged into a single section vesting the right, *but not the duty*, to enforce the terms of the Grant. The downstream neighbor, if not qualified to be a “holder”, under the Conservation Easements Act, nevertheless has common law rights to enforce a servitude -- particularly when the benefited land adjoins the burdened land.
  - **S&P.** Standard 2 Practice F. of LTA Standards requires that each Conservation Easement accepted by a land trust be reviewed and approved by the board of the land trust with timely and adequate information prior to final approval.
- (a) Enforcement**
- **Regulations.** The right of enforcement is both a right and a duty under Regulation §1.170A-14(g)(5)(D)(ii). The Holder must have a right to enforce the conservation restrictions by appropriate legal proceedings including, but not limited, to the right to require the restoration of the Property to its condition as of the Easement Date.
  - **S&P.** Standard 11, Practice E requires that:  
The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties in-

volved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense.

- **S&P.** Standard 11, Practice A requires that:

The land trust determines the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure these funds and has a policy committing the funds to this purpose.

- **Prior Notice.** Notice to Owners is not required prior to entry under §5.02(a) to investigate a suspected, alleged or threatened violation. Prior notice is required prior to routine inspections under §5.02(b).

### **(b) Inspection**

- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires the Holder to have the right to enter the Property at reasonable times for the purpose of inspecting the Property to determine if there is compliance with the terms of the donation.
- **S&P.** Standard 11, Practice C of S&P requires that: “The land trust monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity.”

### **(c) Review**

- **Protection of Resources.** Reserved rights of Owners must be conditioned, in a number of cases, upon Holder review and approval to ensure that adverse impacts on Conservation Objectives are immaterial.
- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires Owners to notify the Holder prior to the exercise of any reserved right, e.g., the right to extract certain minerals, which may have an adverse impact on the conservation interests associated with the qualified real property interest.
- **S&P.** Standard 11, Practice F of S&P requires that: “The land trust has an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.”

### **(d) Interpretation**

- **Conservation Objectives.** A key responsibility of Holder is to ensure that the Conservation Objectives – the purposes for which the Conservation Easement exists – are respected and advanced in the interpretation of the Grant.
- **Regulations.** This duty is not specifically required under the Regulations; however, most Holders perform these

tasks in the ordinary course of administration of a conservation easement.

- **S&P.** Standard 11, Practice D of S&P requires that:

The land trust maintains regular contact with owners of easement properties.... The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures....

### 5.03 Other Rights of the Holder

- **Purpose.** To give the Holder the right and power to perform at its election, the discretionary powers identified in this section.

#### (a) Amendment

- **Policy for Amendment.** PALTA urges Holders to formulate and adopt a policy on Amendment. PALTA intends to collect and publish examples of [Amendment policies](#) adopted by Holders in Pennsylvania. The model does not write into the Grant the policy of the Holder as of the Easement Date; instead, the approach taken is to identify the elements of an Amendment policy that must always apply (consistent with Conservation Objectives; no private benefit under the Code) but leave the issue of conformance to Holder's policy as it exists when the issue arises; i.e., if an Amendment is sought in the year 2020, it is Holder's policy at that time that will apply. For an explanation of private benefit rules, refer to §501(c)(3) of the Code and associated Regulations. The Land Trust Alliance published the report [Amending Conservation Easements](#) in 2007 with recommendations pertaining to Amendments. The report recommends seven principles to guide Amendment policies: "An amendment must:

1. Clearly serve the public interest and be consistent with the organization's mission.
2. Comply with all federal and state law.
3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
4. Not result in private inurement or confer impermissible private benefit.
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement."

- **S&P.** Standard 11, Practice I of S&P provides that the land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a re-

quirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

#### (b) Signs

- **Public Access.** Rights to install signage may need to be expanded if the Holder or Beneficiaries need to install Regulatory Signs in connection with Public Trail use.
- **Project Identification.** Installing signage may benefit the Holder in several ways. First, signs bring to the attention of the public the benefits of land conservation. Second, signs provide notice to a prospective purchaser, lessee or other user of the Property of the interest of the Holder. It then becomes their responsibility to inquire about the terms of the Grant.

#### (c) Proceedings

- **Purpose.** To put Holder in a position to take legal action under certain circumstances.
- **Protection of Resources.** A 2011 case ([Historic Green Springs v. Louisa County Water Authority](#), United States District Court for the Western District of Virginia) underscored the desirability of providing by agreement (rather than litigation) the right of Holder to take action under Applicable Law to protect natural resources. That case established the right of the easement holder to take action under the Clean Water Act to prevent polluting discharges upstream from the conserved property. Rather than litigate this point under the numerous federal and state statutes that may apply, the model explicitly provides this right to Holder.
- **Administrative Actions.** The Pennsylvania Municipalities Planning Code does not explicitly confer standing on the Holder as an "aggrieved person" -- a status that is necessary to be heard at a municipal hearing on a zoning, subdivision or land development and to appeal an adverse decision. While the municipality will not be bound by the understanding that Holder has these rights in (c)(ii), the Owners may be precluded from silencing the Holder at a municipal hearing. Another useful purpose of (c)(ii) is to provide Holder a basis on which to assert its right to be heard in (and appeal from) an administrative proceeding pertaining to the location of Utility Improvements to be installed on land to be taken by condemnation.

#### ADDITIONAL SUBSECTION, IF APPLICABLE:

#### (d) Resource Management Activities

To enter the Property<sup>1</sup> to observe various species and habitats and to perform resource management activities in furtherance of Conservation Objectives. Resource management activities, other than cutting and removal of Invasive Species by mechanical means, are to be performed in accordance with a Resource Management Plan submitted to Owners for review and approval, not to be unreasonably withheld or delayed.

<sup>1</sup> A particular area of the Property could be substituted; for example, the Highest Protection Area.

- **Purpose.** Some Holders want the opportunity to further Conservation Objectives by furnishing the Holder's own labor and materials for projects involving properties on which the Holder holds a conservation easement. An example might be a stream restoration project. The model provision requires Owners' approval for most projects in deference to the Owners' understandable desire to participate in decisions that might significantly alter landscapes or involve safety risks. Cutting back or digging out Invasive Species was considered a fairly low-impact activity that the Holder might engage in without Owners' prior approval.

## 5.04 Review

- **Purpose.** The purpose of this section is to provide the procedure for Review as and when Review is required under Articles II, III and IV.

### (a) Notice to the Holder

- This provision contains the procedural requirements to initiate the Review process.
- Some Holders may want a longer period of Review. If one or more of the Beneficiaries has a right to participate in the Review, the number of days in this provision for the Holder to respond should be somewhat longer than the period Beneficiary is given to Review under this Article.
- If the Holder has adopted a specific set of minimum criteria for submission, then this provision should be modified to substitute following after "including with the notice": "the items required for such submission under the Review Requirements of the Holder". The definition of "Review Requirements" in Article VIII accommodates two approaches – the Review Requirements can be simply included in the Baseline Documentation or can also be attached as an Exhibit to the Grant. In either case, the definition incorporates changes to the Review Requirements over time.

### (b) Notice to Owners

- Among the four possible responses to Owners' request for Review is rejection of Owners' proposal for insufficiency of information on which to base the Holder's decision. This alternative is included so as to avoid the need to incorporate detailed Review Requirements into the Grant and to give the Holder a reasonable opportunity to determine whether or not additional information is needed to give a definitive response to Owners' proposal.

### (c) Failure to Notify

- This subsection sets forth the consequences of the Holder's failure to respond in a timely way. An alternative to extending the time in subsection (b) above to 45, 60 or 90 days is to reverse the "deemed approved" to "deemed disapproved." The rationale for this reversal is that it provides an incentive to Owners to contact the Holder before the running of the 30-days to be sure the Holder has received all of the information the Holder needs to make the decision. It is also more likely that, if additional time is needed to make the decision, it is to the benefit of Owners to grant the extension.

### (d) Standard of Review

- The approach taken by the model is to allow for the possibility of wholly discretionary Review in those instances in which the activity, use or Improvement would otherwise not be permitted at all. Subsection (d)(i) makes it clear that the phrase "which Holder, without any obligation to do so" in relation to an approval or determination means that Holder is not obliged to give its reasons for accepting or declining a proposal by Owners in that particular instance. The phrase is only used a few times in the model: 3.03(c)(viii) pertaining to storage tanks and Utility Improvements servicing locations outside the Property; 4.03(d) pertaining to vehicular use in Highest Protection Area; 4.04(b)(iv) pertaining to conversion of Woodland Areas into Agricultural use; 7.06 pertaining to issuance of a Waiver. Users may, of course, use the phrase more or less frequently as desired.
- Except for those instances in which Review is wholly discretionary on the part of Holder, the general rule provided in the model is that Holder must act reasonably in discharging its duty to Review. The rationale for including in the model a standard of reasonableness based upon ecological concerns as set forth in subsection (d)(ii) is to avoid the possibility that a court might imply a standard of commercial reasonableness if no other standard has been agreed upon by the parties.
- Some users may want to substitute for both subsections (i) and (ii) the general principle that Holder need not be reasonable in making its decision -- a "sole and arbitrary" standard. The risk of adopting that standard as a stand-alone proposition (without the reasonableness standard of subsection (ii) as a backup) is that the standard might not hold up if tested in litigation. Parties to contractual arrangements have an implied duty of good faith and fair dealing which requires them to act reasonably towards each other. If the "sole and arbitrary" standard is stricken, then there is no standard at all and a standard of commercial reasonableness may be inferred to fill the void. Nevertheless, the following provision can be substituted for subsections (i) and (ii) of 5.04(d):

Holder's approval may be given or withheld in Holder's sole and arbitrary discretion. Holder may, but is not required to, furnish Owners with the reasons for Holder's decision.

### ADDITIONAL SUBSECTION, IF APPLICABLE:

### (e) Dispute Resolution

- **Notice of Dispute.** If Owners disagree with Holder's determination under §5.04 their only recourse under the model is to litigate the reasonableness of Holder's decision under the standards set forth in subsection (d). If Owners and Holder desire to include an alternative means to resolve the dispute, an additional subsection (e) can be added that will provide in clause (e)(i) a notice provision to start the alternative dispute resolution procedure and, thereafter, provisions for mediation or arbitration or both. The examples set forth below are only intended to provide



the basic terms of alternative dispute resolution. Counsel for Holders may desire to use more extensive provisions. For more information, see the [American Arbitration Association's website](#). (Mediators and arbitrators have opportunity to provide contact information and references in the [Experts](#) directory at [ConservationTools.org](#).)

- (i) Holder's decision under §5.04(b) is final unless, within ten (10) days after receipt of Holder's notice, Owners deliver to Holder a notice ("Owners' Dispute Notice") that Owners dispute the reasonableness of Holder's decision under the standards set forth in §5.04(d) and the reasons for such determination. If Owners and Holder do not otherwise resolve the dispute within ten (10) days following Owners' Dispute Notice, the dispute is to be referred for alternative dispute resolution as provided below.
- **Mediation.** Mediation, whether or not required under the document, can be a valuable tool to assist Owners and Holder in finding a way to resolve a disagreement as to whether the proposal that is subject to Review adversely affects natural resources or is inconsistent with Conservation Objectives. The purpose of mediation is to resolve disputes – not to judge whether one side is right and the other is wrong. If the mediation is not successful, Owners can proceed to litigate the dispute or, if desired or required by the terms of the Grant, can seek arbitration of the dispute (see below). Because mediators do not act as judges or final arbiters of the dispute, it is inappropriate to draft a mediation provision that calls for the mediator to issue a decision if the mediation is unsuccessful.
- (ii) If Owners and Holder do not otherwise resolve the dispute within ten (10) days following Owners' Dispute Notice, the dispute is to be referred to a mediator mutually agreeable to Owners and Holder. If, within thirty (30) days following Owners' Dispute Notice, Owners and Holder are unable to agree upon a person to serve as mediator, the Pennsylvania Land Trust Association is authorized to appoint the mediator at the request of either Owners or Holder. The person appointed as mediator must, unless otherwise agreed by Owners and Holder, be an appropriately certified or trained mediator. The mediator may engage a forester, agronomist or other conservation or resource management professional to assist in finding a resolution of the issue that both meets the requirements for approval of a proposal subject to Review and is acceptable to Owners and Holder. Both the mediator and any resource management professional engaged by the mediator must be independent and unaffiliated with either Owners or Holder. The costs of mediation are to be borne equally (one-half each) by Owners and Holder. Both Owners and Holder must exercise good faith, reasonable efforts to resolve the dispute; however, if, within sixty (60) days following Owners' Dispute Notice, a mutually binding resolution of the dispute has not been achieved, neither Owners nor Holder are obliged to continue mediation.
- **Final Disposition.** Mediation never guarantees a final result. A provision in a conservation easement document that purports to require the mediator to issue its decision at the end of an unsuccessful mediation is not enforceable against the mediator and changes the role of the mediator to that of judge rather than neutral facilitator. If Owners or Holder are determined to have a final disposition to the Review process without litigating in court, they must provide for binding arbitration without right of appeal. Provisions for binding arbitration must be carefully drafted so as to be enforceable. A discussion of the requirements for drafting effective arbitration clauses is outside the scope of this commentary. One concern, however, that should be noted is whether an agreement to arbitrate would be enforceable against subsequent Owners. In order to be binding, the parties to arbitration must agree to waive their constitutional rights to a judicial resolution of a dispute. The issue is whether acceptance of a deed to a Property under and subject to a document requiring binding arbitration constitutes a knowing and voluntarily waiver of Constitutional rights to jury trial and other due process of law.
- **Cost and Time.** Arbitration is a more formal procedure than mediation. It is conducted by an arbitrator who basically acts as a judge under rules that are very much like the procedures that would apply to a trial in a court of law. As a result, arbitration may cost as much in time and expense as litigating in court and, at the end, may not result in a final disposition without further resort to judicial process. One type of arbitration, often called baseball arbitration because it is used by major league baseball to resolve contract disputes, is a bit of a gamble but may reduce the cost and time required to reach a final disposition. The procedure encourages both Owners and Holder to discard negotiating positions and, instead, put forth their last best offer. The following is a simple example of a baseball-type arbitration clause.
- (iii) If the mediation under the preceding subsection is unsuccessful, Owners and Holder agree to submit their respective final written proposals to a conservation or resource management professional, unaffiliated with either Owners or Holder, who has the expertise, training or qualifications to conduct a Review of their respective proposals (the "Reviewer") so as to select one, and only one, that meets the standard of reasonableness set forth above. If Owners and Holder are unable to identify a mutually agreeable Reviewer, the Reviewer is to be appointed by the Pennsylvania Land Trust Association. Owners and Holder must each submit one, and not more than one, written proposal to the Reviewer within ten (10) days following appointment of the Reviewer. Within thirty (30) days following receipt of such proposals, the Reviewer must select, by notice to Owners and Holder, either Owners' proposal or Holder's proposal as submitted, without compromise or modification. Neither Owners nor Holder are permitted to communicate with the Reviewer during the Review period. The decision of the Reviewer is final and is conclusively deemed to

meet the standards of reasonableness set forth above in this section. Owners and Holder accept this procedure in full satisfaction of any and all rights that they may have under applicable law or otherwise to appeal or otherwise litigate disputes arising with respect to Review under this Grant. The costs of the Reviewer are to be borne equally (one-half each) by Owners and Holder.

### 5.05 Reimbursement

- The approach taken by the model is to correlate the obligation of Owners to reimburse with the obligations of the Holder to enforce, inspect, Review and interpret under §5.02. Note that expenses under §5.03 are not reimbursable unless by separate agreement. There may be instances in which Holder is exercising one or more of these discretionary rights at the request of, or for the benefit of, Owners and reasonably expects its costs and expenses to be reimbursed. For example, Owners may request an Amendment or may ask Holder to intercede in a proceeding affecting the Property. In those cases, Holder should seek a written commitment from Owners to reimburse Holder's reasonable costs and expenses.
- Some Owners do not want to commit to reimburse expenses without prior notice or approval. The following language can be added to §5.05 to accommodate that concern:

Owners are not responsible to reimburse costs and expenses arising from Holder's response to an inquiry or request by a Person other than Owners without Owners' approval.

### ADDITIONAL SECTION, IF APPLICABLE:

### 5.06 Beneficiaries

- **Purpose.** The purposes of this section are to describe the relationship between the Holder and one or more Beneficiaries and to specify exactly what rights have been vested in each Beneficiary.
- **S&P.** Standard 8, Practice J of S&P provides that land trusts engaging in a partnership or joint acquisition of a long term stewardship project should document in writing, as appropriate, the goals of the project, roles and responsibilities of each party, legal and financial arrangements, communications to the public and between parties, and public acknowledgment of each partner's role in the project. The provisions of Article V are intended to document the rights of each Beneficiary consistent with Standard 8, Practice J Other arrangements as between Holder and Beneficiary covering matters described in Standard 8, Practice J may be documented by grant agreements or other writings separate from the Grant.

#### (a) Land Trust Beneficiary

- If a land trust will be named a Beneficiary in §1.07, the specific rights to be held by that land trust are to be listed in §5.06. The land trust relationship can range from "back-up grantee" (only the right of enforcement in (i) below is granted) to "co-holder" (all four rights listed below are granted).

- Model provision:

Owners and Holder grant to the Land Trust Beneficiary the following rights and benefits with respect to this Grant:

- (i) The right to exercise Holder's rights and duties under this Grant should Holder fail to uphold and enforce in perpetuity the restrictions under this Grant.
  - (ii) A right of prior consultation with Holder when Owners request Review under Article V.
  - (iii) A right of prior approval of any Amendment.
  - (iv) A right of prior approval of any transfer of Holder's rights under this Grant.
- **S&P.** Standard 11, Practice H of S&P provides that a land trust who regularly consents to being named as a backup or contingency Holder should have a policy or procedure for accepting conservation easements from other land trusts and has a plan for how it will obtain the financial resources and organizational capacity for conservation easements that it may receive at a future date.
- (b) State Program**
- If the DCNR has been named as a Beneficiary as described in §1.07 of this commentary, add the following provisions to §5.06 of the Grant:

The Conservation Easement vested in Holder by this Grant 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 to another entity, including a municipality, 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.

**(c) County Program**

- **County Beneficiary.** If the County has been named as a Beneficiary as described in §1.07 of this commentary, add the following provision to §5.06 of the Grant:

Owners and Holder grant and convey to the County the following rights and benefits with respect to this Grant:

- (i) The right to exercise enforcement rights or to compel transfer of the Conservation Easement to another Qualified Organization should Holder fail to uphold and enforce in perpetuity the restrictions applicable to the County Program Area under this Grant.
  - (ii) A right of prior consultation with Holder when Owners request Review under Article V.
  - (iii) A right of prior approval of any Amendment to determine whether the Amendment permits uses of the County Program Area not permitted under the County Program.
  - (iv) A right of prior approval of any transfer of Holder's rights under this Grant with respect to the County Program Area other than to the Land Trust Beneficiary.
- **Accounting of Stewardship Funds.** At least one County wants to expand the right granted in subsection (i) above to include the following:

In furtherance of County's right to compel transfer of the Conservation Easement, County also has the right to require an accounting of any contribution made by County to Holder to fund stewardship of this Grant and the right to compel Holder to transfer with the Conservation Easement the residue of such stewardship fund that remains with Holder.

**(d) Local Program**

- **Township Beneficiary.** If the Township has been named as a Beneficiary as described in §1.07 of the commentary, add the following provision to §5.06 of the Grant:

Owners and Holder grant and convey to Township the following rights and benefits with respect to this Grant:

- (i) The right to exercise enforcement rights or to compel transfer of the Conservation Easement to another Qualified Organization should Holder fail to uphold and enforce in perpetuity the restrictions applicable to the Township Program Area under this Grant.
- (ii) A right of prior consultation with Holder when Owners request Review under Article V.
- (iii) A right of prior approval of any Amendment to determine whether the Amendment permits uses of the Township Program Area not permitted under the Township Program.
- (iv) A right of prior approval of any transfer of Holder's rights under this Grant with respect to the Township Program Area other than to the Land Trust Beneficiary.

**ADDITIONAL SECTION, IF APPLICABLE****5.07 Public Access**

- **Generally Not Required but Sometimes Desirable.** Conservation easement transactions generally do not require public access. However, public agencies sometimes require public access as a condition for financially supporting a conservation project. Also, a grant of public access can be helpful to support Owners' eligibility for a federal tax deduction associated with the charitable donation of a conservation easement (specifically in regard to the public benefit test for qualified conservation contributions).
- **Resources.** Resources are available at [ConservationTools.org](http://ConservationTools.org) to help establish and manage public access:
  - **Model Access Easements.** The [Model Grant of Fishing & Boating Access Easement](#), the [Model Trail Easement Agreement](#) and the [Model Grant of Trail Easement](#) may be coupled with a grant of conservation easement to establish public access as part of a conservation project.
  - **Hybrid Easement.** The [Model Fishing Access Agreement and Commentary](#) combines a grant of public access and resource protection in one document. However, if resource protection is a high priority, users may be better served by using the [Model Grant of Conservation Easement](#) in combination with the [Model Grant of Fishing & Boating Access Easement](#).
  - **Guides.** Among other resources at [ConservationTools.org](http://ConservationTools.org) are the guide [Reducing Liability Associated with Public Access](#) and the guide [Trail Easements](#).
- **Adaptable to Provide Access to Organized Groups without Granting Access to the Public.** Owners may want to grant limited access on their land to schools or other organizations for various educational or recreational purposes. The model documents prepared for public access purposes may be adapted to provide this more limited access.
- **Three Alternatives to Provide Public Access.** Any one of the model access easements identified above (any of these, or another preferred by the user, an "Access Agreement") can be used, singly or together with §5.07 of the Grant, to provide public access in association with a conservation easement project. Alternative 1 below explains how to use them together to maximize the benefits of each approach. Alternative 2 addresses public access issues solely in the Access Agreement. Alternative 3 grafts the entirety of the easement for access into the conservation easement which, for reasons discussed below, has some drawbacks that should be considered.

**ALTERNATIVE 1 TO PROVIDE PUBLIC ACCESS: USE SEPARATE ACCESS AGREEMENT WITH §§5.07(A) AND (B) TO ASSURE PERMANENCY.**



- **Rationale for Separate Access Agreement.** There are a number of reasons supporting a decision to use a separate document to address issues particular to affirmative easements to provide rights of public entry onto private property. First, the Holder of a conservation easement by design typically has very limited affirmative rights of entry and no ability to allow the public to enter. The Owners are entirely in control of the Property. As such, it is not appropriate for Holder to take responsibility for injuries occurring on the Property. A public access easement is very different. Within the area subject to the right of public access (the "Easement Area"), Owners may want the holder of the Access Agreement to take primary responsibility for injuries occurring within the Easement Area if immunity under Applicable Law is not available. Second, using two documents allows a County Beneficiary or Township Beneficiary, to assume a leadership role in managing and administering the public access – either from the outset or at a later date -- as part of a wider recreational system. Third, there is no need for every change of the Access Agreement to go through the process for approving and reporting Amendments of conservation easements. Fourth, the model Access Agreements were designed to allow both Owners and Access Holder the opportunity to address an array of management and administrative issues that cannot be fully explored in a single section of the Grant.

- **Rationale for Inclusion in Grant.** Beneficiaries often want to strongly and permanently tie the elements of a conservation project together: both the natural resource protection elements and the public access elements. For example, a public agency helping with the costs of the conservation transaction may want to ensure that the Holder of the Grant of Conservation Easement has a continuing duty in perpetuity to ensure public access (even if the holder of the Access Agreement changes). Another example: Owners may want to bolster their federal tax position that public access was an integral part of a single qualified conservation contribution.

- **Utilize Both to Maximize Benefit.** If Owners and Holder are satisfied that a separate Access Easement is desirable for the reasons summarized above, §5.07 (a) provided below can be added to the Grant to etch in stone for all time that the grant of public access is permanent, perpetual and part of a single, unified, conservation transaction. Some financial supporters of conservation projects may want the Holder's *right* to furnish public access, under §5.07(a), to be accompanied by the *duty* to do so. §5.07(b), set forth below, assures a project funder that any public access required by the funder as a condition of providing funding for the project will in fact be provided in perpetuity. Together, §§5.07(a) and (b), although entirely or in part redundant to the Access Agreement, solidify the power of Beneficiaries to see that public access is provided regardless of anything included in the Access Agreement -- as of the Easement Date or at any time in the future. Because these sections are part of the Grant, they cannot be

changed except by Amendment approved in accordance with applicable provisions of the Grant.

## 5.07 Public Access

### (a) Grant of Public Access

By signing this Grant, the undersigned Owner or Owners, on behalf of themselves and all subsequent Owners, grant to Holder, in perpetuity, the right to traverse the Property within the area identified as "\_\_\_\_\_" on the Conservation Plan (the "Easement Area") [and more fully described in the Access Agreement]. The easement granted to Holder in this section includes the right to make the Easement Area available to the general public for walking, nature study and other purposes described in the Access Agreement.

- **Additions to Glossary.** For consistency, add the term "Easement Area" to the Glossary in Article VIII with the following cross-reference: "The term is defined in §5.07." Add the term "Access Agreement" to the Glossary. *See* the commentary to Article VIII for a definition of "Access Agreement."

### (b) Holder's Obligation

Holder must take such steps as may be reasonably necessary to remove any Improvements and constrain any uses or activities that impair, in any material respect, public access to the Easement Area pursuant to the easement granted in this §5.07. Should Holder fail to do so after notice and a reasonable opportunity to cure, the Beneficiaries may exercise such rights as they may have under this Grant to restore public access to the Easement Area.

- **Obligation to Install Access Improvement.** Some project funders may additionally want to obligate the Holder to build a public trail or other public access improvements. In this case, add the following to the end of the first sentence of §5.07(b): "and install, or cause the installation of, the public trail [or other public access improvements]."

- **Numbering.** If §5.07(b) is unneeded, the content of §5.07(a) may be placed directly under the heading for §5.07 and the subsection reference may be eliminated.

## ALTERNATIVE 2 TO PROVIDE PUBLIC ACCESS: USE SEPARATE ACCESS AGREEMENT ALONE.

- **Rationale.** If Owners and Holder understand the benefits of addressing public access issues in a separate document and neither they nor any Beneficiaries see the need to reassert the permanency of the grant of public access in §5.07, then a simple and direct way to grant public access is to record an Access Agreement at the same time, but after, the recordation of the Grant. In that case, no §5.07 is needed.

**ALTERNATIVE 3 TO PROVIDE PUBLIC ACCESS: USE §5.07 OF THE GRANT ALONE (NO SEPARATE ACCESS AGREEMENT).**

- **Rationale.** If Owners, Holder, or Beneficiaries do not want to record a separate Access Agreement to address issues that arise when public access to private property is granted, then use the following alternate §5.07, tailoring as needed per the footnotes.

**(a) Grant of Public Access**

By signing this Grant, the undersigned Owner or Owners, on behalf of themselves and all subsequent Owners, grant to Holder, in perpetuity, the right to traverse the Property within the area identified as “\_\_\_\_\_” on the Conservation Plan (the “Easement Area”) for the purposes described in §5.07(c) below.

- **Additions to Glossary.** For consistency, add the term “Easement Area” to the Glossary in Article VIII with the following cross-reference: “The term is defined in §5.07.”
- **Alternatives to Delineation on Conservation Plan.** The Easement Area may instead be described in a separate exhibit, in which case substitute the following: ‘traverse the Property within the area identified as “\_\_\_\_\_” on Exhibit “\_\_\_” (the “Easement Area”).’ Alternatively, use prose to describe the Easement Area; for example, ‘traverse the Waterway and within eight (8) feet of the Top of the Banks of the Waterway (collectively, the “Easement Area”).’

**(b) Holder’s Obligation**

Holder must take such steps as may be reasonably necessary to remove any Improvements and constrain any uses or activities that impair, in any material respect, public access to the Easement Area pursuant to the easement granted in this §5.07. Should Holder fail to do so after notice and a reasonable opportunity to cure, the Beneficiaries may exercise such rights as they may have under this Grant to restore public access to the Easement Area.

- **Obligation to Install Access Improvement.** Some project funders may additionally want to obligate the Holder to build a public trail or other public access improvements. In this case, add the following to the end of the first sentence of §5.07(b): “and install, or cause the installation of, the public trail [or other public access improvements].”

**(c) Purposes of Easement for Access**

The purposes of the easement for access are as follows:

- (i) For public use of the Easement Area for [insert purposes<sup>2</sup>]. [Insert limitations; for example: Public access is limited to the hours between dawn and dusk.<sup>3</sup>]
- (ii) For the installation and maintenance of [insert facilities; for example, “the Public Trail or “a boat launch”] and posting of Regulatory Signs with respect to the use of the Easement Area or other information pertaining to the public access granted under this section.<sup>4</sup> The rights granted in this subsection (ii) are exercisable only by Holder and Persons designated by Holder to exercise these rights.

- **Addition to Glossary.** If applicable, add the term “Public Trail” to the Glossary in Article VIII. A definition of “Public Trail” is furnished in Article VIII of this commentary.

**(d) Rights of Owners**

- (i) **Consistent with Public Access.** The easement for access is non-exclusive. Owners may continue to use the Easement Area in accordance with the terms of this Grant so long as Owners’ use is consistent with the rights granted in this section and does not prevent or impair access to the Easement Area for the purposes described above.<sup>5</sup> Owners may at any time request from Holder clarification of activities and uses that conform to this standard.<sup>6</sup>

<sup>2</sup> Examples: “fishing and boating”; or “hiking, nature study and wildlife watching”; or “walking, hiking, jogging, non-motorized cycling and horseback riding on the Public Trail”.

<sup>3</sup> Another example: “Holder may impose limitations on the time, place and manner of public entry. To the extent required by Applicable Law, neither this section nor any other provision of this Grant prevents use of the Easement Area by power-driven mobility vehicles by Persons with mobility impairments.” Examples of reasonable limitations would be requiring animals to be leashed or restricting audio devices.

<sup>4</sup> This subsection could be expanded to include rights of Holder to perform resource management activities. See, for example, Article II of the [Model Grant of Fishing & Boating Access Easement](#).

<sup>5</sup> Some Owners want assurance that they can continue to engage in certain activities that may impact the Easement Area. A provision such as the following can be added: “As of the Easement Date, the undersigned Owner or Owners and Holder have agreed that the following activities engaged in by Owners, their family members or their invitees are consistent with the grant of the easement for access: Sustainable Forestry, recreational hunting and fishing, installation of deer stands and posting of Regulatory Signs (other than signs prohibiting public access to the Public Trail.”

<sup>6</sup> Some Owners want assurance that Holder will make reasonable accommodations for Owners’ activities in the interest of public safety. A provision such as the following can be added: “Holder will not unreasonably withhold its consent to temporary limitations on public access to accommodate Owners’ right to engage in Sustainable Forestry and hunting activities at times and loca-

- (ii) **Right to Exclude.** Owners retain the right to take any action permitted under Applicable Law to remove from the Property (including the Easement Area) Persons engaged in activities or uses other than those set forth as purposes of the easement for access granted above.<sup>7</sup>

**(e) Immunity under Applicable Law**

Nothing in this Grant limits the ability of Owners, Holder or any Beneficiary to avail itself of the protections available under any Applicable Law affording immunity to Owners, Holder or any Beneficiary including, to the extent applicable, the Recreational Use of Land and Water Act.<sup>8</sup>

**(f) Public Access Claims; Owner Responsibility Claims**

If a claim for any Loss for personal injury or property damage occurring within the Easement Area after the Easement Date (a “Public Access Claim”)<sup>9</sup> is asserted against either Owners or Holder, or both, it is anticipated that they will assert such defenses as are available to them under Applicable Law. The phrase “Public Access Claim” excludes all claims (collectively, “Owner Responsibility Claims”) for Losses and Litigation Expenses arising from, relating to or associated with (i) personal injury or property damage occurring prior to the Easement Date; (ii) Improvements other than those (if any) installed by Holder; or (iii) activities or uses engaged in by Owners, their family members, contractors, agents, employees, tenants and invitees or anyone else entering the Property (including the Easement Area) by, through, or under the express or implied invitation of any of the foregoing.

tions that do not unreasonably interfere with the public benefit intended to be conferred in this Grant.” Sometimes this reserved right is limited to a specific number of days or a specific hunting season by adding the following: “Temporary limitations may not exceed a total of \_\_\_\_ days within any calendar year and, unless otherwise approved by Holder, after Review, are limited to the days set forth in the closure schedule included in the Baseline Documentation.”

<sup>7</sup> This provision is intended to give Owners’ assurance that they can control (with the assistance of local police, if necessary) undesirable activities such as loitering, picnicking, etc. without the need to list every undesirable activity.

<sup>8</sup> The Recreational Use of Land and Water Act evidences the public policy of the Commonwealth of Pennsylvania to provide immunity from certain claims to landowners who gratuitously allow their property to be used for recreational purposes by the public.

<sup>9</sup> For consistency, “Public Access Claim” and “Owner Responsibility Claim” should be added to Article VIII of the Grant with, in each case, a cross-reference to this section as follows: The term is defined in §5.07 of this Grant.

**(g) Indemnity**

If immunity from any Public Access Claim is for any reason unavailable to Owners, Holder agrees to indemnify, defend and hold Owners harmless from any Loss or Litigation Expense if and to the extent arising from a Public Access Claim. Owners agree to indemnify, defend and hold the Holder harmless from any Loss or Litigation Expense if and to the extent arising from an Owner Responsibility Claim.

**ADDITIONAL SECTION, IF APPLICABLE:**

**5.08 Administrative Agent**

- **Land Trust as Administrative Agent.** If a land trust has been named as Administrative Agent as described in §1.10 of the commentary, add the following provision to Article V of the Grant:

Owners and Holder acknowledge that the duty of Administrative Agent is to provide inspection, review and interpretation services in the ordinary course; to communicate decisions of Holder with respect to items subject to Review; and to perform such other services as are requested by Holder under the terms of a separate agreement between Holder and Administrative Agent.

## Article VI. Violation; Remedies

**6.01 Breach of Duty**

- **Purpose.** The purpose of this provision is to ensure that the Conservation Easement will be enforceable in perpetuity. This provision, and other limitations on transfer by Holder in §1.06, are required for the Conservation Easement to qualify as a charitable contribution under Regulation §1.170A-14(g)(5)(D)(ii).
- **S&P.** Standard 11, Practice G of S&P requires the land trust to have a contingency plan for all of its easements in the event the land trust ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the land trust secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement the land trust has complete and accurate files and stewardship and enforcement funds available for transfer.

**6.02 Violation**

- **Purpose.** This section sets forth the procedure for enforcement of the Conservation Easement.
- **Persons Responsible.** Do not alter this provision to create a connection between the violation and some act or failure to act by Owners. A violation is a violation whether or not caused by Owners. Restrictions in the Grant have been stated in the passive voice so that the activity itself is the violation regardless of who was the cause of the violation. Tenants, invitees and trespassers can violate the restrictive covenants set forth in the Grant. It is up to Owners to maintain control over the Property. There are several ra-

tionales underpinning this approach. First, it avoids the situation in which the Holder must prove not only that a violation occurred but that the Owner (and not anyone else in the universe) caused it. Second, if an activity is not a violation unless Owners caused it, then the Holder has no leverage to cause Owners to restore the damaged resource or keep it from happening again.<sup>10</sup> To mitigate any overly harsh consequences on an innocent Owner, the model also includes §6.07 captioned “No Fault of Owners”. While that provision does not absolve Owners from restoring the damaged resource, it gives the Owners comfort that they won’t be responsible for costs of Holder in connection with the violation.

**(a) Notice**

- **Purpose.** This provision is to give Owners some comfort that, before they are exposed to monetary damages or other remedies, they will be given notice of the alleged violation. See Article VIII for requirements applicable to notices.

**(b) Opportunity to Cure**

- **Purpose.** The approach taken by the model is to provide a reasonable period to cure if, within the initial 30-day period, there is a meeting of the minds between Owners and the Holder as to what constitutes a reasonable cure and what constitutes a reasonable period of time to effectuate that cure.

**(c) Imminent Harm**

- **Purpose.** If the Holder becomes aware of a prohibited activity that will destroy protected resources, the Holder cannot delay obtaining a court order to cease the activity. For example, if the violation is tree cutting, the trees will be gone by the time the cure period expires.
- **Consultation.** On the other hand, Owners frequently want some kind of notice before they become responsible for Litigation Expenses incurred by the Holder based on an alleged violation. If that is an issue, users can consider adding a statement to the effect that the Holder will endeavor to communicate or consult with Owners regarding the alleged violation prior to commencement of remedies. Do not use the words “notice” or “notify” because that will require written notice given in accordance with Article VII. Consulting or communicating with Owners can be accomplished via a telephone call.

### 6.03 Remedies

- **Purpose.** The purpose of this section is to describe the specific remedies that the undersigned Owners and the Holder agree are appropriate if a violation should occur in the future.
- **Enforceability of Waivers.** Holders and their counsel need to keep in mind that not all promises of the undersigned Owners are binding upon future Owners of the Property who did not, themselves, make the promise. The

rule developed by case law over many centuries required that the promise had to be about something pertaining to the land itself. For example, the restrictive covenants in Articles II, III and IV are unquestionably binding upon future Owners. On the other hand, it is highly questionable whether a court would enforce against future Owners waivers of procedural or constitutional rights just because the Person signing the Grant did so.

- **Due Process of Law.** The approach taken by the model is to include only those remedial provisions that a court would be willing to enforce against all Owners and that do not purport to waive the constitutional rights of Owners to notice, opportunity to be heard, to have the dispute determined by a court before a jury and any other constitutionally protected right of due process of law.
- **ConservationTools.org.** The guide [\*Legal Considerations for Stewardship Funding Arrangements\*](#) explains the legal difficulties that may arise when a conservation easement is used to document Owners’ obligation to make future stewardship contributions to Holder. The [\*Model Stewardship Funding Covenant and Commentary\*](#) provide an alternative, and more reliable, means to evidence, secure and collect financial obligations from Owners.
- **Arbitration; Mediation.** Provisions for arbitration and/or mediation are sometimes added to grants of conservation easement; however, it is doubtful that the undersigned Owner can waive the constitutional right of future Owners to a trial by jury so requirements for mandatory arbitration or mediation may be of limited usefulness in a conservation easement. Mediation and some types of arbitration provisions may be helpful for the expeditious resolution of a dispute as to whether an Owners’ proposal should have been approved after Review and, to that end, an optional new section pertaining to alternative dispute resolution has been included in §5.04 of the commentary. Holders who want to insert provisions for arbitration or mediation in the general remedies section of the Grant should consult with counsel and choose an effective and enforceable provision. For information on arbitration and mediation, consult the website of the American Arbitration Association (<http://www.adr.org>). A provision requiring arbitration or mediation must always except the rights of Holder to take immediate action, including petitioning a court for injunctive relief, when imminent harm to Conservation Objectives has occurred or is threatened.

**(a) Injunctive Relief**

- **Purpose.** Relief in the nature of a court order forcing a Person to do or refrain from doing certain activity is a special remedy that under Applicable Law usually requires a showing that other relief will not suffice to make the Person harmed by the activity whole.
- **Restatement.** The Restatement recommends special treatment for a conservation servitude held by a governmental body or a conservation organization: it is enforceable by coercive remedies and other relief designed to give

<sup>10</sup> For example, if dumping occurs, it is reasonable to expect that Owners will put a chain across the access point or take similar measures to prevent recurrence.

full effect to the purposes of the servitude without the showing otherwise required under Applicable Law.

**(b) Civil Action**

- This remedy is intended to furnish the Holder with a judgment for a specific sum of money that the Holder is entitled to collect from Owners. The judgment automatically creates a lien on the real property of Owners in the county in which the judgment is entered and can be enforced against any assets of Owners. The amount of the judgment will be set by the court in the reasonable amount necessary to compensate the Holder for Losses, Litigation Expenses and other sums owing by Owners under the Grant.

**(c) Self-Help**

- Many Holders want the power to enter the Property so as to stop a violation while a court order is being sought to restrain further activity. Holders are urged to consult with counsel and, if circumstances suggest that the entry is unwelcome, consider requesting police escort. The power of self-help should be used only if the entry can be made without violence and without harm to persons or property.

**ADDITIONAL SUBSECTION, IF APPLICABLE:**

- **Fine.** Some Holders have expressed a desire to impose a financial penalty to incentivize Owners to bring the Property back into compliance with the Grant sooner rather than later. This device is widely used by community associations to penalize owners who violate restrictive covenants. A remedy in the nature of a financial penalty may also be appropriate for violations that recur sporadically but do not continue for longer than the cure period. For example, Owners allow the Standard Protection Area to be used from time to time for dirt bike racing. By the time the notice and cure provision has run, the activity has ceased only to recur again in a few weeks or months. If desired, the following provision may be added to §6.03:

**(d) Fine**

Collect a reasonable penalty for each day the violation continues after the expiration of the applicable notice or grace period under §6.02 above (if any) or, in the case of subsequent violations within the same calendar year in which notice and opportunity to cure (if any) under §6.02 has previously been given, for each day the subsequent violation exists whether or not notice of the subsequent violation has then been given or the opportunity to cure has run. [The penalty is \$\_\_ per day subject to adjustment over time to maintain equivalent value with the U.S. dollar as of the Easement Date.]

**6.04 Modification or Termination**

- **Purpose.** This provision is intended to apply whenever the Conservation Easement is at risk for modification or termination due to a claim of “changed circumstances”, “impossibility” or condemnation (the exercise of the power of eminent domain by a governmental entity).

- **S&P.** Standard 11, Practice J of S&P requires the land trust to understand its rights and obligations under condemnation and the Code and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The land trust works diligently to prevent a net loss of conservation values. Standard 11, Practice K provides that, in rare cases, it may be necessary to extinguish, or a court may order the extinguishment of an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.
- **Changed Circumstances.** In regard to claims of “changed circumstances”, the view of legal scholars set forth in §7.11 of Restatement is as follows: A conservation servitude held by a governmental body or a conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:
  - If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the *cy pres* doctrine, except as otherwise provided by the document that created the servitude. When the *cy pres* doctrine is applied, the court will try to find a purpose as near as possible to the particular purpose for which the servitude was created.
  - If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude.
  - If the changed conditions are attributable to the holder of the servient estate [i.e. the Owners], appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.
  - Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.

**(a) Compensatory Damages**

- This provision is intended to be a powerful disincentive to litigation aimed at invalidating a conservation easement. It removes the monetary reward that might otherwise result by successful litigation.

**(b) Restitution**

- The view of legal scholars is that the remedy of restitution should be available, if desired by the Holder, in the case of violation of a conservation servitude.

**ADDITIONAL SUBSECTION, IF APPLICABLE:**

- **Conservation Objectives within Property.** Some Owners request Holder to commit its share of the proceeds of a potential taking to projects furthering Conservation Objectives within the remainder of the Property not subject to the taking. For example, if additional road right-of-way is taken, Holder might make available its share of the proceeds to fund planting additional vegetative buffer in furtherance of applicable Conservation Objectives. If that is acceptable to Holder, add the following to §6.04:

**(c) Application of Proceeds**

At the request of Owners, Holder will make available its share of the proceeds of a partial taking of the Property (but not other termination or extinguishment) to fund projects that further Conservation Objectives within the remainder of the Property. Holder's share of the proceeds available for this purpose is net of costs of collection, attorneys' fees and other expenses for which Holder is entitled to reimbursement under Article V.

**6.05 Remedies Cumulative**

- **Purpose.** The purpose of this provision is to negate the presumption under Applicable Law that once a Person chooses a particular remedy, the Person has made his election and cannot choose others or pursue more than one remedy at the same time.

**6.06 No Waiver**

- **Purpose.** The purpose of this provision is to negate the equitable defense of laches. That defense applies when a Person who has a right fails to assert that right and the other Person changes the Person's position relying on what appears to be acquiescence.

**6.07 No Fault of Owner**

- **Purpose.** This provision is intended to give some comfort to Owners that they will not be held responsible for the acts of others.
- **Burden of Proof.** The provision is specifically worded to avoid imposing on the Holder the burden of proving that a particular violation was the fault of Owners and no one else.

**6.08 Multiple Owners; Multiple Lots**

- **Purpose.** To give some comfort to Owners that they are not responsible for violations on portions of the Property that they do not control.
- **Joint and Several.** Some forms provide for joint and several liability of Owners that could result in an unfair result under certain circumstances. For example, two Owners own two different lots within the Property. X is wealthy and Y has no assets but the lot. Y is in violation of the

Conservation Easement. Under a provision that simply states "all Owners are jointly and severally liable", the Holder could collect the entirety of its Losses and Litigation Expenses from X.

**6.09 Multiple Owners; Single Lot**

- **Purpose.** This provision means that, if two Owners own the Property, the Holder can collect from either or both of the Owners. A paying Owner can collect from a non-paying Owner under the doctrine of subrogation, but it is not the Holder's problem.

**Article VII. Miscellaneous**

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

**7.01 Notices**

- The purpose of this section is to provide a procedure for the giving of formal notices under the Grant.
- If the user has adopted the defined term "Notice" included in Article VIII of this commentary, §7.01(a) may be deleted.

**(a) Form of Notices**

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

**(b) Address for Notices**

- A street address should be furnished as commercial couriers (such as FedEx or UPS) cannot deliver to P.O. Boxes.

**7.02 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 apply.

**7.03 Assignment and Transfer**

- **Purpose.** The purpose of this section is to set forth the rules governing the transferability of rights and duties under the model.

**(a) By the Holder**

- **Purpose.** The limitations on the Holder's ability to transfer its interest are required under §1.170A-14(g)(6)(1) of the Code.
- **Notice.** Some Owners request prior notice and rights of approval as to the identity of the proposed transferee. Rights of prior notice may be given to Owners if the Holder desires to do so. That will give Owners the opportunity to contact the Holder for additional information and, perhaps, suggest other choices.

- **Example.** The Holder must notify Owners within 30-days prior to the assignment of the identity and address for notices of the Qualified Organization who has agreed to assume the obligations of the Holder under this Grant.
- **Rights of Approval of Transferee.** The question often arises whether Owners should be given a right of prior approval over the identity of the proposed transferee Qualified Conservation Organization. The rationale in support of that argument is that the Owner selected a particular Holder anticipating a good working relationship with that Holder. If Holder can transfer at will to any Qualified Conservation Organization, the expectations of Owner regarding that good working relationship may not be met. The argument against that position is that it is inappropriate to bind the Holder to continuing holding a Conservation Easement that may not be consistent with its mission in the future. Alternatives can be negotiated that provide a mechanism for Owners to object to a particular transferee and suggest another Qualified Conservation Organization willing to accept the transfer of the Conservation Easement.
- **S&P.** Standard 9, Practice L of S&P provides that if the land trust transfers a conservation easement, the land trust must consider whether the new Holder can fulfill the long-term stewardship and enforcement responsibilities, ensures that the transaction does not result in a net loss of important conservation values and, for donated properties, ensures that the transfer is in keeping with the donor's intent.

#### (b) By Owners

- **Purpose.** Owners can freely transfer their interest in the Property; however, they can only transfer under and subject to the Conservation Easement whether or not specifically mentioned in the deed of transfer.
- **Pre-Transfer Procedures.** Requirements for pre-transfer inspection are included in Article II.

#### 7.04 Burdens; Benefits; Exclusive to Holder

- **Purpose.** To set forth the understanding of Owners and the Holder that the Grant is not just the agreement of the undersigned Persons but binds and benefits all Persons who succeed to their respective interests; to clarify that certain benefits of the Grant, such as the power and authority to exercise rights of Review, Amendment, and Waiver, run only to Holder and not Owners.
- **Voluntary.** When a Conservation Easement is donated in whole or in part, it may be helpful to add a provision along the lines of the following to underscore that the donation was knowing and voluntary.

The undersigned Owner or Owners have been represented by legal counsel of their selection (or had the opportunity to be so represented) and understand that they are permanently imposing restrictions on the future use and development of the Property that constrain the full use and development otherwise available under Applicable Law.

- **Multiple Lots.** The model takes the position that, when a conservation easement encumbers more than one Lot, the Owners are not the intended beneficiaries of a common plan imposed on the Property. Thus, the Holder may make changes in the application of the Grant as to any one Lot without seeking approval from the Owners of the other Lots. Sometimes, however, a conservation easement is granted, in part, to create a common scheme of restricted development and, in those cases, Owners may expect the Grant to create a common plan running to the benefit of all of the Lots. While that sounds fine in the abstract, as a practical matter it empowers the Owners of any one of the Lots to substitute their judgment for the decision Holder would otherwise make in the ordinary course.
- **Alternative Regarding Multiple Lots.** As an alternative to the last sentence of the model provision, the following seeks to balance the interests of Owners as a whole without giving undue weight to any one Owner:

Owners requesting Review, Amendment or Waiver applicable to less than all of the Lots within the Property must furnish to all other Owners copies of the request submitted to Holder and notice that Owners have not more than \_\_\_\_ days from the date of the notice to notify Holder of their objection to such request including the reasons why the request is inconsistent with maintenance or attainment of Conservation Objectives. If, within the applicable time period, Holder has not received notices of objection from Owners owning, in the aggregate, at least \_\_\_\_% of the acreage within the Property, Holder may proceed to make its determination without further notice to, or consultation with, Owners of other Lots. If sufficient notices of objection have been received, then the Owners seeking Review, Amendment or Waiver must consult with the objecting Owners to remove or mitigate features affecting Conservation Objectives. Holder is not obligated to render a decision unless and until the requisite number of Owners have withdrawn or waived their objections.

#### 7.05 Requirement of Writing

- **Purpose.** This provision has multiple 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 Grant. Second, it puts Holders on notice of their need to inform staff or other Persons performing monitoring or administrative duties of the limits of their authority.
- **Amendment.** Ordinarily, an Amendment needs to be approved by the Board or other governance committee that approves acceptance of the Conservation Easement. An Amendment is signed with all of the formalities required of the original Grant and is intended to be recorded in the Public Records. An Amendment permanently changes the terms of the Grant.



- **Waiver.** A party to an agreement can exercise its discretion to waive strict compliance with the terms of the agreement; however, Holders must take care to exercise this discretion only with respect to specific circumstances and for a specific period of time. Oral promises are particularly dangerous because they can be raised later as a defense to Holder's exercise of rights vested by the Grant. The recollection of the Owners may be very different from the Person making the oral commitment on behalf of Holder. The definition of "Waiver" in Article VIII seeks to make clear that a Waiver does not constitute an Amendment because the terms of the Grant remain unchanged. Holder merely waives its right to invoke its remedies under Article VI for a limited period of time. A Waiver must 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. The Board of a land trust should provide direction to the staff as to its authority to grant a Waiver and under what circumstances. Examples of circumstances in which a Waiver might be considered by Holder in its discretion are: unusual weather or unexpected occurrence (drought, fire, earthquake, subsidence, pest invasion); unavailability of a plan, permit or approval for circumstances outside the Owners' control; or a one-day accommodation of an uncommon event such as permitting a tent or parking in a field for a family wedding.

## 7.06 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 – if one provision fails (for example, the Holder is not permitted a self-help remedy under Applicable Law) the others remain in full force.

## 7.07 Counterparts

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

## 7.08 Indemnity

- **Purpose.** The Property is *not* in the care, custody or control of the Holder. The Holder needs to be protected from claims that are the responsibility of the Owners in the first place so that Owners (or their insurer) will defend those claims without the need for the Holder to furnish its own defense and incur Litigation Expenses.
- **Environmental Laws.** Among other liabilities under Applicable Law, this provision is intended to avoid Litigation Expenses in case the Holder is named as a potentially responsible party with respect to an alleged violation of environmental laws on or about the Property.

- **Liability Coverage.** This provision is intended to place the burden for defense of claims ordinarily covered by homeowners insurance on the Owners and their insurer.
- **Claims Arising from Public Access.** When public access is granted under Article V of the model, Owners often request a clarification as to whether the indemnity in §7.08 requires Owners to indemnify Holder for claims asserted by members of the general public arising from the grant of public access.

### • If Indemnified Elsewhere for Public Access

**Claims.** If Owners are indemnified for Public Access Claims, whether under §5.07 or a separate Access Agreement, add the following clarification to the end of §7.08:

The indemnity set forth in this section does not obligate Owners to indemnify Holder for Losses or Litigation Expenses arising from Public Access Claims as defined in [§5.07 or, if applicable, the Access Agreement.]

### • If Not Indemnified Elsewhere for Public Access

**Claims.** If no other indemnity agreement applies, then the following can be added, if circumstances warrant, to the end of §7.08 to furnish an appropriate exception for claims covered by the Recreational Use of Land and Water Act. The rationale for this exception is that neither Owners, nor their insurance company, should be compelled to provide a defense for Holder as to a Public Access Claim. See the guide [Reducing Liability Associated with Public Access](#) for further information on insurance and indemnity issues:

The indemnity set forth in this section does not obligate Owners to indemnify Holder for claims that are barred by the immunity furnished under the Recreational Use of Land and Water Act". [Note: for clarity, add the definition of Recreational Use of Land and Water Act (provided in the commentary to Article VIII) to the Glossary in Article VIII.]

## 7.09 Guides to Interpretation

- **Purpose.** The provisions of this section are intended to assist future readers of the document to interpret it correctly.
- (a) **Captions**
  - **Purpose.** This provision is self-explanatory; however, drafters need to be aware of the consequences of falling afoul of this provision. You cannot rely on a caption to convey meanings that are not in the text itself.
- (b) **Glossary**
  - **Purpose.** It is good practice to delete those terms provided in Article VIII that were not used in the Grant as modified to reflect particular circumstances. However, if that does not occur, the error should not be allowed to affect the interpretation of the document.
- (c) **Other Terms**
  - **Purpose.** These provisions avoid needless repetition of phrases.



**(d) Conservation Easement Act**

- **Purpose.** The purpose of this paragraph is to state the intention of the undersigned Owners to grant to the Holder all rights, powers and privileges accorded to the holder of a conservation easement under Applicable Law.

**(e) Restatement (Third) of the Law of Property: Servitudes**

- **Purpose.** The purpose of this paragraph is to increase the likelihood that a court interpreting this Grant, should there be any doubt as to the correct interpretation of a provision, will look to the *Restatement (Third) of the Law of Property: Servitudes* as the better view of the law applicable to conservation servitudes.

**7.10 Entire Agreement**

- **Purpose.** The written text of the Grant 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.
- **Representations in Prior Agreement.** Holder may want to modify this section if there are any representations, warranties or agreements contained in an engagement letter or donation agreement that are intended to survive the grant of the Conservation Easement.

**7.11 Incorporation by Reference**

- **Purpose.** The provision avoids needless repetition of phrases.

**7.12 Coal Rights Notice**

- **Purpose.** To satisfy the requirements of §9(d) of the Conservation Easements Act. The notice must be in at least 12-point type and be preceded by the word “Notice” in at least 24-point type.
- **Coal Distribution.** To see a DCNR map of coal distribution in Pennsylvania, click on DCNR website at [www.dcnr.state.pa.us](http://www.dcnr.state.pa.us), click on GEOLOGY, click on PUBLICATIONS, click on EDUCATIONAL RESOURCES, under the heading “Page-Size Maps” click on Distribution of PA Coals (Map 11).

**Article VIII. Glossary**

- **Purpose.** To keep all defined terms in one Article for convenience of reference. All initially capitalized terms not defined in Article I should be defined in the Glossary not in the body of the Grant. Occasionally, exceptions to this rule are appropriate and, in that case, cross-reference the definition in the Glossary. The phrase “Other Defined Terms” may be substituted for “Glossary”, if desired.
- **Legally Binding.** Definitions of initially capitalized terms are intended to be legally binding on the parties to the document.
- **Commentary.** Article VIII of the commentary includes all of the following:

- Definitions of initially capitalized terms used in alternative provisions included in the commentary (but not in the model).
- Definitions of terms used in the model (but not initially capitalized) are included in the commentary for informational purposes only. These are terms familiar to conservation professionals that may or may not be familiar to Owners or their counsel.
- Information concerning the definitions of terms used in the model or in alternative provisions included in the commentary. This information is “bulleted” so as to differentiate it from definitions.

**8.01 Access Agreement**

The document entitled “\_\_\_\_\_” between the undersigned Owner or Owners and \_\_\_\_\_, dated the same date as this Grant and intended to be recorded immediately after this Grant

- See §5.07 of the commentary.

**8.02 Access Drive(s)**

- See commentary §3.02(c).

**8.03 Additional Improvements**

- See commentary to Article III.
- The 6<sup>th</sup> edition of the model added the phrase “whether temporary or permanent” for emphasis but the defined term in prior versions never excluded any improvements on any basis including permanency.

**8.04 Agricultural Improvements**

- See commentary to §3.03(b).

**8.05 Agricultural**

- See definition of Sustainable when used as a modifier to Agricultural.
- The source of subparagraph (a) of this definition is the *Draft Soil and Erosion and Sedimentation Control Manual for Agriculture* published by the Pennsylvania Department of Environmental Protection and available online at [www.dep.state.pa.us](http://www.dep.state.pa.us) (hereafter referred to as “DEP Manual for Agriculture”).
- The phrase is used in the discussion of resource protection objectives for water resources in the model.

**8.06 Agricultural Management Plan**

**[This is a draft definition to encourage discussion. Users are welcome to suggest improvements to the Pennsylvania Land Trust Association.]**

A Resource Management Plan for Agricultural operations conforming to the following requirements and such other limitations as are imposed by Holder as a condition of approval in accordance with applicable provisions of Article V pertaining to Review:

**(a) Qualified Preparer**

The Agricultural Management Plan (AMP) must be prepared by a qualified agricultural professional engaged by Owners. A qualified agricultural professional has a mini-

num of three years experience managing agricultural lands and has furnished to Holder satisfactory credentials including, at a minimum, evidence of a Bachelor of Science degree in agricultural science, crop and soil science, environmental science or similar educational credentials approved by Holder after Review.

#### (b) Plan Content Requirements

The AMP must be designed to achieve Conservation Objectives, must be reviewed and updated not less than once per ten-year period, and include the following components unless otherwise approved by Holder:

- (i) Soil Conservation Plan.
- (ii) Measures to preserve availability of agricultural soils for Sustainable Agriculture.
- (iii) Measures to control non-point source pollution runoff.
- (iv) Identification of potential erosion problems and measures to minimize or eliminate erosion.
- (v) Program to conserve and enhance productive soils for Sustainable uses.
- (vi) Guidelines for use of fertilizers, herbicides and other substances consistent with Best Management Practices.
- (vii) Management of irrigation to protect the quantity and quality of water resources.
- (viii) Measures to preserve hedgerows and scenic resources within the Property.
- (ix) Measures to minimize adverse effects upon habitats for Native Species of plants and wildlife.
- (x) Prohibition of Agricultural activities except in accordance with the AMP.

#### 8.07 Amendment

- See commentary to §7.05.

#### 8.08 Animal Unit

One thousand pounds (live weight) of any animal.

- This definition is provided to set a standard to determine overgrazing as discussed in commentary to §4.04(b).

#### 8.09 Applicable Law

- This definition is intended to incorporate changes in law over time. For example, if the question of compliance arises in 2020, the reference is to Applicable Law at that time (not the Easement Date).

#### 8.10 Best Management Practices

- See definition of Resource Management Plan. The phrase can also be used to provide a standard for activities permitted without a Resource Management Plan. See, for example, §4.03(b).
- The recommendations of the Natural Resource Conservation Service of the United States Department of Agriculture for key conservation practices are available online at <http://www.nrcs.usda.gov/technical/ECS/agronomy/core4.pdf>.

- The recommendations of the Pennsylvania Department of Environmental Protection for watershed management (including erosion and sedimentation requirements) are available online at:
- <http://164.156.71.80/WXOD.aspx?fs=0442d740780d00008000049b0000049b&ft=1>.
- Forest Stewardship Council principles and criteria are available online at [http://www.fscus.org/standards\\_criteria](http://www.fscus.org/standards_criteria).
- The Sustainable Forestry Initiative Standard 2005-2009 is available online at <http://www.aboutsfb.org/SFBStandard2005-2009.pdf>.
- The National Standards and Guidelines for the Forest Stewardship Program established by the United States Department of Agriculture (Forest Service) are available online at <http://www.fs.fed.us/spf/coop/library/FSP%20National%20Standards%20&%20Guidelines.pdf>. For implementation of standards and guidelines into a forest management plan, see “Planning for Forest Stewardship – a Desk Guide” available online at <http://www.fs.fed.us/spf/coop/library/Forest%20Stewards%20deskguide.pdf>.
- The American Forest Foundation’s Standards of Sustainability for Forest Certification (2004-2008) are available online at [http://65.109.144.60/cms/test/26\\_34.html](http://65.109.144.60/cms/test/26_34.html).
- Best Management Practices for Pennsylvania Forests, prepared by the Best Management Practices Task Force under the auspices of the Forest Issues Working Group, Shelby E. Chunko, editor, is available online at <http://pubs.cas.psu.edu/FreePubs/pdfs/uh090.pdf>.

#### 8.11 Biological Diversity

Biological diversity (or biodiversity) is the variety of life and its processes, which includes the abundances of living organisms, their genetic diversity and the communities and ecosystems in which they occur. Diversity at all levels from genes to ecosystems need to be maintained to preserve species diversity and essential ecosystem services like climate regulation, nutrient cycling, water production and flood/storm protection.

- The source of this definition is *Conservation Thresholds for Land Use Planners*, Environmental Law Institute, 2003. ISBN #1-58576-085-7 available online at [www.elistore.org](http://www.elistore.org) (hereafter referred to in this commentary as *Conservation Thresholds*.)
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

#### 8.12 Biological Integrity

Biological (or ecological) integrity refers to a system’s wholeness, including presence of all appropriate elements and occurrences of all processes at appropriate rates, that is able to maintain itself through time.

- The source of this definition is *Conservation Thresholds*.

- The term is used in the discussion of resource protection objectives for Sustainable land uses in the model.

### 8.13 Buffer

Linear bands of permanent vegetation, preferably consisting of native and locally adapted species, located between aquatic resources and adjacent areas subject to human alteration.

- The source of this definition is *Conservation Thresholds*.

### 8.14 Barnyard Runoff Controls

The collection and reduction of runoff water and agricultural wastes from barnyards, feedlots and other outdoor livestock concentration areas for storage or treatment to improve water quality.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of resource protection objectives for water resources in the model.

### 8.15 Code

- This definition is intended to incorporate changes in the Internal Revenue Code over time. *See also Applicable Law above.*

### 8.16 Conservation Easements Act

- *See commentary to §7.10.*

### 8.17 Commercial Improvement.

An Improvement, other than a Residential Improvement or Agricultural Improvement, that is designed or used for retail, office or other commercial use.

### 8.18 Conservation Cover

Establishing and maintaining perennial vegetative cover to protect soil and water resources on land retired from agricultural production. This will help reduce soil erosion and sedimentation, thus protecting water quality and creating or enhancing wildlife habitat.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

### 8.19 Conservation Cropping Sequence

An adapted sequence of crops designed to provide adequate organic residue for maintenance or improvement of soil tilth. By utilizing this practice one will help improve the physical, chemical and biological soil conditions, maintain or improve soil productivity, protect the soil against erosion and overload runoff and maintain or improve water quality.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

### 8.20 Conservation Tillage System

Any tillage and planting system in which at least 30 percent of the soil surface is covered by plant residue after planting to reduce soil erosion by water during the critical erosion period.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

### 8.21 Construction

- Note that the definition of Construction encompasses a variety of activities that go beyond construction of Improvements.

### 8.22 Contour Farming

Farming sloping lands in such a way that tillage, planting and harvest are done on the contour (this includes following established grades of terraces or diversions). This practice may be applied to reduce sheet and rill erosion, to manage runoff, to increase plant available moisture, and to improve surface water quality by reducing siltation.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

### 8.23 Cross Slope Farming

Farming sloping land in such a way that tillage, planting and harvesting are done perpendicular to the predominant slope, but not necessarily on the contour. This practice is used to reduce sheet and rill erosion and improve surface water quality by reducing siltation.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

### 8.24 Default Rate

- A factor of two percentage points over prime has been included in the definition in Article VIII; however, this can be varied by agreement of the parties. The purpose is to provide an incentive to prompt payment but not be so high as to constitute a penalty.
- The definition may be expanded to cover the likelihood that the *Wall Street Journal* will not be available in perpetuity. Add to the end of the existing provision: “or, if that index is no longer available, another widely disseminated and generally accepted index of the short-term interest rate charged by lending institutions to qualified borrowers that is adopted by Holder by notice to Owners.”

### 8.25 Dwelling Unit

- The purpose of defining a Dwelling Unit is to create a standard for measuring intensity of use. *See also commentary §4.05.*

**8.26 Easement Area**

- The term “Easement Area” is defined in §5.07.
- This term is added to the Glossary when a grant of public access is to be included as part of the Grant. *See* §5.07 of the commentary.

**8.27 Ecosystem**

An ecosystem is a geographic area including all the living organisms (e.g. people, plant, animals and microorganisms), their physical surroundings (e.g. soil, water and air) and the natural cycles (nutrient and hydrologic cycles) that sustain them. Ecosystems can be small (e.g., a single forest stand) or large (e.g. an entire watershed including hundreds of forest stands across many different ownerships).

- The source of the definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for Sustainable land uses.

**8.28 Existing Agreements**

- *See* commentary §3.02(b). PALTA recommends obtaining appropriate title information to identify Existing Agreements as part of the Baseline Documentation. At a minimum, Holders should request a copy of Owners title policy and inquire whether Owners have granted any easements or other servitudes during their period of ownership.

**8.29 Existing Improvements**

- This definition is sufficient if, in fact, there is an exhaustive list of Existing Improvements included in the Baseline Documentation. It is also acceptable for Holders to list Existing Improvements here assuming the list is relatively short.
- Example: “Existing Improvements as of the Easement Date are as follows: \_\_\_\_.”
- The 6<sup>th</sup> edition of the model added the phrase “whether temporary or permanent” for emphasis but the defined term in prior versions did not exclude any improvements on any basis including permanency.

**8.30 Extraction Improvements**

- *See* commentary with respect to Existing Agreements, Extraction Improvements (Article III), extraction activities and uses (Article IV) and definition of Surface Use Agreement (Article VIII).

**8.31 Forest**

A biological community dominated by trees and other woody vegetation, with a potential mature height greater than 12 feet, having at least 20% closure.

**8.32 Forestry**

- This definition was selected from many because it included woodland management activities not only for commercial timbering purposes but also for resource protection purposes. *See* definition of Sustainable when used as a modifier to Forestry.

**8.33 Forest Management Plan**

[This is a draft definition to encourage discussion. Users are welcome to [suggest improvements](#) to the Pennsylvania Land Trust Association.]

A Resource Management Plan for Forestry operations within the Property (1) that achieves and maintains certification of the Property, or applicable portion of the Property, as a “Well-Managed Forest” by Forest Stewardship Council or other company worldwide accredited to offer landowners independent, third party certification of Sustainable Forest management practices; or (2) otherwise meets the requirements set forth below and such other terms and conditions as are required by Holder as conditions of approval after Review.

- **FSC Standards.** Alternative (1) above eliminates the need for Owners to propose, and Holder to Review, an individualized Forest Management Plan for Property if it has been certified to conform to FSC Standards; for example, forest enrolled in The Nature Conservancy’s “Working Woodlands” program.

**(a) Qualified Preparer**

The Forest Management Plan (FMP) must be prepared by a qualified forester engaged by Owners. A qualified forester is (1) a Person recognized as a Certified Resource Manager by the Forest Stewardship Council or equivalent certification standard; or (2) a professional forester with a minimum of three years experience managing woodlands who has furnished to Holder satisfactory credentials, at a minimum, evidence of a Bachelor of Science degree in forestry from an educational institution with a forestry curriculum accredited by the Society of American Foresters or other comparable educational standards and two letters of recommendation from similarly qualified professionals.

**(b) Plan Requirements**

The FMP must be designed to achieve Conservation Objectives pertaining to forest and woodland resources including the following:

- (i) A description of and an appropriately scaled and accurate map identifying the natural and physical features of the Property to include property boundary lines; forest type, stocking, age and stand history; wetlands and water bodies, including rivers, streams, ponds, and lakes both intermittent and year-round; roads, trails or other non-forested areas; special plant and wildlife habitats, including rare or endangered plant or wildlife species or communities to the extent identified by the Pennsylvania Department of Conservation and Natural Resources.
- (ii) An access plan indicating principal routes of ingress and egress for all areas in which forest management is to be conducted including roads, trails and log landing areas, which minimizes new forest openings. Access Drives must not exceed twenty (20) feet in width.
- (iii) Management of forest stands for long (i.e. \_\_\_\_ years or more) rotations.

- (iv) Implementation of Best Management Practices for the conduct of forest management and harvesting activities including the establishment, maintenance and reclamation of log landings and skid roads.
- (v) Creation of a balance of forest age classes and diversity of Native Species composition within the Property; i.e., no plantation forestry (a forest stand raised artificially, either by sowing or planting, except planting or replanting with a diversity of Native Species) nor any liquidation or clear cutting (except to remove diseased or damaged trees for replanting with a diversity of Native Species).<sup>11</sup>
- (vi) Measures to minimize erosion and conserve productive soils for Sustainable uses including erosion control measures to be employed during, and at the completion, of each forest management activity to ensure soil stabilization and to prevent erosion and sediment run off adjacent to wetlands and water bodies.
- (vii) Measures to maintain and enhance the quality of forest and timber resources on the Property.
- (viii) Measures to protect the quantity and quality of water resources including the type, amount and location of herbicides, pesticides, fungicides, insecticides, rodenticides and fertilizers to be used, if any.
- (ix) Measures to preserve canopy where identified as contributing to scenic or wildlife habitat resources described in Conservation Objectives.
- (x) Measures to minimize adverse effects upon, and to protect and enhance, habitats for Native Species of plants and wildlife.
- (xi) Prohibition of Forestry activities except in accordance with the FMP.
- (xii) Requirement for on-site, active supervision of all harvesting activities by qualified forester with reporting requirements to Holder of any non-conformity with FMP.

<sup>11</sup> This provision may or may not be appropriate depending upon prioritizing Conservation Objectives. Sometimes clear cutting of one area is preferable to disturbance of a number of areas by selective cutting. Factors that may influence Holder's determination of which method may be appropriate are (1) the importance of maintaining canopy as a Conservation Objective - whether for scenic view or maintenance of a relatively natural habitat; (2) whether "clear cutting" can be done at a time of year, for example, winter, that does not materially impair Conservation Objectives pertaining to natural habitat and ample habitat remains in the vicinity for repopulation; and (3) whether the area being clear cut can and will be reforested with a diversity of Native species in furtherance of Conservation Objectives.

- (xiii) Requirement of completion of harvesting activities within one-year following date of FMP or such longer period as is approved by Holder after Review<sup>12</sup>.

### 8.34 Fragmentation

The breaking up of a previously continuous habitat into spatially separated and smaller parcels. Fragmentation results from human land use associated with forestry, agriculture and settlement but can also be caused by natural disturbances like wildfire, wind or flooding. Suburban and rural development commonly change patterns of habitat fragmentation of natural forests, grasslands, wetlands and coastal areas as a result of adding fences, roads, houses, landscaping and other development activities.

- The source of this definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

### 8.35 Habitable Improvements

Any dwelling, guesthouse, tenant house, dormitory, clubhouse, bunkhouse or other Improvement containing an apartment or other sleeping accommodations for human habitation.

- This definition is provided to regulate the number of buildings that can be used for one or more Dwelling Units. This definition is particularly useful in cases such as clubhouses, bunkhouses, bed-and-breakfast establishments or quarters for employees where the number of Dwelling Units is less important than the size of the Improvements used for these purposes.

### 8.36 Habitat

The physical features (e.g. topography, geology, stream flow) and biological characteristics (e.g. vegetation cover and other species) needed to provide food, shelter and reproductive needs of animal or plant species.

- The source of this definition is *Conservation Thresholds*.

### 8.37 Height

- This definition is widely accepted by Owners as it does not penalize Owners who want steeply roofed Improvements or want to fit Improvements into an existing hillside.

### 8.38 Hoop House

An Agricultural Improvement that extends the growing season by creating a shelter made out of translucent material (such as polyethylene) over crops. The translucent material is often stretched over arched poles to create a tunnel of a Height sufficient to permit entry by Agricultural workers.

- This definition is furnished for the purpose of allowing Holder to exclude, or provide an alternative limitation for,

<sup>12</sup> A forest management plan is intended to have a long life -- typically a decade or more. However, Owners may propose a Forest Management Plan to accommodate a single harvest. In that case, Holder may want to put a time frame on its completion as an "unusual" event.



Impervious Coverage associated with Hoop Houses from otherwise applicable limitations on Improvements within the Standard Protection Area set forth in §3.03(c).

### 8.39 Impervious Coverage

- The definition in the model is purposely expansive so as to include any kind of cover (including packed earth and impounded water) that does not support vegetation.

### 8.40 Improvement

- The definition provides a collective term for all buildings and structures on the Property whether existing as of the Easement Date or later constructed.

### 8.41 Indemnified Parties

- The definition is intended to be sufficiently expansive to cover claims against Persons acting on behalf of the Holder. Nevertheless, PALTA recommends that land trusts consult with their insurance carriers to evaluate their coverage under this indemnity.

### 8.42 Invasive Species

- The source of the definition is Executive Order 13112 authorizing formation of the National Invasive Species Council, which coordinates federal responses to the problem of Invasive Species. See [www.invasivespecies.gov](http://www.invasivespecies.gov) – the gateway to federal efforts concerning Invasive Species. On this site is information about the impacts of Invasive Species and the federal government’s response, as well as read select species profiles and links to agencies and organizations dealing with Invasive Species issues.
- The definition provided in the model applies to plant species only and is, accordingly, more limited than the federal definition. The definition in the model can be expanded, if desired, to include all biota – not just plants.

### 8.43 Lien

- The definition is used in §5.01 pertaining to the obligation of Owners to obtain and deliver subordinations of Liens existing as of the Easement Date.

### 8.44 Litigation Expense

- The definition includes fees incurred in connection with investigation of a violation. Frequently survey fees are required to establish whether or not a violation has occurred. These would be included in Litigation Expenses whether or not litigation has commenced.
- The source of this definition is Stark, Tina, *Negotiating and Drafting Contract Boilerplate*, ALM Publishing 2003. ISBN 1588521052, §10.08(1) (hereafter referred to in this commentary as *Negotiating Boilerplate*).

### 8.45 Losses

- This definition is intended to encompass the items that may be included in a civil action under §6.03.
- The source of this definition is *Negotiating Boilerplate*.

### 8.46 Lot

- The definition is typical of that found in zoning and subdivision ordinances.

### 8.47 Market Value

- This term is used as measure of the Holder’s Losses under §6.04.

### 8.48 Mature Trees

Trees having a diameter of \_\_\_\_ inches or more at a Height of five (5) feet from ground level.

- Mature trees, depending on species and environment, may vary greatly in diameter. If user intent is to preserve trees based on their diameter, the term “Large Trees” may more accurately describe the resource to be protected. The term “Mature Trees” is included as a non-technical term preferred by some to suggest not only size but beauty as well. (If the trees in question can be identified on the Conservation Plan, the definition of “Specimen Tree” in the commentary’s Article VIII provides an alternative approach.)

### 8.49 Native Species

- This definition may be refined to refer to a specific valley or region if desired by the Holder.
- The source of the definition is the Pennsylvania Department of Conservation and Natural Resources, State Forest Resource Management Plan “*Management of Natural Genetic Diversity in Pennsylvania State Forest Lands*” available online at [www.dcnr.state.pa.us/forestry/sfrmp/eco.htm#biodiversity](http://www.dcnr.state.pa.us/forestry/sfrmp/eco.htm#biodiversity).
- For a listing of plants identified as Native Species in Pennsylvania, see the listing provided by the Pennsylvania Natural Heritage Program available online at [www.dcnr.state.pa.us/forestry/pndi](http://www.dcnr.state.pa.us/forestry/pndi).

### 8.50 Notice

A formal notification under this Grant in writing and delivered by one the following methods of delivery: (i) personal delivery; (ii) certified mail, return receipt requested and postage prepaid; or (iii) nationally recognized overnight courier, with all fees prepaid.

- **Purpose.** Use of a defined term for “Notice” is intended to increase awareness that definitional requirements must be met for a communication to be recognized as “Notice” for purposes of the Grant.
- **Capitalizing and Rephrasing.** Users must carefully review the Grant and initially capitalize the term as needed. Rephrasing may be necessary; for example, changing “notify” to “furnish Notice of”.
- **Communications.** To maintain the difference between formal Notice and other communications, either party should let the other know when it rejects a communication that it has, in fact, received for failure to comply with Notice requirements. Otherwise, the argument will be asserted that a course of conduct has developed in which formal requirements of notice have been ignored and, thus, are of no further force and effect.

### 8.51 Owner Responsibility Claim

- The phrase “Owner Responsibility Claim” is defined in §5.07.

**8.52 Owners**

- The defined term is always used in the plural because it refers to all Owners starting with the undersigned Owners and encompassing all future Owners in perpetuity.

**8.53 Owners' Dispute Notice**

- The phrase "Owners' Dispute Notice" is defined in §5.04(e)(i).

**8.54 Patch**

A patch is a relatively homogeneous type of habitat that is spatially separated from other similar habitat and differs from its surroundings.

- The source of the definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

**8.55 Person**

- The definition avoids the need for repetitious phrases.

**8.56 Preferential Tax Program**

Any program under Applicable Law that, as of the applicable date of reference, provides preferential tax treatment for farmland, forestland, open space or other property under conservation easement. As of the Easement Date, examples of Preferential Tax Programs are Act 153 of 1995, Act 319 (sometimes referred to as "Clean and Green") (72 Pa. Stat. 5490.1 et seq.) and Act 515 (16 Pa. Stat. 11941), and the Preserved Farmland Tax Stabilization Act of 1994, P.L. 605, No. 91.

- This definition is provided for use in connection with Subdivision requirements (*see* commentary to §2.03). The definition may also be used when a Township is named as a Beneficiary (*see* commentary to §1.07). The definition includes future programs that may provide a tax benefit for conservation or resources or preserving open space or making land available to the public for recreational use.

**8.57 Proportionate Value**

- This definition conforms to the requirements of the Code.
- The Regulations permit valuation of the Conservation Easement using a before-and-after approach; i.e., by comparing the value of the Property immediately prior to the Easement Date with the value of the Property immediately following the Easement Date. The diminution in value attributable to the restrictions in the Grant constitutes Market Value for these purposes.

**8.58 Public Access Claim**

- The phrase "Public Access Claim" is defined in §5.07.

**8.59 Public Trail**

A trail for use by the general public to be established within the Easement Area.

- This definition is provided for use when a "Grant of Public Access" is included in Article V and the access includes a trail. *See* also commentary to §3.02(c). The rules applicable to the Public Trail may need to be differentiated from the rules otherwise applicable to trails in general.

**8.60 Qualified Organization**

- This is the definition provided in the Code.

**8.61 Recreational Use of Land and Water Act**

The Recreational Use of Land and Water Act, Act of February 2, 1966, P.L. (1965) 1860, No. 586, as amended, 68 P.S. §477-1 *et seq.*, as may be amended from time to time.

**8.62 Regulations**

- The definition includes future changes to the regulations.

**8.63 Regulatory Signs**

- These are intended to be the typical no trespassing and no hunting signs but also include signage to indicate trails and interpret resources along trails.

**8.64 Renewable Energy**

- The definition is intended to be open-ended to include sources of renewable energy that may be discovered in the future.

**8.65 Residential Improvements**

- The definition includes both dwellings and accessory residential improvements. If the Holder desires to limit dwellings separate from other Residential Improvements, use the term Habitable Improvements.

**8.66 Resource Management Plan**

- There are many ways to describe a Resource Management Plan. This definition emphasizes that the plan is, in the first instance, prompted by what the Owners want to do on their Property. The RMP is then developed so as to accommodate, to the extent consistent with Conservation Objectives, the Owners' desires so long as the methodology complies with Best Management Practices.
- Agricultural Management Plans and Forest Management Plans are types of Resource Management Plans. Users who have included either or both definitions in a grant of conservation easement may want to clarify the term "Resource Management Plan" by adding: The term "Resource Management Plan" includes any Agricultural Management Plan or Forestry Management Plan as those terms are defined in this Article.

**8.67 Review**

- *See* commentary to Article V.

**8.68 Review Requirements**

- The definition is intended to incorporate future changes in Review Requirements and incorporate Review Requirements set forth as an Exhibit or included in the Baseline Documentation.

**8.69 Site Improvements**

- The definition is intended to encompass all kinds of Improvements that are not buildings. This includes both Access Drives and, to the extent not within a roofed structure, such as an electrical substation, Utility Improvements.

**8.70 Soil Conservation Plan**

- See commentary to §4.04(b). The requirements of Applicable Law include preparation by the Natural Resource Conservation Service; however, that requirement can be added to the definition if desired.
- The source of this definition is the DEP Manual for Agriculture.

**8.71 Specimen Tree**

An unusually large or well-shaped tree that is worthy of special consideration and has been identified as a “Specimen Tree” on the Conservation Plan.

- This definition is provided for use when a higher standard of care is to be applied under Article IV to activities affecting certain trees.

**8.72 Steep Slope Areas**

- This definition can be varied depending upon the locale. In some parts of the Commonwealth, slopes are not considered steep unless in excess of 20% to 25%.

**8.73 Subdivision**

- See commentary to Article II.

**8.74 Surface Use Agreement**

[This is a draft definition to encourage discussion. Users are welcome to [suggest improvements](#) to the Pennsylvania Land Trust Association.]

An agreement between Owners and the Person intending to exercise rights to remove or otherwise extract minerals, gas or oil from the Property that sets forth the terms and conditions under which those rights may be exercised. Holder may, at its election, be a party to the Surface Use Agreement or may be named in the Surface Use Agreement as an intended beneficiary with rights to enforce its terms. The following information is required for Review by Holder of any request for approval of extraction activities or Construction of Extraction Improvements and the agreements of the parties with respect to such issues are to be set forth in the Surface Use Agreement:

- Proposed location and maximum area to be disturbed by operations either on a temporary or permanent basis.
- Means of containment and off-site disposal of rock, shale and other spoils
- Measures to prevent erosion or degradation of soils.
- Provision, containment and off-site disposal of water or other compounds in the rock-fracturing process
- Copies of applications for permits and approvals including plans and supporting documentation; other evidence of compliance with Applicable Law. Emergency plan for accidents and releases.
- Safety measures to prevent contamination of water or other resources within the Property or releases of substances regulated under Applicable Law

- Safety measures (such as fencing) to prevent injury to persons or property; insurance certificates; releases and indemnity agreements.
- Schedule of anticipated surface operations (not to exceed one year)
- Restoration plan upon completion of surface operations consistent with Conservation Objectives; schedule for completion of restoration; warranty through two growing seasons.
- Long-term arrangements for maintenance and security of Access Drives.
- Any anticipated non-compliance with Height, Impervious Coverage or other applicable limitations whether temporary, during Construction, or permanent.
- Enforcement rights of Holder with respect to any violations of Surface Use Agreement or other conditions of approval.
- Reimbursement to Holder, either lump sum or by share of royalties, or combination of both, for anticipated costs and expenses of Holder in connection with Review including, if applicable, negotiation and documentation of surface use agreement and additional burdens of oversight and enforcement arising from extraction activities, uses and Construction pertaining to Extraction Improvements.

**8.75 Sustainable**

- This definition was selected as it keyed in to the Conservation Objectives for the Standard Protection Area.
- The source of the definition is Hubbard, Lee and Long, “*Forest Terminology for Multiple-Use Management*”, University of Florida available online at [www.sfrc.ufl.edu/Extension/ssfor11.htm](http://www.sfrc.ufl.edu/Extension/ssfor11.htm).
- Sustainability is widely regarded as economically and ecologically desirable and the only viable long term pattern of human land use.

**8.76 Top of the Bank**

The elevation at which rising waters begin to inundate the floodplain. In case of ambiguous, indefinite or nonexistent floodplain or question regarding location, the Top of the Bank shall be the bankfull water elevation as delineated by a person trained in fluvial geomorphology and utilizing the most recent edition of *Applied River Morphology* by Dave Rosgen or reference book of greater stature.

- In most cases, it is expected that parties should be able to reasonably agree to the location of the Top of the Bank. However, in case of ambiguous, indefinite or nonexistent floodplain or question regarding location, the definition provides science-based instructions for determining the location based on delineating the bankfull water elevation.

**8.77 Utility Improvements**

- The definition is expansive to include other future sources of power.



- The 6<sup>th</sup> edition clarifies that Utility Improvements are a subset of Site Improvements. Unlike other Site Improvements, Utility Improvements may, if necessary, cross the Highest Protection Area to transport water, electricity, telecommunications and other necessary services to and from the Property.

### 8.78 Waiver

- See discussion in §7.06 captioned “Amendments; Waivers”.

### 8.79 Wet Areas

- PALTA generally recommends the 100-foot setback standard; however, users may vary this requirement depending upon the circumstances.

### 8.80 Woodland Areas

- This definition can be varied depending upon whether or not hedgerows are important to Conservation Objectives. The term is used in §4.04 (b) to identify those portions of the Standard Protection Area that (a) if wooded as of the Easement Date, are intended to remain covered with tree canopy (even if timbered) and are not intended to be converted to Agricultural uses; and (b) if not wooded as of the Easement Date, are intended to remain uncultivated so as to permit succession to woodland. The term “Woodland Areas” includes both Forest (as defined in this commentary) as well as other areas less densely populated with trees.

[NAME OF  
BENEFICIARY]

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

- **Witness/Attest:** It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Easement Date. See commentary to opening recitals of Grant.
- **Exhibits.** Check that all Exhibits referenced in the Grant are attached to the Grant before it is signed and recorded in the Public Records.

Exhibit “A”	Legal Description of Property
Exhibit “B”	Conservation Plan

#### Other Possible Exhibits:

Exhibit “\_\_\_” Public Policy Statements.  
Exhibit “\_\_\_” Review Requirements  
Exhibit “\_\_\_” Easement Area  
Exhibit “\_\_\_” Mortgage Subordination  
Exhibit “\_\_\_” County Supplement  
Exhibit “\_\_\_” Township Supplement

#### Disclaimer Required by IRS Rules of Practice

Any discussion of tax matters contained in this message is not intended or written to be used and cannot be used for the purpose of avoiding any penalties that may be imposed under Federal tax laws.

## 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.
- **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.
- **Joinder/Acceptance.** If a Beneficiary desires to join in the Grant to evidence its acceptance<sup>13</sup> or a County, Township or other Person has agreed to assume rights and obligations pertaining to public access<sup>14</sup> an additional signature line should be added as follows:

*Acceptance by Beneficiary:*

<sup>13</sup> See commentary to §1.07 pertaining to “Acceptance”.

<sup>14</sup> See commentary to §5.08 pertaining to “Assignment and Assumption”.