

**Model**  
**Grant of Conservation Easement**  
**and Declaration of Covenants**  
**with Commentary**



**Seventh Edition**

Model updated 10/4/2023  
Commentary updated 10/4/2023



# Preface

The *Model Grant of Conservation Easement and Declaration of Covenants with Commentary* provides users with a state-of-the-art legal document and guidance to customize it to nearly any situation. The model, which was first published in 2005, is informed by many years of regular and heavy use by land trusts, governments, and landowners across Pennsylvania and across the nation. No conservation easement document has benefited from more real-world testing, user scrutiny, and cycles of peer review.

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

The model uses plain language and careful formatting to improve readability. Its flexible structure helps users avoid drafting errors when adapting it to their particular projects. The model provides for three levels of protection to deal with variations in conservation objectives across a property, but one or two levels can easily be removed for use with simpler projects.

The model is tailored to Pennsylvania state law, and the Pennsylvania Department of Conservation and Natural Resources requires its use for DCNR grant projects. It has been applied to numerous local government and federally-funded projects and has been adapted for use in states from Arkansas to Alaska.

## Notes on the Seventh Edition

Moving from the sixth to seventh edition of the model involved an extensive and intensive, multi-year drafting and review process—in-person user discussions, webinars, and postings of drafts (six in all) for public review and comment.

In the years following the seventh edition's publication in 2016, WeConservePA has posted numerous additions and updates to the commentary. It has also posted changes to the model, which are itemized below:

§3.02(c) – 5/18/2017

§6.04 – 5/3/2019

§1.07(e), §6.01(c), and two article 9 definitions – 3/5/2020

§8.09(f) and §7.06 – 10/27/2020

§1.04(b)(1) and §1.07(a) – 11/8/2021

§1.07(a), §2.02, and §3.02(b) – 10/4/2023

Brief explanations of these changes can be viewed [online](#) at WeConservePA's [library](#).

## Use the Newest Version

WeConservePA frequently updates its model legal documents and guides to address changes in the law and new understandings of conservation practices. Check the [WeConservePA library](#) for the most up-to-date material.

## Help Improve the Model

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

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

## Acknowledgements

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**pennsylvania**  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES

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# Model Grant of Conservation Easement and Declaration of Covenants Quick Start Guide



The **commentary** posted with the model easement document at [library.weconservepa.org](http://library.weconservepa.org) explains the reasoning behind each provision and provides instructions to help you deal with a wide range of circumstances. If you have a question or concern, refer to the commentary.

The commentary's **supplemental provisions** provide a wealth of optional matters not otherwise addressed in the model.

**Who has rights?** Do you want another organization to have rights regarding the easement? If yes, list it in §1.08 and enumerate its rights in §6.06. Find sample rights in the commentary's supplemental provisions.

**Public access?** Do the owners want to commit to allowing a trail or other public access? If so, check out the options in the supplemental provisions.

**Tax benefits?** If the owners won't be pursuing federal tax benefits for a charitable donation, you may delete §1.07.

**Customizing Conservation Objectives, Protection Areas, and Restrictive Covenants**

The **Conservation Objectives** are the **heart of the easement**. In §1.04, the model provides commonly used, generically written objectives. Add to, delete, or modify them to match what you want to accomplish. Also, add detail regarding the resources to be protected. See the commentary for examples.

Articles 2 through 5 contain a generic set of **restrictive covenants**. Modify them to match your Conservation Objectives. Following best practices informed by decades of drafting experimentation and stewardship experiences, the covenants prohibit all uses except for those listed in the grant. By doing so, the covenants provide owners and holder with a clear picture of everything that may be done on the land.

A use that is likely to be problematic if conducted poorly or at too high a frequency or intensity can be made conditional, subject to holder's approval following the process for **Review** set forth in the model. (Uses—perhaps not yet invented—unanticipated during the drafting process may be approved by holder after Review.)

**Numerical limits** regarding impervious cover, etc., serve as **placeholders, not recommendations**. Adjust them to fit the project.

**It is generally unwise to modify articles 6 through 9.** Do not do so without careful research, reflection, and consultation. Unlike the content of articles 1 through 5, much of which depends on the character of the land and the goals of the holder and owners, the later articles address administrative matters applicable to all properties and have been refined to reflect decades of experiences.

**Related WeConservePA models include:**

- *Conservation Easement Donation Agreement*
- *Stewardship Funding Covenant*
- *Consent, Non-Disturbance, and Subordination Agreement*
- *Amendment of Grant of Cons. Easement*
- *Grant of Trail Easement*

The model and commentary save you the legal costs of reinventing wheels. However, be sure to involve legal counsel before completing a project. A good attorney will ensure that, given particular circumstances, the easement document does what you intend it to do.



**Prepared by:**

Name:

Address:

Telephone:

**Return to:**

Name:

Address:

**Tax parcel(s):**

**Model Grant of Conservation Easement  
and Declaration of Covenants**

WeConservePA publishes this model and its  
expansive commentary at [library.weconservepa.org](http://library.weconservepa.org).

**Grant of Conservation Easement  
and Declaration of Covenants**

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

**Article 1. Background; Grant to Holder**

**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 Easement; Covenants**

- (a) **Easement.** By this Grant, the undersigned Owner or Owners grant and convey to Holder an unconditional and perpetual easement upon the Property for the purpose of advancing the Conservation Objectives described below (that easement, the “Conservation Easement”). The Conservation Easement empowers Holder to block activities, uses, and Improvements inconsistent with the Conservation Objectives. Article 6 more fully describes the rights this Grant vests in Holder.
- (b) **Owner Covenants.** By this Grant, the undersigned Owner or Owners, in furtherance of the Conservation Objectives, establish covenants binding upon Owners’ interest in the Property, which are set forth in articles 2 through 5. Article 7 addresses potential violation of these covenants and remedies.
- (c) **Holder Covenants.** By this Grant, Holder accepts the Conservation Easement and, in furtherance of the Conservation Objectives, establishes covenants binding upon Holder’s easement interest in the Property, which are set forth in article 6.

**1.03 Easement Plan**

Attached as exhibit B is a survey or other graphic depiction of the Property (the “Easement 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.

**1.04 Conservation Objectives**

The resource-specific and area-specific purposes of the Conservation Easement (collectively, the “Conservation Objectives”) are as follows:

**(a) Resource-Specific**

- (1) **Water Resources.** To maintain and improve the quality of water resources, both surface and groundwater, within, around, and downstream of the Property.

- (2) **Biological Resources.** To protect and improve the quality of natural habitat for animals, plants, fungi, and other organisms, particularly Native Species.
- (3) **Soil Resources.** To prevent the loss and depletion of soil on the Property.
- (4) **Scenic Resources.** To protect scenic views of the Property visible from public rights-of-way and other public access points outside the Property.
- (5) **Ecosystem Services.** To absorb within the Property rainwater that otherwise might cause erosion and flooding downstream of the Property; to sequester carbon in plants and soil to mitigate rising atmospheric carbon levels; and to support other healthy ecosystem processes.

**(b) Area-Specific**

- (1) **Highest Protection Area.** To protect and enhance the richness of biodiversity and natural habitat.
- (2) **Standard Protection Area.** To promote good stewardship of the land so that it will always be able to support open space activities including Sustainable Agriculture or Sustainable Forestry.
- (3) **Minimal Protection Area.** To accommodate, subject to moderate constraints, a wide variety of activities, uses, and Improvements, confining them to the Minimal Protection Area where they will not be detrimental to the achievement of other Conservation Objectives.

**1.05 Baseline Documentation**

As of the Easement Date, the undersigned Owner or Owners and Holder have signed an acknowledgment of the accuracy of the report (the “Baseline Documentation”) to be kept on file at the principal office of Holder. The Baseline Documentation contains an original, full-size version of the Easement Plan and other information sufficient to identify on the ground the protection areas identified in this article; describes Existing Improvements; identifies the conservation resources of the Property described in the Conservation Objectives; and includes, among other information, photographs depicting existing conditions of the Property as of the Easement Date.

**1.06 Defined Terms**

Initially capitalized terms not defined in this article 1 are defined in article 9.

**1.07 Federal Tax Items**

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

- (a) **Qualified Conservation Contribution.** The undersigned Owner or Owners intend this grant of Conservation Easement, a transfer of a partial interest in real estate, to qualify as a qualified conservation contribution (as defined under §170(h)(1) of the Code). If the Conservation Easement is transferred to any Person, that Person must commit to hold it exclusively for conservation purposes as defined in the Regulations.
- (b) **Public Benefit.** The undersigned Owner or Owners have granted the 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 may identify other information supporting the significant public benefit of the Conservation Easement.
- (c) **Mineral Interests.** The undersigned Owner or Owners represent that no Person has retained a qualified mineral interest in the Property of a nature that would disqualify the Conservation Easement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the Easement Date, the grant of such an interest is prohibited, and Holder has the right to prohibit the exercise of such a right or interest if granted in violation of this provision.
- (d) **Notice Required Under Regulations.** To the extent required for compliance with §1.170A-14(g)(5)(ii) of the Regulations, and only to the extent such activity is not otherwise subject to Review under this Grant, Owners agree to notify Holder before exercising reserved rights that may have an adverse impact on the conservation interests associated with the Property.
- (e) **Extinguishment.** In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that (1) the grant of the Conservation Easement gives rise to a real estate right, immediately vested in Holder, that entitles Holder to compensation upon extinguishment of the easement; and (2) extinguishment for unexpected changes that make impossible or impractical the

continued use of the Property for conservation purposes (as defined in the Regulations) of this Grant can only be accomplished by judicial proceedings. The fair market value of the right is to be determined in accordance with the Regulations; i.e., it is at least equal to the proportionate value that the 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 this Grant or Applicable Law, Holder is entitled to payment of the Proportionate Value. Holder must use funds received on account of the Proportionate Value for conservation purposes (as defined in the Regulations).

- (f) **Acknowledgment of Donation.** Except for such monetary consideration (if any) as is set forth in this article, Holder acknowledges that no goods or services were delivered to the undersigned Owner or Owners in consideration of this Grant.
- (g) **No Representation of Tax Benefits.** The undersigned Owner or Owners represent, warrant, and covenant to Holder that:
- (1) The undersigned Owner or Owners have not relied upon information or analyses furnished by Holder with respect to either the availability, amount, or effect of a deduction, credit, or other benefit to Owners under Applicable Law; or the value of the Conservation Easement or the Property.
  - (2) The undersigned Owner or Owners have relied solely upon their own judgment and/or professional advice furnished by the appraiser and legal, financial, and accounting professionals engaged by the undersigned Owner or Owners. If a Person providing services in connection with this 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.
  - (3) This Grant is not conditioned upon the availability or amount of a deduction, credit, or other benefit under Applicable Law.

#### **1.08 Beneficiaries**

No Beneficiary is identified in this Grant.

#### **1.09 Consideration**

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

#### **1.10 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 Liens or, if it is not, that Owners have obtained and recorded in the Public Records the legally binding subordination of the Liens affecting the Property as of the Easement Date.

## **Article 2. Transfer; Subdivision**

#### **2.01 Prohibitions**

All of the following are prohibited except as set forth in the next section:

- (a) **Transfer of Portion of Property.** Transfer of ownership, possession, or use of a portion of the Property, including subsurface portions of the Property, independent of the remainder of the Property.
- (b) **Subdivision.** Change in the boundary of a Lot or other Subdivision of the Property.
- (c) **Transfer of Density.** Use of open space area protected under this Grant to increase (above limits otherwise permitted under Applicable Law) allowable density or intensity of development within other portions of the Property or outside the Property.
- (d) **Transfer of Rights.** Transfer of development rights or other rights granted or allocated to the Property in support of development outside the Property.

#### **2.02 Permitted**

The following actions are permitted:

- (a) **Lots Within Property.** If the Property contains more than one Lot, Subdivision to (1) merge two or more Lots into one; or (2) subject to Review, reconfigure 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 and approval by Holder without any obligation to do so, creation and transfer of a Lot to a Qualified Organization for park, nature preserve, public trail, or other conservation purposes.
- (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.
- (d) **Commitments Regarding Resource Management Practices.** Commitments to implement resource management practices consistent with Conservation Objectives and otherwise permitted under this Grant together with the transfer of rights, credits, or offsets (for example, carbon or nutrient credits) arising from or related to such commitments.

### 2.03 Requirements

- (a) **Establishment of Lots; Allocations.** Prior to transfer of a Lot following a Subdivision, Owners must (1) furnish Holder with the plan of Subdivision approved under Applicable Law and legal description of each Lot created or reconfigured by the Subdivision; (2) mark the boundaries of each Lot with permanent markers; and (3) 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 a change to the description of the Property set forth in exhibit A or 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 3. Highest Protection Area

### 3.01 Improvements

Improvements within the Highest Protection Area are prohibited except as permitted below in this article.

- (a) **Existing Improvements.** Existing Improvements may be maintained, repaired, and replaced in their existing locations. 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 Servitudes.** Improvements that Owners are required to allow because of an Existing Servitude are permitted.
- (c) **Additional Improvements.** The following Additional Improvements are permitted:
  - (1) Fences, walls, and gates, not to exceed \_\_\_\_\_ (five if not noted otherwise) feet in Height or such greater Height as is approved by Holder after Review.
  - (2) Signs; however, signs other than Regulatory Signs are limited to a maximum of \_\_\_\_\_ (eight if not noted otherwise) square feet per sign and a total of \_\_\_\_\_ (32 if not noted otherwise) square feet for the entire Property.
  - (3) Habitat enhancement devices such as birdhouses and bat houses.
  - (4) Trails covered (if at all) by wood chips, gravel, or other highly porous surface.
  - (5) Subject to Review, footbridges, stream crossing structures, and stream access structures.
  - (6) Tree stands and blinds for hunting or nature study. Tree stands and blinds to remain in place for more than a season are subject to Review.
  - (7) 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.

- (8) Subject to Review, Extraction Improvements 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 construct or service such Improvements are permitted.

### 3.02 Activities and Uses

Activities and uses within the Highest Protection Area are prohibited except as 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.
- No Invasive Species are introduced.

(a) **Existing Servitudes.** Activities and uses that Owners are required to allow because of an Existing Servitude are permitted.

(b) **Resource Management and Disturbance.** The following activities and uses are permitted:

- (1) Cutting trees, Construction, or other disturbance of resources to the extent reasonably prudent to remove, mitigate, or warn against an unreasonable risk of harm to Persons or their belongings. 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.
- (2) Planting, replanting, and maintaining Native Species or, subject to Review, planting, replanting, and maintaining other vegetation.
- (3) Subject to Review, removal of vegetation to accommodate replanting as permitted in this article; subject to Review, eliminating Invasive Species to benefit natural habitat and the ecosystem.
- (4) Construction of permitted Improvements with prompt restoration of soil and vegetation disturbed by such activity.
- (5) Vehicular use in the case of emergency and in connection with activities or uses permitted under this subsection.
- (6) 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 if not noted otherwise) inches per year.
- (7) 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, injection, or release are permitted.
- (8) 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.)
- (9) Piling of brush and other vegetation to the extent reasonably necessary to accommodate activities or uses permitted within the Highest Protection Area.
- (10) Other 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 or other plan approved for that activity after Review.

(c) **Recreation and Education.** Recreational, educational, and scientific research activities are permitted 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: (1) walking, horseback riding on trails, cross-country skiing, bird watching, nature study, fishing, and hunting; and (2) wildlife research 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 approves the use after Review.

## Article 4. Standard Protection Area

### 4.01 Improvements

Improvements within the Standard Protection Area are prohibited except as permitted below in this article.

- (a) **Permitted Under Preceding Article.** Improvements permitted under the preceding article are permitted in the Standard Protection Area.
- (b) **Additional Improvements.** The following Additional Improvements are permitted:
  - (1) Agricultural Improvements.
  - (2) Site Improvements reasonably required for activities and uses permitted within the Standard Protection Area.
  - (3) Subject to Review, Site Improvements servicing other areas of the Property, if not reasonably feasible to install entirely within Minimal Protection Area.
  - (4) Site Improvements servicing activities, uses, or Improvements not within the Property that Holder, without any obligation to do so, approves after Review.
  - (5) Subject to Review, Improvements for generating and transmitting Renewable Energy that Holder, without any obligation to do so, approves after Review.
- (c) **Impervious Coverage Limitations.** Total Impervious Coverage, including that of both Existing and Additional Improvements but excluding that of Access Drives and ponds, must not exceed \_\_\_\_\_ (3000 if not noted otherwise) square feet. This limitation is subject to the following supplemental limitations and exceptions:
  - (1) Impervious Coverage must not exceed \_\_\_\_\_ (500 if not noted otherwise) square feet per roofed Improvement.
  - (2) Subject to Review, Holder may adjust Impervious Coverage limits to accommodate specific Agricultural Improvements intended to improve the production of soil grown crops without damaging soils or harming water quality (for example, well-designed and situated high tunnels).
  - (3) Subject to Review, Holder may adjust Impervious Coverage limits to account for the lesser impact of specific Improvements designed to reduce environmental harm caused by Impervious Coverage (for example, green roofs and permeable surfacing materials).
- (d) **Access Drive Limitations.** Unless otherwise approved by Holder after Review, Access Drives (both Existing Improvements and Additional Improvements) are limited to \_\_\_\_\_ (800 if not noted otherwise) feet in length and a driving surface not to exceed \_\_\_\_\_ (14 if not noted otherwise) feet in width.
- (e) **Height Limitations.** The Height of Additional Improvements permitted under this or the following article must not exceed 35 feet. This limitation is subject to the following supplemental limitations and exceptions:
  - (1) Fences, walls, and gates remain limited as in the Highest Protection Area.
  - (2) Improvements for recreational and other (non-Agricultural and non-Forestry) open space activities must not exceed \_\_\_\_\_ (nine if not noted otherwise) feet in Height.
  - (3) Subject to Review, Holder may adjust Height limitations for specific Improvements requiring a greater Height to be functional (for example, Agricultural silos or Renewable Energy structures).
- (f) **Other Limitations on Additional Improvements.** Additional Improvements permitted within the Standard Protection Area are further limited as follows:
  - (1) Signs remain limited as in the Highest Protection Area.
  - (2) Utility Improvements must be underground or, subject to Review, may be aboveground where not reasonably feasible to be installed underground.
  - (3) The following Improvements are not permitted unless Holder, without any obligation to do so, approves after Review: 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).
  - (4) Extraction Improvements remain limited as in the Highest Protection Area.



#### 4.02 Activities and Uses

Activities and uses within the Standard Protection Area are prohibited except as 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.
  - No Invasive Species are introduced.
- (a) **Permitted Under Preceding Article.** Activities and uses permitted under the preceding article are permitted within the Standard Protection Area.
- (b) **Agriculture.** Sustainable Agriculture that maintains continuous vegetative cover and, if conducted in accordance with a Soil Conservation Plan furnished to Holder, Sustainable Agriculture that does not maintain continuous vegetative cover are permitted. In either case, the limitations set forth below apply:
- (1) Within Wet Areas, Agriculture is prohibited unless approved after Review; within \_\_\_\_\_ (15 if not noted otherwise) feet of water's edge, Agriculture is prohibited.
  - (2) Within Steep Slope Areas, the Soil Conservation Plan is subject to Review.
  - (3) Animal operations must be conducted in conformance with a nutrient management plan or manure management plan furnished to Holder and meeting the requirements of Applicable Law; concentrated animal operations, as defined by Applicable Law as of the Easement Date, are prohibited.
  - (4) 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.
  - (5) Woodland Areas must not be used for or converted to Agricultural uses unless Holder, without any obligation to do so, approves after Review.
- (c) **Forestry.** Sustainable Forestry is permitted in accordance with a Resource Management Plan approved after Review.
- (d) **Compatible Activities Related to Agriculture or Forestry.** The following activities are permitted if supportive of Sustainable Agricultural or Sustainable Forestry and conducted at a low intensity compatible with the Conservation Objectives:
- (1) The storage of plant and animal products produced on the Property.
  - (2) The piling or composting of the residues of plant or animal production occurring on the Property for sale or subsequent Agricultural or Forestry use.
  - (3) Subject to Review, sale of Agricultural or Forestry products produced on the Property.
  - (4) Subject to Review, services that directly support Agricultural production or Forestry.
- (e) **Other Disturbance of Resources.** The following activities and uses are permitted:
- (1) 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.
  - (2) Removal of vegetation and other Construction reasonably required to accommodate permitted Improvements.
  - (3) Mowing, planting, and maintenance of lawn, garden, and landscaped areas.
  - (4) Generation of Renewable Energy and transmission of such energy if and to the extent Improvements for that purpose are permitted under this article.
  - (5) Subject to Review, disposal of sanitary sewage effluent from Improvements permitted within the Property is permitted if not reasonably feasible to confine such disposal to Minimal Protection Area.
- (f) **Other Activities.** Outdoor recreational and other open-space activities are permitted that (1) are limited in time, place and intensity so as not to interfere with Conservation Objectives and (2) do not require motorized vehicles except, subject to Review, as ancillary support to the primary activity. Activities that require earth disturbance or that will result in more than a *de minimis* reduction in soil permeability are subject to Review.

## Article 5. Minimal Protection Area

### 5.01 Improvements

Improvements within the Minimal Protection Area are prohibited except as permitted below in this article.

- (a) **Permitted Under Preceding Articles.** Improvements permitted under a preceding article are permitted.
- (b) **Additional Improvements.** The following Additional Improvements are permitted:
  - (1) Residential Improvements.
  - (2) Site Improvements servicing activities, uses, or Improvements permitted within the Property.
- (c) **Limitations on Improvements.** Improvements permitted within the Minimal Protection Area are limited as follows:
  - (1) Not more than one Improvement (whether an Existing Improvement or Additional Improvement) may contain Dwelling Units (if any) permitted under this article.
  - (2) Limitations on Impervious Coverage and Access Drives set forth for the Standard Protection Area do not apply to the Minimal Protection Area.
  - (3) Limitations on Height, signs, Utility Improvements, Extraction Improvements, and storage tanks applicable to the Standard Protection Area continue to apply.

### 5.02 Activities and Uses

Activities and uses within the Minimal Protection Area are prohibited except as 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.
- No Invasive Species are introduced.
- (a) **Permitted Under Preceding Articles.** Activities and uses permitted under the preceding articles 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.
- (c) **Release and Disposal**
  - (1) Disposal of sanitary sewage effluent from Improvements within the Property is permitted.
  - (2) Other piling of materials and non-containerized disposal of substances and materials are permitted 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 otherwise adversely affect Conservation Objectives.
- (d) **Residential and Other Uses**
  - (1) Residential use is permitted but limited to not more than one Dwelling Unit.
  - (2) An activity or use not otherwise addressed in this article is permitted if, from vantage points outside the Minimal Protection Area, it is not distinguishable from a permitted Agricultural, Forestry, or residential use; or, if it is, Holder determines, after Review, that the activity or use is consistent with the Conservation Objectives.

## Article 6. Rights and Duties of Holder and Beneficiaries

### 6.01 Holder Covenants

In support of the Conservation Objectives, Holder declares the following covenants binding upon its easement interest in the Property:

- (a) **Exercise of Powers.** Holder must exercise the powers granted to it by this Grant to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives.
- (b) **Must Be Qualified Organization.** Holder must be and remain at all times a Qualified Organization and must not transfer the Conservation Easement or otherwise assign its rights or responsibilities under

this Grant to a Person other than a Qualified Organization committed to upholding the Conservation Objectives.

- (c) **Proceeds Used for Conservation Purposes.** Holder must use any funds received on account of the release, termination, or extinguishment of the Conservation Easement in whole or in part in furtherance of Holder's conservation purposes.
- (d) **Forfeiture Remedy.** If Holder fails to abide by the covenants of this section, a Beneficiary of the Conservation Easement or the Commonwealth of Pennsylvania may petition a court of competent jurisdiction to order the Conservation Easement transferred to a Qualified Organization ready, willing, and able to abide by such covenants.

## **6.02 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 of the covenants and, if found, to enforce the terms of this Grant by exercising Holder's remedies in this Grant.
- (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.

## **6.03 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: (1) will not impair Holder's power, enforceable in perpetuity, to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives; (2) will not result in a private benefit prohibited under the Code; and (3) will be consistent with Holder's policy with respect to Amendment as of the applicable date of reference.
- (b) **Signs.** To install one or more signs within the Property identifying the interest of Holder or Beneficiaries in the Conservation Easement. Such signs do not reduce the number or size of signs permitted to Owners under this Grant. 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 (1) pertains to the impairment of Conservation Objectives; or (2) may result in a transfer, Improvement, or use that violates the terms of this Grant.

## **6.04 Review**

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

- (a) **Notice to Holder.** Before Owners begin or allow a Subdivision, Improvement, activity, or use that is subject to Review, Owners must (1) notify Holder of the proposed change including with the notice such information as is reasonably sufficient to comply with Review Requirements and otherwise describe the proposal and its potential impact on the Conservation Objectives and (2) receive Holder's approval.
- (b) **Notice to Owners.** Upon receipt of Owners' notice, Holder must review the proposed change and notify Owners of Holder's determination to (1) accept Owners' proposal in whole or in part; (2) reject Owners' proposal in whole or in part; (3) accept Owners' proposal conditioned upon compliance with conditions imposed by Holder; or (4) reject Owners' proposal for insufficiency of information on which to base a determination. If Holder gives conditional acceptance under clause (3), commencement

of the proposed Subdivision, Improvement, activity, or use constitutes acceptance by Owners of all conditions set forth in Holder's notice.

- (c) **Time for Review.** If requested by Owners, Holder must furnish its estimate of the time required to review the proposed change and use its best efforts and due diligence to notify Owners of its determination within this time period. Otherwise, Holder must make its determination within a reasonable period of time following receipt of Owners' notice to Holder.

(d) **Standard of Review**

- (1) The phrase "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.
- (2) 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 resources described in the Conservation Objectives or that is otherwise inconsistent with maintenance or attainment of Conservation Objectives.

**6.05 Costs and Expenses**

Owners must pay or reimburse, as the case may be, Holder's costs and expenses (including Losses, Litigation Expenses, allocated personnel costs, and reasonably incurred liabilities) in connection with: (a) enforcement (including exercise of remedies) under the terms of this Grant; (b) response to requests by Owners for Review, Waiver, or Amendment; and (c) compliance with requests for information, interpretation, or other action pertaining to the Grant if required by Applicable Law.

## **Article 7. Violation; Remedies**

**7.01 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 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:
- (1) Owners cease the activity constituting the violation promptly upon receipt of Holder's notice;
  - (2) Owners and Holder agree, within the initial 30-day period, upon the measures Owners will take to cure the violation;
  - (3) Owners commence to cure within the initial 30-day period; and
  - (4) 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 a natural resource or other feature of the Property described in the Conservation Objectives.

**7.02 Remedies**

Upon expiration of the cure period (if any) described in the preceding section, Holder may do 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.** Exercise Holder's rights under Applicable Law to obtain a money judgment (together with interest thereon at the Default Rate).

- (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.

### 7.03 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. In the event of an extinguishment of the Conservation Easement, Holder is entitled to the greater of the compensation provided under this section or the compensation provided under any other provision of this Grant.
- (b) **Restitution.** Holder is entitled to recover from the Person seeking the modification or termination: (1) 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 (2) reimbursement of Litigation Expenses as if a violation had occurred.

### 7.04 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 one or more of the other rights or remedies available to Holder at the same time or at any other time.

### 7.05 Waivers

- (a) **No Waiver.** If Holder does not exercise a 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.
- (b) **No Material Effect.** Holder in its discretion may provide a Waiver if Holder determines that the accommodation is for a limited time and limited purpose and will have no material effect on the Conservation Objectives.

### 7.06 No Fault of Owners

Holder will waive its right to reimbursement in regard to a violation 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.

### 7.07 Multiple Owners

- (a) **Multiple Lots.** If different Owners own Lots within the Property, only Owners of the Lot in violation will be held responsible for the violation.
- (b) **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 8. Miscellaneous

### 8.01 Notices

- (a) **Requirements.** Each Person giving notice pursuant to this Grant must give the notice in writing and must use one of the following methods of delivery: (1) personal delivery; (2) certified mail, return receipt requested and postage prepaid; or (3) 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:

#### **8.02 Governing Law**

The laws of the Commonwealth of Pennsylvania govern this Grant.

#### **8.03 Transfer**

- (a) **Notice Required.** Not less than thirty (30) days prior to transfer of the Property or a 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 (1) 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 (2) enter the Property to assess compliance with this Grant.
- (c) **Ending Continuing Liability.** If Holder is not notified per this section's requirement, it is not the obligation of Holder to determine whether a violation first occurred before or after the date of the transfer. The pre-transfer Owners continue to be liable on a joint and several basis with the post-transfer Owners for the correction of violations under this Grant until such time as Holder is given the opportunity to inspect and all violations noted in Holder's resulting inspection report are cured.

#### **8.04 Burdens; Benefits**

This Grant binds and benefits Owners and Holder and their respective personal representatives, successors, and assigns.

- (a) **Binding on All Owners.** This Grant vests a servitude running with the land binding upon the undersigned Owner or Owners and, upon recordation in the Public Records, all subsequent Owners of the Property or any portion of the Property are bound by its terms whether or not 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.
- (b) **Rights Exclusive to Holder.** Except for rights of Beneficiaries (if any) under this Grant, only Holder has the right to enforce the terms of this Grant and exercise other 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 Owners of the Lot that is the subject of a request for Review, Waiver, Amendment, interpretation, or other decision by Holder have a right to notice of, or other participation in, such decision.

#### **8.05 Documentation Requirements**

- (a) **Between Holder and Owners.** 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.
- (b) **Between Holder and Assignee.** Any assignment of Holder's rights under this Grant, if otherwise permitted under this Grant, must be in a document signed by both the assigning Holder and the assignee Holder. The assignment document must include a covenant by which the assignee Holder assumes the covenants and other obligations of Holder under this Grant. The assigning Holder must deliver the Baseline Documentation and such other documentation in Holder's possession reasonably needed to uphold the Conservation Objectives.

#### **8.06 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 application of any provision of Applicable Law that renders any provision of this Grant invalid, illegal, or unenforceable in any respect.

#### **8.07 Counterparts**

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

#### **8.08 Indemnity**

Owners must indemnify and defend the Indemnified Parties against all Losses and Litigation Expenses arising out of or relating to: (a) a breach or violation of this Grant or Applicable Law; and (b) personal injury (including death) and damage to personal belongings 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.

#### **8.09 Guides to Interpretation**

(a) **Captions.** 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 a term defined in the Glossary is not used in this Grant, the defined term is to be disregarded.

(c) **Other Terms**

(1) The word “including” means “including but not limited to.”

(2) The word “must” is obligatory; the word “may” is permissive and does not imply an 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 and Preservation 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.

(f) **Interpret in Favor of Conservation Objectives.** If any provision of this Grant or any writing submitted to or issued by or on behalf of Holder in connection with this Grant is vague, ambiguous, or may be interpreted or construed to favor an interest other than Holder’s, such provision is to be given the interpretation or construction most favorable to Holder’s interest in the Conservation Easement.

#### **8.10 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 Beneficiaries (if any) pertaining to the transaction set forth in this Grant.

#### **8.11 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.

#### **8.12 Coal Rights Notice**

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

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

#### **8.13 Jurisdiction; Venue**

Holder and Owners submit to the exclusive jurisdiction of the courts of the Commonwealth of Pennsylvania located in the county in which the Property is located and agree that any legal action or proceeding relating to this Grant or the Conservation Easement may be brought only in those courts located in that county.

## Article 9. Glossary

**“Access Drive”** means a road, drive, or lane providing vehicular access.

**“Additional Improvement”** means an Improvement other than an Existing Improvement.

**“Agricultural Improvement”** means an Improvement 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 building, farm stand, feeding and irrigation facilities.

**“Agricultural or Agriculture”** means one or more of the following:

- (1) Production for sale of grains, vegetables, fruits, seeds, nuts, and other plant products; mushrooms; animals and their products.
- (2) Production of field crops and forage.
- (3) Production of nursery stock and sod to be removed and planted elsewhere.
- (4) Boarding, stabling, raising, feeding, grazing, exercising, riding, and training horses and instructing riders.

**“Amendment”** means an amendment, modification, or supplement to this Grant signed by Owners and Holder and recorded in the Public Records. The term “Amendment” includes an amendment and restatement of this Grant.

**“Applicable Law”** means 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 (including notices issued interpreting the Regulations) are also included in the defined term.

**“Beneficiary”** means a Person given rights under the terms of this Grant (other than Owners or Holder).

**“Best Management Practices”** mean a series of guidelines or minimum standards (sometimes referred to as BMP’s) recommended by federal, state, and/or county resource management agencies for farming and forestry operations; for preventing and reducing pollution of water resources and other disturbances of soil, water, and vegetative resources; and for protecting wildlife habitats.

**“Code”** means the Internal Revenue Code of 1986, as amended through the applicable date of reference.

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

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

**“Default Rate”** means an annual rate of interest equal at all times to two percent (2%) above the prime rate announced from time to time by the *Wall Street Journal*.

**“Dwelling Unit”** means the 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.

**“Existing Improvement”** means an Improvement existing as of the Easement Date as identified in the Baseline Documentation.

**“Existing Servitude”** means an easement or other matter affecting title to the Property (other than a Lien) accorded priority to the Conservation Easement by notice in the Public Records or other prior notice recognized under Applicable Law.

**“Extraction Improvements”** mean 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.

**“Forestry”** means planting, growing, nurturing, managing, and harvesting trees whether for timber and other useful products or for water quality, wildlife habitat, and other Conservation Objectives.

**“Height”** means 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.

**“Impervious Coverage”** means 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). Also included in Impervious Coverage are green roofs and porous pavement surfaces. 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.

**“Improvement”** means a building, structure, facility, or other improvement, whether temporary or permanent, located on, above, or under the Property.

**“Indemnified Parties”** mean 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.

**“Invasive Species”** means a plant species that is non-native (or alien) to the ecosystem under consideration and 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 Mid-Atlantic Natural Areas” by the National Park Service and U.S. Fish and Wildlife Service, are to be used to identify Invasive Species.

**“Lien”** means a mortgage, lien, or other encumbrance securing the payment of money.

**“Litigation Expense”** means any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting any claim of violation or claim for indemnification under this Grant including, in each case, attorneys’ fees, other professionals’ fees, and disbursements.

**“Losses”** mean any liability, loss, claim, settlement payment, cost, expense, interest, award, judgment, damages (including punitive damages), diminution in value, fines, fees, penalties, or other charge other than a Litigation Expense.

**“Lot”** means a unit, lot, or parcel of real estate separated or transferable for separate ownership or lease under Applicable Law.

**“Market Value”** means 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.

**“Native Species”** mean 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.

**“Owners”** mean the undersigned Owner or Owners and all Persons after them who hold an interest in the Property.

**“Person”** means an individual, organization, trust, government, or other entity.

**“Public Records”** mean the public records of the office for the recording of deeds in and for the county in which the Property is located.

**“Qualified Organization”** means a governmental or charitable entity that (a) meets the criteria of a qualified organization under §1.170(A-14)(c)(1) of the Regulations and (b) is duly authorized to acquire and hold conservation easements under the Conservation and Preservation Easements Act.

**“Regulations”** mean 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.

**“Regulatory Signs”** mean signs (not exceeding one square foot each or such greater dimensions as are the minimum required by Applicable Law) to control access to the Property or for informational, directional, or interpretive purposes.

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

**“Residential Improvements”** mean dwellings and Improvements accessory to residential uses such as garage, swimming pool, pool house, tennis court, and children’s play facilities.

**“Resource Management Plan”** means a record of the decisions and intentions of Owners prepared by a qualified resource management professional for the purpose of protecting natural resources that the Conservation Objectives aim to protect during certain operations potentially affecting those resources. It 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 operations to be conducted in accordance with the plan.

**“Review”** means review and approval by Holder under the procedure described in article 6.

**“Review Requirements”** mean, collectively, any plans, specifications, or other information required for approval of the Subdivision, activity, use, or Improvement under Applicable Law (if any) plus the information required under (a) an exhibit incorporated into this Grant or (b) the Baseline Documentation or (c) if the information described in items (a) and (b) is inapplicable, unavailable, or insufficient under the circumstances, the guidelines for Review of submissions set by Holder to provide sufficient information to conduct its Review.

**“Site Improvement”** means an unenclosed Improvement such as an Access Drive, Utility Improvement, walkway, boardwalk, retention/detention basin or other stormwater management facility, well, septic system, bridge, parking area or other pavement, lighting fixture, sign, mailbox, fence, wall, gate, man-made pond, berm, and landscaping treatment. The term does not include Extraction Improvements.

**“Soil Conservation Plan”** means a plan for soil conservation that meets the requirements of the Natural Resources Conservation Service as of the applicable date of reference and for erosion and sedimentation control under Applicable Law.

**“Steep Slope Area”** means an area greater than one acre having a slope greater than 15%.

**“Subdivision”** means any division of the Property or any Lot within the Property; and any creation of a unit, lot, or parcel of real estate, 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.

**“Sustainable”** means land management practices that provide goods and services from an ecosystem without degrading soil or water resources and without a decline in the yield of those goods and services over time.

**“Utility Improvement”** means an Improvement for the reception, storage, or transmission of potable water, stormwater, sewage, electricity, gas, telecommunications, or other sources of power. The term does not include Extraction Improvements.

**“Waiver”** means 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.

**“Wet Area”** means a watercourse, spring, wetland (including vernal pools), or non-impounded standing water, and the area within 100 feet of its edge.

**“Woodland Area”** means an area within the Property described as “wooded” or “forested” in the Baseline Documentation or identified as such on the Easement Plan, or if not wooded or forested as of the Easement Date, is designated as successional woodland area on the Easement Plan.

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 seventh edition of the  
**Model Grant of Conservation Easement and Declaration of Covenants**  
(v. 2023.10.04) provided by WeConservePA.



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

COMMONWEALTH OF PENNSYLVANIA:

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

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

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

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

Print Name:

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

SS

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

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

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

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

Print Name:

# Commentary for the Model Grant of Conservation Easement and Declaration of Covenants

## General Instructions

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

**Guides.** Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by WeConservePA and made available at no charge at the [WeConservePA.org](https://www.weconservepa.org) library.

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

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

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

**Start from a Model.** Each 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 WeConservePA model should be used as the starting point for each project. Avoid using a document prepared for another project as a starting point for a new conservation easement. A model serves in part to remind users of the issues that need to be considered in the drafting process. The value of a model is lost, and errors and omissions become virtually guaranteed, when a document prepared for another property is used as a starting point for a new conservation easement.

**Standards and Practices.** 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 decades of experiences and lessons learned by organizations across the country. The commentary’s citations of S&P reference the 2017 edition of S&P.

**Get Legal Counsel.** The model and commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The model must be revised to reflect the specific circumstances of the particular project under the guidance of legal counsel. S&P Practice 9.A.1. calls for land trusts to:

Obtain a legal review of every land and conservation easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.

**Disclaimer.** Once a document based on the model has been prepared or reviewed by an attorney licensed to practice law in the applicable state, you may delete the text near the end of the model that begins “Nothing contained in the model, which was prepared in the context of Pennsylvania law, is intended to be relied upon as legal advice or to create an attorney-client relationship...”

**Delete the Label.** At the top right corner of the first page, delete the label “Model Grant of Conservation Easement...” and its accompanying note before recording a document.

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

**Identify Changes and Streamline Review.** Word-processing software enables you to quickly identify modifications in the terms set forth in the model. Microsoft Word provides you the capability to track modifications made 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 the [WeConservePA.org](https://www.weconservepa.org) library periodically for updates to the model and commentary.

## Preliminary Matters

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### Recording

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

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

**Margins.** Minimum margin requirements vary among counties; however, a typical requirement is a 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right, and bottom margins. (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 specifications.

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

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

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

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

**S&P.** Practice 9.F.3 calls for land trusts to promptly record conservation easement documents.

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

### Amending and Restating a Grant of Easement

**Use the Model to Amend and Restate.** The model is often adapted for the purpose of amending and restating a grant of conservation easement. The topic of amending and restating grants of easement is addressed in the guide [Amend OR Amend and Restate: Matching Approach to Situation When Making Changes to a Conservation Easement](#).

#### OPTION 1: ADAPT THE MODEL TO AMEND AND RESTATE A GRANT OF EASEMENT

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See "Amending and Restating a Grant of Easement" in the supplemental provisions for instructions on adapting the model to amend and restate an older easement document.

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### Title of Document

**Rationale.** The title was selected for its accuracy in describing the twofold purpose of the Grant (the easement document): first, it operates as an instrument of conveyance transferring the property right identified as the conservation easement from Owners to Holder; and, second, it operates to impose perpetual covenants upon the respective interests of Owners and Holder in the Property. The title is also consistent with the traditional titles for these documents, which distinguish the conservation easement from the covenants imposed on the Property in support of the easement.

**The Paper Is Not the Property Interest.** The Grant could be titled "Conservation Easement" to make for easier reading (as it was in early editions of the model), but a conservation easement is not a stack of paper; it is a real property interest. The granting document and the property interest conveyed by it are not the same thing but confusion can arise on this distinction when they share a name. For further discussion, see the guide [The Nature of the Conservation Easement and the Document Granting It](#).

**Conveyance, Not Contract.** The title "Land Conservation Agreement" is an attractive, marketing-friendly alternative, but it is problematic. An easement document is the product of the Owners and Holder

reaching agreement as to the nature of the real property interest (the conservation easement) to be conveyed and the covenants to be established in support of that property interest, but the easement document is not itself an agreement. The word “agreement” can connote a contract rather than a conveyance, thus causing confusion. For further information, see the guide [The Nature of the Conservation Easement and the Document Granting It](#).

**Agricultural.** The addition of the word “Agricultural” before “Conservation Easement” may help to assure preferential treatment in Pennsylvania. Examples:

- Transfer by a conservancy to a private party of land that is subject to an “agricultural conservation easement” is excluded from realty transfer tax in Pennsylvania; the same is not so for other eased lands. (See the guide [Realty Transfer Tax: Exclusions for Conservation-Related Transactions in Pennsylvania](#) and 72 P.S. § 8102-C.3(18)(iii).)
- 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 WeConservePA 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.
- The guide [Reducing Pennsylvania Inheritance Tax](#) reviews the qualifications necessary for an agricultural conservation easement to reduce Pennsylvania inheritance tax.

## OPTION 2: ADD A CAPTION

You can add a caption to the document’s heading to highlight a particular feature of the document. See “Adding a Caption to the Heading” in the supplemental provisions for more information including examples.

## Opening Recital

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

## Easement Date

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

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

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

The date of delivery is the effective “Easement Date.”

## Undersigned Owner or Owners

**Identify Persons Granting the Easement.** Insert names exactly as set forth in the deed by which the Persons granting the conservation easement acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into those Persons, it is good practice to recite the off-record facts to clear up the apparent gap in title. Recite these facts either in §1.01 or at the end of the legal description attached as exhibit A.

**All Owners Must Join.** All Owners as of the Easement Date must join in the Grant for the grant of conservation easement to be effective under Applicable Law and to qualify as a Qualified Conservation Contribution under §1.170A-14(b)(1) of the Regulations.

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

X and Y, husband and wife

and

X and Y, as joint tenants with rights of survivorship.

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

X, a Pennsylvania limited partnership.

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

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

**Holder**

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

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

X, a Pennsylvania 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 lead to confusion.

Other parties to the document may be added here, if desired; however, the model has been constructed to name additional “Beneficiaries” (if any) in §1.08. It is not necessary for purposes of giving public notice of the content of the document to name additional Beneficiaries in the opening paragraph.



## Article I. Background; Grant to Holder

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**Purpose.** Article I performs several important functions:

- It informs the reader of the factual information necessary to understand the subject matter of the document.
- It operates to grant the conservation easement for the purposes described as the Conservation Objectives.
- It addresses requirements of the Code and Regulations that are needed to qualify the easement as a Qualified Conservation Contribution and that aren't covered elsewhere in the document.

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

### 1.01 Property

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

**Future Guidance.** The Pennsylvania Land Trust plans to publish in 2021 a guide tentatively entitled [Delineation of Internal and External Conservation Easement Boundaries](#).

**Model Assumes One or More Whole Parcels.** The model in its default form assumes that, as is typical, you intend to conserve the entirety of one or more contiguous parcels of land owned by the Owners in a single Grant. If this is your intention, then exhibit A should present a legal description of the boundary of a single parcel if a single parcel is involved and, optimally, the outer boundary of the cluster of multiple parcels if multiple parcels are involved.

**Existing Description in Multiple Parcels.** If the existing description of the Property consists of more than one parcel description, it is helpful if not necessary to plot the descriptions on a map which will show how they fit together into a whole. The map can serve as the basis both for the description of the Property by its outward boundary for purposes of exhibit A and for development into the Easement Plan described in §1.03.

**Disregard Interior Lots.** Preferably, interior lots or parcels should be disregarded for purposes of exhibit A and exhibit B (excepting Transferrable Lots). They should not be mentioned. If multiple parcel descriptions can't be pieced into a whole to establish a legal description of the outer boundary, this indicates that,

absent special circumstances, a surveyed legal description is needed to avoid problems with future easement stewardship and potential for confusion.

**Last Resort.** The description could be comprised of the individual descriptions of the parcels, assuming the whole of each parcel is to be conserved; however, this approach demands great caution. You do not want the text and graphics contained in the document to lead the present of future Owners to infer that they can transfer individual parcels out of the whole of the Property unless that is in fact intended to be allowed.

### OPTION 3: EASE LESS THAN THE ENTIRETY OF ONE OR MORE PARCELS

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**Conservation Area Instead of Property.** If you intend the conservation easement to apply only to a portion of one or more parcels, then customize the model as follows:

1. Change the caption of §1.01 to “Property; Conservation Area.”
2. Substitute the following for the first two sentences in §1.01:  
  
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.
3. Replace the term “Property” with the term “Conservation Area” in the remainder of the document following §1.01 except for its use (twice) in §8.09(e) “Restatement (Third) of the Law of Property: Servitudes.”

**Apply Universally?** You may want to consider using this customization on all of your projects—even if portions of parcels aren't being excluded—so as to have wording consistency in your documents.

**Avoiding “Property” as an Undefined Term.** With the exceptions noted above, the model avoids the use of the undefined word “property” to ensure that when performing a universal change of “Property” to “Conservation Area,” there are no unintentional changes of meaning.

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**Compilation Versus Verification.** A map that simply plots existing descriptions without any verification on the ground as to accuracy may not be sufficient for stewarding the easement in the future. Depending on circumstances, a survey by a licensed professional may be necessary to truly understand the location of the easement's boundaries.

## Conservation and Preservation Easements Act.

Section 4(b) of Pennsylvania's [Conservation and Preservation 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.

Thus, if you are describing a "Conservation Area"—less than the entire property described in a deed—the Act requires more of you.

**S&P.** Practice 9.D.1 calls for land trusts to:

Determine both the legal description and physical boundaries of each property or conservation easement.

**Not Required by Law but Desirable.** Pennsylvania's [Conservation and Preservation Easements Act](#) does not require a surveyed legal description of the Property. However, a complete and accurate description of the Property boundary by courses and distances starting from a verifiable point of beginning and ending at that same point is generally desirable and, depending on circumstances, arguably necessary to conform with Land Trust Standards and Practices. Typically, this requires a field 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 on the north side of \_\_\_\_  
Road west of the intersection of \_\_\_\_ Road and \_\_\_\_  
Road.

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

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

**Parcel Identifier.** The Tax Parcel Identification number for the Property is required for recording in most if not all counties. Some counties also require a Uniform Parcel Identification number. See Uniform Parcel Identifier Law (21 Pa. Stat. §§331-337). Some counties charge additional recording fees to note the tax parcel number 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.

## I.02 Easement; Covenants

**Purpose.** The Grant is an instrument of conveyance just like a deed. It operates to: transfer a real estate interest (the conservation easement), establish a system of rights and responsibilities binding upon all present and future Owners of the Property, and establish a system of rights and responsibilities on Holder's interest in the Property to ensure that the conservation easement is enforced in perpetuity.

### (a) Easement

**Purpose.** The intent of the subsection is to create a separate real estate interest in the Property (the conservation easement) and convey it to Holder. The subsection's description of the real estate interest called a conservation easement is a plain language version of the definition of conservation easement found in the [Conservation and Preservation Easements Act](#). For discussion, see the guide [The Nature of the Conservation Easement and the Document Granting It](#).

**Unconditional and Perpetual.** To qualify a donation of a conservation easement as a charitable donation under §1.170A-14(b)(2) of the Regulations, the conservation easement must be both unconditional and perpetual.

**PA Assumes Unconditional.** Under Pennsylvania law, an easement is unconditional unless the Grant or circumstances of delivery provide otherwise.

### Examples of Conditional Grants:

- **Condition Precedent.** A Grant is subject to a condition precedent if it states that it becomes effective only when some condition is met; for example, Owners grant and convey the conservation easement to Holder but only if the owners of the adjoining property also convey a substantially similar conservation easement on their property. The easement is ineffective (and does not meet the requirements of a qualified conservation contribution under the Code) until the condition is satisfied.
- **Conditional Delivery.** The Grant is delivered to Holder with instructions to record only upon the death of the Owner. The conservation easement is ineffective (and does not meet the requirements of a qualified conservation contribution under the Code) until the condition is satisfied.
- **Condition Subsequent.** A Grant is subject to a condition subsequent if it states that the conservation easement becomes void or voidable, whether in whole or in part, if a later event should occur; for example, if the Grant allows the Owner to terminate the easement if, within five miles of the Property, an interstate highway connection is ever constructed. (An easement subject to a condition subsequent does not meet the requirements of a

qualified conservation contribution under the Code because it is not perpetual.)

**Perpetual.** Under Pennsylvania law, an easement is perpetual unless otherwise provided in the Grant.

**Less Than Perpetual.** Under the Pennsylvania [Conservation and Preservation Easements Act](#), a conservation easement must be for a term of not less than 25 years; however, WeConservePA strongly advises against establishing non-perpetual easements except in extraordinary circumstances. In addition, Grants that allow the Owner the right to withdraw land from the easement may be disallowed as charitable contributions for failure to meet the perpetuity requirement. For example, the IRS has disallowed deductions and been supported by U.S. Tax Court because the donor reserved the right to obtain a release of a portion of the conserved land from the easement if the Owners substituted other acreage of equal or better conservation value. (See <https://www.ustaxcourt.gov/InOpHistoric/BalsamMountainInvestmentsLLCMemo.Morrison.TCM.WPD.pdf>.)

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

**Easement Purposes.** The Grant operates to vest a conservation easement in Holder. A 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 easement obligations by paying compensatory damages.

## (b) Owner Covenants and Rights

**Purpose.** The subsection establishes a set of rules governing ownership of the Property. These rules detail the transfers, Subdivisions, activities, uses, and Improvements that, as of the Easement Date, are, or are not, considered consistent with the Conservation Objectives.

**Organization.** Covenants may be more or less restrictive depending upon the resource values of different protection areas within the Property. The restrictive covenants in the model are organized into four articles: article 2 (covenants applicable to the entire

Property), article 3 (covenants applicable to Highest Protection Area), article 4 (covenants applicable to Standard Protection Area), and article 5 (covenants applicable to Minimal Protection Area).

## (c) Holder Covenants and Rights

**Purpose.** This subsection establishes a set of rules governing Holder’s easement rights and the powers Holder may exercise under the terms of the Grant and assures that the rights and powers granted to Holder will be exercised as and when needed to uphold the Conservation Objectives.

**Organization.** The Holder covenants and rights are found in article 6. Section 6.01 sets forth the covenants Holder establishes on its interest in the Property to assure that the Conservation Objectives are upheld. (For further discussion of the significance of the Holder covenants, See the guide [The Nature of the Conservation Easement and the Document Granting It](#).) Sections 6.02 and 6.03 set forth specific rights and duties of Holder regarding the powers granted to it.

## I.03 Easement Plan

**Purpose.** This section incorporates the Easement Plan into the text of the Grant. The Easement Plan identifies the different areas of the Property that are subject to different Conservation Objectives and restrictions.

**Earlier Editions.** The Easement Plan was called the Conservation Plan in earlier editions. Some users found that name confusing since the term “conservation plan” is often used for plans to protect a farm’s soil. The name change avoids the potential for confusion.

**Identification.** The version of the Easement Plan recorded with the Grant is sometimes reduced to the extent that not all the information contained in the plan is legible. Thus, it is a good practice to identify the Easement Plan with as much specificity as possible so that there is no question as to the plan that was intended as the Easement Plan in the event the full-size version of the Easement Plan needs to be consulted. For example, statements such as the following could be added to the end of the section:

The Easement Plan was prepared by \_\_\_\_, dated \_\_\_\_, and entitled \_\_\_\_ with plan number \_\_\_\_; a full-size version of the Easement Plan recorded with this Grant is on file as part of the Baseline Documentation

The Easement Plan was prepared by Holder and dated \_\_\_\_, based upon a survey prepared by \_\_\_\_, dated \_\_\_\_, and entitled \_\_\_\_; the Easement Plan is on file as part of the Baseline Documentation.

A full-size copy of the Easement Plan must be kept on file as part of the Baseline Documentation.

**Generally Necessary.** An Easement Plan must be incorporated into the Grant unless the entirety of the

Property is in the Highest Protection Area or the Standard Protection Area and there are no special features (e.g., Woodland Areas or Specimen Trees) that need to be graphically identified. (See the commentary to §1.04 for a detailed explanation of the three protection areas used in the model.)

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#### OPTION 4: PROVIDE FOR TRANSFERABLE LOTS

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The model by default does not allow the transfer of a Lot separate from the remainder of the Property. If you want the Owners to retain the right to transfer one or more Lots constituting the Property (whether existing as of the Easement Date or to be created in the future), this right must be added to §2.02 and the Transferable Lots' actual (or potential) locations must (in most cases) be designated on the Easement Plan.

See "Providing Owners the Right to Transfer Certain Lots" in the supplemental provisions for complete instructions on this matter.

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**Identification of Areas.** The boundaries of protection areas must be identified by permanent markers on the ground such as monuments, pins, marks on rocks or trees, or, where appropriate, natural or artificial physical features such as a ridge line, stream bank, or rail line. The physical location of these reference points must then be depicted on the Easement Plan and supported in the Baseline Documentation by objectively verifiable descriptions (such as courses and distances from reference points or GPS coordinates) sufficient to create a permanent record of their locations.

**Variable Boundary.** 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 with Commentary](#).

**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 Easement 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 "Providing for Beneficiaries of the Grant" of the supplemental provisions for a further description of the State Program Area.

**S&P.** Practice 9.D.2 states that:

If a conservation easement contains restrictions or permitted rights that are specific to certain zones or areas within the property, include the locations of these areas in the easement document so that they can be identified in the field.

#### Minimal Protection Area or Conservation

**Area?** The question sometimes arises whether a portion of a Property that is or may be developed should be included in the land subject to the Grant (as a Minimal Protection Area) or excluded from the Property such that only a Conservation Area is subject to the Grant:

- On the one hand, by excluding the area, 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.
- On the other hand, by excluding the area subject to future development, the undersigned Owner or Owners avoid potentially falling afoul of a limitation in the Regulations regarding qualified conservation contributions.

The Regulations (§1.170A-14(5)) provide that "a deduction will not be allowed for the preservation of open space under §170(h)(4)(A)(3), 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."

Another reason to exclude a portion of the Property from the Conservation Area is to avoid falling afoul of the Regulation disallowing a charitable deduction if a portion of the eased Property can be used for extraction of minerals by surface mining. See the commentary to §1.07(b) for a further discussion.

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.

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#### OPTION 5: DETERMINE LOCATION OF MINIMAL PROTECTION AREA AFTER THE EASEMENT DATE

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If you want to provide for one or more Minimal Protection Areas and are uncertain as to the optimal location(s) for them at the time of the Grant, a few drafting options are available. See both "Providing for Future Minimal Protection Areas" and "Providing for Alternative Minimal Protection Areas" in the supplemental provisions.

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### 1.04 Conservation Objectives

**Purpose.** This section sets out the intentions of the parties with respect to the conservation of the Property. The Conservation Objectives constitute the heart of the easement—the reason for its existence.

**Sets Scope of Conservation Easement.** The conservation easement is a powerful tool for natural re-



source protection, but its power is limited by its purposes (its Conservation Objectives) as set forth in this section. Thus, it is imperative to take care to carefully craft these Conservation Objectives. They should describe all of the resources that you wish to protect now, and in the future, and how the easement will work to preserve different resources within different protection areas of the Property.

**Educational Tool.** The section serves as an educational tool for future Owners and anyone else seeking to understand the conservation easement's purpose.

**Interpretive Tool.** The section serves as a guide for future Amendment—generally, any change in the restrictive covenants must be consistent with the Conservation Objectives. (See the guide [Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#) for more information.) Also, if the Grant becomes the subject of litigation, it will help inform the court of the rationale underpinning the particular covenants or higher standards applicable to particular areas.

**Support of a Charitable Deduction.** This section, together with the Baseline Documentation, public policy statements, and other evidence of public benefit (see §1.05 and §1.07(b)) will help support a claim (if any) of a charitable deduction for a qualified conservation contribution.

**S&P.** Practice 8.C.1 calls for land trusts to determine and document the important conservation values on the Property; Practice 9.E.1 calls for land trusts to “identify the conservation values being protected.”

#### (a) Resource-Specific Objectives

**Purpose.** Subsection (a) sets forth the natural and scenic resources to be protected under the Grant. If any one or more of the categories is not applicable to the Property, delete the inapplicable item.

#### OPTION 6: ADD OBJECTIVES

You may wish to establish resource-specific objectives not provided in the model, for example:

- Protection of Mature Trees or preservation of Specimen Trees
- Protection of dark skies and prevention of light pollution
- Protection of historic, archaeological, or other cultural resources
- Protection of geological resources

Instructions and examples for doing so are contained in the supplemental provisions under “Adding Conservation Objectives.”

**Describing; Not Implying Unchanging Resources.** The commentary for each resource-specific objective calls for describing the resources being pro-

tected and enhanced by the Grant. While the descriptions of natural resources provide the reader with a sense of the natural values being protected as of the Easement Date, they are not intended to suggest that these resources should be held in stasis. The reality is that ecosystems change over time—water courses move, species composition shifts, species adapt—perhaps for the worse, perhaps for the better, with or without human intervention. When elaborating on the natural resource values, do not inadvertently expand the objective to indicate that these resources should remain unchanged.

**Reasons to Elaborate.** Including descriptions of the resources to be protected and enhanced by the Grant in this section near the beginning of the document (rather than relying only on the Baseline Documentation) might better ensure that they will be given appropriate attention by the Internal Revenue Service (if a tax deduction is involved), judges (in the event of litigation), and new Owners.

**Not Elaborating.** The specific nature of many of the natural resources addressed by the resource-specific objectives will change over time. Some users of the model, preferring not to in any way imply that the nature of these resources being protected is fixed as of the Easement Date or believing that the Baseline Documentation descriptions suffice for their circumstances, choose not to describe the resources in detail in this section.

#### (1) 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). Examples:

\_\_\_\_ Creek borders the Property for approximately \_\_\_\_ feet and is a stream within the watershed of the Susquehanna River, which is the dominant source of fresh water to the Chesapeake Bay, whose protection and restoration is a multi-state priority.

The headwaters, wetlands, and tributaries to \_\_\_\_ Creek found on the Property support the health of the \_\_\_\_ River and the recharge of groundwater in the basin.

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.

Approximately \_\_\_\_ acres of the Property are underlain by a carbonate geologic formation that possesses a large capacity to store and recharge groundwater, which feeds \_\_\_\_ Creek and supplies water to \_\_\_\_.

Water drains from the Property into Tributary \_\_\_\_ to \_\_\_\_ Creek.

## (2) Biological Resources

**Elaborate.** Add a brief description of the living landscape within the Property giving particular attention to wildlife habitat, migration corridors, biodiversity, and Native Species found on or about the Property (and that are more fully described in the Baseline Documentation) to be protected and enhanced by the Grant. Examples:

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: \_\_\_\_\_.

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 \_\_\_\_\_.

A botanical survey of the Property identified plant species designated as endangered [or rare or uncommon] in Pennsylvania including \_\_\_\_\_.

The addition of this Property to already protected lands in the area, including \_\_\_\_\_, further ensures a critical mass of habitat for several species, including \_\_\_\_\_, which improves the probability of their long-term viability in the region.

The non-impounded flow of the creek and its shaded, vegetated banks supports a rich variety of aquatic and other riparian life.

The entirety of the Property lies within the Kittatinny Ridge Corridor. The Kittatinny Ridge is recognized as a globally significant migration flyway in spring and fall for thousands of hawks and eagles and millions of songbirds. The Property provides critical habitat, breeding grounds, and stopover habitat for birds and for a variety of other wildlife including \_\_\_\_\_.

## (3) Soil Resources

**Elaborate.** Add a brief description of the quality and character of the Property's soils. Describe their suitability and value to support vegetative resources and,

where permitted, to support Sustainable Agriculture or Sustainable Forestry. Examples:

The Conservation Easement and others applicable to properties in the vicinity of the Property 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.

Approximately \_\_\_\_ acres of the Standard Protection Area consist of Prime Farmland Soils and Soils of Statewide Importance according to a survey of the soils of \_\_\_\_\_ County prepared by the United States Department of Agriculture Natural Resources Conservation Service.

For a variety of maps and information, see the Natural Resources Conservation Service website

<http://www.nrcs.usda.gov/>. NRCS's Pennsylvania soils pages are at <http://www.nrcs.usda.gov/wps/portal/nrcs/surveylist/soils/survey/state/?stateid=PA>

## (4) 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.

\_\_\_\_ Road borders the Property for approximately \_\_\_\_ feet; the public traveling the road is afforded scenic views of the woodlands covering the Property.

The Property sits on a ridge whose scenic wooded and open character is visible from public roads and facilities for many miles around.

## (5) Ecosystem Services

**Elaborate.** Add a brief description of services not addressed in the other categories that the Property's natural resources, when protected, provide to the ecosystem and the public good. Examples:

Dense woodland and rocky outcroppings on the steep slopes of the Property leading down to \_\_\_\_ Creek help to retain, detain, and disperse stormwater runoff, thus mitigating erosion and flooding downstream of the Property.

Mature woodlands within the Property provide cooling effect in the daytime and generate oxygen (while sequestering carbon) in the night.

Extensive perennial gardens within the Property attract and feed a wide variety of bees, hummingbirds, and butterflies, which are essential to plant and crop pollination.

**Other.** Examples of other ecosystem services or alternative wordings include the following:

To contribute to the resiliency and functioning of natural processes important to human systems.

To provide habitat for pollinators of nearby crops.

**More Information.** The Wikipedia entry for “Ecosystem services” ([https://en.wikipedia.org/wiki/Ecosystem\\_services](https://en.wikipedia.org/wiki/Ecosystem_services)) provides an introduction to the topic of ecosystem services and many specific examples of such services, some of which, depending on the conservation project, may be appropriate for enumeration in this Conservation Objective. See also the National Wildlife Foundation’s material at <http://www.nwf.org/wildlife/wildlife-conservation/ecosystem-services.aspx>

## (b) Area-Specific Objectives

**Purpose.** Subsection (b) supplements and differentiates the Conservation Objectives as applied to each of the three protection areas shown on the Easement Plan.

If any one or more of the protection areas will not be used for this Property, either delete that item or leave the heading and substitute for the text under that heading the following:

None of the Property has been designated as Highest Protection Area [or Standard Protection Area or Minimal Protection Area] on the Easement Plan.

### (1) Highest Protection Area

**Minimal Disturbance.** Designate as “Highest Protection Area” those portions of the Property where the promotion of biodiversity and wildlife habitat is of prime concern—areas that are intended to be wild or undisturbed in character. Highest Protection Area may also be used to keep riparian buffer undisturbed. If Agricultural use or Forestry use for commercial timbering is contemplated, the area may be best designated as “Standard Protection Area,” not “Highest Protection Area.” There may or may not be areas appropriate for protection as Highest Protection Area within a Property.

**Wild and Undisturbed.** In 2021, the wording of the Highest Protection Area objective was shortened and now reads: “To protect and enhance the richness of biodiversity and natural habitat.” Prior to this, it went on to say “, keeping the area wild or undisturbed in character.” This deleted phrase caused some confusion. Some people interpreted the text such that they should heavily err on the side of avoiding or blocking activities—even if there might be significant potential

to enhance biodiversity and habitat—in favor of not directly disturbing the land. Unwavering use of such an interpretation can be unfortunate because as invasive species, climate change, and other factors make it increasingly hard for land to naturally regenerate and serve as healthy ecosystem, the frequency of situations is increasing where human intervention on the land to boost biodiversity and habitat is desirable.

We should be on guard for hubris that tells us that we can fully control and improve natural systems; we should also guard against proposals that may not be authentic in seeking to protect and enhance the natural values of the land. In any case, we should avoid the fallacy that hands-off management is always (or perhaps even often) the best strategy for optimizing biodiversity and habitat.

**Elaboration.** You may choose to elaborate on how the objective affects human activities on the land. For example:

To protect and enhance the richness of biodiversity and natural habitats, only disturbing the land for this purpose or, with minimal disturbance of habitat, for nonintrusive enjoyment of the land.

**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 [Stroud Water Research Center](#) has conducted substantial research on this question. See, for example, “Streamside Forest Buffer Width Needed to Protect Stream Water Quality, Habitat, and Organisms: A Literature Review,” Bernard W. Sweeney and J. Denis Newbold, June 2014, Journal of the American Water Resources Association.

These findings informed the development of the [Model Riparian Buffer Protection Overlay District: Proposed Regulation for Use in a Municipal Zoning Ordinance, 2nd Edition](#). Quoting from the introduction to that model:

Sweeney and Newbold advocate, based upon their studies, minimum 30-meter (100-foot) forested riparian buffers as effective to substantially reduce pollutants from reaching a watercourse. This model ordinance establishes a minimum buffer width of one hundred (100) feet consistent with these findings. Municipalities may wish to impose a greater width than 100 feet, for example, requiring a 150-foot buffer for headwater or first-order streams, which are more sensitive to land disturbance and stormwater runoff.

**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.)

## (2) **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 Improvements. As a general rule, the Standard Protection Area is the remainder of the Property that is not to be designated Highest Protection Area or Minimal Protection Area. Some Properties may not have any “Standard Protection Area,” for example, a Property covered entirely with old-growth forest or that the parties want to grow into old-growth forest.

## (3) **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 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.

## **1.05 Baseline Documentation**

**Purpose.** Because it is neither attached nor recorded, the Baseline Documentation must be definitively identified by the Owners and Holder as of the Easement Date. There must be no question that it definitively describes the Property and its conservation values on that date. Effective administration of the Grant depends upon undisputed acceptance of the documentation in Holder’s file as complete and authoritative. (Section 8.11 incorporates the Baseline Documentation into the Grant.) As stated in §1.05, the baseline documentation and the signed acknowledgment that the report is accurate are to be kept on file with Holder.

**Tax Necessity.** If the 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 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 date the easement was granted.

**Necessity for All Easements.** Whether or not federal tax benefits are involved, baseline documentation is critical to the soundness of a conservation project.

**Preparation and Timing.** Common practice is for Holder to prepare the baseline documentation, whether or not the Owners will seek a charitable deduction.

**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, among other items, 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.** Among S&P’s guidelines regarding Baseline Documentation, Practice 11.B.1 states that for each conservation easement, land trusts should “have a baseline documentation report, with written descriptions, maps and photographs that documents” the conservation values to be protected and conditions of the Property as necessary for monitoring and enforcement.

## **1.06 Defined Terms**

**Purpose.** This section directs the reader to article 9 for definitions of initially capitalized terms used in the Grant that are not defined in article 1.

**Alternative Title.** Some users may prefer labeling article 9 “Other Defined Terms” rather than “Glossary” so as to reaffirm the legally binding nature of the definitions set forth in that article.

## **1.07 Federal Tax Items**

**Income Tax Deduction.** A donation of a conservation easement, in whole or in part, may qualify the donors to receive a charitable deduction against their federal income taxes if the donation meets the re-



quirements of §170(h) of the Code. Case law regarding tax deductibility continues to evolve as do interpretations of the Code and its application to specific circumstances and specific grant provisions, so donors must consult with their own legal and other professional counsel to be reasonably assured regarding deductibility. The items in this section are intended to support deductibility but are not sufficient alone.

**Purpose.** Provisions throughout the model (such as §1.05 “Baseline Documentation”) are designed to support an easement donation as a qualified conservation contribution. However, those provisions that are placed in the model solely for the purpose of establishing a qualified conservation contribution are collected in this section.

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#### OPTION 7: IF NO TAX DEDUCTION IS INTENDED

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**Eliminate §1.07 if No Donation.** If there is no donation, or no intent to claim a charitable contribution for federal tax purposes, the section can be simply deleted.

**Substitute Acknowledgement if No Donation.** Alternatively, to be sure there is a meeting of the minds between Owners and Holder on this issue, retain the caption and replace the text with the following:

The undersigned Owner or Owners and Holder confirm that the grant to Holder of this Conservation Easement is not intended to be a qualified conservation contribution under the Code and Regulations.

**Retain §1.07 Even if No Donation.** If the granting Owners intend the Property to pass to one or more of their children upon their deaths, they may want to retain §1.07 (and other provisions qualifying the Grant as a charitable contribution for federal tax purposes) even if there will be no charitable contribution as of the Easement Date. 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 ensure that the conservation easement qualifies as a qualified conservation contribution even if no charitable deduction is being sought.

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**S&P.** Standard 10 “Tax Benefits and Appraisals” calls for land trusts to work diligently to see that every charitable gift of a conservation easement meets tax law requirements and sets forth a series of practices to help with this and to ensure that land trusts establish appropriate relationships with Persons seeking to donate easements and safeguard their reputations. For example, Practice 10.A.2 clarifies that the land trust should not make assurances to Owners as to whether a particular gift will be deductible, the monetary value

of the gift from a tax perspective, or what the resulting tax benefits (if any) will be.

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#### OPTION 8: ADD PROVISIONS SPECIFIC TO FARMERS AND TO HIGH-VALUE ESTATES

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See “Addressing Tax Code Benefits Specific to Farmers and High-Value Estates” under the supplemental provisions for optional subsections related to estate taxes and to tax benefits specifically for qualified farmers and ranchers.

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#### (a) Qualified Conservation Contribution

**Intent.** This subsection expresses the intent of the granting Owners that the grant qualify as a qualified conservation contribution. Whether there is actually a tax deduction to be obtained as a result of the transfer of the conservation easement to Holder will depend on conformance with the Code and Regulations and establishing via a qualified appraisal that value has been donated.

#### (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 conservation purpose set forth in §170(h)(4)(A) of the Code, which reads:

**In General.** For purposes of this subsection, the term “conservation purpose” means—

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is—
  - (I) for the scenic enjoyment of the general public, or
  - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.

For an in-depth discussion, see Stephen J. Small’s *The Federal Tax Law of Conservation Easements*.

**Model Approach.** The model does not simply restate the conservation purposes set forth in the Code. Rather, the entire text of the Grant, including article I’s Conservation Objectives (with additional description and customization by users), as well as the Baseline Documentation, are to be taken as a whole in support of one or more of the conservation purposes outlined in the Code.

## OPTION 9: IDENTIFY CATEGORIES UNDER THE CODE

You may want to specify in the text of §1.07(b) which of §170(h)'s purpose categories the conservation easement is intended to qualify under. In that case, add a reference to the category or categories at the end of the first sentence. Examples:

- by preserving a relatively natural environment
- by preserving scenic views of open space for enjoyment by the public
- by preserving open space in furtherance of public policy

**Public Policy Statements.** Frequently, donors seek to qualify the easement under the category “preservation of open space in furtherance of public policy.” 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.

## OPTION 10: PLACEMENT OF PUBLIC POLICY STATEMENTS

**Place in Baseline Documentation.** The model notes that “the Baseline Documentation may identify other information supporting the significant public benefit of the Conservation Easement,” thus, if you so choose, a recitation of public policy statements may be placed in the Baseline Documentation.

**Place in Text:** If desired, public policy statements may be inserted into the text of the Grant by reciting them under §1.07(b). For example, add to the end of §1.07(b):

The grant of this Conservation Easement furthers the following public policies adopted by federal, state, or local government: [insert list]

**Place in Exhibit.** Users may attach a summary of public policy statements into the Grant as an exhibit. Example: add to the end of §1.07(b):

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.

## (c) Mineral Interests

**Disqualification.** If someone other than the Owners has the right to extract or remove minerals by surface mining, or Owners are permitted to do so under the terms of the Grant, 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.

**Information.** Those who have access to the Learning Center maintained by the Land Trust Alliance can find a [collection of materials](#) addressing the issue located in the Conservation Defense Clearinghouse under the topic “Mineral Interests.” The materials include links to Code provisions, articles, and other guidance. For properties that have a reserved right that has never been exercised (or, at least, not for several decades), you may want to include in the Baseline Documentation evidence that the possibility of future exercise of the right is so remote as to be negligible. The Bureau of Mines and Reclamation of the Pennsylvania Department of Environmental Protection is a good source of information to make this determination. The Bureau maintains a [Pennsylvania Mine Map Atlas](#) that may support the conclusion that, in the vicinity of the Property, mineral reserves are not present in quantities that support commercially feasible mining operations.

## (d) Notice Required under Regulations

**Purpose.** This subsection seeks to avoid the possibility of non-compliance with §1.170A-14(g)(5)(2) of the Regulations, which provides as follows: “In the case of any donation referred to in paragraph (g)(5)(1) 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 impact 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 2, 3, 4, and 5.

## (e) Extinguishment

### 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 §7.03.** Under article 7, 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. The model sets that as the minimum to be paid (so as to conform to the Regulations) but Holder may be entitled to a greater amount under article 7. It is good practice for 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 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 §1.07(e).

**Judicial Proceedings.** Holder must enforce the conservation easement in perpetuity regardless of changes over time occurring in the vicinity of the Property. The model mandates this as a holder covenant in §6.01 whether or not the conservation easement is intended as a qualified conservation contribution. What happens when changes occur such that the conservation easement no longer serves a useful conservation purpose? The law of servitudes provides that an easement that serves no useful purpose is a nullity and may be extinguished on the public records. But another step is needed when the holder of the easement is a public charity. Pennsylvania law governing charitable organizations prohibits the holder of a charitable asset (such as a conservation easement) from wasting or frittering it away or diverting it from its charitable purpose. So, as to have no question that it has acted improperly, the Holder desiring extinguishment notifies the Office of the Attorney General of its intent and petitions the court having jurisdiction for an order allowing release of the easement due to failure of purpose. A likely reason for failure of purpose, and that described in the Regulations, is an unexpected change that make impossible or impractical the continued use of the Property for conservation purposes. The text added to §1.07(e) for the 7<sup>th</sup> edition emphasizes that (in addition to state law) legal proceedings are mandated by the Regulations when the subject of the extinguishment is a qualified conservation contribution.

#### (f) 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.

**WeConservePA Guidance.** See the guide [Donation Agreements](#) and the [Model Conservation Easement Donation Agreement](#) for a fuller discussion.

**Recommendation.** It is recommended that the Holder 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 the caption “Acknowledge Receipt” under the commentary to §1.09.

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

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

#### OPTION 11: OBTAIN ASSURANCE OF NO TAX AVOIDANCE

**Notice 2017-10.** The U.S. Treasury Department and Internal Revenue Service identify certain syndicated conservation easement transactions as tax avoidance transactions in [Notice 2017-10](#). Many Holders wish to avoid involvement in such transactions. If this is the case, a Holder may want to obtain assurance from the Owners that the proposed grant is not part of a tax avoidance transaction.

**Obtaining Assurance.** If the Owners have not provided the Holder with written assurance that the granting of the Conservation Easement is not part of a tax avoidance transaction, and it is not otherwise evident to Holder that the grant is not a tax avoidance transaction, then this subsection can be expanded to provide assurance. Add an item “(4)”:

The grant of the Conservation Easement is not part of a tax avoidance transaction under Applicable Law.

#### I.08 Beneficiaries

**Purpose.** This section serves to identify all the Persons (if any), other than Holder and Owners, who are granted rights by the Grant.

**Default Is No Beneficiary.** The model’s default provision clarifies that there is no Person who can claim that the Person was an intended Beneficiary.

## OPTION 12: NAME ONE OR MORE BENEFICIARIES

**See the Supplemental Provisions.** If the easement is to have one or more Beneficiaries, see “Providing for Beneficiaries of the Grant” in the supplemental provisions for instructions.

**WeConservePA Guidance.** The guide [Holders, Beneficiaries and Backup Grantees](#) describes the roles and relationships Beneficiaries may have to a Holder and the land. It also describes the advantages of establishing Beneficiaries rather than setting up easement co-holding relationships.

**Named in 1.08; Rights Described in 6.06.** You name Beneficiaries, if any, in §1.08, but you describe the rights to be granted to the Beneficiaries in a new section created for that purpose: §6.06 “Rights of Beneficiaries.” See “Providing for Beneficiaries of the Grant” in the supplemental provisions for instructions.

### 1.09 Consideration

**Purpose.** The amount of consideration (if any) being paid for the easement is set forth here. 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.** Receipt of nominal consideration need not be accounted for in the acknowledgement letter that “no goods and services were received on account of this donation.”

While not strictly necessary and duplicative of the closing recitation of the model, the following recitation can be added to §1.09 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 the commentary to §1.07(g). Also, see “Consideration and Substitutes for Consideration” in the guide [Donation Agreements](#).

### 1.10 Superior to all Liens

**Purpose.** Subordination of any Lien affecting the Property as of the Easement Date is required for claiming a federal tax deduction for a qualified conservation contribution; however, even if no charitable contribution is being claimed, Holder would want assurance that the easement could not be extinguished by foreclosure of a Lien prior in right to the easement. This would certainly be particularly true in the case of a purchased easement; Holder would want the purchase price applied first to satisfy outstanding Liens.

**Title Search.** A title search will disclose whether any Liens affect the Property as of the Easement Date and thus require subordination.

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

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

**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.

**WeConservePA Guidance.** The guide [Pre-Existing Mortgages in Easement Transactions](#) and accompanying [Model Consent, Non-Disturbance, and Subordination Agreement with 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 an easement under and subject to an outstanding Lien provided that no tax benefit was being sought. Some of the factors influencing the decision to take that risk would be: the relative value of the Lien to the value of the Property; the creditworthiness of the Owners; and the financial resources of Holder if, in a worst case scenario, Holder had to purchase the outstanding Lien so as to prevent extinguishment of the easement upon foreclosure.

## OPTION 13: ADDITIONAL SECTIONS UNDER ARTICLE 1

The supplemental provisions contain information and instructions for adding additional sections to article 1 under the headings of:

- “Funding Stewardship”
- “Owners’ Representations”
- “Providing Additional Assurance to Owners”

## Article 2. Transfer; Subdivision

**Purpose.** This article details the rules governing Subdivision and transfer. It serves to regulate the transfer of a portion of the Property independent of the remainder of the Property; to regulate the number, size, and configuration of Lots within the Property; and to foreclose opportunities to use the conservation achieved by the easement to increase the density of development on or outside the Property. A number of reasons, both administrative and in furtherance of Conservation Objectives, may be advanced in support of these objectives including the following:

- To avoid the increased risk of enforcement problems arising from a multiplicity of Owners.
- To avoid the increased 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.
- To maintain uniformity in appearance for aesthetic reasons.
- To control the allocation of rights and limitations among Lots.
- To avoid facilitating increased development density outside the Property that is inconsistent with broader conservation efforts.

### 2.01 Prohibitions

**Purpose.** This section establishes a broad prohibition on Subdivision, transfer of portions of the Property, and use of the conservation achieved with the easement to increase density of development permitted under local regulations. The following section sets forth the exceptions to this broad prohibition.

#### (a) Transfer of Portion of Property

**Broad Scope.** The model provision is intended to cover any kind of transfer or separation of ownership, possession, or control of any portion of the Property or any rights belonging to the Property, from the remainder of the Property.

**Applies to Leases.** Transfer of possession and control of land by lease is prohibited unless permitted in §2.02. Separation of possession and control via a lease, just like separation of ownership, can result in the potential problems listed above that the provisions of article 2 are intended to prevent.

#### (b) Subdivision

**Broad Scope.** The model provision, which must be read together with the definition of Subdivision in article 9, is intended to cover any kind of change in the

boundary of a Lot (including a change in the Property boundary) and any other separation of Property interests.

**Applies to Leases.** The definition of Subdivision includes the leasing of portions of the Property. This is consistent with the definition of subdivision in the Pennsylvania Municipalities Planning Code and many local ordinances.

**Applies to Condominium Units.** The definition of Subdivision includes separations arising from the creation of condominium units in part to prevent any potential attempt to circumvent restrictions on Subdivision by this method.

#### (c) Transfer of Density

**Open Space Developments.** Some local land use ordinances provide incentives to preserve open space in a development by allowing in a portion of the development more dwelling units per acre than otherwise permitted under the law but only if another area within the development plan is set aside as open space in perpetuity. This approach may, among other names, be called open space subdivision, conservation design, conservation subdivision, conservation by design, or planned residential development.

**Model Provision.** The model forecloses the opportunity for the Owners to use any portion of the Property as the set aside acreage for an open space development. Subsection 2.01(c) prevents density otherwise allowed by a land use ordinance in a Highest Protection Area or Standard Protection Area (areas where this zoning density can't be used because of the conservation easement) to be transferred to a Minimal Protection Area or to land outside the Property.

### OPTION 14: ADDRESSING TRANSFER OF DENSITY

**Eliminate Prohibition.** In some instances, a conservation easement is part of an overall conservation and development plan involving the transfer of development density; Holder is accepting the easement to assure local residents and the municipality that promises made by a developer in regard to development density will be kept. In such cases, delete §2.01(c).

**Apply Prohibition only to Development Outside the Property.** In some cases, the phrase "within other portions of the Property or outside the Property" may be changed to "outside the Property." This change is appropriate when both Holder and Owners understand, and the Easement Plan reflects, that some of the Property (one or more Minimal Protection Areas, for example) may take advantage of increased

density due to the remainder being protected in perpetuity as Standard Protection Area or Highest Protection Area.

#### (d) Transfer of Rights

**TDR.** Some land use ordinances designate areas within the municipality targeted for no or limited growth and areas targeted for high development density. The ordinance then allows landowners in the low development areas to receive zoning rights in exchange for, or as a consequence of, preserving open space or limiting density of use of their land. The ordinance allows, by free market exchange, landowners to sell these development rights to someone who can use them to increase the density or intensity of development in an area targeted for development. These zoning arrangements are sometimes called transferrable development rights or TDRs.

**Sewage.** Other rights in support of development that can be exchanged for compensation include rights to pump a certain number of gallons of wastewater per day into a community sewage system.

**Perspective Used in Model.** The model prohibits sale of these types of rights. Many Holders and their funders find the model provision appropriate because, as they see it, the Owners of eased land have already permanently given up their rights to develop the Property; thus, they have nothing to sell. Those who conclude prohibition of sale of TDRs is appropriate may support increased development density elsewhere in the municipality (or region) but want to encourage developers to increase development density and support conservation as part of a carefully planned land use program. They do not want developers to skip the conservation part of the equation by using already conserved land as credit for increased density.

**Another Perspective.** Others may want Owners who voluntarily conserve their Property to have the same advantages to profit on sales of development rights as other landowners in the event a municipality establishes a TDR program. To do otherwise penalizes these Owners for doing the right thing and preserving their land voluntarily. This logic works when considering only the Owners who conveyed the easement but not so well when considering successor Owners who gave up nothing but might receive a windfall from a new TDR program. Users of the model who do not want the model provision to apply may delete the provision.

#### OPTION 15: CLARIFICATION IF DELETING §201(C) OR (D)

If you elect to delete §2.01(c) or (d) from the list of prohibitions, you may want to clarify that the item is permitted by noting so in §2.02 “Permitted Changes.”

## 2.02 Permitted

**Purpose.** The list in §2.02 presents the universe of permitted exceptions from the general prohibition in §2.01.

#### OPTION 16: PROVIDE FOR TRANSFERABLE LOTS

The model by default does not allow the transfer of a Lot separate from the remainder of the Property. Customize the model if you want the Owners to retain the right to:

- transfer one or more Lots constituting the Property at the time of the Grant;
- create and transfer a Lot at a later date; or
- temporarily transfer a portion of the Property for estate and tax planning purposes (i.e., for a qualified personal residence trust).

See “Providing Owners the Right to Transfer Certain Lots” in the supplemental provisions for instructions.

#### OPTION 17: PROVIDE FOR FUTURE MINIMAL PROTECTION AREAS

If you wish to provide for the future creation of one or more Minimal Protection Areas and are uncertain as to optimal locations, the supplemental provisions’ “Providing for Future Minimal Protection Areas” furnishes instructions for providing Owners the right to locate one or more Minimal Protection Areas in defined locations or locations that meet certain criteria.

#### OPTION 18: PROVIDE FOR ALTERNATIVE MINIMAL PROTECTION AREAS

There may be two or more acceptable and readily identifiable locations for a single Minimal Protection Area but uncertainty at the time of the grant as to which location is optimal. The supplemental provisions’ “Providing for Alternative Minimal Protection Areas” furnishes instructions for allowing Owners to fix the location of a Minimal Protection Area in one of several alternate locations.

#### (a) Lots Within Property

**Merger of Lots.** The model permits Owners to reduce the number of Lots within the Property without Review because reducing the number of Lots is unlikely to harm the Conservation Objectives or Grant administration. Note that pertinent information about the change in boundaries of Lots must be provided to Holder before transfer under §2.03(a).

**Reconfiguration with Review.** 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). This provides Holder the opportunity to review changes to the configuration of Lots shown on the Easement Plan or described in the Baseline 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 legal description of the Property in exhibit A. Examples of the kinds of occurrences that might lead to 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.

#### (b) Transfer to Qualified Organization

**Review Required.** The model permits Subdivision and transfer of a Lot to a Qualified Organization subject to Review by Holder without any obligation to do so. The rationale for requiring Review is that Holder may want to check that Conservation Objectives are furthered by the transfer and reserved rights under the Grant are reasonably allocated.

**Why Full Holder Discretion?** Previously, the model only made this transfer subject to Review; it did not include the Holder discretion provided by the “without any obligation to do so” clause. That clause was added in October 2023 out of concerns expressed that an Owner could seek to create a tightly held land trust to receive subdivided land for a nature preserve as a way of circumventing the subdivision and transfer restriction. If the transfer was simply subject to Review and the Holder denied the proposal without cause other than the feeling that the Owner is doing an end-run around the subdivision limitations, the courts, if petitioned, might find that the Holder acted unreasonably in discharging its Review responsibilities. By changing the model to remove the reasonableness standard for Review for this item, the possibility of the Owner circumventing the subdivision restriction is reduced.

**Additional Control.** You 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 guide [Reversionary Interest](#).

**No Review.** Some users may be less concerned with the potential for misuse of this permission and prefer to delete the Review requirement altogether.

#### (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 upholding of the Conservation Objectives—that the activities and uses to be permitted 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. 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.

**Lease of Interior Space.** Leases of interior space within Improvements are exempted from Review; however, this does not mean that tenants do not have to comply with applicable provisions of the Grant. The exemption only reduces Holder’s administrative burden of Review of items with a low probability of adverse consequences to Conservation Objectives.

#### (d) Commitments Regarding Resource Management Practices

**How Do These Commitments Relate?** The prohibitions set forth in section 2.01 include: “Transfer of development rights or other rights granted or allocated to the Property in support of land development outside the Property.”

Is a carbon credit one such prohibited right? Can a carbon credit be construed as supporting land development outside the Property? Or is a carbon credit an interest in real property that would be addressed by the first prohibition of section 2.01? (The law as of 2023 is in flux as to the nature of carbon credits: are they a real or personal property interest?) Does it make a difference whether carbon credits are created for the voluntary market or regulatory market?

**Providing Clarity.** This provision was added to the model in October 2023 to make clear that easements created using the model in no way prevent carbon transactions—assuming those transactions don’t require resource management practices contrary to the Conservation Objectives and restrictive covenants of the grant.

**Not a Comment on Offsets.** The inclusion of this provision is not intended to imply that carbon offsets are a meritorious strategy for addressing atmospheric carbon levels or to address the pros and cons of carbon transactions on conserved lands. It simply provides certainty that such transactions are possible under the easement if they are otherwise feasible. For more discussion of carbon offsets, see the guide [The Intersection of Carbon Offsets and Conservation Easements](#).

## 2.03 Requirements

**Purpose.** This section ensures that Holder will receive the information necessary to administer the terms of the Grant and exercise its rights as applied to multiple Lots.

### (a) Establishment of Lots; Allocations

**Purpose.** Some types of Subdivision require prior Review; others do not. This provision assures that Holder always has updated information on the location of Lots within the Property before a newly formed or reconfigured Lot is transferred, whether or not Holder had the opportunity of prior Review.

**Establishing Allocations.** The recorded document establishing the allocations among the Lots could be:

- the deed of a Lot. For example, the deed could recite that:  
the transfer is under and subject to a certain Grant of Conservation Easement and Declaration of

Covenants recorded \_\_\_\_\_ (the “Grant”), which Grant sets forth a maximum limit on Impervious Coverage on the entire Property (as described in such Grant) and, with respect to such maximum limit, it is hereby agreed that \_\_\_\_ square feet of the Impervious Coverage is allocated to the premises conveyed herein and the remainder reserved to the premises retained by Grantor.

- 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.



## Introduction to Articles 3, 4, and 5

### Dovetail with Conservation Objectives

Article 1 sets the big picture. In it, the grant of the easement occurs and the purposes of the easement—its reason for being, its Conservation Objectives—are established. The covenants declared in articles 3, 4, and 5 (as well as article 2) flow from the Conservation Objectives. The covenants can be thought of as a roadmap or recipe to guide both Owners and Holder as to how to achieve the Conservation Objectives on the Property and in each of the Property's sub-areas. The covenants are intended both to support and dovetail with the Conservation Objectives.

During the easement planning stage—before the model is customized to the particular circumstances—Owners and Holders should devote time and effort to crafting the permitted item lists and appropriate limitations on those items so that each item supports maintenance or achievement of Conservation Objectives whether directly or indirectly.

### Structure of Restrictive Covenants

#### Organization by Protection Area

The restrictive covenants are organized first by protection area and then, within each protection area, by the categories of Improvements and Activities and Uses. (This reverses the arrangement used in the 6<sup>th</sup> and earlier editions.) A separate article is afforded for each protection area to describe the plan for achieving Conservation Objectives within that area: article 3 (Highest Protection Area), article 4 (Standard Protection Area), and article 5 (Minimal Protection Area).

#### Organization by Broad Prohibition Followed by Permitted Items

Each of the two sections in the three articles begins with a blanket prohibition on Improvements or activities and uses. Each prohibition is comprehensive. The prohibition is then followed by a list of permitted items. This approach provides clarity to both the Owners and Holder as to just what is permitted and what isn't; it helps with understanding the covenants both when the Grant is drafted and in the decades that follow.

Some drafters may be tempted to “reinforce” the blanket prohibitions by mentioning particular items that are prohibited. The problem with doing this is that it tends to weaken the force of the overall prohibition. If you add “in particular x and y are prohibited,” you may inadvertently be lending support to the argument that “z must not be prohibited because, if it were, it would have been listed with x and y.”

Another problem with “reinforcement”: the addition of narrow prohibitions may cause some readers, including those involved with the initial drafting, to lose

sight that the blanket prohibitions are a fundamental feature of the model.

### Cumulative Approach

The model uses a cumulative approach to permissions so as to avoid repetition and excessively lengthy easement documents. 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.

### Reconciling Permitted Uses with Objectives

#### Focus on Resource Protection

The model serves to protect the natural and scenic resources described in the Conservation Objectives—not enforcement of zoning restrictions that may bear only tangentially on achievement of Conservation Objectives (if at all). Thus, the terms residential, commercial, institutional, industrial, and the like appear only rarely in the model or the commentary's optional provisions. This is unlike many older easement documents that, lacking models in the nascent conservation easement field, borrowed terms from municipal land use ordinances.

To illustrate the point: In an age of electronic commerce, buying and selling goods and services via the internet can occur with little or no effect on natural and scenic resources on a Property; it makes no conservation sense to prohibit the activity just because it happens to be commercial in nature. In contrast, agricultural use without good resource protection planning can result in the ruination of soil and water resources.

#### Reconcile Levels of Activity with Objectives for Protection Areas

The provisions of articles 3, 4, and 5 are intended to reconcile increasing levels of human activity with the resource-specific and area-specific objectives of the Highest Protection Area, Standard Protection Area, and Minimal Protection Area. You must be careful to ensure that you do not permit Improvements, activities, and uses that would be detrimental to the resource-specific and area-specific Conservation Objectives you explicitly set forth for the protection area. Conversely, you do not want to be unnecessarily restrict Improvements, activities, and uses in a protection area that do not have the potential to directly or indirectly harm the Conservation Objectives.

If a federal tax deduction is to be sought for an easement donation, permissions must be consistent 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, a conservation easement with Conservation Objectives to preserve farmland pursuant to a state program and protect wildlife habitat would not qualify under the Regulations if under the terms of the contribution the specific wildlife habitat identified in the Conservation Objectives could be injured or destroyed by Agricultural practices permitted in the operation of the farm. The Regulations are not intended to prohibit uses of the land, such as selective timber harvesting or selective farming, if under the circumstances, those uses do not impair significant conservation interests; however, you must be careful in crafting both Conservation Objectives and restrictive covenants so as to not run afoul of the rules.

### **Constraint on Intensity and Frequency**

Each article contains a crucial, overarching limitation on activities and uses that are permitted under the article, limiting their intensity and frequency to levels that will not adversely affect Conservation Objectives. Some Owners may object to this blanket and non-specific constraint. However, the difficulty in trying to accommodate this objection is that nearly any activity or use in high enough frequency or intensity will damage natural or scenic resources, and there is usually no way to quantify the answer to the question “how much is too much?” For example, one equestrian or mountain biker may not cause erosion into a nearby stream but with some greater, unknown volume of users, that may change. An occasional softball game is quantitatively and qualitatively different from use 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 an otherwise permitted 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.)

### **Flexibility for the Future**

Section 3.02(b)(10) of the model provides Holder the discretion (but not the obligation) to allow for new activities and uses of the land not otherwise permitted by the model’s covenants. This flexibility enables Holder in its management of the easement to potentially accommodate activities and uses that haven’t yet been invented or weren’t anticipated during the drafting of the Grant and to do so without having to amend the Grant.

The model does not provide the same flexibility to Holder with respect to Improvements. New types of Improvements not anticipated in the covenants cannot be accommodated without Amendment. The model, however, does provide Holder with some flexibility in

managing Impervious Coverage and other limitations that the model places on permitted Improvements.

The rationale for the differing treatment between activities and uses and Improvements is that the specific limits on Improvements are frequently the result of considerable negotiation and, often, compromise. Allowing for the possibility of further adjustment in the text of the Grant beyond that already allowed by the model may unintentionally suggest that the agreed upon limit is still subject to further negotiation and compromise.

## **Customize**

### **Permitted Items**

The lists of permitted Improvements, activities, and uses contained in the model are intended to be appropriate to many conservation projects; however, they are not expected to be the perfect match for every project. You should customize the lists to meet your particular circumstances.

You should take care to ensure that the Improvements, activities, and uses that you choose to list as permitted in articles 3, 4, and 5 are consistent with the Conservation Objectives for the particular Property. If a listed item appears inconsistent with a Conservation Objective, then you should either delete the item or reevaluate whether the Conservation Objective as written correctly captures what you aim to achieve with the easement.

### **Items Subject to Review**

The model makes a number of permitted items “subject to Review” by Holder. Subject to Review by definition includes subject to approval. See article 6 for the process and standards of Review. You may find that the model’s choice of items that require Review to be a good match for a particular project. However, you should remove the Review requirement or apply it to additional items as appropriate to optimize the protection of natural and scenic resources without needlessly consuming the time and energy of Owners and Holder.

### **Numeric Limits**

The model includes blanks for users to insert specific numeric limitations on some permitted items (for example, square footage constraints on Impervious Coverage). The blanks are followed by numeric limitations inserted not as recommendations (although they may be appropriate for some projects) but only as fail-safe mechanisms to eliminate any possibility that an easement document based upon the model could be signed and recorded with blanks where numbers should have been inserted. Each limitation needs to be evaluated and tailored as applied to the size and character of the particular Property and the Conservation Objectives for that Property.

You may delete a parenthetical fail-safe limitation once you have filled in the blank associated with that limitation; just be sure to reevaluate the limitation for each subsequent project (which will not be an issue if you always start a new easement document from your customized template rather than a document used for another project).

## Using Only One or Two Protection Areas

Some conservation projects only need one or two protection areas. The model is designed to accommodate these situations; however, to preserve the cumulative approach to permissions, avoid cross-referencing errors, and maintain consistent numbering within documents across many easement projects, do not delete the entire article addressing that protection area. Instead, choose from the following strategies.

### OPTION 19: NO HIGHEST PROTECTION AREA

If no Highest Protection Area is designated within the Property on the Easement Plan, do not delete the entirety of article 3. Instead, insert the following text immediately under the title of article 3:

There is no Highest Protection Area within the Property.

Then follow the directions for one of the below alternatives:

- **Minimal Tailoring Alternative.** Add the following sentence to the initial text you inserted, leaving article 3's original text unchanged:

The provisions of this article are set forth solely for the purpose of incorporation by reference into subsequent articles.

- **More Tailored Approach.** After the initial text you inserted, you can delete the remainder of the text of article 3 if you move to article 4 the content of model §3.01(a) and §3.01(b), making adjustments appropriate to the project. (For example, a Height limitation on fences in article 3 may be unnecessarily restrictive for the Standard Protection Area.) Replace cross references to limitations in the Highest Protection Area (see 4.01(e)(1), (f)(1) and (f)(4)) with specific limitations. You can keep the numbering of sections in article 4 uniform with your easement documents that have a Highest Protection Area if you make the change as follows:

Substitute for §4.01(a) "Permitted under Preceding Article" the following:

#### (a) Existing Improvements and Servitudes

- (1) Existing Improvements may be maintained, repaired, and replaced in their existing locations. Existing Improvements may be expanded or

relocated if the expanded or relocated Improvement complies with requirements applicable to Additional Improvements of the same type. [This is the verbatim text of model §3.01(a).]

- (2) Improvements that Owners are required to allow under the terms of Existing Servitudes are permitted. [This is the verbatim text of model §3.01(b).]

Substitute for §4.02(a) "Permitted under Preceding Article" the following:

#### (a) Existing Servitudes

Activities and uses that Owners are required to allow because of an Existing Servitude are permitted.

### OPTION 20: NO STANDARD PROTECTION AREA

If no Standard Protection Area is designated within the Property on the Easement Plan, do not delete the entirety of article 4. Instead, insert the following text immediately under the title of article 4:

There is no Standard Protection Area within the Property.

Then follow the directions for one of the below alternatives:

- **Minimal Tailoring Alternative.** Add to the initial insert above, leaving article 4's original text unchanged:

The provisions of this article are set forth solely for the purpose of incorporation by reference into subsequent articles.

- **More Tailored Approach.** After the initial insert above, you can delete the remainder of the text of article 4 if you move to article 5 any Standard Protection Area permissions and limitations that are appropriate for the Minimal Protection Area for the particular project.

### OPTION 21: NO MINIMAL PROTECTION AREA

If no Minimal Protection Area is designated within the Property on the Easement Plan (and no Minimal Protection Area may be designated in the future under the terms of the Grant), delete the entirety of the text of article 5 because other articles do not depend on its covenants. However, to avoid cross-referencing errors and preserve numbering consistency across easement documents, keep the heading (article 5) and insert the following text:

There is no Minimal Protection Area within the Property.

## Article 3. Highest Protection Area

**Purpose.** This article details the rules governing the size and location of Improvements, the intensity of use of land, and the disturbance of natural resources in the Highest Protection Area.

**Dovetail with Conservation Objectives.** The covenants in this article are intended to dovetail with the Conservation Objectives described in article 1 as they apply to the Highest Protection Area. Just as you customize the Conservation Objectives to the project, so should you customize the covenants in this article to be fully consistent with and support those Conservation Objectives.

**If No Highest Protection Area.** If there is no Highest Protection Area, follow the instructions contained in the commentary section titled “Introduction to Articles 3, 4, and 5.”

### 3.01 Improvements

**Purpose of Prohibition.** The prohibition assures that the list of permitted items set forth in this section comprise the universe of Improvements permitted within the Highest Protection Area.

**Definition of Improvements.** The definition of Improvement in article 9 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. Dirt roads and riding rings are Improvements. Agricultural fields are not considered Improvements even if “man-made” by removing vegetation.

#### (a) Existing Improvements

**Purpose.** The model permits Existing Improvements to remain in their existing locations as of the Easement Date wherever they may be within the Property.

#### OPTION 22: PROVIDE FOR RELOCATION

If an Existing Improvement (perhaps a hunting cabin) is located within the Highest Protection Area as of the Easement Date, and Holder wants to encourage relocation to a less ecologically sensitive area, a sentence along the lines of the following can be added to §3.01(a):

The cabin 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: (1) Owners are not entitled to replace that Existing Improvement within the Highest Protection Area; but (2) Owners are permitted to replace the Existing Improvement within the Standard Protection Area without counting against

limitations otherwise applicable to Improvements in that area.

#### (b) Existing Servitudes

**Existing Servitudes Trump Easement.** If a servitude predates a conservation easement, under the law Holder cannot stop the exercise of rights provided by the servitude, no matter what the Grant says.

**Research Title.** Before finalizing a grant of conservation easement, Holder should obtain title information to determine what rights Persons have to disturb natural and scenic resources within the Property by exercise of rights under Existing Servitudes.

**Inspect and Inquire.** Besides recorded documents, unrecorded rights to use or occupy the Property existing as of the Easement Date may take priority over the conservation easement if Holder knew or had reason to question whether Persons other than Owners had existing rights in the Property. These outstanding interests may be disclosed by questioning the Owners, carefully reviewing the Property survey, and physically inspecting the Property to check for any visible evidence of use or occupancy by others not disclosed by recorded title documents. Common examples of physical evidence prompting further inquiry include: Utility Improvements, access ways that may serve other properties, evidence of mining or other extraction activities, farm operations that do not appear to be conducted by Owners, and signs that do not appear to refer to Owners or activities conducted by Owners. Owners’ disclosures of unrecorded interests constituting Existing Servitudes, including copies of unrecorded documents, should be included in the Baseline Documentation.

**S&P.** Practice 9.F.1 calls on land trusts to

Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire.

Practice 9.F.2 calls for land trusts to:

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

**Modification of Existing Servitude.** A prospective Holder might want to condition its willingness to accept a conservation easement upon receipt of a modification or supplement to the Existing Servitude that would bring the exercise of rights under the Existing

Servitude 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 (1) exercise its own judgment that it would be unlikely for additional or replacement Utility Improvements to be installed in another location with materially adverse effect on Conservation Objectives; or (2) require written confirmation from the utility company that the easement granted in the Existing Servitude is, in fact, limited to a specific corridor within the Property. Another example: A Holder might condition its acceptance of the conservation easement upon the receipt of a satisfactory Surface Use Agreement (see the next paragraph) consistent with the Conservation Objectives. That condition would be set forth in the donation or purchase agreement between the prospective Holder and the Owners.

**Sub-surface Versus Surface Rights.** With respect to Existing Servitudes 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 Servitude purports to cover the entire Property. Since the law is fuzzy on what constitutes reasonable use as it applies to particular circumstances, Persons holding sub-surface rights are sometimes willing to work with Owners to develop a formal understanding of each party's rights. 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 the supplemental provisions to the commentary.

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#### OPTION 23: PROVIDE HOLDER RIGHT TO ADDRESS EXISTING SERVITUDES OR NEGOTIATE SURFACE USE AGREEMENTS

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Users may decide to accept the conservation easement subject to an Existing Servitude but reserve the right to negotiate a satisfactory Surface Use Agreement or other changes or clarifications to the Existing Servitude after the Grant is in effect. The supplemental provisions contain an optional provision to be added to §6.03 "Other Rights of Holder" to accomplish this.

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### (c) Additional Improvements

**Customize.** The list of permitted Additional Improvements and the indication of certain items as "subject to Review" are intended to be appropriate to many conservation projects; however, they are not expected to be a perfect match for every project.

Customize the list and items subject to Review to meet the particular circumstances.

**Expand with Caution.** Additional Improvements within the Highest Protection Area should be limited to those that Holder has determined are consistent with the Conservation Objectives for this highest level of protection. If the list of permitted items is materially expanded, 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 §6.04. Different Holders 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 may approve after Review, "without any obligation to do so." The addition of that phrase allows Holder to give or withhold approval in its discretion. See the commentary to §6.04 for further discussion.

**Limitations.** The model is constructed with a very limited list of permitted Additional Improvements in the Highest Protection Area. Because the inherent nature of the permitted items generally constrains their potential impact on the Property's natural and scenic resources, separate subsections setting forth limitations like 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 an "Impervious Coverage Limitations" subsection similar to that provided for the Standard Protection Area should be added to the article.

- (1) **Fences, Walls, and Gates.** The appropriate Height restriction on this type of improvement will vary with the resources to be protected. A relatively low Height such as the model's failsafe limitation of five feet may be necessary to maintain scenic views of the Property and allow the free movement of wildlife. Conversely, if exclusion of deer from all or portions of the Highest Protection Area is needed to allow forest regeneration, then fences of eight feet or higher may be desirable. Whatever Height limitation is chosen in drafting the document, the model enables Holder to approve a fence Height greater than this limitation if Holder finds it consistent with the Conservation Objectives.

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#### OPTION 24: FENCES, WALLS, AND GATES

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**Limit Materials and Design.** Some users add further restrictions to advance the Conservation Objective of maintaining 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.”

**Limit Location.** 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.

**Allow Greater Height Outside Viewshed.** Limiting the Height of fences, walls, and gates primarily furthers Conservation Objectives pertaining to scenic views. In cases where a scenic viewshed can be delineated on the Easement Plan or by verbal description, you may elect to apply a Height limitation only to fences, walls, and gates within that viewshed. Examples:

Fences, walls, and gates but, within 500 feet of State Road, limited to a maximum of four feet in Height.

Fences, walls, and gates but, within the area marked “scenic viewshed” on the Easement Plan, limited to four feet in Height.

- (2) **Signs.** The approach taken by the model is to allow latitude with posting of “no hunting,” “no trespassing,” and similar signs because, as the term “Regulatory Sign” is defined in article 9, they must not exceed one square foot each (or the minimum dimension required by law) and, thus, are not likely to interfere with Conservation Objectives pertaining to scenic views. All other signs are limited to a maximum area per sign and a maximum area of signage within the entire Property.

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#### OPTION 25: SIGNAGE

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**Signage for Public Use.** If an easement for a Public Trail is being incorporated into the Grant or by separate document, this provision may need to be expanded to better accommodate signs associated with the Public Trail. See the supplemental provisions for sample provisions regarding Public Trails.

**Prohibit or Limit Lighting.** Particularly when larger signage is permitted, users may want to consider a prohibition on illumination of the sign or a limitation that all illumination must be downward directed and of an intensity consistent with Conservation Objectives. For a more comprehensive limitation on nighttime illumination, see “Dark Skies” under “Adding Conservation Objectives” in the supplemental provisions. Example:

Illumination of signs must only utilize low wattage, shielded lighting that is directed downward from a position immediately above the sign.

- (3) **Habitat Enhancement.** The listed items are permitted anywhere within the Property without Review because, typically, they neither impair scenic views nor

materially increase Impervious Coverage. Their positive benefits to habitat protection outweigh potential negative effects.

- (4) **Trails.** The model’s approach is that trails covered by relatively permeable, natural materials are permitted anywhere within the Property without Review.

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#### OPTION 26: ADDRESS LOCATION, WIDTH, OR SURFACE OF TRAILS

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**Limit Location.** You may want to limit the location of trails installed as Additional Improvements. Sample text:

Unless otherwise approved by Holder after Review, trails (other than Existing Improvements, if any) must be located outside Wet Areas and not more than 100 feet from the boundary between the Highest Protection Area and the Standard Protection Area.

**Limit Width.** Limitations on the width of trails frequently are added to the model provision. Some Holders limit to a relatively narrow width (such as 4 to 6 feet). Other Holders prefer a wider path (particularly when used as a bridle path) so it is less likely to become rutted.

**Further Limit Surface Material.** Some organizations want to ensure that shredded tires or other artificial materials aren’t used for trail surfacing. Sample text:

No synthetic products are to be used.

**Permit Other Surfaces for Public Trail.** If a right-of-way for a Public Trail is being incorporated into the Grant or a separate grant of easement, 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 9 includes the requirements for compliance with the Americans with Disabilities Act. WeConservePA resources regarding trails and ADA accessibility, include the manual [Universal Access Trails and Shared Use Paths: Design, Management, Ethical, and Legal Considerations](#).

- (5) **Improvements in Wet Areas.** The model provision permits a number of items often found in Wet Areas but imposes a Review requirement because of the heightened environmental concerns.

**Stream Access Structures.** A fishing pier and dock or boat ramp for kayaks and canoes are examples of stream access structures that might be appropriate Improvements in the Highest Protection Area depending on the particular facts and circumstances. If the model were to be customized to allow livestock some access to the water in the Highest Protection Area, then a structure to accommodate this use while minimizing environmental harm might also be appropriate.

- (6) **Improvements Related to Hunting and Nature Study.** The Highest Protection Area may be used for hunting and nature study; thus, the model permits certain items used in connection with these activities. Review is not required for tree stands and blinds installed from time to time and removed at the end of the hunting or birding season for which they were installed. The rationale is that these temporary, portable structures are not likely to result in significant damage to protected resources. Review is required for more permanent, non-seasonal Improvements.

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#### OPTION 27: IMPROVEMENTS RELATED TO HUNTING AND NATURE STUDY

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**Allow Tree Stands Whether or Not Permanent.** You may be willing to allow tree stands without Review whether or not permanent because they have little or no effect on Impervious Coverage and are unlikely to impair scenic views. In that case, the second sentence of the subsection could be changed to the following:

Blinds to remain in place for more than a season are subject to Review.

**Require Review Only If Blinds Are Installed in Wet Areas.** You may be concerned about blinds if, as is likely the case, they are installed in Wet Areas and may be installed in ways that significantly disturb habitat and vegetation. In that case, substitute the following for the second sentence of the subsection:

Blinds within Wet Areas and tree stands and blinds that are to remain in place for more than a season are subject to Review.

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#### OPTION 28: TENTS AND CAMPING

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The supplemental provision's "Providing for Camping" discusses issues to consider and alternatives for providing for camping.

- (7) **Access Drives and Utility Improvements.** The only feasible route for providing access and utilities may be through the Highest Protection Area, but perhaps neither a clear future need or an optimal pathway may be evident during easement planning. The model permits access and utilities if no other reasonable means is available and makes these improvements subject to Review.
- Carve out Existing or Known Future Pathway.** If the Access Drive or Utility Improvement already exists or its future pathway is certain, you may want to carve the pathway out of the Highest Protection Area, designating it instead as Standard Protection Area or Minimal Protection Area. However, if uncertainty exists as to the future, which is often if not usually the case, then the flexibility provided by the option below may be preferable.

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#### OPTION 29: LOCATE CORRIDOR ON EASEMENT PLAN.

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If, as of the Easement Date, a preferred location for access and utilities has been identified, you may add to the end of the provision:

Unless Holder, without any obligation to do so, approves another location after Review, such Improvements are permitted only within the area identified as "Future Access Corridor" on the Easement Plan.

- (8) **Subsurface Extraction Improvements.** The model allows wholly subsurface Extraction Improvements within all areas of the Property including the Highest Protection Area if Holder approves after Review.

**Surface Improvements Not Permitted.** The provision allows Extraction Improvements from outside the Highest Protection Area to extend into the deep subsurface of that area but prohibits Improvements on or affecting the surface of the area or which threaten resources protected in the Conservation Objectives. If not otherwise altered in article 4 or article 5, that rule applies to the entire Property. Alternatives for the Standard Protection Area and Minimal Protection Area are provided in the commentary to those articles.

**Surface Impacts.** Improvements on or affecting the surface (such as a wellpad, 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. These activities, even on a temporary basis, may be inconsistent with Conservation Objectives for the Highest Protection Area and, perhaps, the entire Property.

**Rationale for Model's Approach.** The model seeks to recognize the interests of Owners to economically benefit from the oil and natural gas resources beneath their Property so long as Conservation Objectives are not compromised either by the Improvement itself, its long-term use, or the short term activities required prior to or as a result of Construction. In areas of the Commonwealth containing major gas deposits, many Owners will not consider conserving their land if they are to be deprived of potential income from gas extraction that is unlikely to conflict with the Conservation Objectives. In many cases, Owners have no flexibility in extraction matters, the mineral rights having been previously sold or leased to another. (See the discussion of Existing Servitudes in §3.01(b) of the commentary.)

**Review Considerations.** Among the criteria Holder should consider in its Review of proposed Extraction Improvements are the plans for Construction and

maintenance of the Extraction Improvement to be sure there will at no time any surface disturbance whether permanent or temporary; the depth at which the Improvement will be located; and whether impairment of water or other resources may occur as a result of the Improvement.

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#### OPTION 30: ENERGY

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**Prohibit Extraction Improvements.** Some users may take the position that the drilling and, perhaps, blasting required to extend Extraction Improvements through the Property present a significant risk to one or more Conservation Objectives whether or not the Construction activities occur in the deep substrata. Others may be opposed to extraction of natural gas and oil as a matter of broader concern about potential impacts of fossil fuel consumption including climate change and, thus, do not want any portion of the Property to facilitate that activity. If that is the case, delete the entirety of §3.01(c)(8).

**Permit Renewable Energy Improvements.** Some users may want to expand the model provision to include Improvements for the generation and transmission of Renewable Energy (such as geothermal facilities) within the Property. In that case, add after “Extraction Improvements”:

and Improvements for generation and transmission of Renewable Energy

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#### OPTION 31: ADDRESS PAST FOSSIL FUEL EXTRACTION

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**Improvements to Restore Land.** If the land has a history of fossil fuel extraction, you may want to add an item to §3.01(c) to provide for future restoration, for example:

Subject to Review, Improvements to plug, cap, remove, remediate, or otherwise terminate oil and gas wells, mines, or other Extraction Improvements.

Also, add a counterpart to §3.01(b):

Subject to Review, plugging, capping, removing, remediating or otherwise terminating oil and gas wells, mines, or other Extraction Improvements with prompt restoration of soil and vegetation disturbed by such activity.

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### 3.02 Activities and Uses

**Purpose of Prohibition.** The prohibition assures that the list of permitted items set forth in this section comprises the universe of activities and uses permitted within the Highest Protection Area. See notes on the comprehensive prohibition in “Introduction to Articles 3, 4, and 5.”

**Overarching Limitation on Intensity and Frequency.** The purpose of this limitation is discussed

under the topic “Constraint on Intensity and Frequency” in the “Introduction to Articles 3, 4, and 5.”

**Overarching Provision on Invasive Species Introduction.** This overarching limit on permitted activities and uses allows the permitted activities and uses to address non-native vegetation without the need to exclude, in each case, Invasive Species.

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#### OPTION 32: INTRODUCE OTHER OVERARCHING LIMITS

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The supplemental provision’s “Adding Conservation Objectives” suggests additional overarching limitations regarding historical, archaeological, and cultural resources that might be added to §3.02 in conjunction with complementary Conservation Objectives.

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#### (a) Existing Servitudes

**Existing Servitudes Trump Easement.** Existing Servitudes, whether allowing the exercise of rights of use or occupancy or allowing certain Improvements to be constructed or remain on the Property, take priority over the Conservation Easement. This topic is discussed in the commentary to §3.01.

**Research Title.** Before finalizing a grant of conservation easement, holders should obtain title information to determine what rights Persons have to disturb natural resources within the Property by exercise of rights under Existing Servitudes.

**S&P.** See the commentary to §3.01(a) regarding Existing Servitudes and Land Trust Standards and Practices.

**Surface Use Agreements.** The commentary to §3.02(b) discusses the concerns of Holder pertaining to the exercise of rights under Existing Servitudes and negotiation of Surface Use Agreements.

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#### OPTION 33: PROVIDE HOLDER RIGHT TO ADDRESS EXISTING SERVITUDES OR NEGOTIATE SURFACE USE AGREEMENTS

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Users may decide to accept the conservation easement subject to an Existing Servitude but reserve the right to negotiate a satisfactory Surface Use Agreement or other changes or clarifications to the Existing Servitude after the Grant is in effect. “Providing Holder with Right to Negotiate Changes to Existing Servitudes” under the supplemental provisions contains an optional provision to be added to §6.03 “Other Rights of Holder” to accomplish this.

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#### (b) Resource Management and Disturbance

**Purpose.** This subsection sets forth those activities and uses that are consistent with the Conservation Objectives for the Highest Protection Area.

**Review.** Except for item (I), which provides permission to address hazardous conditions, and which, to avoid liability, should not be subject to Review, users



may use their discretion as to whether or not to customize the model to condition other activities on Review.

- (1) **Addressing Unreasonable Risk.** Item (1) is intended to shield Holder from liability for personal injury or property damage occurring on or about the Property by tree limbs falling or similar hazards. Holders who are concerned that this provision creates a loophole for unwarranted disturbance of trees and other resources should consult with their legal counsel and insurance representatives before changing the provision.
- (2) **Planting, Replanting, and Maintaining Vegetation.** The Highest Protection Area may be wildlife habitat of the highest quality or may be a landscape scarred by overgrazing or high grading. For the former, attainment of the Conservation Objective may mean for the most part leaving the land alone; for the latter, a Holder will probably want to encourage the Owners to plant or replant or allow others to do the same if the Owners are not already so inclined. The model provision allows Holder to use the Review process to determine whether a plan for planting or replanting vegetation advances the Conservation Objectives even if some portion of the plantings are to be non-Native Species.
- (3) **Removal of Vegetation; Eliminating Invasives.** Review is required under §3.02(b)(3) for removal of vegetation and Invasive Species from the Highest Protection Area because, without appropriate planning, Conservation Objectives may be impaired, for example, erosion of bare soil into streams, destabilization of Steep Slopes, destruction of habitat for birds and small mammals, and scenic views of woodland replaced with views of dead understory and tree stumps.

#### OPTION 34: REMOVAL OF INVASIVES

**No Review for Invasive Removal.** Requiring Review for removal of Invasive Species may discourage Owners from removing Invasive Species, thus presenting an obstacle to achieving a Conservation Objective of improving the quality of wildlife habitat for Native Species. This risk must be weighed against the risk to Conservation Objectives of poorly planned removal of Invasive Species. If you decide to allow removal of Invasive Species without Review, change §3.02(b)(3) to read as follows:

Eliminating Invasive Species to benefit natural habitat and the ecosystem and, subject to Review, removal of vegetation to accommodate replanting as permitted in this article.

**Allow Removal by Cutting.** Some prefer to allow removal of Invasive Species by mechanical means (cutting as opposed to herbicide application) without Review; however, if using this alternative, Holder may want to stipulate that all cutting of trees remains subject to the limitation set forth in (b)(6).

- (4) **Construction.** As a general rule, if an Improvement is permitted, Construction of that Improvement is permitted subject to limitations in the Grant or imposed as a result of Review. Limitations applicable to Construction in the Highest Protection Area (which carry through to the entire Property) are that disturbed soils and vegetation must be promptly re-stored.
- (5) **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 under §3.02(b)(5); however, see the restriction applicable to recreational activities under §3.02(c) below.
- (6) **Cutting Trees.** Owners have an understandable desire to use wood from their own Property for their personal use (e.g., burning firewood in a woodstove or fireplace), 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.

#### Model's Approach: Cap Measured by Stump

**Area.** The model provision 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. This formulation provides for easy compliance by Owners and relatively easy monitoring by Holder, freshly cut stumps being 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.)

**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).

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#### OPTION 35: TREE CUTTING AND REMOVAL

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**Restrict Use of Wood to Property.** If you wish to confine use of wood cut under this provision to those uses taking place on the Property, add "and only for use within the Property" to the end of the provision. Such a limitation reduces the likelihood that an inconsequential quantity of wood taken for use off-property could slip into something of larger impact due to the Owners not staying attuned to the limit on quantity. However, such a limitation is also very challenging to monitor and enforce.

**Set Cord-based Standard.** 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. (Estimating 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.)

**Allow Removal of Fallen Trees.** Because animals, fungi, and plants make extensive use of naturally fallen trees, these trees are included in the tree removal limit. If fallen tree habitat is not important for maintenance of Conservation Objectives, you may delete the phrase "standing or fallen" from the model provision and add a sentence to clarify as follows:

Cutting and removal of trees that have fallen due to natural causes (but not due to human activity) are not included in the calculation of wood removed set forth in this subsection.

**Address Funder Requirements.** If funding for a project is contingent on allowing timber production throughout the entire Property, add a subsection permitting Sustainable Forestry to the extent required for compliance with the funder's rule and subject to conformance with a Resource Management Plan approved by Holder after Review.

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- (7) **Extraction of Natural Gas or Oil.** The model provision allows subsurface Improvements permitted in §3.01 to be used for the purpose of extraction of oil and natural gas.

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#### OPTION 36: ENERGY

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**Don't Allow Extraction.** If subsurface Improvements are not permitted under §3.01, or you do not want them used for extraction activities, then this provision may be deleted.

**Allow Subsurface Renewable Energy Activities.** If you elect to allow subsurface Improvements for the generation or transmission of Renewable Energy, the right to engage in the activity must be listed here by inserting after "Subject to Review":

generation and transmission of Renewable Energy  
and

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- (8) **Application of Manure, etc.** The model allows application of certain substances to promote the growth and health of vegetation anywhere within the Property without Review. Manure and plant materials must be well composted prior to application; otherwise, these substances may introduce pathogens, excessive nutrients, and weed seeds to the area of application. The model provision also allows, without Review, application of fertilizer, pesticides, and herbicides in accordance with manufacturers' recommendations.

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#### OPTION 37: APPLICATION OF SUBSTANCES

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**Require RMP for Substances Other than Compost.** If you want to disallow application of fertilizers, herbicides, pesticides, and other substances unless used in accordance with a Resource Management Plan approved by Holder after Review, substitute the following text for the first sentence of the provision:

In accordance with a Resource Management Plan approved by Holder after Review, both (A) application of manure and plant material, both well composted and (B) application of other substances to promote the health and growth of vegetation subject to compliance with manufacturer's recommendations.

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- (9) **Piling of Brush.** The model permits piling of vegetative materials arising from activities within the Highest Protection Area.

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#### OPTION 38: FURTHER LIMITS ON BRUSH PILES

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**Control for Scenic View.** Some users may want to add a Height or locational control to maintain scenic views. Examples:

Brush and vegetation piles must not exceed 8 feet in Height and must be located outside of areas identified as scenic in the Conservation Objectives.

Brush and vegetation piles are not permitted within 100 feet of the Public Trail.

**Exclude Piling of Materials from Forestry Activities.** If you modify the model to allow Sustainable Forestry without Review in the Highest Protection Area (although it's generally preferable to confine this activity to Standard and Minimal Protection Areas), you may want to exclude piling of timber or other products derived from those Sustainable Forestry activities or make these items subject to Review so that Holder is given the opportunity to determine whether the location and intensity of the activity is consistent with the Conservation Objectives.

- (10) **Other Activities.** The category of “other activities” addresses the reality that after the Easement Date, the Owners may identify an activity that (A) they wish to pursue, (B) that was not contemplated during the planning and drafting of the Grant, and (C) that clearly would not harm the Conservation Objectives. Conversely, the Owners may identify any number of activities that would have the potential to harm the Conservation Objectives. To guard against undue Owner pressure to approve activities that might have a negative or uncertain impact on the Conservation Objectives, this provision contains the safeguards of (A) requiring a plan for the activity, (B) making that plan subject to Review, and (C) not creating any obligation for Holder to make a determination.

**Safety Valve.** Item 3.02(b)(10) also serves as a kind of safety valve to provide latitude for changes in the environment, resource management practices, and technologies over time. For example, if Native Species found in Pennsylvania as of the Easement Date are no longer thriving due to climate change, Owners may want to replace them with other species adapted to warmer climates. Adaptations such as these can be accomplished with a Resource Management Plan approved by Holder after Review under the authority of this provision.

**Alternative to Amendment.** If the model did not contain the flexibility of this subsection, Owners would have to seek and achieve an Amendment to pursue the desired activity. The Amendment process contains administrative and other hurdles that both Owners and Holder generally may prefer to avoid. (See WeConservePA resources regarding conservation easements and amendments including the [Model Policy on Conservation Easement Amendment](#) and the guides [Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#) and [Amending and Restating Grants of Conservation Easement: Best Practices to Document Change](#).)

### (c) Recreation and Education

**Model Permits Low Impact Activities.** The model accommodates recreational activities in the Highest Protection Area but limits the activities to

those with minimal likelihood of interference with the Conservation Objectives. The model avoids using the phrase passive recreational use as there does not appear to be consensus on the meaning of that phrase.

**Public Access Not Implied.** The listing of hunting, fishing, and other recreational uses as permitted activities does not imply that the Property is open to the public; the model, as written, places no obligation on the Owners to provide public access. 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 6 granting public access. See “Providing for Public Access” in the supplemental provisions.

**Hunting and Conservation Objectives.** Hunting is generally consistent with typical Conservation Objectives “to protect and improve the quality of natural habitat” and “to protect and enhance the richness of biodiversity and natural habitat.” In many regions, the harvest of deer can be important for maintaining a diversity of plant life and the regeneration of forest.

**No Vehicular Use Without Approval.** The model excludes vehicular use in connection with an activity permitted under subsection (c) within the Highest Protection Area unless Holder approves the use after Review.

### OPTION 39: VEHICULAR USE FOR OTHER ACTIVITIES

**Allow Non-motorized Vehicular Use.** You may view bicycle use of trails within the Highest Protection Area to be consistent with habitat and other values of the Highest Protection Area but not view motor bikes, all-terrain vehicles, snowmobiles, and the like similarly. In that case, add the following:

Non-motorized vehicles (for example, bicycles) are permitted for recreation and other uses permitted under this subsection without Review but only if confined to trails.

**Allow Vehicular Use on Public Trail.** If public access to a recreational trail is permitted under the Grant or another document, allow motorized vehicles for Persons with mobility challenges. Example:

Wheeled vehicles, whether motorized or not, are permitted on the Public Trail to transport Persons requiring mobility assistance.

**Allow Vehicular Use.** You may not desire to regulate vehicular use at all, reasoning that the burdens of enforcement and Review may not yield a significant conservation benefit. If so, delete the last sentence of the subsection. (If vehicular use ever rises to an intensity or frequency that threatens Conservation Objectives, Holder can take action to stop the use under the authority of §3.02's overarching limitation regarding intensity and frequency of activities.)

## Article 4. Standard Protection Area

**Purpose.** This article details the rules governing the size and location of Improvements, the intensity of use of land, and the disturbance of natural resources in the Standard Protection Area.

**Dovetail with Conservation Objectives.** The covenants in this article are intended to dovetail with the Conservation Objectives described in article 1 as they apply to the Standard Protection Area. Just as you customize the Conservation Objectives to the project, so should you customize the covenants in this article to be fully consistent with and support those Conservation Objectives.

**If No Standard Protection Area.** If there is no Standard Protection Area, follow the instructions contained in the commentary section titled “Introduction to Articles 3, 4, and 5.”

### 4.01 Improvements

#### (a) Permitted under Preceding Article

**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. The limitations applicable to an Improvement in the Highest Protection Area remain the same except as otherwise noted in article 4.

**No Highest Protection Area.** If there is no Highest Protection Area, follow the instructions contained in the commentary section titled “Introduction to Articles 3, 4, and 5” for an alternative to §4.01(a).

#### (b) Additional Improvements

**Segregate Permissions from Limitations.** All of the Improvements listed in this subsection are permitted subject to limitations found in subsections (c), (d), (e), and (f). For clarity, keep limitations grouped in these subsections rather than adding limitations in subsection (b).

#### OPTION 40: ADD OTHER IMPROVEMENTS.

**Consider Other Possible Improvements.** You may wish to accommodate more than just Agricultural and Site Improvements within the Standard Protection Area. For example, if permitted recreational activities might require Improvements beyond those classified as Site Improvements, you will want to add those types of Improvements to §4.01(b), for example, a roofed Improvement to accommodate a refreshment stand.

**Limitations on Possible Improvements.** In conjunction with the permitted Improvements, you may also want to establish particular limitations on those Improvements in one or more of the limitations (Im-

pervious Coverage, Height, etc.) subsections that follow. For example, if the Standard Protection Area may be used for competitive recreational activities such as courts, tracks, or playing fields, consideration must be given to whether and how much lighting will be allowed for the activity, whether sanitary facilities are permitted and in what locations, and similar concerns to assure that needed Improvements remain consistent with the Conservation Objectives.

**Recreational and Camp Improvements.** You may want to clarify that Improvements used for recreational purposes or in support of camp uses are permitted either as a separate category of Improvement or a type of Site Improvement. For example, cabins might be accommodated using the former approach and tracks and playing fields using the latter. You will need to address “Recreational Improvements” or “Camp Improvements” separately if one or more roofed structures will be permitted in support of such activities (since roofed structures are not categorized as Site Improvements). Perhaps an equipment shed, refreshment stand, or sanitary facilities will be permitted outside the Minimal Protection Area. Similarly, you may need to accommodate cabins outside the camp core that you may have placed within the Minimal Protection Area. Whether or not roofed, some users may want to define “Recreational Improvement” or “Camp Improvement” to specify certain limitations on these Improvements separate from other Improvements. Sample definitions of Recreational Improvement and Camp Improvement are included in the supplemental provisions.

**Allow Surface Extraction Improvements for Oil and Natural Gas.** An additional subsection may be added to §4.01(b) to permit aboveground Extraction Improvements within the Standard Protection Area subject to such controls as are necessary or desirable to maintain Conservation Objectives. Example:

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 vertical well for the extraction of oil or natural gas from substrata beneath the Property. The vertical well must be constructed 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 9.

Add the definition of Surface Use Agreement (contained in the Supplemental Definitions) to article 9.

Review the commentary to §4.02, which contains complementary provisions with respect to activities and uses.

## (1) Agricultural Improvements

Agricultural Improvements are permitted in the Standard Protection Area because the approach taken by the model is to:

- constrain, as much as possible, the size of the Minimal Protection Area;
- recognize that not every Improvement desirable for support of Agriculture is likely to be accommodated within the Minimal Protection Area; and,
- if Additional Improvements are needed in the Standard Protection Area in support of Agriculture, allow them subject to such limitations as are needed for consistency with the Conservation Objectives.

**Clarification for Seventh Edition.** The seventh edition specifically lists farm stands as an example of an Agricultural Improvement. The item was added as a clarification without any implication that it was previously excluded or included.

## (2) Site Improvements Serving SPA

**No Review.** Site Improvements supporting uses and activities permitted within the Standard Protection Area are permitted without Review under this subsection. Under this provision, for example, a detention basin required for residential use of the Minimal Protection Area would not be permitted in the Standard Protection Area.

**Utilities.** This rule applies to Utility Improvements, which by definition are a type of Site Improvement; it does not apply to Extraction Improvements, which are explicitly excluded from the defined term “Site Improvement.”

## (3) Site Improvements Serving Other Areas of the Property

**Review Required.** Site Improvements serving other areas of the Property are only permitted in the Standard Protection Area if, after Review, Holder concludes that it is not reasonably feasible to install them in the Minimal Protection Area. For example, the Owners may request and Holder may approve a septic system in the Standard Protection Area if the existing septic system within the Minimal Protection Area must be replaced and percolation tests indicate that there is no

available location within that area with soils meeting requirements under Applicable Law.

## (4) Site Improvements Serving Outside the Property

**Holder’s Full Discretion.** The model provision permits Holder, without any obligation to do so, to give or withhold approval (on a case-by-case basis but without the need for Amendment), for a Site Improvement servicing properties other than the Property. Example of an application of the provision:

An opportunity arises to hook the Property into a community sewage system but, in order to do so, an underground pipe, which would serve more than just the Property, must be installed across a portion of a field within the Standard Protection Area. Holder has the discretion to just say no; Holder also has the discretion to allow the Improvement upon satisfaction of certain conditions: for example, the Owners must permanently abandon the existing wastewater disposal system and restore agricultural soils disturbed during Construction.

## (5) Renewable Energy Improvements

The model permits Improvements for Renewable Energy (whether surface or subsurface) under this subsection. The approval is discretionary under the model as a result of the concern that Renewable Energy Improvements come in a variety of forms and we do not know what new forms will arise in the future. A definition of the term Renewable Energy is provided in article 9 of the model.

### OPTION 41: RENEWABLE ENERGY IMPROVEMENTS

**No Renewable Energy Improvements.** You may rule out wind turbines and solar panels regardless of size or location. In that case, delete this provision in its entirety.

**No Discretionary Approval.** If you do not view Renewable Energy Improvements as any different from other permitted Improvements (for example Agricultural Improvements), you may eliminate the phrase “without any obligation to do so”.

**Limit Height or Impervious Coverage.** Limitations on Height and Impervious Coverage regarding Renewable Energy Improvements can be imposed under §4.01(c) and (e) and/or by the terms of Holder’s approval after Review.

## (c) Impervious Coverage Limitations

**Purpose.** Depending on the particular land to be placed under easement, Impervious Coverage limitations are probably central to achieving either all or most of the Conservation Objectives.

**Overall Limit Subject to Sublimits and Exceptions.** The model allows you to set an overall limit on Impervious Coverage within the Standard Protection Area and then set sublimits on particular types of Impervious Coverage and exceptions for particular circumstances.

**Access Drives Not Included.** The Impervious Coverage of Access Drives is not figured into Impervious Coverage limits in this subsection because Access Drives are regulated separately in the next subsection.

**Man-made Ponds Not Included.** Man-made ponds are not subject to either the total Impervious Coverage limit or an individual limit. (The exclusion from the total limit is consistent with prior editions. However, unlike the 6<sup>th</sup> and earlier editions, the present edition does not include an individual limit.)

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#### OPTION 42: IMPERVIOUS COVERAGE

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**Addressing Ponds.** The surface area of man-made ponds is counted in the definition of Impervious Coverage but the model's default language does not limit this type of Impervious Coverage. If substantial ponds exist or are contemplated for the future and if these ponds may have material impacts on the Conservation Objectives, you may want to add another sublimit to §4.01(c), for example:

- (4) Impervious Coverage associated with man-made ponds must not exceed \_\_\_\_\_ square feet in total.

**Addressing Non-Problematic Improvements.** Other Improvements covered under the definition of Impervious Coverage that, in the particular context, don't have a significant detrimental impact on the Conservation Objectives may also be excepted from the Total Impervious Coverage limitation by modifying §4.01(c), for example:

...but excluding that of Access Drives, ponds, and \_\_\_\_\_, must not exceed...

**Allowing More Holder Discretion.** The model provides Holder with the discretion to allow (without Amendment) Impervious Coverage in excess of the stated limits but only to address narrow circumstances specified in the model. Some users may want additional flexibility. The major downside to reserving that flexibility is that, even if the Grant clearly states that Holder has the discretion to approve or disapprove without obligation to do so, Owners sometimes push for accommodations whenever the opportunity appears to be given in the Grant. If, despite this, you want to give Holder the flexibility to exercise its judgment on a case-by-case basis, without Amendment, then add the following to the end of §4.01(c):

and such other adjustments for specific Improvements as Holder, without any obligation to do so, approves after Review.

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#### (1) Roofed Improvements

**Purpose.** The limit per roofed Improvement is aimed at minimizing the intrusion of large bulk buildings into scenic views of open space. The same number of square feet of Impervious Coverage can appear to be a factory (if all under one roof) or a bucolic family farm (if broken up into a smaller barn and a few sheds).

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#### OPTION 43: LIMIT ROOFED IMPROVEMENTS

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**Limit Total Impervious Coverage of Roofed Improvements.** You may choose to limit total Impervious Coverage attributable to roofed structures in addition to limiting that of individual buildings. If so, add the following to §4.01(c)(1):

Total Impervious Coverage of roofed Improvements must not exceed \_\_\_\_\_.

**No Per Structure Limit.** You may elect to depend on an overall limit on roofed Improvements (without specifying any per Improvement limit). In this case, replace the text of §4.01(c)(1) with the text provided above.

**No Roofed Improvement Limits.** You may elect to delete this subsection if you do not want to distinguish Impervious Coverage associated with roofed Improvements from other Improvements. This option may be particularly appropriate if the Conservation Objectives do not include protecting scenic views.

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#### (2) Adjustment for Specific Agricultural Improvements

**Purpose.** The model was designed with the intent of preserving the Standard Protection Area's availability for Sustainable Agriculture and/or Forestry subject to the limitations necessary to achieve the Conservation Objectives. To avoid inadvertently and unnecessarily rendering Agriculture economically infeasible in the Standard Protection Area, the model provides Holder the ability to adjust—on a case-by-case basis and without the need for Amendment—Impervious Coverage limits upward in order to accommodate structures that extend the growing season.

**If High Tunnels Not Consistent.** If Agriculture will not be a permitted activity or if you determine that high tunnels would harm scenic views (or other Conservation Objectives), delete this subsection.

#### (3) Adjustment for Lesser Impact Improvements

**Purpose.** This subsection allows a relaxation of otherwise applicable Impervious Coverage limits for Improvements that function (for purposes of stormwater absorption and infiltration) similar to unimproved open space. Since green roofs, permeable surfacing materials, and other green technologies reduce potential negative impacts on Conservation Objectives but don't necessarily eliminate those impacts, Holder must exercise caution in considering and approving higher Impervious Coverage limits under this subsection.

**(d) Access Drive Limitations**

**Purpose.** Limiting the Impervious Coverage attributable to existing and future Access Drives furthers Conservation Objectives as do other Impervious Coverage limits. The model addresses Access Drives separately—and via limits on length and width—because Impervious Coverage limits for Access Drives (including farm lanes) tend to be rather large and imprecisely estimated. When an Access Drive Impervious Coverage limit is lumped into an overall limit for all Improvements, the resulting number may be exceedingly large and difficult to administer.

**Length Limitation.** The model limits the overall length of Access Drives. Sometimes, the appropriate length limit is easy to calculate, for example when the Access Drive serves the single purpose of linking point A to point B. Sometimes, calculating an overall cap can be challenging; for example, farm lanes can be shifting and indistinct.

**Width Limitation.** The model limits the width of Access Drives largely to thwart any effort to create a parking lot under the guise that it is a permitted Access Drive.

**OPTION 44: ACCESS DRIVES**

**Limit As to Purpose.** If the Access Drive permitted as an Additional Improvement has a specific purpose (such as providing access to and from a public right-of-way and a Minimal Protection Area designated on the Easement Plan), that limitation may be substituted for the aggregate length limitation in the default provision. For example:

A single Access Drive is permitted as an Additional Improvement for the purpose of providing pedestrian and vehicular access from the public right-of-way of \_\_\_\_\_ Road to and from Minimal Protection Area B.

**Exclude Relatively Porous Surfaces.** One possible solution to the difficulty of setting a maximum length applicable to farm lanes is to exclude from the limitation farm lanes covered, if at all, by wood chips or other porous surface.

**Address Concerns with the Law.** Local land use regulations sometimes require a minimum width for roads and drives servicing certain types of Improvements or developments. If you are concerned that a minimum width other than as set in the Grant may be required, add the following to the end of §4.01(d):

or such greater width as is required under Applicable Law.

**Address in Impervious Coverage.** If you are satisfied that Access Drives can be handled in the overall Impervious Coverage limitation (by deleting the exclusion of Access Drives in §4.01(c)) sufficiently to satisfy concerns as to the conservation impact of Access Drives, then §4.01(d) can be deleted in its entirety.

**(e) Height Limitations**

**Purpose.** Limitations on the Height of Improvements may serve several purposes, for example, preserving scenic views and protecting the flight paths of birds. Exceptions can be made for silos or wind turbines 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. In reviewing easement documents from a variety of sources, WeConservePA found that Height restrictions of 30-35 feet are typical.

- (1) **Fences, Walls, and Gates.** This subsection clarifies that the general Height limitation applicable to Improvements in the Standard Protection Area and Minimal Protection Area does not increase the allowable Height of fences, walls, and gates.
- (2) **Recreational Improvements.** This subsection affords users the opportunity to set a higher or lower limit for recreational Improvements.

A Height of eight feet 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 feet, 11-5/8 inches).

The Height limit can be set so low as to allow only relatively flat Improvements (tracks, trails, and courts). Example:

Improvements in connection with recreational use are limited to Site Improvements not exceeding two feet in Height. Fencing in connection with a recreational activity remains subject to applicable limitations on fencing within the Standard Protection Area.

- (3) **Adjustment for Specific Improvements.** This subsection affords the opportunity to adjust the Height limit when a permitted Improvement requires additional Height to be functional.
- (f) **Other Limitations on Additional Improvements**  
This subsection affords the opportunity to further limit or clarify limitations upon certain Improvements. For example, if you view recreational Improvements as inconsistent with Conservation Objectives, then you may want to add a provision under this subsection stating that Improvements used for recreation (other than trails permitted in article 3) are prohibited.
- (1) **Signs.** This subsection clarifies that, although signs are a type of Site Improvement, they remain limited as per article 3.
- (2) **Utility Improvements.** This subsection places additional limitations on Utility Improvements, which by definition are a subset of Site Improvements.

**Aboveground Utility Improvements.** Some users may want to clarify that this provision does not rule out Utility Improvements and components thereof that must be located, or extend, aboveground to be functional: for example, antennae, satellite dishes, structures enclosing or capping transmission facilities, caps on septic tanks, “sand mound” type septic disposal systems, and connections between the underground Utility Improvement and the Improvement serviced by it.

- (3) **High Concern Improvements.** This subsection provides Holder with a high level of discretion in accepting or rejecting proposals for the types of Improvements listed here—items that may be particularly problematic vis-à-vis the Conservation Objectives.
- (4) **Extraction Improvements.** With or without the inclusion of this subsection, Extraction Improvements continue to be limited to the scope described in article 3. However, given the sometimes high-stakes nature of gas operations, this subsection serves to provide additional clarity.

## 4.02 Activities and Uses

**Purpose.** The model’s restrictive covenants pertaining to the Standard Protection Area are intended to ensure that Agricultural, Forestry, and other open space uses protect the quality and quantity of soil, water resources, scenic views, and other resources described in Conservation Objectives.

**Blanket Prohibition and Overarching Limits.** See the discussion in the “Introduction to Articles 3, 4, and 5” and the commentary to §3.02 regarding the blanket prohibition and overarching limits that open this section.

### OPTION 45: INTRODUCE OTHER OVERARCHING LIMITS AND REQUIREMENTS

#### Limit Cutting of Mature Trees or Specimen

**Trees.** You may want to ensure that Mature Trees or Specimen Trees are not cut, whether they are part of an Agricultural, Forest, or manicured landscape. If that is the case, add the following provision to the bulleted list of §4.02:

Cutting of Mature Trees [or Specimen Trees] remains prohibited unless Holder approves after Review.

Also add to article 9 of the Grant the definition of Mature Trees or Specimen Trees provided in the supplemental provisions.

You will also want to ensure that your Conservation Objectives are drafted to support the protection provided by the limit. The supplemental provisions’ “Adding Conservation Objectives” contains guidance on adding Conservation Objectives pertaining to Mature and Specimen Trees and includes sample language.

**Protect Historical, Cultural, and Archaeological Resources.** The supplemental provisions’ “Adding Conservation Objectives” suggests additional overarching limitations regarding historical, archaeological, and cultural resources that might be added to §4.02 in conjunction with complementary Conservation Objectives.

**Require Notice of Impervious Coverage Increase.** You may want to require Owners to notify Holder of Construction that substantially increases Impervious Coverage whether or not Review is required. For example, you could add the following provision to the bulleted list of §4.02:

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.

#### (a) Permitted under Preceding Article

**No Highest Protection Area.** If there is no Highest Protection Area, see instructions in the “Introduction to Articles 3, 4, and 5” for an alternative to §4.02(a).

#### (b) Agriculture

**Sustainable.** This subsection permits Sustainable Agriculture. Agriculture that is not Sustainable remains prohibited.

**Continuous Cover.** Sustainable Agriculture is permitted without Review or requirement for a Soil Conservation Plan if it maintains continuous vegetative cover. Such a plan may or may not be needed under Applicable Law, but it is not a requirement of article 4.

#### Absence of Continuous Cover Triggers Plan

**Requirement.** A Soil Conservation Plan is required if the Agricultural use does not maintain continuous vegetative cover. The model does not require Review of a Soil Conservation Plan since, by definition under the model, the plan must both conform to the requirements of the Natural Resources Conservation Service for a conservation plan and to Applicable Law regarding erosion and sedimentation control.

Examples of continuous vegetative cover: pasture and fields permanently planted with hay or other cover crops and not overgrazed so as to result in exposure of bare soil.

Examples of non-continuous vegetative cover: plowed fields and fields planted with field crops (whether or not plowed).

**Requirement for Erosion and Sediment Control.** Pennsylvania’s Chapter 102 regulations, which address Erosion and Sediment Control, require that persons involved with earth disturbance implement Best Management Practices (BMPs) as part of a written erosion and sedimentation control plan to minimize erosion and soil loss. Farm operations that disturb



5,000 square feet or more of land come under this requirement. Guidance on BMPs can be found in the Erosion and Sediment Pollution Control Program Manual published by the Pennsylvania Department of Environmental Protection (<http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-88925/363-2134-008.pdf>).

**Soil Conservation Plan Goes Step Further.** A Soil Conservation Plan, or “conservation plan” as the term is used by the Natural Resources Conservation Service (NRCS), goes beyond erosion and sedimentation control to more fully guard against the loss of productive soil. The Soil Conservation Plan, while not required by law, can be used to satisfy the erosion and sedimentation control requirements noted above. Certified Conservation Planners, employed by NRCS, county conservation districts, or other public or private service providers, can craft conservation plans in cooperation with farmers.

**Conservation Plan Required for Incentives.** A current conservation plan is a requirement for participation in Pennsylvania’s REAP tax credit program and Agricultural Conservation Easement Purchase Program.

#### OPTION 46: FURTHER LIMIT AGRICULTURE

**Require Agricultural Management Plan.** You 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 §4.02(b) and add to article 9 of the Grant the definition of Agricultural Management Plan provided in the supplemental provisions.

**Add Standard for Overgrazing.** Rather than relying on the general limitation on intensity and frequency of use in §4.02, or observation of grazing in pasture exposing bare soil, you may prefer a specific standard to determine when permitted grazing use becomes overgrazing. In this case, you can add a new subsection to §4.02(b) such as the following:

Not more than one Animal Unit per 1.5 acres of fenced pasture is permitted.

You would then add the definition of Animal Unit, which is included in the supplemental provisions, to article 9.

**No-Till.** You may want to clarify whether the no-till method of agriculture is considered continuous vegetative cover or not.

**Use of Herbicides and Pesticides.** Herbicide and pesticide use is not directly addressed in article 4; thus, it is permitted only if and to the extent it is integral to a permitted activity (such as Sustainable Agriculture) or covered by §3.02(b)(8)’s allowance for “substances to promote the health and growth of vegetation.” Any use must also be of a frequency and intensity that won’t harm the Conservation Objectives.

For example, an herbicide to be applied within the Standard Protection Area in accordance with manufacturers’ recommendations is prohibited if runoff from it will harm protected resources (water, for example). If you do not want to rely primarily on the overarching limitation on frequency and intensity of use to guard against potential harm from herbicide and pesticide use, you may add another limitation to §4.02(b) such as the following:

Herbicides and pesticides must be applied in conformance with an Agricultural Management Plan approved by Holder after Review.

**Require Organic.** You may want to ensure that Agriculture is not only Sustainable but conforms to third-party certified organic standards as well. In that case, you may add another limitation to §4.02(b) such as the following:

Agricultural activities for the production of fruits, vegetables, livestock, and other items for commercial sale must 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.

**Organic but Not Certified.** 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.

**Certification Programs.** 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 Veri-Flora program of fresh cut flowers and potted plants by SCS Global Services (<https://www.scsglobalservices.com>).

**Substitute Gardening, Horticulture, and Silviculture for Agriculture and Forestry.** In some cases, preserving scenic views of gardens and landscaped areas is the primary Conservation Objective and both Agricultural and Forestry activities would be inconsistent with that goal. In that case, substitute for §4.02(b) and §4.02(c) of the model a provision permitting mowing, gardening, landscaping, horticultural, and silvicultural uses together with limitations on those activities (if any). Another option is to simply eliminate §4.02(b) and §4.02(c) inasmuch as mowing, gardening

and landscaping is routinely permitted in the Standard Protection Area under §4.02(e)(3).

- (1) **Within Wet Areas.** This subsection establishes safeguards to ensure that Agricultural uses do not impair water quality. Review is required for Agricultural activities within Wet Areas and prohibited within the area closest to the water's edge (within 15 feet if not noted otherwise).

**Addressing Invasives Along Water's Edge.** Invasive, non-native plants can be a major problem in Wet Areas. A carefully planned and managed grazing plan can reduce the presence and spread of these species by putting them at a competitive disadvantage vis-à-vis desirable species. The selection of grazing animal, timing of the grazing, and the intensity of the grazing are among the key factors to be considered in a successful invasives management program.

Grazing accomplished in accordance with a Resource Management Plan whose driving purpose is to control invasives may be more appropriately viewed as an activity provided for under §3.02(b)(10) than an Agricultural activity (even if that activity results in well-fed goats, sheep, cattle, or other herbivores); in this case, the limitations on Agricultural activities including prohibition near water's edge do not prevent well-managed grazing to control invasives.

#### OPTION 47: WET AREAS

##### **Discretionary Approval Close to Water's Edge.**

You may want to allow livestock access to water in locations which minimize adverse effects on water resources and aquatic habitat. In that case, add to the end of §4.02(b)(1):

unless Holder, without any obligation to do so, approves after Review.

- (2) **Within Steep Slope Areas.** This subsection assures that Agriculture on Steep Slopes is conducted (if at all) consistent with Conservation Objectives pertaining to preservation of soils and water resources. It does this by making the Soil Conservation Plan, prepared in accordance with Applicable Law, also subject to Review by Holder. The Holder may expect to find conservation practices such as contour farming and cross slope farming in the plan it reviews.
- (3) **Animal Operations.** Animal operations by many accounts present a greater threat to water quality than non-animal operations. Agricultural run-off into Pennsylvania streams is a major environmental problem affecting water quality not only in Pennsylvania but outside as well (the Chesapeake Bay, for example). As such, the model requires for animal operations that the nutrient management or manure management plan be provided to the Holder and prohibits concentrated animal operations.

**Plan Required.** By law, manure management plans (which can be written by the farmer) are required of all farms having one or more animals. Nutrient management plans (which are written by a certified nutrient management planner) are required only for concentrated animal operations; the Penn State Cooperative Extension encourages them for smaller operations.

**Concentrated Animal Operation.** Pennsylvania's Nutrient Management Act (Act 38) defines a concentrated animal operation as an agricultural operation that meets both of the following criteria: (1) contains 8 or more Animal Equivalent Units (AEUs) and, (2) has an animal density in excess of 2 AEUs on an annualized basis per acre of land suitable for manure application. (Included in the density calculation are non-production livestock such as boarding horses.) Much work has gone into interpreting this definition and developing calculations for applying the definition to particular farms. This work is set forth in [Pennsylvania's Nutrient Management Act Program Technical Manual](#) provided by the State Conservation Commission. Version 11 of the manual was released in October 2019.

#### OPTION 48: ANIMAL OPERATIONS

**Review Plans.** If your organization has the wherewithal to review nutrient management or manure management plans, you may want to make the nutrient management or manure management plan subject to Review.

**Allow CAOs.** Depending on the details, land that hosts a concentrated feeding operation might nevertheless provide conservation benefits to the public. If that is the case, you may choose to delete the clause that follows the semicolon in §4.02(b)(3).

- (4) **Soil Removal.** The model requires a Resource Management Plan approved by Holder to assure continued availability of Agricultural soils.

#### OPTION 49: SOIL REMOVAL

**Prohibit Soil Removal Activities.** You may not consider activities that involve soil removal consistent with Conservation Objectives even if conducted in accordance with a Resource Management Plan. In that case, substitute the following for the text of this subsection:

No Agricultural uses involving removal of soil from the Property (such as sod farming and ball-and-burlap uses) are permitted.

- (5) **No Woodland Conversion.** The model takes the approach that Woodlands within the Standard Protection Area may be the subject of Sustainable Forestry but not converted to Agricultural Uses. Typically, this furthers Conservation Objectives pertaining to scenic views and resource values of woodlands.

## OPTION 50: WOODLAND PROTECTION

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**Permit Conversion of Woodlands.** Delete this subsection if the understanding is that Woodlands within the Standard Protection Area can be converted to Agricultural uses without impairment of Conservation Objectives.

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### (c) Forestry

Forestry uses must be Sustainable and implemented in accordance with a Resource Management Plan approved after Review. Tree cutting permitted under article 3 (without need for a Resource Management Plan) continues to apply within the Standard Protection Area.

## OPTION 51: FORESTRY

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**Require Forest Management Plan.** If you desire more specificity as to the nature of the Resource Management Plan for Forestry uses, you may want to replace it with the term Forest Management Plan and add the definition of Forest Management Plan set forth in the supplemental provisions or your own definition to article 9 of the Grant.

**Tax Considerations.** A provision that requires Owners to provide a well-defined, detailed Forest Management Plan and Holder to approve the same prior to forestry activities may strengthen a donor's claim on their federal tax return that a gifted conservation easement qualifies as a charitable contribution.

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### (d) Compatible Activities Related to Agriculture or Forestry

This provision allows Owners the opportunity to engage in low-intensity activities supporting Agriculture and Forestry within the Standard Protection Area. The Review requirement, applied to items (3) and (4) may be important to assure that the wider of scope of activities permitted by this subsection are consistent with the Conservation Objectives.

## OPTION 52: ALLOW AGRITAINMENT ACTIVITIES

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The word Agriculture as defined in the model does not include use for public events whether or not related to the harvest season and whether for profit or not. Such activities are sometimes referred to as "agritainment." If you want to provide for the possibility of hayrides and other agritainment activities that (1) aren't clearly covered by §4.02(f) and (2) aren't directly a part of agricultural production, then add these items as a new subset under subsection (d), for example:

Agritainment activities that are not directly a part of agricultural production and, thus, do not fall under the definition of Agriculture (such as hayrides) that Holder, without any obligation to do so, deter-

mines are consistent with maintenance or attainment of Conservation Objectives and are conducted in accordance with a plan approved for the activities after Review.

Some (but not all) agritainment activities might arguably be covered by §4.02(f) of the model. If you want to add a provision such as the above, you will want to consider its interplay with §4.02(f).

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- (1) **Storage.** One might infer that storage of plant products fell under the meaning of production in previous editions of the model, especially since Agricultural silos were permitted; this provision, new to the 7<sup>th</sup> edition, eliminates the need for inference by explicitly permitting storage of plant products; it also clearly allows storage of animal products. Storage however is limited to products "produced on the Property" and is subject to Impervious Coverage limitations and other limitations set forth in article 4.
- (2) **Piling or Composting.** Prior to the 7<sup>th</sup> edition, this item appeared in part under a subsection titled "Release and Disposal." Some users add limits regarding the size of compost piles and their composition.
- (3) **Sale of Agricultural and Forestry Products.** This subsection (and the inclusion of "farm stand" in the definition of Agricultural Improvement) provides for the sale of farm products in the Standard Protection Area.

## OPTION 53: RESTRICT SALE OF PRODUCTS

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**No Sales in the SPA.** You may want to confine the selling (if any) of Agricultural and Forestry Products to the Minimal Protection Area. If this is the case, do all of the following:

- Delete this subsection and restate it as a new subsection in §5.02(d).
  - Add to §4.01(f) a new subsection stating that:  
Farm stands and other structures dedicated to the purpose of selling Agricultural products are not permitted.
  - Add to §5.01(b) a new item:  
Farm stands and other structures dedicated to the purpose of selling Agricultural and Forestry products produced on the Property.
- 

- (4) **Support Services.** Examples of such services may be veterinary services, farrier service, and, perhaps, repair of Agricultural vehicles if wholly contained within an Agricultural Improvement or limited to a confined area consistent with scenic views.
- (e) **Other Disturbance of Resources**
  - (1) **Use of Water Resources.** Water can be removed or impounded for permitted uses within the Property only. This activity is not permitted at all in the Highest

Protection Area. Note that Site Improvements supporting this activity (well and well pump, for example) require Review if water is pumped for use outside the Standard Protection Area.

- (2) **Removal of Vegetation and Construction.** This is the same standard as applied in article 3 except the requirement for “prompt restoration of vegetation” is deleted in article 4.
- (3) **Lawn and Garden Activities.** The Standard Protection Area may serve as an adjunct to residential use of the Minimal Protection Area, Lawn, garden, and landscaped areas may feature prominently in scenic views to be protected.

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#### OPTION 54: LIMIT MOWING

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**Limit Mowing within Wet Areas.** Since frequent mowing adjacent to water bodies is detrimental to water quality, you may want to limit mowing within Wet Areas, for example, by adding the following sentence to the end of this subsection:

Grassy and herbaceous vegetation within Wet Areas may not be mowed more than twice a year.

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- (4) **Generation of Renewable Energy.** If Improvements for Renewable Energy may be allowed within the Standard Protection Area, then this provision will allow the generation and transmission activities associated with the operation of those Improvements. If Improvements for Renewable Energy are not to be allowed within the Standard Protection Area, then delete this subsection.
- (5) **Wastewater Disposal.** This subsection allows certain substances to be released within the Standard Protection Area. Wastewater from the Minimal Protection Area may be released if there is no feasible alternative. For example:

The wastewater disposal infrastructure within the Minimal Protection Area is failing and needs to be replaced, but the soils are not likely to support installation in the area under Applicable Law. In this circumstance, Holder may find it appropriate to approve, subject to certain conditions, the construction and use of a replacement system in the Standard Protection Area.

#### (f) Other Activities

**Purpose.** This section serves as a catchall provision that allows (besides Sustainable Agricultural, Sustainable Forestry, and the other activities listed prior) a number of other open-space activities within the Standard Protection Area.

**Soil Disturbance Safeguard.** The last sentence of the subsection provides Holder some discretion to prohibit or limit recreational and other open-space activities that disturb or compact a material amount of soil.

**Vehicular Use.** The approach taken by the model is to allow non-motorized recreational vehicular use (for example, bicycles) in the Standard Protection Area. Motorized vehicles are permitted only as ancillary support to the primary activity (for example, for mowing turf within a recreational area or carrying equipment to a playing field) and, even then, only after Review and approval.

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#### OPTION 55: VEHICULAR USE

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**No Limit on Vehicular Use.** You may not want to burden Holder with the obligation to enforce a restriction on recreational vehicular use, because the probability of material damage to the Conservation Objectives is remote. In that case, delete the second condition in the first sentence of the subsection.

**No Review of Vehicular Use.** You may want to retain the restriction on vehicular use but don't see the need to subject such use to Review. In that case, delete “subject to Review.”

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#### OPTION 56: ADD OTHER ACTIVITIES AND USES

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**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 subsection to §4.02. See also the commentary to §4.01(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.

**Use of Substances Prohibited in the Highest Protection Area.** Some users modify the model to place additional restrictions on the use fertilizers, pesticides, and/or herbicides in the Highest Protection Area. If so, they should consider whether it is desirable or necessary to clarify or relax the applicability of the restrictions to the Standard Protection Area, for example, by adding the following provision:

Application of fertilizers, pesticides, and herbicides in support of Agricultural, landscaping, or horticultural uses is permitted if applied in accordance with manufacturers' recommendations.

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## Article 5. Minimal Protection Area

**Purpose of Covenants.** The covenants pertaining to the Minimal Protection Area set forth in article 5 serve to assure the Owners that on an appropriate portion of the Property they will be able to construct Improvements and undertake certain activities with only moderate constraints and without undue interference from Holder. These Improvements and activities are confined to the Minimal Protection Area to ensure that there is no detriment to the Conservation Objectives.

**Greater Latitude.** The covenants pertaining to the Minimal Protection Areas provide latitude for (with appropriate but modest limits) a variety, density, and intensity of Improvements and uses not permitted elsewhere within the Property.

**Reduce Impacts on Highest or Standard Protection Areas.** By providing for more types of use and more intense use of one or more Minimal Protection Areas, you may be able to better protect the conservation resources in the Highest and Standard Protection Area by keeping those Improvements, activities, and uses out of those areas. For example:

- A Minimal Protection Area could serve as a staging area for Forestry uses in more restricted portions of the Property.
- A Minimal Protection Area could serve as the main (but unlikely exclusive) location of Agricultural infrastructure.
- A Minimal Protection Area could be established to confine the placement of cabins, toilets, showers, pavilions, trash bins, etc. needed to support outdoor recreation within the Standard Protection Area or Highest Protection Area.

**Dovetail with Conservation Objectives.** The covenants in this article are intended to dovetail with the Conservation Objectives described in article 1 as they apply to the Minimal Protection Area. Just as you customize the Conservation Objectives to the project, so should you customize the covenants in this article to be fully consistent with and support the Conservation Objectives.

**If No Minimal Protection Area.** If there is no Minimal Protection Area, follow the instructions contained in the “Introduction to Articles 3, 4, and 5.”

### 5.01 Improvements

#### (a) Permitted under Preceding Articles

**No Standard Protection Area.** If there is no Standard Protection Area, follow the instructions in the “Introduction to Articles 3, 4, and 5.”

#### (b) Additional Improvements

- (1) **Residential Improvements.** Residential Improvements are not permitted under articles 3 and 4; they are listed as permitted here.

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#### OPTION 57: DON'T PERMIT RESIDENTIAL IMPROVEMENTS

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**If No Residential Improvements.** If you don't want to permit Residential Improvements, delete this item. Also, in §5.02(d), delete reference to “Residential” in the subsection title, delete §5.02(d)(1), and delete reference to “residential use” in §5.02(d)(2).

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- (2) **Site Improvements.** Additional Improvements permitted under articles 3 and 4 are automatically permitted in the Minimal Protection Area under the same limitations as applied in articles 3 and 4 unless otherwise provided. This subsection allows Site Improvements to serve the entire Property without Review.

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#### OPTION 58: PERMIT OTHER IMPROVEMENTS

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**Allow 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 you want to accommodate Construction of one or more commercial Improvements within the Minimal Protection Area, add the definition of Commercial Improvement furnished in the supplemental definitions and add, for example, the following addition to the list of Additional Improvements:

Subject to Review, not more than one Commercial Improvement [for example, either the antique shop identified as an Existing Improvement or a replacement for such Improvement].

If there is concern that a Commercial Improvement, despite its confinement to the Minimal Protection Area, could harm the Conservation Objectives if not designed appropriately, limitations such as the following could be added to the above example:

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.

**Allow Surface Extraction Improvements.** If surface Extraction Improvements have not been permitted in article 4, they may, if desired, be listed under §5.01(b) as permitted Improvements. Add the provision set forth in the commentary to §4.01(b) under “Allow Surface Extraction Improvements for Oil and Natural Gas” to §5.01(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 the commentary to §3.01(b), §3.02(b) and the issues identified in the definition of “Surface Use Agreement” in the supplemental definitions.

### (c) Limitations on Improvements

**Purpose.** The limitations listed in the model seek a balance between restricting the Minimal Protection Area as needed to protect Conservation Objectives while maintaining desirability and economic viability of the Property as a whole. The model places minimal limitations on Improvements in the Minimal Protection Area with the expectation that users will minimize the amount of Minimal Protection Area.

**Check Against Conservation Objectives.** Check the list of limitations to see if other limitations are needed to maintain Conservation Objectives. For example, a Minimal Protection Area located near the public right-of-way may need to maintain or impose limits on the design and materials used for an Improvement in furtherance of a Conservation Objective pertaining to scenic views.

- (1) **Limit on Number of Improvements Containing Dwelling Units.** The limit on Improvements that may contain Dwelling Units in §5.01(c)(1) works in tandem with the limit on the number of Dwelling Units under §5.02(d)(1). For example, if the understanding is that a second Dwelling Unit is to be an accessory suite within the main residence, then allow only one Improvement to contain Dwelling Units and allow two Dwelling Units under §5.02(d)(2).

**Allowing More Improvements.** The limitations on Residential Improvements under §5.01 and Dwelling Units under §5.02 fit squarely within one of the examples of public benefit (limiting density or intensity of use) described in the Code. However, you may find the limit on Improvements more restrictive than needed to achieve the Conservation Objectives for a particular project and may prefer a higher but controlled intensity of development to more efficiently use the land.

- (2) **Limits on Impervious Coverage and Access Drives Do Not Apply.** This provision clarifies that limits on Access Drives and Impervious Coverage applicable to the Standard Protection Area do not apply to those Improvements within the Minimal Protection Area.

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#### OPTION 59: LIMIT IMPERVIOUS COVERAGE IN MINIMAL PROTECTION AREA

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**Generally Preferred to Minimize the Size of the Minimal Protection Area.** Subsection 5.01(c)(2) may be modified to establish Impervious Coverage limitations in the Minimal Protection Area if the Minimal Protection Area is so large that limitation becomes necessary. The strongly preferred alternative, however, is to keep the Minimal Protection Area of a reasonable size such that, assuming a high degree of Impervious Coverage within it, 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, you may want to add:

Impervious Coverage associated with Residential Improvements must not exceed a maximum of \_\_\_\_ square feet exclusive of Access Drives and walkways.

- (3) **Carry Over of Other Limits.** This provision clarifies that certain limits on Improvements set forth in articles 3 and 4 continue to apply within the Minimal Protection Area. It also provides a place where drafters may address desired variations (if any) from Standard Protection Area limits as applied to the Minimal Protection Area.

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#### OPTION 60: HEIGHT

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**Allow Greater Fence Height for Public Safety.** If a pool is a possible Additional Improvement within the Minimal Protection Area, you may want to allow for a greater Height when needed to comply with Applicable Law by adding a statement such as the following:

A fence surrounding an Improvement (for example, a swimming pool) is permitted to exceed the otherwise applicable Height limit to the extent required for compliance with Applicable Law.

**Impose a Lower Height limit.** If a Minimal Protection Area is located within a scenic vista described in the Conservation Objectives, you 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 \_\_\_\_.

## 5.02 Activities and Uses

**Purpose.** This section provides for a wide range of human activity within the confines of the Minimal Protection Area where it will not be detrimental to the Conservation Objectives.

### **Blanket Prohibition and Overarching Limits.**

See the discussion in the commentary to §3.02 and the “Introduction to Articles 3, 4, and 5” regarding the blanket prohibition and overarching limits that open the section.

#### **OPTION 61: INTRODUCE OTHER OVERARCHING LIMITS**

See “Adding Conservation Objectives” in the supplemental provisions for sample limitations that can be added to §5.02 in conjunction with new Conservation Objectives.

### **(a) Permitted under Preceding Articles**

**No Standard Protection Area.** If there is no Standard Protection Area, follow the instructions set forth in the “Introduction to Articles 3, 4, and 5.”

### **(b) Disturbance of Resources**

**General Rule.** Within the Minimal Protection Area, soil may be disturbed, and trees, shrubs, and herbaceous materials may be cut, mowed, or cleared if the disturbance is reasonably related to permitted activities or uses.

#### **OPTION 62: ALLOW OTHER DISTURBANCES OR FURTHER LIMIT THEM**

**Require Vegetative Buffer.** Sometimes one of the Conservation Objectives is maintenance of landscaping or a vegetative buffer contributing to scenic views from the public right-of-way. In this case, expand the subsection to include a limitation such as the following:

The general rule set forth in this subsection (b) is subject to the following limitation: the area within 50 feet of the public right-of-way of State Road must remain covered with vegetative materials substantially as depicted in the Baseline Documentation. Owners are permitted to make decisions about cutting, pruning, planting, and replanting without Review so long as the area maintains the scenic appearance described as a Conservation Objective.

**Protect Specimen or Mature Trees.** The general rule needs to be modified if Specimen Trees or Mature Trees are to be protected. See the optional content in the commentary to §4.02.

**Allow Extraction of Oil and Natural Gas.** If surface Extraction Improvements are to be allowed within the Minimal Protection Area but not the Standard Protection Area or Highest Protection Area, add:

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.

### **(c) Release and Disposal**

- (1) **Disposal of Wastewater.** In the Standard Protection Area, disposal of wastewater is only allowed if the wastewater is generated on the Property, disposal is infeasible in the Minimal Protection Area, and Holder approves after Review. In the Minimal Protection Area, wastewater generated anywhere on the Property may be disposed of without need for Review. Wastewater from outside the Property remains prohibited.
- (2) **Piling and Other Disposal.** Piling of vegetative materials arising from permitted activities is permitted anywhere within the Property. This subsection allows piling of non-vegetative materials and disposal of other substances subject to limitations.

#### **OPTION 63: LIMIT PILING AND DISPOSAL**

**Limitations on Piling.** You may want to limit the number or size of piles, rule out location within a scenic viewshed, ban certain items (for example, construction materials or parts of motor vehicles), or specify that the pile is intended to be temporary by imposing a time limit for off-site disposal.

**Limits on Application of Herbicides, Pesticides, etc.** If you customized the model’s covenants for the Highest or Standard Protection Areas regarding application, of herbicides, pesticides, etc., you will want to determine what changes if any are needed in the Minimal Protection Area’s covenants.

### **(d) Residential and Other Uses**

- (1) **Residential Use.** Subsection (1) creates a limitation on density of residential use. See the commentary to §5.01(c) pertaining to the interrelationship of this provision and the limitation on Improvements containing Dwelling Units.
- (2) **Uses Not Otherwise Permitted**

**Zoning Irrelevant; Impact on Conservation Objectives Relevant.** The approach taken by the model is that it is not the duty of Holder, nor does it necessarily further Conservation Objectives, to regulate land use in accordance with zoning categories. Within the Minimal Protection Area, the emphasis is on not allowing development, activities, or uses that have a

reasonable likelihood of impairing the Conservation Objectives for the Property.

**Permitted if Indistinguishable from Permitted Activities.** If an activity or use viewed from outside of the Minimal Protection Area is indistinguishable from an Agricultural, Forestry, residential, or recreational use permitted within the Property, then it is permitted in the Minimal Protection Area.

**Permitted if Review Determines Consistent with Conservation Objectives.** If the activity or use is distinguishable but Holder determines after Review that it is consistent with Conservation Objectives, then it is permitted. Examples of activities that might be permitted because of the flexibility of this subsection:

- **Bed-and-Breakfast.** Owners desire to maintain a bed-and-breakfast within the main residence to accommodate a maximum of six guests, utilizing a

maximum of three parking spaces. A sign identifying the use will be installed in conformance with existing limitations on signage.

- **Artist Studio.** Owners desire to use a portion of the barn as an artist studio with space for display and sale of their artwork. An area outside the barn may also be used to exhibit outdoor sculpture. It is not anticipated that more than two parking spaces will be needed to accommodate customers.

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#### OPTION 64: USE THE PROVISION'S FLEXIBILITY ELSEWHERE

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A provision similar to this may be utilized in article 4 if an Improvement in the Standard Protection Area (for example, a barn) is intended to be used for a non-Agricultural purpose as in the above example and it doesn't make sense to designate the area around the Improvement as Minimal Protection Area.

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## Article 6. Rights and Duties of Holder and Beneficiaries

**Purposes.** This article sets forth the rights and responsibilities of Holder to carry out its commitment to conserve the Property and administer the Grant. Article 6 may be expanded to evidence:

- The rights of Beneficiaries. (See optional content under the heading “Providing for Beneficiaries of the Grant” in the supplemental provisions.)
- Other affirmative easements that may be included in the Grant, for example, public access provisions. (See optional content under the heading “Public Access” in the supplemental provisions.)

### 6.01 Holder Covenants

**Purpose.** This section evidences the benefits of, and burdens upon, Holder’s conservation easement in the Property. The easement is a real estate interest and, like a fee simple interest, can be burdened and benefited by covenants. The guide [The Nature of the Conservation Easement and the Document Granting It](#) discusses how Holder covenants like those set forth in §6.01 help to uphold the Conservation Objectives in perpetuity.

**Earlier Editions.** All of the Holder covenants identified in §6.01 existed in earlier editions of the model. The 7<sup>th</sup> edition groups them under one heading to emphasize their common purpose.

#### (a) Exercise of Powers

**Purpose.** This subsection evidences Holder’s commitment to use the power it has been given under the terms of the Grant to advance the Conservation Objectives.

#### (b) Must be Qualified Organization

**Purpose.** This subsection ensures that the easement power granted to Holder and Holder’s responsibilities for administration of the Grant will not fall into the hands of a Person who is not committed to advancing the Conservation Objectives; who is not organized for charitable purposes; who is not ready, willing, and financially able to exercise its powers and perform its administrative functions under the Grant; or who does not have the capacity to enforce the easement under Applicable Law.

**Tax Compliance.** The definition of Qualified Organization in article 9 incorporates as item (a) the criteria for a qualified organization (for the purpose of accepting qualified conservation contributions) set forth in the Regulations. The limitations on Holder’s ability to transfer its interest are required under the Code.

**CPEA.** The definition of Qualified Organization in article 9 goes beyond Code requirements and incorporates as item (b) the requirements to be a holder of

conservation easements as set forth in state law, in this case, §3 of the [Conservation and Preservation Easements Act](#). For a discussion of Holder qualifications and standing to enforce conservation easements in Pennsylvania, see the guide [Who Has Standing? Conservation Easements in Pennsylvania Courts](#).

**Earlier editions.** Section 6.01(b) replaces in part the §7.03(a) of earlier editions.

#### (c) Proceeds Used for Conservation Purposes

**Purpose.** This subsection ensures that if the easement interest of Holder in the Property is ended for some reason, whether as to the entirety of the Property or a part, the compensation or other proceeds receivable by Holder on account of the event will be used for the Holder’s charitable conservation purposes.

**Conservation Versus Other Purposes.** Pennsylvania law requires that all charitable assets (whether real estate assets such as the conservation easement or cash assets) must be used in furtherance of the mission of the charitable organization. This covenant ensures, particularly for entities with multi-faceted purposes, that it is the organization’s conservation purposes that are supported.

**Note on Qualified Conservation Contributions.** For easement donations providing a federal tax deduction, the proceeds must be used in a manner consistent with the conservation purposes (as defined in the Code) of the original contribution. That requirement is addressed in §1.07(e) of the model.

#### (d) Forfeiture Remedy

**Purpose.** This subsection ensures that a mechanism is in place for Holder to be removed and replaced by another Qualified Organization if it fails to abide by the Holder covenants including its obligation to enforce and administer the conservation easement in perpetuity.

**Earlier Editions.** This provision replaces §6.01 “Breach of Duty” in earlier editions and clarifies the process for transfer to another Qualified Organization.

**Persons Entitled to Bring Action.** Any Beneficiary identified in the Grant may exercise the remedy as may the Commonwealth of Pennsylvania acting through the Office of the Attorney General. For a further discussion, see the guide [The Nature of the Conservation Easement and the Document Granting It](#). See also the guide [Holders, Beneficiaries and Back-Up Grantees](#) for a discussion of the relationships among Persons with an interest in seeing that Holder covenants are upheld in perpetuity.

## 6.02 Rights and Duties of Holder

**Purpose.** Holder not only has the right but also the obligation to perform the tasks listed in this section. (In contrast, the next section (§6.03) lists rights that Holder may but is not obligated to exercise.)

**Standard of Care.** 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.

### (a) Enforcement

**Notice for Entry.** Notice to Owners is not required prior to entry under §6.02(a) to investigate a suspected, alleged, or threatened violation. Prior notice is required prior to routine inspections under §6.02(b).

**Regulations.** The right of enforcement is both a right and a duty under Regulation §1.170A-14(g)(5)(D)(2). 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.** Among other S&P's practices addressing enforcement, Practice 11.E.2 calls for land trusts to "[i]nvestigate potential violations in a timely manner and promptly document all actions taken."

### (b) Inspection

**S&P.** Among S&P's practices addressing monitoring, Practice 11.C.2 calls on land trusts to monitor each easement property annually.

**Regulations.** Regulation §1.170A-14(g)(5)(2) requires 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.

### (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.

**S&P.** Practice 11.F.1 calls on land trusts to:

Respond to landowner required notices or requests for interpretation or approvals in a timely and consistent manner, as specified in the conservation easement deed or in a written procedure.

**Regulations.** Regulation §1.170A-14(g)(5)(2) requires Owners to notify 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. See the commentary to §1.07(d) for a discussion of the rights of notice required by the Regulations and the rights of Review (including both notice and approval) under the Grant.

## (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.

**S&P.** Practice 11.F.1 is quoted above. It references requests for interpretation.

**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.

## 6.03 Other Rights of Holder

**Purpose.** This section lists the rights and powers provided to Holder under the Grant that the Holder may choose, at its discretion, to exercise.

### (a) Amendment

**Approach.** The subsection first sets forth two factors (addressed below) that are fundamental to the consideration of any Amendment, then applies Holder's policy on Amendment as it exists when the issue arises. (For example, if an Amendment is sought in the year 2036, Holder's policy at that time will apply.) The model does not write into the Grant the Holder's Amendment policy (if any) as of the Easement Date.

#### (1) No Impairment of Holder's Conservation Easement Interest.

The first factor required to support an Amendment is that the Amendment must not impair the conservation easement. A number of issues are subsumed in this criterion. A change in the description of the Property may diminish Holder's interest in the Property. A change in the scope of Conservation Objectives to be served by the easement may also diminish the conservation easement. A change in restrictive covenants that lessens the likelihood of achievement of Conservation Objectives or diminishes Holder's powers of enforcement may impair the conservation easement. For further discussion, see the guide [Amending Grants of Conservation Easements: Legal Considerations for Land Trusts](#).

#### (2) No Impermissible Private Benefit.

The second factor required is that the Amendment must further the public interest in conservation and any benefit to the Owners must be incidental to that purpose. For an explanation of private benefit rules, refer to §501(c)(3) of the Code and associated Regulations and guidance. For guidance as to application of private benefit rules to conservation easements, see the guide [Amending Grants of Conservation Easements: Legal Considerations for Land Trusts](#).

#### (3) Consistent with Holder's Policy on Amendments.

The last criteria ensures that, as best practices evolve with respect to Amendments, Holder will

look to its then-applicable Amendment policy to determine whether the proposed Amendment is satisfactory.

#### **WeConservePA Policy for Amendment.**

WeConservePA urges Holders to formulate and adopt a policy on Amendment. To assist with policy development and amendment decisions, WeConservePA maintains a [Guide and Model Policy for Conservation Easement Amendment](#).

**LTA Recommendations.** The Land Trust Alliance publishes a report, [Amending Conservation Easements: Evolving Practices and Legal Principles](#) with recommendations pertaining to Amendments. The report, last updated in 2017, 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.** Practice 11.H addresses Amendments with reference to the above-stated seven principles.

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

**Purpose.** This subsection provides Holder an affirmative easement to install and maintain one or more signs identifying the Holder’s (or Beneficiary’s) interest in the Property.

**Public Access.** Rights to install signage may need to be expanded if the Holder is to be granted the right to establish a Public Trail. (“Providing for Public Access” in the supplemental provisions provides guidance in establishing a Public Trail in conjunction with a conservation easement project.)

**Project Identification.** Signs benefit conservation and Holder in several ways:

- Signs call to the public’s attention the benefits of land conservation and Holder’s efforts.
- They notify prospective purchasers, lessees, or other users of the Property of the interest of Holder; these Persons may then inquire about the terms of the Grant and avoid misunderstandings as to what they can and can’t do with the Property.

- Signs also alert the public to the Property’s conserved status.

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

**Purpose.** This subsection puts 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 via 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 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 under (c)(2), the provision may preclude the Owners from silencing Holder at a municipal hearing. Another useful purpose of (c)(2) 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.

### **6.04 Review**

**Purpose.** This section provides the procedure and standards for Review as and when Review is required under articles 2, 3, 4, and 5.

**Use of Review.** In planning and preparing a Grant, you should take care to allow, without Review, only those items that do not have a foreseeable adverse effect on Conservation Objectives.

**S&P.** Practice 9.E.1 calls on land trusts to:

Allow only uses and permitted rights that are not inconsistent with the conservation purposes and that will not significantly impair the protected conservation values.

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

**Purpose.** This provision contains the procedural requirements to initiate the Review process.

The definition of Review Requirements in article 9 accommodates multiple approaches to establish the Review Requirements.

#### **(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 Holder's decision. This alternative is included so as to avoid the need to incorporate detailed Review Requirements into the Grant and to give Holder a reasonable opportunity to determine whether or not additional information is needed to give a definitive response to Owners' proposal.

### (c) Time for Review

**Purpose.** This subsection addresses the time required by Holder to review a proposed change and provides for Owners receiving a response in a reasonable period of time.

**Flexibility Is Necessary.** Some reviews require only a very short time for completion while other more complex ones can take considerable time and effort. This provision provides Holder flexibility to deal with this variability while providing Owners assurance that they can receive a response in a reasonable period of time. A document drafted with a fixed period of time for review doesn't realistically address the wide variability in the complexity of proposals; conversely, a document that fails to address the issue of time opens the door for differing expectations and potential disputes. The model's provision seeks a balance affording benefits to both Owners and Holder: Owners benefit because it may be less likely that Holder will reject their proposal outright to comply with a fixed time for review and more likely that Holder will take the time to consider alternatives to meet its standards for approval. Holder benefits because its time estimate can take into consideration the availability of its own staff and, in some cases, expertise of others, to furnish a thorough review.

**Prior Approaches.** Previous editions set rigid time requirements for Holder to make a time determination: If Holder failed to act within the time limit, the request was deemed approved. Stimulated by a tax court ruling in 2018, this approach was revisited and scrutinized by land trust practitioners who firmly rejected it on multiple counts, among them:

- Automatic approval of an action that runs contrary to the Conservation Objectives is inconsistent with the reason for the easement's existence.
- Automatic approval conflicts with Holder's obligation to block actions inconsistent with the Conservation Objectives, unnecessarily escalating the potential for conflict and litigation.
- An easement donated in whole or part that includes a deemed approval provision may be disallowed as a qualified conservation contribution.

Previous editions also contained a commentary option to have Owners' requests instead be deemed disapproved if not acted on by Holder within the specified time period. This alternative likewise has been rejected in favor of the fair and balanced approach now presented in the model.

### (d) Standard of Review

- (1) **Wholly Discretionary Standard.** The model allows for the possibility of wholly discretionary Review by Holder. Making items subject to this Review standard is appropriate in those instances in which the Grant might otherwise be drafted to not permit the activity, use, or Improvement at all. Subsection (d)(1) makes it clear that the phrase 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 appears five times in the model's restrictive covenants. Users may, of course, use the phrase more or less frequently as desired.
- (2) **Reasonableness Standard.** Except for those instances in which Review is identified as 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 conservation concerns as set forth in subsection (d)(2) is to avoid the possibility that a court might infer a standard of commercial reasonableness if no other standard has been agreed upon by the parties.

#### OPTION 65: SOLE AND ARBITRARY STANDARD

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Some users may want to substitute for both subsections (1) and (2) 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 (2) 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 might be inferred to fill the void. Nevertheless, if desired, the following provision can be substituted for subsections (1) and (2) of 6.04(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.

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### 6.05 Costs and Expenses

**Purpose.** Holder's ability to responsibly perform its duties regarding the conservation easement requires financial resources—money to enforce the easement should violations occur, to respond to requests by Owners, and to comply with requests if required by Applicable Law. The payment and reimbursement requirements of this section help ensure that Holder can

meet its obligations under the Conservation Easement—an absolute necessity if the Conservation Objectives are to be achieved.

**Tax Requirement.** To be considered eligible to receive tax-deductible gifts of conservation easements, a Holder must “have the resources to enforce the restrictions.” (§1.170A-14(c) of the Regulations) Section 6.05 helps ensure that Holders meet this standard.

**Remedy for Nonpayment.** Failure by Owners to make payments or reimbursements when due is a violation of the terms of the Grant. Under §7.01 Holder must give 30-days’ notice of non-payment and opportunity to cure. If not paid within the cure period, Holder may commence a civil action for collection under §7.02(b).

**Placing Owners’ Concerns in Perspective.** Some Owners raise the concern that this covenant may expose them to unreasonable risks of liability. Several safeguards to address Owners’ interests are discussed below. However, it should be emphasized that payment and reimbursement provisions in past documents have not served as profit centers for Holders, and, for those familiar with the standards and practices that Holders work under, it is hard to conceive that this could change in the future. It would also be to the extreme detriment of any Holder to attempt to charge unreasonably under this provision as it would severely damage a Holder’s relationships with Owners, donors, and the public alike. It would also expose Holder to potential litigation, which Holders generally seek to avoid.

#### OPTION 66: REQUIRE SUBSTANTIATION

For Holders who can administratively handle the paperwork involved, the following safeguard can be added at the end of §6.05:

Costs and expenses will be passed through to Owners under this provision based upon actual costs incurred without mark-up. Upon request of Owners, Holder will provide commercially reasonable substantiation of costs and expenses charged to Owners such as statements, invoices, and time records.

#### (a) Enforcement

**Provision Is Crucial.** Holders are severely disadvantaged if and when well-funded Owners are willing to take a calculated risk that the Holder will not have the resources to sustain a prolonged defense of the easement. An obligation to reimburse Holder’s Litigation Expenses is intended to cause Owners to recalculate their risks. It is highly inadvisable to delete this provision.

**Stewardship Contribution Not Relevant.** The stewardship contribution, if any, received by Holder in conjunction with its acceptance of the easement is not

a satisfactory replacement for this provision. The contribution supports various facets of Holder’s stewardship activities. It is not a prepaid fund allowing Owners the opportunity to violate the easement without any liability for Litigation Expenses other than their own.

**Prevailing Party Condition Inadvisable.** Some Owners seek to limit their reimbursement obligation to circumstances in which Holder is the prevailing party in the action. For most Holders, that approach is inadvisable.

- First, experience has shown that, absent a clear violation requiring immediate action, Holders typically seek an amicable resolution to non-compliance situations. Holders invest time and resources working with Owners on ways to bring the Property into compliance with the easement. Legal fees may be incurred to review documentation and prepare a notice of violation. These costs and expenses arise from the violation whether or not litigation ensues.
- Second, litigated cases often settle before judgment. Courts encourage settlement. Settlement eliminates the risk of an adverse ruling creating judicial precedent for similar cases. In a settlement there is no “prevailing party.” The parties may agree upon an allocation of costs and expenses in the settlement agreement. The Holder who can assert an obligation in the Grant to reimburse Holder’s Litigation Expenses will be in a stronger position to negotiate fair compensation for its Losses and Litigation Expenses.

#### Responsibility Not Limited to Acts of Owners.

For the reasons discussed in §7.01, do not limit Owners’ payment obligations only to violations caused by or which were the fault of Owners. The exception to this general rule is the limited waiver granted in article 7 for violations not the fault of Owners. If desired, a provision may be added at the end of §6.05 as follows:

Owners’ payment obligations are subject to the waiver granted under article 7 for violations not the fault of Owners.

#### (b) Response to Requests by Owners

**Note on Earlier Editions.** Prior to the 7<sup>th</sup> edition, the model differentiated reimbursement obligations based upon whether the expense was ordinary or routine or not. The 7<sup>th</sup> edition takes a different approach and limits Owners’ obligation to costs and expenses incurred in response to specific actions requested by Owners: Review, Waiver, and Amendment.

#### OPTION 67: RESPONSES TO OWNER REQUESTS

**Cover Interpretation.** If you want Holder to be reimbursed for the costs of interpreting the Grant at Owners’ request, expand item (b) to read:

response to requests by Owners for Review, Waiver, Amendment, or interpretation of this Grant

**Limit Hours Charged.** Some Holders may consider responding to requests for Review and Waiver as part of ordinary easement administration. Also, for some projects the costs of Review are to be covered by a pre-arranged Stewardship Funding Arrangement (see the guide [Stewardship Funding Arrangements](#)). In those cases, Holders may be willing to limit their right to reimbursement responding to Owners' requests for Review or Waiver. In that case, you may add a sentence such as the following to the end of the provision:

Owners are not required to reimburse Holder for time spent by Holder's employees (but not outside consultants or professionals) responding to requests for Review or Waiver [up to a maximum of \_\_\_\_ hours per request.]

**Estimate Costs Prior to Incurring.** Another comfort that may be provided to Owners concerned about unreasonable or unanticipated charges is to afford them the opportunity to understand and, perhaps, negotiate the costs and expenses to be passed through with respect to a specific task. For example:

Owners may, before commencement of Holder's services, request an estimate of the costs and expenses Holder anticipates incurring in responding to Owner's request for Review or Waiver. Absent unanticipated circumstances requiring additional time or services of outside consultants or professionals, Owner's payment obligation will not ex-

ceed the estimated amount. [Holder will not commence acting on the request for Review or Waiver until such time (if at all) as Owner and Holder come to agreement on the fixed or maximum amount to be paid by Owners.]

**Cost of Responding to Amendment Request.**

The optional limitations on costs and expenses to be reimbursed by Owners refer only to requests for Review and Waiver (not Amendment). The reason is that responding to a request for Amendment is, by its nature, an extraordinary, unforeseen, and unforeseeable event. Some Holders may have sufficient past experience and capacity to conclude that requests for Review and Waiver can be handled without additional funding from Owners. The rarity and peculiarity of Amendment requests do not allow for such generalization. Another reason to resist limits on staff time committed to responding to Amendment requests is to assure that Holders are not disadvantaged if they take whatever time is necessary under the circumstances to consider all of the benefits and detriments of the requested Amendment.

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**(c) Compliance with Requests Required by Applicable Law**

If Holder is required by law to produce documentation or produce testimony on matters pertaining to the easement, the provision requires Owners to reimburse Holder's costs and expenses. A likely reason for such a demand to be placed on Holder is a review or audit of an easement gift by the Internal Revenue Service.



## Article 7. Violation; Remedies

### 7.01 Violation

**Purpose.** This section sets forth the procedure for enforcement of the covenants and the upholding of the Conservation Objectives.

**Do Not Alter this Provision.** Do not alter this provision to limit the universe of violations addressable by Holder to acts or failures to act by the Owners.

**A Violation Is a Violation No Matter the Person.** Tenants and invitees as well as trespassers can violate the restrictive covenants set forth in the Grant; however, a violation is a violation whether or not caused by the Owners. Restrictions in the Grant are stated so that the activity itself is the violation regardless of who was the cause of the violation.

**Rationale.** There are several rationales underpinning this approach.

- First, it avoids the situation in which Holder must prove not only that a violation occurred but that the Owners and not anyone else in the universe caused it.
- Second, if an activity is not a violation unless the Owners caused it, then Holder has no leverage on the Owners to restore the damaged resource or keep it from happening again. (For example, if dumping occurs, the provision incentivizes the Owners to take the reasonable actions of installing a chain across the access point, talking with local law enforcement, or taking similar measures to prevent recurrence.)
- Third, it is up to the Owners—the Persons who control and manage the land—to in fact maintain control of their land. Granting a conservation easement does not free Owners from the responsibilities of ownership.
- Fourth, the Holder has covenanted under Article 6 to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives. That power is diminished if limited to acts of Owners (and not others).

To mitigate any overly harsh consequences on an innocent Owner, the model also includes §7.06 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 gives 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 8 for requirements applicable to notices.

#### (b) Opportunity to Cure

**Purpose.** The model provides a reasonable period to cure if, within the initial 30-day period, there is a meeting of the minds between Owners and 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 harm to protected resources is imminent (for example, heavy machinery is moving in to log an area), there is no time for notices and cure periods if the Conservation Objectives are to be supported. Holder must act immediately, for example, by obtaining a court order to cease the activity.

**Consultation.** On the other hand, Owners frequently want some kind of notice before they become responsible for Litigation Expenses incurred by Holder based on an alleged violation. If that is an issue, you can consider adding a statement to the effect that 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 8. Consulting or communicating with Owners can be accomplished via a telephone call.

### 7.02 Remedies

**Purpose.** This section describes the specific remedies that are appropriate and available to Holder if a violation should occur in the future.

**Not All Promises Are Binding.** Holders and their counsel need to keep in mind that not all promises of the Owners granting a conservation easement are binding upon future Owners of the Property who did not, themselves, make the promise. The rule developed by case law over many centuries requires that to be binding upon future Owners promises have to be about something pertaining to the land itself. For example, the restrictive covenants in articles 2 through 5 are unquestionably binding upon future Owners. In contrast, 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.

**Securing Stewardship Commitments.** 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](#) provides an alternative, and more reliable, means to evidence, secure, and collect financial obligations from Owners.

**Caution on Arbitration and Mediation.** Provisions for arbitration and/or mediation are sometimes added to grants of conservation easement; however, it is doubtful that the Owner granting the conservation easement can waive the constitutional right of future Owners to a trial by jury. Thus, easement requirements for mandatory arbitration or mediation may be of limited usefulness.

**Consult Counsel.** If you nevertheless want to insert provisions for arbitration or mediation in the general remedies section of the Grant, you should consult with counsel and choose a provision that is likely to be enforceable and effective.

**Address Imminent Harm.** A provision requiring arbitration or mediation must always maintain 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.

**Mediation in Context of Review.** 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, the supplemental provisions include an optional section titled "Providing Alternative Dispute Resolution Regarding Review."

**More Information.** For more information on arbitration and mediation, see the website of the [American Arbitration Association](#).

#### (a) Injunctive Relief

**Purpose.** Relief in the nature of a court order forcing a Person to do or refrain from doing a 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. Pennsylvania law, however, supports the rule that violation of an easement (unlike a restrictive covenant) entitles Holder to an injunction or other order for relief (regardless of the availability of damages).

**Restatement.** The Restatement (Third) of the Law of Property: Servitudes recommends special treatment for a conservation servitude held by a governmental body or a conservation organization: the servitude is

enforceable by coercive remedies and other relief designed to give 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 Holder with a judgment for a specific sum of money that 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 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 a 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.

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#### OPTION 68: ADD FINE FOR NON-COMPLIANCE

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Some Holders desire the ability 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. An example of such a situation:

Owners allow the Standard Protection Area to be used from time to time for dirt bike racing in violation of the easement's covenants. By the time the notice and cure provision has run, the activity has ceased, only to recur again in a few weeks or months.

You can add a subsection (d), such as the following provision, to the section to help address this situation:

**(d) Fine for Non-compliance.** Collect a reasonable penalty for each day the violation continues after the expiration of the applicable notice or grace period under §7.01 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 §7.01 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 provision could go on to specify that:



The penalty is \$\_\_\_ per day subject to adjustment over time to maintain equivalent value with the U.S. dollar as of the Easement Date.

### 7.03 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).

**Changed Circumstances.** In regard to claims of changed circumstances, the view of legal scholars set forth in 7.11 of the Restatement (Third) of the Law of Property: Servitudes 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.

**Taking Not Affecting Conservation Easement.** Some Holders are uncertain whether they may use their discretion to determine whether a taking of an interest in the Property by a condemnor necessarily constitutes a compensable taking as to the Holder's easement interest. Example:

A portion of an agricultural field has been taken by condemnation for an Improvement that will be located wholly underground. The work will be performed outside the growing season. Soil will be stockpiled on-site, replaced, and restored per a plan

approved by Holder. The Owner is satisfied with the offer of compensation for the taking and is willing to allow the Improvement.

For purposes of §7.03 of the Grant (but not §1.07(e)), Holder may conclude, after Review, that the above example of a taking does not materially affect its easement interest (or, if it does, the effect is temporary). The Review analysis should include an examination of all of the issues included in a Review of a proposed Amendment. See the discussion of Amendment in §6.03 of this commentary and its references to WeConservePA publications. As to Grants evidencing qualified conservation contributions for federal tax purposes, strict compliance with the provisions of §1.07(e) is recommended.

**S&P.** Among S&P practices addressing eminent domain, Practice 11.J.1 calls on land trusts to “[f]ollow the terms of the conservation easement with respect to taking appropriate action...”

#### (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.

The provision operates both independently and in support of §1.07(e). If the conservation easement was purchased or otherwise not intended to be claimed as a charitable contribution for federal tax purposes, then §1.07 may be deleted from the Grant and, if it is, §7.03 operates independently to ensure that compensation is paid to Holder for the loss of its easement interest. If the donation of the conservation easement was claimed as a qualified conservation contribution for federal tax purposes, then the Proportionate Value under §1.07(e) must be paid as a minimum and, if greater, Holder remains entitled to the compensation due under §7.03.

#### (b) Restitution

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

### OPTION 69: PROCEEDS

**Conservation Objectives within Property.** Some Owners want 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 plant additional vegetative buffer in furtherance of applicable Conservation Objectives. If that is acceptable, add the following provision as subsection (c) to §7.03:

**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 7.

#### 7.04 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.

#### 7.05 Waivers

##### (a) 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.

##### (b) No Material Effect

**Purpose.** The purpose of this provision is to distinguish the circumstances under which a Waiver may be a reasonable accommodation and to differentiate a Waiver (for a limited time and for a limited purpose) from an Amendment, which permanently changes the Grant.

**Discretionary Accommodation.** 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 9 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 7 for a limited period of time. A Waiver must be memorialized in writing, but it can simply be a letter from Holder to Owners in response to a written request from Owners to Holder requesting a waiver to permit specified

activities for a specific period of time. The governing body of Holder 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; and
- a one-day accommodation of an uncommon event such as permitting a tent or parking in a field for a family wedding.

#### 7.06 No Fault of Owners

**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 Holder the burden of proving that a particular violation was the fault of Owners and no one else.

#### 7.07 Multiple Owners

##### (a) Multiple Lots

This subsection protects the Owners of one Lot from responsibility for a violation occurring on another Lot owned by other Owners. 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. Owner X is wealthy and Owner Y has no assets but the lot. Owner Y is in violation of the conservation easement. Under a provision that simply states "all Owners are jointly and severally liable," Holder could collect the entirety of its Losses and Litigation Expenses from Owner X.

##### (b) Single Lot

This subsection allows Holder to collect amounts owing to Holder from any one or more of the Owners of the Property without regard to their ownership shares. A paying Owner can collect from a non-paying Owner under the doctrine of subrogation, but it is not the Holder's problem.

## Article 8. Miscellaneous

**Purpose.** The article groups together a variety of provisions pertaining to both Owners and Holder or pertaining to the administration or interpretation of the Grant.

### 8.01 Notices

This section provides a procedure for the giving of formal notices under the Grant.

If you adopt the defined term Notice from the supplemental provisions and add it to article 9, section 8.01(a) may be deleted. However, before deleting, be sure that you initially capitalize the word “notice” each time it appears in the Grant.

#### (a) Requirements.

Electronic mail and telefax can be added as well if 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 because commercial couriers (such as FedEx or UPS) cannot deliver to P.O. boxes.

### 8.02 Governing Law

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

### 8.03 Transfer

**Earlier Editions.** The content of this section was set forth in article 2 of the 6<sup>th</sup> edition. Editions prior to the sixth addressed ending continuing liability in article 6.

**S&P.** Practice 11.D.2 calls on land trusts to “[e]stablish systems to track changes in land ownership.”

#### (a) Notice Required

**Purpose.** Holder must be informed of names and addresses for notices to 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. Notice of pending transfer also provides opportunity to educate pending Owners so as to ensure that they understand their obligations and Holder’s rights and management approach at the beginning of a new relationship.

#### (b) Prior to Transfer

**Purpose.** This subsection establishes clear authorization for Holder to contact participants in a real estate transaction involving the Property—brokers, attorneys, title companies, and 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, the 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.** This subsection furnishes 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.

#### **OPTION 70: RELIEVE PRE-TRANSFER OWNERS FROM LIABILITY**

If you want to relieve pre-transfer Owners from liability for violations associated with their time owning the Property, the following can be added to the end of the subsection:

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 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.

#### **OPTION 71: ADD SUBSECTION RE. 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. You can add the following provision to §8.03 as subsection (d) to address those concerns:

**Failure to Timely Inspect.** 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.

### **8.04 Burdens; Benefits**

**Purpose.** This section sets forth the understanding of Owners and Holder that the Grant is not just the agreement of the Persons granting the easement but binds and benefits all Persons who succeed to their respective interests in the Property. It also clarifies 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.

#### **(a) Binding on All 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 the easement is specifically mentioned in the deed of transfer.

#### **OPTION 72: EMPHASIZE THAT DONATION WAS KNOWING AND VOLUNTARY**

When a conservation easement is donated in whole or in part, it may be useful in the event that anyone challenges the conveyance 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.

#### **(b) Rights Exclusive to Holder**

**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, 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. This topic is discussed in the guide [Holders, Beneficiaries and Backup Grantees: Defining Roles and Relationships to Achieve Conservation Easement Objectives](#).

### OPTION 73: NOTIFY OWNERS OF OTHER LOTS

As an alternative to the last sentence of the model provision, the following provision 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.

fulfill the long-term stewardship and enforcement responsibilities.”

### OPTION 74: PROVIDE OWNERS WITH NOTICE OF ASSIGNMENT

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

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

**Rights of Approval of Transferee?** The question sometimes arises whether Owners also should be given a right of prior approval of a proposed transferee even though the transferee must, per article 6, be a Qualified 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 another 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 Holder to continuing to hold a conservation easement that may not be consistent with its mission in the future; the situation has arisen where a Holder is undergoing major restructuring with another organization and Owners, who were not the granting Owners but who are hostile to conservation, endeavor to block a reasonable assignment in an effort to force a relaxation of conservation restrictions. Alternatives can be negotiated that provide a mechanism for Owners to object to a particular transferee and suggest another Qualified Organization willing to accept the transfer of the conservation easement without binding Holder to Owners' preferences.

### 8.06 Severability

**Purpose.** This section seeks to avoid the application of rules of interpretation that courts might otherwise apply generally to interpret legal documents.

**Mutual Dependence.** The first sentence of this provision denies application of the rule that if one provision of a document fails, all fail because they are all dependent on each other. Under the Grant provision, if one fails (for example, Holder is not permitted a self-help remedy under Applicable Law), the others remain in force.

**Waiver of Applicability.** The second sentence seeks to avoid the possibility that a governing body

## 8.05 Documentation Requirements

### (a) Between Holder and Owners

**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 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.** Amendments need to be approved by Holder's 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.

### (b) Between Holder and Assignee

**Purpose.** This provision ensures that any assignment of Holder's rights under the Grant complies with Applicable Law and provides the assignee Holder with sufficient documentation to efficiently take over the rights and responsibilities of Holder under the terms of the Grant.

**S&P.** Practice 9.I. states that when transferring a conservation easement to another land trust or public agency, the Holder should establish protections as appropriate and “consider whether the new holder can

may enact a law prohibiting enforcement of a covenant included in the Grant, for example, a law prohibiting private restrictions on certain types of Improvements. To the extent possible, the parties agree to recognize the continued validity of a Grant restriction otherwise affected by the law.

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#### OPTION 75: EXPLICITLY ADDRESS CHANGES IN CONDITION

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To exercise an abundance of caution in support of the easement document's restrictions, you may add a provision directing the courts to refrain from exercising powers to remove encumbrances. See "Explicitly Addressing Changes in Condition" in the supplemental provisions for further explanation and a sample provision.

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### 8.07 Counterparts

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

### 8.08 Indemnity

**Purpose.** The Property is not in the care, custody, or control of Holder. 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 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 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.

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#### OPTION 76: ADDRESS CLAIMS ARISING FROM PUBLIC ACCESS

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When public access is granted under article 6 of the model, you may want to clarify whether the indemnity in §8.08 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 article 6 or a separate Access Agreement, you may add the following clarification to the end of §8.08:

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 [article 6 or, if applicable, the Access Agreement.]

**If Not Indemnified Elsewhere for Public Access Claims.** If no other indemnity agreement applies, you may add the following provision—if circumstances warrant—to the end of §8.08 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.

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 9 of the supplemental provisions) to the Glossary in article 9.]

See the guide [Reducing Liability Associated with Public Access](#) for further information on insurance and indemnity issues

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### 8.09 Guides to Interpretation

**Purpose.** The provisions of this section are intended to assist future readers in correctly interpreting the document.

#### (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.** When tailoring the model to reflect particular circumstances, it is a good practice to delete those terms provided in article 9 that are not used in the edited document. However, if the deletion does not occur, this provision clarifies that 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 and Preservation Easements Act

**Purpose.** This provision sets forth the intention of the Persons granting the conservation easement to grant to Holder all rights, powers, and privileges accorded to the holder of a conservation easement under Pennsylvania's main statute pertaining to conservation easements.

**(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.

**(f) Interpret in Favor of Conservation Objectives**

**Purpose.** To resolve disputes concerning the interpretation of an easement or covenant, courts developed a rule favoring the landowners' right to use their land free of burdensome restrictions. The Conservation and Preservation Easements Act reverses that preference for conservation and preservation easements in Pennsylvania, but many state statutes lack such a provision. The model provision both helps to address this gap outside of Pennsylvania and assures that the Grant will continue to be interpreted as agreed in the Grant even if the Conservation and Preservation Easements Act were to be changed in the future.

**8.10 Entire Agreement**

**Purpose.** The written text of the Grant signed by Owners and 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.

**8.11 Incorporation by Reference**

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

**8.12 Coal Rights Notice**

**Purpose.** The model includes this notice to satisfy the requirements of §9(d) of the [Conservation and Preservation Easements Act](#). The Act requires the notice to be in at least 12-point type and be preceded by the word "Notice" in at least 24-point type.

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

**Coal Distribution.** To see the Pennsylvania Department of Conservation and Natural Resources' map of Distribution of Pennsylvania Coals, go to [https://library.dcnr.pa.gov/GetDocument?docId=1752506&DocName=Map11\\_DistrCoals\\_Pa.pdf](https://library.dcnr.pa.gov/GetDocument?docId=1752506&DocName=Map11_DistrCoals_Pa.pdf) or, if that link fails, search for the terms DCNR and coal distribution.

**8.13 Jurisdiction; Venue**

**Purpose.** This provision serves to avoid dispute about where claims arising with respect to the Grant will be litigated.

**Choices.** The default provision assumes that both Holder and Owners will not object to litigating disputes in the county in which the Property is located. In some cases, Holder may want to specify the county in which Holder's principal office is located. This location may be preferred because the Property is sufficiently distant that litigating in the county in which Holder is located will cause a hardship. Another reason may be that Holder believes the courts in the county in which the Property is located may have little or no understanding about conservation easements.



## Article 9. Glossary

**Purpose.** Placing the definitions of defined terms (excepting those defined in article 1) in one location—rather than where terms first appear in the document—facilitates reference by readers.

**Alternative Label.** If desired, the heading Other Defined Terms may be substituted for “Glossary.”

**Legally Binding.** The definitions of defined terms provided in the document are intended to be legally binding on the parties to the document.

**Instructions.** Defined terms in general should be defined either in article 1 or in the Glossary, not elsewhere in the Grant. Occasionally, exceptions to this rule are appropriate and, in those cases, cross-reference the definition in the Glossary.

**Commentary.** This portion of the commentary only covers capitalized terms included in article 9 of the default version of the model. Other terms, including terms used in optional and alternative provisions of this commentary, are addressed in the supplemental provisions.

### “Access Drive”

The definition includes all access ways for vehicular use whether paved or unpaved. Trails and walkways are not considered Access Drives.

### “Additional Improvement”

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.

### “Agricultural Improvement”

An Agricultural Improvement is determined by its actual or potential use and includes not only buildings but equipment temporarily or permanently affixed to the ground and improved surfaces such as a riding arena.

### “Agricultural or Agriculture”

See the definition of Sustainable. The model only permits Agriculture that is Sustainable.

The 7<sup>th</sup> edition tweaks the definition used in earlier editions by:

- consolidating most of the content of items (i) and (ii) of previous editions into item (1) of the new edition;
- adding “and other plant products” to clearly include hemp, tobacco, and other plants;
- using the term “animals and their products” as a broader term that is inclusive of bees, apiary products, etc.

- grouping nursery stock with sod, both of which may require removal of topsoil.

### “Amendment”

See the commentary to §6.03.

### “Applicable Law”

This definition is intended to incorporate changes in law over time. For example, if the question of compliance arises in 2020, that is the applicable date of reference, and the law to be applied is Applicable Law at that time (not the Easement Date). An exception to this rule is if reference is specifically made to Applicable Law as of the Easement Date (or other date if the model is so customized). In that case, changes to the law after the Easement Date are disregarded.

### “Beneficiary”

The supplemental provisions’ “Naming Beneficiaries and Specifying Their Rights” describes the types of entities that can be Beneficiaries and provides links to outside guidance.

In the 1<sup>st</sup> through 5<sup>th</sup> editions, the term was defined in the Glossary. The 6<sup>th</sup> edition saw the definition moved to article 1; it has been returned to the Glossary for the 7<sup>th</sup> edition.

### “Best Management Practices”

This term is used in the definition of Resource Management Plan. Although it does not appear elsewhere in the model’s default provisions (7<sup>th</sup> edition), the term can be used in tailoring the model, particularly for establishing a standard for activities permitted without a Resource Management Plan or Review.

Examples of government agencies issuing pertinent Best Management Practices are:

- Natural Resource Conservation Service of the U.S. Department of Agriculture (with respect to soil resources; and
- Pennsylvania Department of Environmental Protection (with respect to soil erosion, sedimentation, and water resources).

Examples of organizations issuing standards promoted by agencies for woodland management include:

- Forest Stewardship Council (which has developed a set of 10 principles and 57 criteria that apply to FSC-certified forests);
- Sustainable Forestry Initiative (which produces a “Forest Management Standard,” one of three certification standards regarding forest products that it maintains);



- Penn State College of Agricultural Sciences (which publishes “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); and
- American Forest Foundation (which manages the American Tree Farm System and its “Standards of Sustainability for Forest Certification”).

### “Code”

This definition when used in §1.07, references the law as of the Easement Date and applicable tax years.

When used in §6.03, it addresses the law as it stands at the time of the Amendment. See also the definition of Applicable Law.

### “Conservation and Preservation Easements Act”

See the commentary to §8.09(d).

### “Construction”

The definition encompasses a variety of activities that go beyond construction of Improvements.

Note that the 7<sup>th</sup> edition explicitly includes maintenance in the definition, the reason being that the lines between reconstruction, alteration, and maintenance are often unclear. What is important from a conservation perspective is whether the scale of the activity has the potential to impact the Conservation Objectives.

### “Default Rate”

A factor of two percentage points over prime has been included in the definition in article 9; 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. For example, 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.

### “Dwelling Unit”

Dwelling Unit is a measure of intensity of use. It is not synonymous with Residential Improvement; rather, it describes the intensity of use of a Residential Improvement. See the model and commentary sections 5.01(c) and 5.02(d)(1) to study the interplay between Improvements and Dwelling Units.

### “Existing Improvement”

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.

### “Existing Servitude”

Servitudes are easements, covenants, and other matters affecting title to real estate (other than Liens). A title investigation is needed to disclose most Existing Servitudes affecting the Property and, once that information is available, to evaluate what effect, if any, the Existing Servitude will have on the conservation easement.

**S&P.** Practice 9.F.1 calls on land trusts to

Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire. Update the title at or just prior to closing.

Practice 9.F.2 calls for land trusts to:

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

### “Extraction Improvements”

See the commentary “Subsurface Extraction Improvements” at §3.01(c)(8) and “Allow Surface Extraction Improvements for Oil and Natural Gas” at §4.01(b).

### “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 the definition of Sustainable, a term which is used to modify Forestry in the model.

### “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.

### “Impervious Coverage”

The definition in the model is purposely expansive. A roof, even if green, is still a roof and thus falls under the definition; porous pavement is still pavement and thus too falls under the definition. Article 4’s Impervious Coverage limitations are structured to provide flexibility in adjusting the limitations to account for varying degrees of porosity in surfaces and Owners’

adoption of green technologies like green roofs and porous pavement structures.

### **“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.

### **“Indemnified Parties”**

The definition is intended to be sufficiently expansive to cover claims against Persons acting on behalf of Holder. Nevertheless, it is prudent to consult with insurance carriers to evaluate coverage under this indemnity.

### **“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 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. This increase in scope has much to offer; for example, introduction of Invasive Species of fish has overwhelmed many waterways and is threatening extinction of Native Species. On the other hand, Holder must consider whether it has the commitment or the resources to regulate introduction of all sorts of Invasive Species such as common housecats or non-native earthworms.

### **“Lien”**

The definition is used to describe items affecting title that must be subordinated to the Grant as of the Easement Date.

### **“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(l).

### **“Losses”**

This definition is intended to encompass the items that may be included in a civil action under §7.03.

The source of this definition is *Negotiating Boilerplate*. (See full reference under “Litigation Expense.”)

### **“Lot”**

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

### **“Market Value”**

This term is used to measure Holder’s Losses under §7.03(a).

### **“Native Species”**

This definition may be refined to refer to a specific region if desired.

To find plants identified as Native Species in Pennsylvania, see the [native plant listing](#) published by the Pennsylvania Department of Conservation and Natural Resources.

### **“Owners”**

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

### **“Person”**

The definition avoids the need for repetitious phrases.

### **“Public Records”**

The definition avoids repetition and the need to specify a particular county in each Grant.

### **“Qualified Organization”**

Two criteria define the model’s meaning of Qualified Organization:

- The organization meets the criteria of a qualified organization under §1.170(A-14(c)(1) of the Regulations; and
- The organization is authorized to hold conservation easements under Pennsylvania’s [Conservation and Preservation Easements Act](#).

Section 1.170(A-14(c)(1) of the Regulations states that for purposes of the section:

the term qualified organization means: (i) A governmental unit described in section 170(b)(1)(A)(v); (ii) An organization described in section 170(b)(1)(A)(vi); (iii) A charitable organization described in section 501(c)(3) that meets the public support test of section 509(a)(2); (iv) A charitable organization described in section 501(c)(3) that meets the requirements of section 509(a)(3) and is controlled by an organization described in paragraphs (c)(1) (i), (ii), or (iii) of this section.

The [Conservation and Preservation Easements Act](#) defines holder in its §3:

The term means the following: (1) A governmental body empowered to hold an interest in real property under the laws of the United States or

this Commonwealth. (2) A charitable corporation, charitable association or charitable trust registered with the Bureau of Charitable Organizations of the Department of State and exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 28 501(c)(3)), or other Federal or Commonwealth statutes or regulations, the purposes or powers of which include retaining or protecting the natural, scenic, agricultural or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources and, conserving or managing the use of natural resources; protecting wildlife; maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.

### **“Regulations”**

The term appears only in §1.07 of article 1 and then not again until article 9. Since the term does appear in the definitions of Applicable Law, Market Value, and Qualified Organization, it should be retained even if no federal tax benefits will be sought for an easement donation.

### **“Regulatory Signs”**

These signs are intended to include typical no trespassing and no hunting signs as well as signs indicating the pathway of a trail.

### **“Renewable Energy”**

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

### **“Residential Improvements”**

The definition includes both dwellings and accessory residential Improvements.

### **“Resource Management Plan”**

There are many ways to describe a Resource Management Plan (RMP). 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.

### **“Review”**

See the commentary to §6.04.

### **“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.

### **“Site Improvement”**

The definition is intended to encompass a great variety of Improvements that are not buildings.

### **“Soil Conservation Plan”**

See the commentary to §4.02(b).

### **“Steep Slope Area”**

For information on steep slopes from a land use regulation perspective, see the guide [Steep Slope Ordinance](#).

### **“Subdivision”**

See the commentary to article 2.

### **“Sustainable”**

The word appears in the Conservation Objectives for the Standard Protection Area in article 1 and in article 4, in each case modifying the word Agriculture or Forestry.

Sustainability is widely regarded as economically and ecologically desirable, and the only viable long term pattern of human land use.

For a concise essay addressing the concept of sustainability, see Zencey, Eric [“Theses on Sustainability.”](#) Orion Magazine.

### **“Utility Improvement”**

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.

### **“Waiver”**

See the discussion in the commentary to §7.05 “Waivers.”

### **“Wet Area”**

One hundred feet is a common setback standard and reasonable one to achieve typical water resource protection objectives; however, users may vary this requirement depending upon the circumstances.

### “Woodland Area”

This definition can be varied depending upon whether or not hedgerows are important to Conservation Objectives. The term is used in §4.02(b)(5) 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 Area includes both Forest (as defined in the supplemental provisions) as well as other areas less densely populated with trees.

## Closing Matters

**Consideration in Pennsylvania.** The phrase “INTENDING TO BE LEGALLY BOUND” is a valid substitute for consideration in the Commonwealth of Pennsylvania. (The term “consideration” means something of value given in return for a promise.) Use of the phrase is important in circumstances where the easement is being donated with no consideration being given. Note that only in Pennsylvania is the phrase “intending to be legally bound” recognized by statute as a valid substitute for consideration.

**Signature Lines.** 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 or a County, Township, or other Person has agreed to assume rights and obligations pertaining to public access, an additional signature line should be added as follows:

Acceptance by Beneficiary:

[NAME OF BENEFICIARY]

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

Name:

Title:

See commentary to §1.07 pertaining to “Acceptance.”

See commentary to §6.08 pertaining to “Assignment and Assumption.”

**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.

**Date of Notarization.** The date of notarization (of the signatories’ acknowledgment that they executed the Grant) should not be earlier than the Easement Date. Different recording offices may have different and additional rules regarding dates; one or more offices, for example, requires the document date to match the notarization date. For more dating guidance, see “Easement Date” in the commentary’s “Preliminary Matters” section.

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

### Exhibits Referenced in Article I

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

### Other Possible Exhibits

Exhibit \_\_\_\_ “Public Policy Statements”  
Exhibit \_\_\_\_ “Review Requirements”  
Exhibit \_\_\_\_ “Access Area”  
Exhibit \_\_\_\_ “County Supplement”  
Exhibit \_\_\_\_ “Township Supplement”

# Style Guide

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## Style Guide to the Model

### Fonts

The font used in the seventh edition of the model is Garamond: 10.5 pt. for the main body of text and 14 and 10.5 pt. in bold for article and section headings.

The Coal Rights Notice contained in §8.12 appears in 24 pt. and 12 pt. in order to conform with Pennsylvania's [Conservation and Preservation Easements Act](#).

Italics are avoided due to the risk that if formatting is inadvertently lost during the drafting process, the error might be missed and the intended meaning lost. With that said, italics do appear in the use of Latin terms (one appearance in the default provisions) and titles of major publications.

### Capitalization

Words with the first letter capitalized signify a defined term. The definitions of defined terms are placed either in article 1 or in the glossary contained in article 9.

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

### Numbers

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

### Punctuation

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

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

### Cross-Referencing

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

### Other

“Headings” and numbering must be read in context to understand whether one is reading an actual heading, a full provision, or an item on a list that is part of a larger provision.

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

The article “the” is not used before “Holder.”

Capital “G” Grant refers to the document signed by both Holder and the undersigned Owner or Owners which operates to grant the conservation easement and establish the restrictive covenants upon the Property. A small “g” grant refers to the operation of transferring an interest in real property or a written instrument for that purpose. For example, the Grant may include within it a grant of access easement.

## Style Guide to the Commentary

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

### Fonts

The font Gil Sans MT is used for comments. Rockwell is used for the captions of material addressing options for customizing the model. Garamond is used for optional and sample provisions that could be used to customize the model, matching the font used in the model.

### Italics and Quotation Marks

Italics are generally used for emphasis or contrast, titles of major works (including guides and model documents published by WeConservePA), and foreign words.

Quotation marks are generally used for the following purposes:

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

When words or terms are referred to within a sentence as words or terms, italics or quotation marks may be used as best serves readability and understanding in the particular instance. Examples:

- The term *Extraction Improvement* is defined in the supplemental provisions.

- At the beginning of sentences, rather than using a symbol, “Section” is spelled out.

### Terminology

The word “model” signifies the *Model Grant of Conservation Easement and Declaration of Covenants*.

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

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

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

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

Terms defined in the model’s Glossary (article 9) or in article I that appear in optional or sample text in the commentary that could be inserted into the model are always capitalized consistent with the model’s capitalization practice. Those same terms generally appear with capitalization throughout the commentary to indicate that their meanings as defined in the model continue to hold wherever they appear. However, there are exceptions and complexities:

- The terms *conservation easement* and *easement* appear without capitalization (unless appearing in text intended to be inserted into the model).
- In the model, there is a clear distinction between the undersigned Owner or Owners (those who sign the document granting the conservation easement) and Owners (the signers and all those who hold an interest in the Property after them). In the commentary, the word “Owners” is used in a more general sense and, depending upon the context, includes not only the Owners and the undersigned Owner or Owners identified in a particular Grant but also landowners subject to conservation easements generally and landowners who are contemplating a grant of conservation easement.
- Similarly, the word “Holder” in the commentary is used in a more general sense than the defined term in the model. Depending upon the context, it includes conservation organizations and governments who currently hold or may hold conservation easements in the future.

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

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



# Supplemental Provisions for the Model Grant of Conservation Easement and Declaration of Covenants

## Amending and Restating a Grant of Easement

Depending on the particular facts and circumstances, changes to a conservation easement may be best accomplished through a simple amendment or by an amendment and restatement in full of the easement document. The guide [Amend OR Amend and Restate](#) describes the situations that best lend themselves to each approach.

If a simple amendment is judged most appropriate, the [Model Amendment of Grant of Conservation Easement and Declaration of Covenants with Commentary](#) may be used to accomplish the changes.

The guide [Adding to Land Under Conservation Easement](#) describes three alternatives for adding to eased land and includes a model document to help implement one of the alternatives.

The model may be modified to amend and restate a grant of conservation easement by following the instructions below. A key objective for the Holder in accomplishing any amendment and restatement is to make it clear that the restatement supersedes but does not release the old document. The instructions here help ensure that the restated grant retains the same priority and enforceability as the original grant.

### Title of Document

Entitle the restated grant “Amended and Restated Grant of Conservation Easement and Declaration of Covenants” to indicate that it is not an entirely new grant of easement.

In the opening recital, replace “THIS GRANT OF CONSERVATION EASEMENT AND DECLARATION OF COVENANTS” with:

THIS AMENDED AND RESTATED GRANT  
OF CONSERVATION EASEMENT AND  
DECLARATION OF COVENANTS.

### Easement Date; Restatement Date

In the opening recital, change the term “Easement Date” to “Restatement Date.” Generally, that substitution may be made throughout the restated grant; however, in a few instances (noted below), reference to the date of the original grant is more appropriate.

### Connect to Original Grant

Change the caption of §1.01 from “Property” to “Original Grant; Property” and substitute the following for the first sentence of §1.01:

On \_\_\_\_\_ (the “Easement Date”), [insert name or names of the original grantors of the easement or, if the ownership has not changed, the “undersigned Owner or Owners”] 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 below and more fully in exhibit A (the “Property”). The Original Grant was recorded on \_\_\_\_ in the Public Records in Book \_\_\_\_ Page \_\_\_\_\_. The undersigned Owner or 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 Restatement Date set forth above.

(Follow this text with the Property identification table set forth in §1.01.)

### Easement; Covenants

#### Easement: If Property Description Has Changed or Conservation Objectives Expanded

If the restated grant incorporates a new description of the Property or an expanded set of Conservation Objectives, replace the first sentence of §1.02(a) with the following text:

The Owners have granted and conveyed or, by this Grant, do grant and convey to Holder an unconditional and perpetual easement upon the entire Property including any land not described as within the bounds of the Property under the Original Grant for the purpose of advancing the Conservation Objectives described below (that easement, the “Conservation Easement”).

This text assures that the conservation easement has been granted with respect to the entirety of the Property described in the restated grant regardless of any possible inaccuracies in the description incorporated into the original grant. If there is absolutely no change

in the Property description, then delete from the provision the words “including any land not described as within the bounds of the Property under the Original Grant.”

### **Easement: If Property Description and Conservation Objectives Remain the Same**

If the Property description is not changing, then replace the first sentence of §1.02(a) with the following text:

The undersigned Owner or Owners and Holder agree and confirm that, as of the Restatement Date and at all times thereafter, the easement granted and conveyed under the Original Grant and affirmed with this Grant (that easement, the “Conservation Easement”) (1) remains valid, binding and enforceable with respect to the Property prior in right to all other Liens or other matters affecting title to the Property but for Existing Servitudes and (2) includes within its scope all of the purposes identified as the Conservation Objectives whether or not mentioned in the Original Grant.

This text reconfirms the continued validity, enforceability, and priority of the conservation easement established by the original grant.

### **Owner Covenants**

In §1.02(b) replace “establish” with “amend and restate the.”

### **Holder Covenants**

If the Holder Covenants are being modified, in §1.02(c) replace “accepts” with “affirms its acceptance of” and replace “establishes” with “amends and restates the.”

If the Holder covenants are not being modified, shorten §1.02(c) to “By this Grant, Holder affirms its acceptance of the Conservation Easement.”

## **New Easement Plan**

### **Different Protections for Different Areas**

A restated Grant based on the model is likely to need a new Easement Plan attached as exhibit B and incorporated into §1.03 to show the location of one or more areas, each with a different set of protections—Highest Protection Area, Standard Protection Area, and Minimal Protection Area. Older easement documents tended to identify differing levels of protection, if at all, by identifying a building area.

### **Addressing Building Areas**

You should not simply rename an older grant’s “building area” as a “Minimal Protection Area” in the restatement. The building area and the model’s Minimal Protection Area are similar in that they both usually identify an area where a substantial structure is permitted; however, beyond that, they are likely quite different in concept and implementation. (The philosophy behind the Minimal Protection Area is to sharply limit its size

but to be quite permissive regarding what is permitted and to minimize the need for monitoring in the area.)

## **Conservation Objectives**

Section 1.04 of the model sets forth the Conservation Objectives of the easement. To complete this section for a restatement, you will have to closely study the text of the original grant and likely the baseline documentation to glean the easement’s intended purposes. You should take care to be as accurate as possible in reflecting the original intended purpose of the easement in the Conservation Objectives. (See the guide [Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#).)

Many easement documents drafted before the model’s debut defined the purposes of the easement rather generally—often reciting verbatim the definition of conservation purposes contained in the charitable gift provisions of the federal internal revenue code (IRC 170(h)) with little elaboration. Rather than shoe-horning conservation goals into a tax code-driven provision, the model’s philosophy is to be conservation-driven and tax law-compliant, which tends to deliver a more comprehensive set of conservation purposes and a more detailed description of each purpose. Grants that used the tax code formulation or a similarly generic approach to conservation purposes can be amended and restated to expand the purposes and improve upon the ultimate conservation results delivered by the easement. For example, older grants seldom included water resource protection goals; a restatement is a perfect opportunity to include this valuable conservation purpose.

## **Baseline Documentation**

Restatement affords Holder the opportunity to check the adequacy of existing baseline documentation and supplement it to reflect existing conditions as of the Restatement Date and current standards for such documentation. To assure clarity as to the definition of “Baseline Documentation,” substitute the following for the definition of Baseline Documentation in §1.05:

As of the Restatement Date, the undersigned Owner or Owners and Holder have signed an acknowledgment of the accuracy of a report that incorporates both the baseline documentation referred to in the Original Grant as well as additional photographs and information that reflect existing conditions as of the Restatement Date (that report, the “Baseline Documentation”).

## **Federal Tax Items**

With respect to the amended and restated grant, no charitable gift is allowed unless the Owners make an additional donation either by giving up valuable rights reserved in the original grant or by conveying the easement over land not included in the original grant.



### **No Past or Present Qualified Contribution**

Section 1.07 may be deleted if the original grant was not used and the amended and restated grant will not be used as a qualified conservation contribution for purposes of the charitable gift provisions of the Code.

### **Past Contribution—No; Present Contribution—Yes**

If the original grant was not used as a qualified conservation contribution but the greater conservation value created by the amended and restated grant will be used as a qualified contribution, keep §1.07 in place and unchanged.

### **Past Contribution—Yes; Present Contribution—No**

If the original grant was used as a qualified conservation contribution but the amended and restated grant will not be used as an additional contribution, replace the first sentence of §1.07(a) “Qualified Conservation Contribution” with the following text:

The Original Grant, a transfer of a partial interest in real estate, was intended to qualify as a qualified conservation contribution (as defined under §170(h)(1) of the Code).

In the first sentence of §1.07(b) “Public Benefit,” change “The undersigned Owner or Owners have granted the Conservation Easement to provide...” to “The Conservation Easement has been granted to provide...”

### **Past Contribution—Yes; Present Contribution—Yes**

If the original grant was used as a qualified conservation contribution and the amended and restated grant is intended to result in an additional qualified conservation contribution, replace the first sentence of §1.07(a) “Qualified Conservation Contribution” with the following text:

This Grant and the Original Grant, each transfers of a partial interest in real estate, are intended to qualify as qualified conservation contributions (as defined under §170(h)(1) of the Code).

In the first sentence of §1.07(b) “Public Benefit,” change “The undersigned Owner or Owners have granted the Conservation Easement to provide...” to “The Conservation Easement has been granted to provide...”

## **Existing Improvements**

You must choose whether to define “Existing Improvements” (article 9) as of the Restatement Date or the original Easement Date. Holders desiring to make a fresh start with the easement documentation will prefer the definition to refer to the Restatement Date. Others will find it clearer to define Existing Improvements as of the Easement Date.

If the Restatement Date is selected, you must take into account that Improvements constructed before the Re-

statement Date are grandfathered as Existing Improvements under the restatement and the reference point for determining Additional Improvements likewise moves forward to the Restatement Date. As a result, limitations included in the original grant must be checked and revised in the restated grant to reflect the change.

If the Easement Date is selected, you must take into account that the revised Baseline Documentation updated to the Restatement Date will show Improvements constructed after the Easement Date. To clarify, the definition of Additional Improvements in the Glossary may be supplemented as follows:

Improvements shown on the Baseline Documentation as of the Restatement Date but not included as Existing Improvements as of the Easement Date are considered to be Additional Improvements for purposes of interpreting and applying the provisions of this Grant.

## **Legal and Policy Considerations**

A brief summary of the rationale for Holder’s decision to change the terms of the original Grant guards against misinterpretation and supports the conclusion that Holder has acted in accordance with all legal and ethical standards. You may want to consider adding a section, such as the following, to the end of article 1 to present background material relevant to the Holder’s decision to amend and restate:

### **1.1\_ Consistency of Amendment and Restatement with Applicable Law and Policy**

Holder has entered into this Grant because it has concluded that the amendment and restatement of the Original Grant strengthens the conservation easement held by it with respect to the Property, furthers the conservation purposes of the Original Grant, and otherwise complies with Applicable Law and Holder’s policy on amendment of easements.

**The provision may stop here or additional support may be added, for example:**

This Grant does not diminish in any material way the protections on natural and scenic resources set forth in the Original Grant.

This Grant strengthens the Conservation Easement by defining as the Conservation Objectives the protection of the specific resource values within the Property intended to be protected by the Conservation Easement.

This Grant enhances enforceability and easement administration by clearly stating the limitations on future use and development agreed to by Owners and Holder.

This Grant brings easement administration practices into conformity with Holder’s current practices, which more effectively and efficiently serve to

uphold the Conservation Objectives than the Holder's older practices.

The Holder has made all requisite inquiry and is satisfied that, first, this Grant significantly advances Holder's charitable purpose of protecting natural

resources, and, second, that any benefit to the Owners or other private interests that may accrue from the amendment and restatement does not constitute a private benefit under the Code or, if it does, the benefit is incidental.

## Adding a Caption to the Heading

**Purpose.** A caption can be placed in the heading of the document to highlight a particular feature of the Grant. This can serve to reduce the plausibility of a claim by subsequent Owners that they were unaware of the feature 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 caption may serve to make a purchaser or a settlement agent better aware of particular features of the Grant.

### Examples of Captions:

**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, you may add a caption such as:

Notice of Transfer Required: See section 8.03.

### Notice of Stewardship Fund Arrangement.

Grants of conservation easement may provide for a deferred stewardship contribution by Owners, periodic installment payments, conveyance payments, and other

types of stewardship funding arrangements. (For information, see the guide [Stewardship Funding Arrangements](#) and the accompanying [Model Stewardship Funding Covenant](#).) Examples of succinct notices regarding these stewardship funding arrangements include the following:

A payment of \$\_\_\_\_\_ is due to Holder at the time of each transfer to defray Holder's costs and expenses typically arising when conserved property changes ownership.

Fee of \$\_\_\_\_\_ is due to Holder on transfer of Property.

Conveyance Payment is waived/reduced by \_\_\_% upon Owners' compliance with §8.03(a) "Notice Required."

This Grant requires stewardship payments by Owners. See the Stewardship Funding Covenant recorded immediately after this Grant.

**Public Access.** Some grants of conservation easement include a grant of an affirmative right of public access. If so, you may want to accentuate this feature with a caption such as the following:

Grant of right of public access included. See article 6 and the Trail Easement Agreement recorded immediately after this Grant.

## Adding Conservation Objectives

### (add items to §1.04)

You may wish to establish resource-specific objectives not provided in the model, for example:

- Protection of Mature Trees or preservation of Specimen Trees
- Protection of dark skies and prevention of light pollution
- Protection of historic, archaeological, or other cultural resources
- Protection of geological resources

**Objectives and Covenants Go Hand-in-Hand.** If you add an objective, you must couple it with appropriate changes to the restrictive covenants of articles 2

through 5. Because this point has not always been obvious to easement drafters in the past, it merits reinforcement. If you don't back an objective with appropriate restrictive covenants, then you've created serious problems for future management.

Below are examples of potential additional resource-specific objectives.

### Mature Trees

If older, larger trees are to be given special protection as "Mature Trees," they should be identified on the Easement Plan, and mentioned here. Add to article 9 the definition for Mature Tree set forth in the "Supple-

mental Definitions” and modify the restrictive covenants as necessary to reflect this Conservation Objective. Sample text for a new objective under §1.04(a):

**Mature Trees.** To protect Mature Trees. Older, larger trees support biodiversity and provide shade, cooling, shelter, and nourishment of wildlife. The Conservation Easement provides particular protection to Mature Trees, both those existing as of the Easement Date and those maturing over time. As of the Easement Date, Mature Trees include a mix of Scarlet and White Oaks located in the southwest corner of the Property.

### **Contrast Mature Trees with Specimen Trees.**

Mature Trees are identified using the characteristics set forth in the definition of Mature Trees. Specimen Trees are a distinctly different concept, each tree being specifically identified in the Easement Plan.

## **Specimen Trees**

If the Property contains one or more Specimen Trees—i.e., individual trees that are to be given special protection, they should be identified on the Easement Plan and their protection clearly set forth in the Conservation Objectives. Add to article 9 of the Grant the definition for Specimen Tree set forth in the “Supplemental Definitions” and modify the restrictive covenants as necessary to reflect this Conservation Objective. Sample text for a new objective under §1.04(a):

**Specimen Trees.** To preserve Specimen Trees for the duration of their natural lives. Three trees have been identified on the Easement Plan as Specimen Trees. The Specimen Trees consist of an \_\_\_ approximately \_\_\_ years old and a \_\_\_ rarely found in the vicinity of the Property, \_\_\_\_\_. These trees add to the scenic beauty of the Property as viewed from \_\_\_\_\_ and the historic and scenic character of the community surrounding it [and are, or may become, rare or endangered species].

## **Dark Skies**

**Protect Dark Skies.** Obtrusive outdoor lighting can be problematic. Those concerned with the potential harmful effects of lighting might consider limiting such lighting using a conservation easement. A Conservation Objective such as the following could be established to address the issue:

**Nocturnal Resources.** To guard against the harmful effects of artificial lighting that disrupts the natural nighttime activities of animals and life patterns of plants; to preserve for human enjoyment the aesthetic experience of dark skies and absence of intrusive lighting visible from publicly accessible areas outside the Property.

The Conservation Objective must be matched with restrictive covenants designed to achieve the objective.

For example, text along the lines of the following could be included in a new subsection under §4.01(f):

Fixtures furnishing artificial light during hours of darkness are permitted subject to the following limitations: (A) such fixtures must be certified as “dark sky friendly” by the Dark Sky International Association or similar organization having a mission to guard against nocturnal light pollution; or otherwise conform to the following standards: the lighting fixture must be aimed, mounted, and shielded so as to block light from being projected upward or directed beyond the space requiring illumination for its permitted purpose; and (B) any lamp installed in such fixture must not produce light of an intensity or color inconsistent with Conservation Objectives pertaining to nocturnal lighting.

To further explore the topics of light pollution, dark skies, and light controls, see the guide [Lighting Ordinance](#) and links to model ordinances produced by the International Dark-Sky Association and others.

## **Historic, Archaeological, and Other Cultural Resources**

**Match Objectives to Mission.** Resource-specific objectives pertaining to preservation of buildings and structures may be added to §1.04; however, unless Holder’s mission includes historic preservation, it is advisable to create a separate preservation or façade easement to be held by an organization whose mission focuses on historic preservation. Note that the model is not constructed to address preservation of façades.

**Protection of Structures and Artifacts.** If a structure or artifact of historic or cultural importance is located within the Property and its preservation is to be included in the scope of the conservation easement, add to §1.04(a) a resource-specific objective describing the structure or artifact’s significance and the specific objective in protecting it. (In crafting the objective, keep in mind that the objective must be matched with restrictive covenants designed to achieve that objective.)

For example, if the Property contains an historic stone wall described in the Baseline Documentation, a Conservation Objective along the lines of the following could be included in a new subsection under §1.04(a):

**Historic Stone Wall.** To preserve the stone wall identified on Easement Plan and ensure that any maintenance or repair of it is aesthetically consistent with the structure as it was first constructed or as it appears as of the Easement Date. The wall was first constructed during colonial times using stones gathered...

Another example: If a site contains archaeological artifacts described in the Baseline Documentation, a Conservation Objective such as one of the following could be added to §1.04(a):

**Native American Artifacts.** To preserve the integrity of Native American artifacts that may be buried in the Standard Protection Area, which the Pennsylvania Historical and Commission identified as the location of a prehistoric Native American site.

**Archaeological Resources.** To protect from disturbance, except for archaeological research purposes, the archaeological resources that underlie the surface of the Archaeological Resource Area identified in the Easement Plan. The area's archaeological resources were identified...

Then a restrictive covenant designed to achieve the objective must be incorporated as a new bulleted item under the overarching limits of §3.02, §4.02, and/or §5.02, as the case may be. An example for the historic stone wall:

The stone wall identified on the Easement Plan must not be removed; the wall's individual stones must not be disturbed except for maintenance and repair purposes or on a temporary basis (not to exceed one season) for purposes of facilitating permitted activities on the Property; and maintenance and repairs of the wall must be aesthetically consistent with the structure as it was first constructed or as it appeared as of the Easement Date.

An alternative to consider (whether or not the wall is considered historic) is to describe maintenance and repair activities that are, or are not, permitted by reference to the [Standards](#) of the Secretary of the Interior applicable to maintenance of masonry exteriors of historic buildings.

An example of a restrictive covenant pertaining to archaeological artifacts:

No digging, tilling, or disturbance of soil is permitted [within the Archaeological Resource Area or Standard Protection Area] except for research purposes in accordance with a plan approved by

Holder after Review and prepared by an archaeologist who meets the Secretary of Interior's professional qualification standards for archeology.

**Blocking versus Forcing Expenditures.** When drafting restrictive covenants in support of preservation of Improvements, distinguish covenants blocking Owners from doing certain activities from affirmative covenants mandating that the Owner take particular actions (typically, maintenance, repair, and insurance). Caution is advised because the cost and time needed to enforce affirmative covenants is often greater than enforcement of negative covenants. If, for example, the covenant violated is a prohibition on wall demolition, then the Holder's remedy is a court order blocking the action. If, on the other hand, the covenant requires Owners to inspect the wall annually and repoint with a specific type of grout, what happens if the Owners fail or refuse to do so? One remedy is a court order mandating the maintenance activity, but, if Owners fail to comply, the Holder's remedy is to petition for the court to hold Owners in contempt. Sometimes this process is repeated again and again. Another remedy available to Holder is to perform the repair and charge the cost to the Owners. But if the Owners cannot or will not pay, there may be little chance of recoupment of holder's investment. For these reasons, both caution and additional stewardship funding are advised when affirmative covenants are included in the Grant.

## Geologic Resources

Sample Conservation Objective regarding a notable geological resource:

**Geologic Resources.** To protect from disturbance the outcroppings of quartzite and carbonate rocks present in the Highest Protection Area and the southwest corner of the Standard Protection Area. These rocks, rarely appearing above-ground in the region, date to the Paleozoic period.

This objective would be coupled with covenants to be placed in articles 3 and 4.

## Providing for Future Minimal Protection Areas

### (modify §1.03 and add section to article 2)

If you desire to provide for one or more of the Minimal Protection Areas and are uncertain as to the optimal location(s) at the time of the Grant, you should proceed with caution in addressing the uncertainty.

Allowing Owners to locate a Minimal Protection Area anywhere on the Property at a future date—a floating MPA—is a poor practice and, for Owners seeking a tax deduction, risks falling afoul of the Regulations. In nearly all cases, some areas of the Property are better suited for hosting a Minimal Protection Area than others, and judgment must be exercised regarding which

potential locations are more, or less, consistent with the Conservation Objectives.

The Grant should be drafted to ensure that, using the Conservation Objectives as a guideline, bounds are placed on the location of the Minimal Protection Area; there should be rules to describe where additional Minimal Protection Areas may be established or must not be established.

Tax law is not settled regarding this subject, so it's prudent for Owners who will seek tax deductions to consult with their tax advisors before settling on an approach for addressing future Minimal Protection Areas.

## Drafting Instructions Regarding Easement Plan

One tool for limiting the location of MPAs is to establish a Designation Area on the Easement Plan within which one or more additional Minimal Protection Areas can be established by Owners. Sample language which provides for both a fixed MPA and an unfixed MPA can be added to §1.03 as follows:

Minimal Protection Area A has been established as of the Easement Date in its location shown on the Easement Plan. Minimal Protection Area B may be established after the Easement Date within the area identified as "Designation Area" on the Easement Plan under applicable provisions of article 2.

Another way to limit the discretion of Owners in establishing additional Minimal Protection Areas is to identify areas in which natural resources would be harmed by more intensive use or which would detract from maintenance of scenic views described in the Easement Objectives. Sample language to accomplish this can be added to §1.03 as follows:

Minimal Protection Area B may be established after the Easement Date under applicable provisions of article 2.

## Drafting Instructions for Article 2

In addition to adding a provision to §1.03 Easement Plan, you must add a section to article 2 to set the procedure for ultimately incorporating the fixed location of the additional Minimal Protection Area(s) into the Grant recorded in the Public Records.

A sample provision using each alternative identified above is provided below:

## 2.04 Establishment of Minimal Protection Areas

(a) **Limitations on Minimal Protection Areas.** In addition to Minimal Protection Area A shown on the Easement Plan, two additional Minimal Protection Areas (Minimal Protection Area B and Minimal Protection Area C) may be established after the Easement Date in compliance with this section.

- (1) Minimal Protection Area B is limited to not more than two acres in the aggregate and must be established (if at all) only within the Designation Area shown on the Easement Plan.
- (2) Minimal Protection Area C is limited to not more than one 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 \_\_\_\_ feet or more from the public right-of-way of \_\_\_\_\_ to protect scenic views for the public.

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

- (1) Owners must (1) furnish Holder for Review an amended Easement 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 (2) mark the boundaries of each Minimal Protection Area with permanent markers. This information will become part of the Baseline Documentation incorporated into this Grant.
- (2) The Minimal Protection Area becomes established upon recordation in the Public Records of an Amendment of this Grant that incorporates the amended Easement Plan into this Grant and, if applicable, allocates limitations on Improvements or intensity of uses within Minimal Protection Areas set forth in article 5.

# Providing Owners the Right to Transfer Certain Lots

## (add subsections to §2.02)

**Multiple Ownerships.** The more individual owner-ships a Holder has to deal with in stewarding a conservation easement, the larger the potential for violations and the greater the costs to Holder for easement stewardship. Thus, the model by default does not allow the transfer of a Lot separate from the remainder of the Property. Nevertheless, Owners may need the Grant to allow the transfer of a Lot for a reason such as the following:

- Many zoning ordinances prohibit more than one dwelling per Lot.

- 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.

If you want the Owners to retain the right to transfer one or more Lots constituting the Property (whether existing as of the Easement Date or to be created in the future), instructions are provided below.

## Transfer of Lots Shown on Easement Plan

You may add a provision such as the following as a new subsection at the end of §2.02 so as to permit the transfer of Lots specifically identified on the Easement Plan. 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.

**Transfer of Lots Shown on Easement Plan.** The Lots identified as “Transferrable Lot A” and “Transferrable Lot B” on the Easement Plan may be transferred and, if not legally separated as of the Easement Date, Subdivision of such Lots is permitted in accordance with the Easement Plan. Prior to the first transfer of each Lot, the requirements of §2.03 must be met whether or not following a Subdivision.

You must of course be sure to identify the Transferrable Lots on the Easement Plan.

## Transfer of Lots Not Shown on Easement Plan

You may add a provision such as the following as a new subsection at the end of §2.02 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. The provision addresses a frequent request of Owners: to allow separate ownership of Minimal Protection Areas in order to conform with Applicable Law.

**Creation and Transfer of Lot.** 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 §2.03.

**Preferential Tax Programs.** The provision’s reference to “Preferential Tax Programs” allows the Lot to be sized so as to avoid assessment of roll-back tax. The definition of “Preferential Tax Programs” provided in the supplemental provision must be added into article 9 of the Grant in conjunction with this provision.

## Transfer to Qualified Personal Residence Trust

You may add a provision such as the following as a new subsection at the end of §2.02 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.

**Temporary Transfer.** 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 (1) 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 (2) upon the expiration of the trust the entirety of the Property is unified into a single parcel.

# Providing for Alternative Minimal Protection Areas

## (modify §1.03 and add section to article 2)

The “Providing for Future Minimal Protection Areas” section above addresses situations where clearly defined, optimal locations for a desired Minimal Protection Area(s) can’t be identified at the time of the grant. This section, in contrast, addresses situations in which two or more appropriate and specific locations for a Minimal Protection Area(s) are identified but there is uncertainty at the time of the grant as to which of these locations is optimal.

If you desire to provide for one or more Minimal Protection Areas and are uncertain as to which of several alternative locations will be selected as the fixed location, show the approved alternatives on the Easement Plan and modify §1.03 “Easement Plan” by adding a sentence such as the following example:

The Easement Plan shows two alternative locations for Minimal Protection Area A identified as Minimal Protection Area A-1 and Minimal Protection

Area A-2. Owners may select one of these areas as Minimal Protection Area A as set forth in the section of article 2 entitled “Alternative Minimal Protection Areas.”

Add to article 2 an additional section such as the following example:

**2.04 Alternative Minimal Protection Areas.** The Easement Plan shows two alternative locations for Minimal Protection Area A identified, respectively, as Minimal Protection Area A-1 and Minimal Protection Area A-2.

**(a) Establishment of Minimal Protection Area A.** Owners may establish one, and only one, of the alternative locations as Minimal Protection Area A by:

(1) Notifying Holder of the selected alternative location;

- (2) Signing an amendment to the Grant approved by Holder incorporating a supplement to the Easement Plan that identifies the selected location as Minimal Protection Area A and removes the other alternative; and
- (3) Paying or reimbursing, as the case may be, all costs and expenses of Holder attributable to the provision of alternative Minimal Protection Areas.

**(b) Prior to Establishment.** Until Minimal Protection Area A is established in conformity with the terms of this section, no activity or use may be conducted in, and no Construction of any Improvement may be commenced in, either of the alternative locations for Minimal Protection A except those permitted in the Standard Protection Area.

## Addressing Tax Code Benefits Specific to Farmers and High-Value Estates

(add subsections to §1.07)

### Federal Tax Benefits Specific to Farmers

**Add Qualification for Treatment under Pension Protection Act of 2006.** Add the following subsection to §1.07 if one or more of the Owners donating the easement otherwise qualifies as a “qualified farmer or rancher” under the Pension Protection Act of 2006, i.e., a taxpayer who earns more than 50% of his or her gross income from the business of farming in the taxable year in which the conservation contribution is made. A qualified farmer or rancher may deduct the conservation easement value up to 100% of their Adjusted Gross Income for up to 15 years.

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

### Federal Estate Tax Benefits

**Add Qualification for Treatment under Code §2031(c).** §2031(c) of the Code provides potential federal estate tax benefits to conservation easement donors. Donors should consult with their tax and legal

advisors to determine whether these benefits may be advantageous and whether the benefits outweigh the disadvantages of drafting the Grant to conform with the §2031(c) requirements. If the §2031(c) election is determined to be a useful option to the donors, add the following subsection to §1.07:

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

**Applicability of Estate Tax.** There is a \$5.45 million individual exemption from federal estate tax as of 2016.

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

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

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

## Providing for Beneficiaries of the Grant

(modify §1.08 and add §6.06)

**Extending Easement Rights to Others.** A key issue to be addressed in the Grant is whether anyone other than Holder is to have the right to enforce the Owners’ covenants in articles 2, 3, 4, and 5; and whether anyone, other than as provided under Applicable Law, is to have the right to enforce the Holder’s covenants under article 6. The default language of §1.08

states that there are no Persons who have been granted such rights under the Grant. However, if one or more Persons are to have rights, list these Persons in §1.08 and describe their rights in a newly created §6.06.

**Who Might Be Made a Beneficiary?** The short answer in Pennsylvania is that if you want your named



Beneficiary to actually be able to exercise the rights you want to give them, then you should limit your choice of Beneficiaries to charitable 5.01(c)(3) organizations with a conservation purpose. Pennsylvania's [Conservation and Preservation Easements Act](#) evidences a strong public policy to leave questions pertaining to appropriate easement management to public entities and land trusts specifically identified in the Grant (with the Attorney General available as and when needed to rectify situations in which those entrusted with conservation easements fail to meet their obligations). For more information, see the [Guide to the Conservation and Preservation Easements Act: Pennsylvania Act 29 of 2001](#) and the guide [Who Has Standing? Conservation Easements in Pennsylvania Courts](#).

**Typical Beneficiaries.** Typical Beneficiaries include partnering land trusts and government funders of easement projects. In addition, watershed associations that wouldn't want to hold conservation easements and accept the obligations that entails, might be willing to partner with and support Holders as Beneficiaries, which would give the associations certain rights but not duties in stewarding easements.

**Understanding Relationships with Beneficiaries.** The guide [Holders, Beneficiaries and Backup Grantees](#) describes the roles and relationships Beneficiaries may have to a Holder and the land. It also describes the advantages of establishing Beneficiaries rather than setting up easement co-holding relationships.

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

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

The sample provisions provided in these supplemental provisions for placement in article 6 are intended to document the rights of each Beneficiary. Other arrangements between Holder and Beneficiaries covering matters described in Practice 8.E may be documented in agreements separate from the Grant or, less preferably, within the Grant. (See "Separate Agreement Versus in the Grant" in the guide [Holders, Beneficiaries and Backup Grantees](#) for guidance on this point.)

## Instructions for Identifying Beneficiaries (§1.08)

If certain Persons are intended to be Beneficiaries:

- Delete §1.08's default "No Beneficiaries" statement.
- Insert a subsection containing the following sentence:

The specific rights vested in each Beneficiary listed in this section are described in article 6.

- Insert one or more subsections identifying the Beneficiary or Beneficiaries using, as guidance, the sample text provided in the commentary below.

### Land Trust as Beneficiary

\_\_\_\_\_, a Qualified Organization 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 Beneficiary.

### State as 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 DCNR-approved language for the specific funding program as a subsection of §1.08. Check [DCNR's website](#) for the most recent guidance pertaining to the specific grant program, as wording may change. Also check the conditions of funding outlined in the grant contract for the project.

**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) in the absence of other specific guidance pertaining to the grant program or mandated by the grant contract:

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 \_\_\_\_ (the "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 is 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 6.

**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 PDA Program.

### County as Beneficiary

**County Program.** Set forth below is a provision that can be added to §1.08 if county funds have been used to acquire the conservation easement in whole or in part. This provision is offered for use in the absence of any specific requirements of a county program or mandate contained in a grant contract with the county.

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 a 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 acreage within a 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 §8.11.

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.

### Township, Borough, or City as Beneficiary

**Local Government Program.** Set forth below is a provision that can be added to §1.08 if municipal funds have been used to acquire the conservation easement in whole or in part. This provision is offered in the absence of any specific requirements of a local government program or mandate contained in a grant contract with the local government.

The 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.”

**Local Government Contribution.** Some local governments require a recitation of the funding contributed by the local government towards the acquisition and want the public record to be clear that local government funds have not gone towards acquisition of the conservation easement with respect to acreage included in a 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 acreage within a 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.

**Local Government Supplement.** Some local government programs require the incorporation of certain terms or information into each local government-funded conservation easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all local government-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 §8.11.

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 super-

sede, to the extent of any inconsistency, the provisions of this Grant as applied to the Township Program Area.

**Local Government as “Co-holder.”** Whether or not a local government contributes funding towards acquisition of the conservation easement, it may be desirable to appoint a local government as a Beneficiary for purposes of qualifying the local government as co-holder of the conservation easement

- Act 153 of 1995 requires county assessors to take into consideration the diminution in fair market value of real property due to a conservation easement held by a municipality.
- Act 153 of 1995 also authorizes local tax bodies to exempt municipally-eased properties from real estate millage increases.

If the local government desires to be named as a Beneficiary, add the following provision to §1.08 and add to article 9 of the Grant the definition for Preferential Tax Programs provided in article 9 of this commentary.

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

**Implementing an Open Space Program.** For information on municipal open space programs, see “[Implementing a Municipal Open Space Program](#),” a publication of the Heritage Conservancy.

## Instructions for Identifying Rights of Beneficiaries (§6.06)

The Owners and Holder may grant any number of rights to each Beneficiary named in §1.08. You describe these rights in a new section (§6.06 “Rights of Beneficiaries”) created specifically for this purpose.

**Introduce Rights.** Introduce the rights to be provided to a Beneficiary with the following declaration:

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

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

1. The right to exercise Holder’s rights and duties under §6.02 should Holder fail to do so after notice and reasonable (not less than thirty days) opportunity to cure.

Option: Refer only to a particular subsection or subsections of §6.02.

2. The right to prior approval (not to be unreasonably withheld or delayed) of an Amendment that

would change the Conservation Objectives or weaken Holder’s power to block Improvements, activities, and uses inconsistent with the Conservation Objectives.

3. The right to notice from Holder when Owners request Review.

Option: Expand the right to “notice from and consultation with”

4. The right to approve transfer of Holder’s interests in the Conservation Easement (such approval not to be unreasonably withheld or delayed).

Some users may wish to add the following provision to this section:

Holder is not responsible for the decisions of or actions undertaken by Beneficiary.

The guide [Holders, Beneficiaries and Backup Grantees](#) describes the roles and relationships Beneficiaries may have to a Holder and the land.

## Notes Regarding Rights of Different Types of Beneficiaries

**Funder Requirements.** The above instructions for identifying Beneficiaries and their rights may be used in the absence of specific requirements that some funders establish as conditions for their funding of a conservation project. If your conservation project depends on outside funding, **check for specific funder requirements and grant contract terms!**

**Pennsylvania Department of Conservation and Natural Resources.** If DCNR funds have been used to acquire the conservation easement in whole or in part, insert DCNR-approved language for the specific funding program. Check [DCNR’s website](#) for the most recent guidance pertaining to the specific grant program as wording may change.

## Acceptance of Beneficiary Rights

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

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

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 Holder. For example, the Beneficiary wants to replace

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.

## Funding Stewardship

### (add section to article I)

The conservation easement is a powerful tool but only if Holder's power to achieve Conservation Objectives within the Property is backed up by adequate funding. In some cases, stewardship funding is contributed in full on or before the Easement Date. In other cases, stewardship funding is deferred, in whole or in part, to a later date. Commitments to contribute funds for stewardship after the Easement Date must be evidenced by an enforceable written agreement signed by Owners. This may be a separate document delivered to Holder on or before the Easement Date and simply referenced in the Grant (the preferred method) or the commitment for future stewardship funding may be directly addressed in the Grant.

For an explanation of the issues and challenges 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](#).

### Preferred Approach: Use Separate Document and Reference It in Grant

For reasons set forth in the guide [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 with Commentary](#) provides such a separate document.

When documenting a stewardship funding commitment by the Owners in a separate document, reference to it can be incorporated into article I of the Grant by adding a new section such as the following:

#### 1.1\_ Stewardship Funding Covenant

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

### Alternative Approach: Document Commitment in Grant

If you choose to document a stewardship funding commitment in the Grant, the guide [Stewardship Funding Arrangements](#) and the [Model Stewardship Funding Covenant with Commentary](#) provides funding strategies and terms you can use. For example, if you want a payment to be made to Holder upon each transfer of the Property to help cover Holder's costs in educating the new Owners, you might add the following section to article I of the Grant:

#### 1.1\_ Stewardship Funding Commitment

- (a) **Conveyance Contribution.** 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.
- (b) **Transfer.** "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.
- (c) **Financial Obligations.** Owners authorize the attorney or other Person handling closing of a Transfer 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.

Subsection (c) helps increase the likelihood that Owners will satisfy the commitment and make timely payments to Holder.

## Owners' Representations

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### (add section to article I)

To assure 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, Holder will want them to make certain representations as to factual information upon which Holder has relied in pursuing the easement project and accepting 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.

The [Model Conservation Easement Donation Agreement](#) provides a vehicle to document early the potential donors' representations about their property. It includes in the paragraph captioned "Reliance" a list of factual statements that the donors verify are accurate; if they are not accurate, the donors are given the opportunity to disclose anything known to them that must be disclosed in order to make the statement correct.

Purchase agreements, as well as simple signed statements, may also be utilized to obtain representations early in a project.

### Reaffirmation in Grant

If 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 at the end of article I as follows:

#### 1.1\_ Owners' Representations

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 [Preliminary Agreement Regarding Conservation Easement Donation] dated \_\_\_\_, is complete and accurate as of the Easement Date.

### Representations in Grant

Some Holders prefer to include representations in the text of the Grant, which is also acceptable. The list set forth in the [Model Conservation Easement Donation Agreement](#), 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 §1.07 of the model (captioned "Federal Tax Benefits") includes representations pertaining to that subject matter and §1.10 includes a representation about Liens on the Property. (It should also be noted that the indemnity furnished in §8.08 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.)

## Providing Additional Assurance to Owners

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### (add section to article I)

Applicable rules of law provide that Holder's interest in the Property is limited by the scope of the purposes of the easement (the Conservation Objectives) and, even within that scope, Holder's power to interfere with use of the Property is further constrained by the listing of permitted uses under the provisions of articles 2, 3, 4, and 5. All other rights pertaining to the ownership of land remain vested in the Owners. Nevertheless, some Owners may wish to have the comfort of seeing this also stated in the Grant. The following optional provision, which can be added to article I, was crafted not

because it is needed but rather to provide comfort to Owners that they are not relinquishing any control over their Property except as specifically set forth in the Grant:

#### 1.1\_ 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.

## Providing Holder with Additional Rights

(add provision to §6.03; modify §1.02(a))

### Right to Manage Natural Resources

**Resource Management by Holder.** Some conservation easements provide Holder the right to engage in certain resource management activities—habitat improvement, streambank restoration, and other conservation projects—on the eased property in furtherance of the Conservation Objectives. The grant to Holder of such a right of entry to engage in such activities is much like the grant of an easement for public access described under “Providing for Public Access” in these supplemental provisions.

If you wish to provide Holder with affirmative rights to manage natural resources, first expand the second sentence of §1.02(a) to read in full (new text in *italics*):

The Conservation Easement empowers Holder to block activities, uses, and Improvements inconsistent with the Conservation Objectives and to engage in certain resource management activities in support of the Conservation Objectives.

Second, add to §6.03 a provision, such as the one below, describing the right in more detail:

**Resource Management Activities.** To enter the Property to observe various species and habitats and to perform resource management activities in furtherance of Conservation Objectives. Resource management activities are to be performed in accordance with a Resource Management Plan submitted to Owners for approval, not to be unreasonably withheld or delayed.

**Owner Approval.** The 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. If there is comfort in Holder engaging in certain resource management activities without Owner approval, then adjust the provision accordingly, for example:

**Resource Management Activities.** To enter the Property 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 and planting and maintaining Native Species, are to be performed in accordance with a Resource Management Plan submitted to Owners for approval, not to be unreasonably withheld or delayed.

**Less than Whole.** Rather than the entire Property, a particular area of the Property could be specified, for example, the Highest Protection Area.

**Injury and Damage.** These sample provisions do not address considerations such as who bears the risk of injury or damage to property and whether proceeds of insurance policies will be available to cover such claim. The issues addressed in “Public Access Claim,” “Owner Responsibility,” and “Holder Responsibility” in the section “Providing for Public Access” of this commentary and similar issues discussed in the guide [Reducing Liability Associated with Public Access](#) are, in general, applicable not only to public access but also to entry for resource management. Take note, however, of an important difference: unlike rights of entry for recreational use covered by the [Recreational Use of Land and Water Act](#), Owners are not afforded the Act’s protection for injuries arising from entry for non-recreational purposes

### Right to Negotiate Changes to Existing Servitudes

(only add provision to §6.03)

An organization may decide to accept a conservation easement subject to an Existing Servitude but reserve the right to negotiate a satisfactory Surface Use Agreement or other changes or clarifications to the Existing Servitude after the Grant is in effect. The reason for doing this instead of requiring changes prior to the Grant may be feasibility—either the Owners or Person with rights under the servitude may be unwilling to engage at that time—or uncertainty—there may be a fairly good chance that the rights under the Existing Servitude 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 either case, you may want to insert a provision such as the following at the end of §6.03:

**Existing Servitudes.** To negotiate a Surface Use Agreement or other changes to or clarifications of any Existing Servitude for the purpose of conforming Additional Improvements installed within the Property and activities and uses permitted under the Existing Servitude to applicable limitations set forth in this Grant. Owners agree not to unreasonably withhold or delay Owners’ approval of any such changes or Surface Use Agreement.

Also, add the definition of Surface Use Agreement from these supplementary provisions to article 9 of the model.



## Providing for Public Access

### (potentially add provisions to articles I and 6)

Conservation easement transactions generally do not require public access. However, public agencies sometimes preferentially fund conservation projects that include public access. 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).

Three alternatives for granting Holder the right to provide public access in association with a conservation easement project are provided below:

1. Grant public access using a separate easement document.
2. Use a separate document but strongly couple it to the conservation easement project by adding a section to the conservation easement document.
3. Add a grant of rights of public access to the conservation easement document.

### Alternative 1: Use Separate Access Document

A simple and direct way to provide rights of public entry onto private property is to record a separate access easement document—at the same time, but after, the recordation of the Grant.

**Advantages.** Reasons to use a separate document include the following:

- By design, Holder 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 "Access Area"), Owners may want the holder of the access easement to take primary responsibility for injuries occurring within the Access Area if immunity under Applicable Law is not available.
- Using two documents facilitates the option of having another party—perhaps a County Beneficiary or Township Beneficiary—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.
- There is no need for every change of the access easement document to go through the process for approving and reporting Amendments of conservation easements.

- The model access easement documents 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.

**Models Available.** Any one of WeConservePA's model documents identified below can be used to establish public access independently of the *Model Grant of Conservation Easement and Declaration of Covenants*: (Alternatively, as described in the third option below, their content can be grafted into §6.07 of the Grant.)

- [Model Trail Easement Agreement](#)
- [Model Grant of Trail Easement](#)
- [Model Grant of Fishing & Boating Access Easement](#).

(In addition, 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 and Declaration of Covenants* in combination with the [Model Grant of Fishing & Boating Access Easement](#).) Related WeConservePA resources include the guides [Reducing Liability Associated with Public Access](#) and [Trail Easements](#).

**Limiting Access.** The model documents noted above may be adapted to provide less than full public access, for example limiting access to school groups for educational or recreational purposes.

### Alternative 2: Couple Separate Access Document with the Grant

#### Rationale for Inclusion in Grant

You may 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 conservation easement has a continuing duty in perpetuity to ensure public access (even if the holder of the access easement changes). Another example: Owners may want to bolster their claim to a federal tax deduction for a qualified conservation contribution by showing that public access was an integral part the contribution.

#### Utilize Both to Maximize Benefit

If Owners and Holder are satisfied that a separate Access Easement is desirable for the reasons summarized above, §1.02(d) 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 to be accompanied by the duty to do so. §6.01(e), 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, the subsections, 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 subsections are part of the Grant, they cannot be changed except by Amendment approved in accordance with applicable provisions of the Grant.

### Instructions

Add a subsection (d) to §1.02 “Easement; Covenants”:

**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, an access easement over the area identified as “Access Area” on the Easement Plan for the purposes described in 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 (that document, the “Access Agreement”). This access easement provides Holder the right to make the Access Area available to the public for walking, nature study, and other purposes described in the Access Agreement.

Then, if desirable to impose an obligation on Holder, add a subsection (e) to §6.01 “Holder Covenants”:

**Holder's Obligation.** Holder must take such steps as may be reasonably necessary to remove Improvements and block uses or activities that impair, in a material respect, public access to the Access Area pursuant to the easement granted in article 1. 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 Access Area.

**Obligation to Install Access Improvement.** Some project funders may additionally want to obligate Holder to build a public trail or other public access improvements. In this case, add the following to the end

<sup>1</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>2</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

of the first sentence of §6.01(e): “and install, or cause the installation of, the public trail [or other public access improvements].”

### Alternative 3: Use Grant Alone

If you do not want to record a separate access easement document, you can establish rights of public access by customizing the model using the following instructions (tailoring as needed per the footnotes):

First, add a subsection (d) to §1.02 “Easement; Covenants”:

**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, an access easement over the area identified as “Access Area” on the Easement Plan for the purposes described in §6.07.

### Alternatives to Delineation on Easement Plan.

The Access Area may instead be described in a separate exhibit, in which case replace “on the Easement Plan” with “in exhibit \_\_\_\_”. Alternatively, use prose to describe the Access Area; for example:

...an access easement over the stream that passes through the northwest corner of the Highest Protection Area and within eight (8) feet of the Top of the Banks of the stream (collectively, the “Access Area”).

Next, add a new section to article 6:

### 6.07 Public Access

**(a) Purposes of Access Easement.** The purposes of the easement for access granted under article 1 are as follows:

- (1) To provide Holder the right to make the Access Area available to the public for [insert purposes<sup>1</sup>]. [Insert limitations; for example: Public access is limited to the hours between dawn and dusk.<sup>2</sup>]
- (2) To provide the Holder the right to install and maintain [insert facilities; for example, “the Public Trail or “a boat launch”] and posting of Regulatory Signs with respect to the use of the Access Area or other information pertaining to the public access granted under this section.<sup>3</sup> The rights granted in this subsection (2) are exercisable only by Holder and Persons designated by Holder to exercise these rights.

the Access 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>3</sup> This subsection could be expanded to include rights of Holder to perform resource management activities. See, for example, article 2 of the [Model Grant of Fishing & Boating Access Easement](#).

**(b) Rights of Owners**

**(1) Consistent with Public Access.** The easement for access is non-exclusive. Owners may continue to use the Access 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 Access Area for the purposes described above.<sup>4</sup> Owners may at any time request from Holder clarification of activities and uses that conform to this standard.<sup>5</sup>

**(2) Right to Exclude.** Owners retain the right to take any action permitted under Applicable Law to remove from the Property (including the Access Area) Persons engaged in activities or uses other than those set forth as purposes of the easement for access granted above.<sup>6</sup>

**(c) 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>7</sup>

**(d) Public Access Claims; Owner Responsibility Claims.** If a claim for any Loss for personal injury or property damage occurring within the Access Area after the Easement Date (a "Public Access Claim")<sup>8</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 (1) personal injury or property damage occurring prior to

the Easement Date; (2) Improvements other than those (if any) installed by Holder; or (3) activities or uses engaged in by Owners, their family members, contractors, agents, employees, tenants and invitees, or anyone else entering the Property (including the Access Area) by, through, or under the express or implied invitation of any of the foregoing.

**(e) 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 Holder harmless from any Loss or Litigation Expense if and to the extent arising from an Owner Responsibility Claim.

**Addition to Glossary.** If applicable, add the term "Public Trail" to the Glossary in article 9. A definition is furnished in these supplemental provisions.

**Option to Impose Obligation.** If desirable to impose an obligation on Holder regarding public access, add a subsection (e) to §6.01 "Holder Covenants":

**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 Access Area pursuant to the easement granted in article 1. 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 Access Area.

Some project funders may additionally want to obligate 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 §6.01 (e): "and install, or cause

<sup>4</sup> Some Owners want assurance that they can continue to engage in certain activities that may impact the Access 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>5</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 locations 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>6</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>7</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>8</sup> For consistency, "Public Access Claim" and "Owner Responsibility Claim" should be added to article 9 of the Grant with, in each case, a cross-reference to this section as follows: "The term is defined in §6.07 of this Grant."



the installation of, the public trail [or other public access improvements].”

## Providing for Alternative Dispute Resolution Regarding Review

### (add subsection (e) “Dispute Resolution” to §6.04)

If Owners disagree with Holder’s determination under §6.04, 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)(1) a notice provision to start the alternative dispute resolution procedure and, thereafter, provisions for mediation or arbitration or both.

- (1) Holder’s decision under §6.04(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 §6.04(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.

(The examples provided above and below in this section 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](#).)

### 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. Sample mediation provision:

- (2) 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, WeConservePA 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.

- (3) 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 WeConservePA. 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.

## Providing for Camping

### (add items to article 3 or 4)

Camping can be as simple as a single person sheltering in a small pup tent for one night, or it can involve many people, extensive accommodations, and essentially permanent encampments.

The model does not provide an exception for tents in its general prohibition on Improvements in the Highest Protection Area and Standard Protection Area. The other factor limiting camping in the Highest Protection Area is that recreation is only permitted to the extent that it doesn’t require Improvements other than trails (and isn’t to the detriment of the Conservation Objectives).

For those looking to really rough it, camping could be permissible if it’s done under the stars. But if you’re looking to provide for something beyond this primitive level of camping, some modifications to the document are necessary.

The possible drafting approaches are as varied as the types, intensities, and locations of camping that might be of interest. This section addresses a few of those possibilities.

### Primitive Camping

You may add some variation on the following to §3.01(c):

Tents. No more than two tents sized to accommodate no more than six individuals in total are permissible at any one time. Tents to remain in place for more than two nights are subject to Review.

You would couple the permission for the Improvements with permission for the activity by expanding §3.02(c) to read, for example:

Recreational, educational, and scientific research activities are permitted that do not require Improvements other than trails **and tents** and do not...

### Camping at a Larger Scale

Within the Standard Protection Area, you may want to provide for the possibility of Improvements to accommodate larger groups or more intensive camping uses than would be permitted in the option above for the Highest Protection Area, for example, platform tents erected on permanent or semi-permanent decking. Familiar instances of this more substantial camping use are camps for hunting and fishing clubs, youth groups, and church meetings. You might also include hotel-like, luxury camping experiences. As an example, see the description of [Tentrr](#)’s business model, which connects owners of beautiful land with people who will pay hotel-like rates for outdoor camping experiences. The experience may include a large wood deck in the woods

or by a stream, a large tent with queen-sized bed and woodstove, camp tables, fire pits, showers, and more.

To permit a broad range of camping activity in the Standard Protection Area, add “Subject to Review, Camp Improvements” to §4.01(b). A sample definition for “Camp Improvements” is located in the Supplemental Definitions.

In addition to Review, consider whether the Impervious Coverage and Height limitations contained in §4.01(b) are sufficient to ensure that permitted Camp Improvements and camping uses will be limited to a scale and intensity consistent with the Conservation Objectives.

## Explicitly Addressing Changes in Condition

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(add section to article 8 or I or subsection to §8.06)

**Encumbrances No Longer Serving a Purpose.** A court may remove encumbrances on property that no longer serve useful purposes. The rationale is that the public interest is served by freeing land titles of archaic deed covenants at odds with current land uses in the vicinity.

**Direction to PA Courts.** Pennsylvania’s Conservation and Preservation Easements Act directs the courts to construe the terms of a conservation easement liberally to further the easement’s conservation purposes AND the purposes of the Act. This reverses the normal rule of construction otherwise applied by the courts to legal documents.

**Taking an Abundance of Caution.** To exercise an abundance of caution in support of the easement document’s restrictions and buttress the safeguard provided by the Conservation and Preservation Easements Act, you may consider adding a provision directing the courts to refrain from exercising powers to remove

encumbrances. This can be accomplished either by adding a new section to article 8 or I or by expanding §8.06 “Severability.” For example:

### Changes in Condition

The purpose of the Conservation Easement is to advance the Conservation Objectives in perpetuity regardless of any changes in the condition of the Property or lands in the vicinity of the Property for any reason whether arising from acts of nature or human activities and regardless of changes in climate, economic conditions, development opportunities, profitability of permitted activities, or other condition similar or dissimilar to the foregoing. Such changes are not circumstances justifying extinguishment or termination of the Conservation Easement or any term or provision included in the Grant, all of which are intended to support the Conservation Objectives in perpetuity.

## Supplemental Definitions

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This segment of the commentary provides definitions for a variety of terms that, depending on the particular project and customizations desired to the model, may be appropriate for use in the customization. Each item begins with the definition and concludes with commentary (if any) for that item.

Included is the following content:

- Definitions of initially capitalized terms used in optional and alternative provisions included in the commentary (but not in the default version of the model).
- Definitions of other terms, neither used in the model nor the commentary, which might prove useful in some circumstances.

### “Adventure Facilities”

“Adventure Facilities” means open-air structures for outdoor adventure uses, such as ladders, walls, zip lines, and ropes courses.

### “Agricultural Management Plan”

“Agricultural Management Plan” means 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 6 pertaining to Review:

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

- **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:

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

### “Animal Unit”

“Animal Unit” means 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).

### “Biodiversity”

“Biodiversity” means 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 (but not as a capitalized defined term) in the model’s Conservation Objectives.

Article 2 of the International Convention on Biological Diversity, which came into force December 29, 1993, defines the term as follows:

“**Biological diversity**” means the variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems.

The Belgian contribution to the Clearing-House Mechanism under the Convention on Biological Diversity provides additional useful explanation. Quoting from [http://www.biodiv.be/biodiversity/about\\_biodiv/biodiv-what](http://www.biodiv.be/biodiversity/about_biodiv/biodiv-what) at 8/27/2016:

Biodiversity is not only the sum of all ecosystems, species and genetic material. Rather, it represents the variability within and among them. It can be distinguished from the expression “biological resources”, which refer to the tangible components of ecosystems. Biological resources are real entities (a particular species of bird, a wheat variety growing in a field, oak wood, etc.) while biological diversity is rather an attribute of life (the variety of bird species, the genetic variability of wheat around the world, forest types, etc.).

Biological diversity is often understood at three levels:

- species diversity refers to the variety of different species (plants, animals, fungi and micro-organisms) such as palm trees, elephants or bacteria;
- genetic diversity corresponds to the variety of genes contained in plants, animals, fungi and micro-organisms. It occurs within a species as well as between species. For example, poodles, German shepherds and golden retrievers are all dogs, but they all look different;
- ecosystem diversity refers to all the different habitats - or places - that exist, like tropical or temperate forests, hot and cold deserts, wetlands, rivers, mountains, coral reefs, etc. Each ecosystem corresponds to a series of complex relationships between biotic (living) components such as plants and animals and abiotic (non-living) components which include sunlight, air, water, minerals and nutrients.

### “Biological Integrity” (or “Ecological Integrity”)

“Biological Integrity” or “Ecological Integrity” means 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.

### “Camp Improvement”

“Camp Improvement” means an Improvement (whether or not roofed) used for the conduct of or in support of camping activities permitted under this

Grant. Site Improvements permitted under this Grant which are not used solely in support of camping activities are regulated as Site Improvements, not Camp Improvements.

### **“Commercial Improvement”**

**“Commercial Improvement”** means an Improvement, other than a Residential Improvement or Agricultural Improvement, that is designed or used for retail, office, or other commercial use.

### **“Conservation Cover”**

**“Conservation Cover”** means 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 Pennsylvania Department of Environmental Protection Manual for Agriculture. The manual contains a large number of other definitions pertaining to agriculture and soil conservation.

### **“Ecosystem”**

**“Ecosystem”** means 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.

### **“Forest”**

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

### **“Forest Management Plan”**

**“Forest Management Plan”** means a Resource Management Plan for Forestry operations within the Property that (1) 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.

**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 of 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.

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

1. 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.
2. 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.
3. Management of forest stands for long (i.e. \_\_\_\_ years or more) rotations.
4. 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.
5. 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>9</sup>

<sup>9</sup> This provision may or may not be appropriate depending upon the character of the land and the 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

6. 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.
7. Measures to maintain and enhance the quality of forest and timber resources on the Property.
8. 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.
9. Measures to preserve canopy where identified as contributing to scenic or wildlife habitat resources described in Conservation Objectives.
10. Measures to minimize adverse effects upon, and to protect and enhance, habitats for Native Species of plants and wildlife.
11. Prohibition of Forestry activities except in accordance with the FMP.
12. Requirement for on-site, active supervision of all harvesting activities by qualified forester with reporting requirements to Holder of any non-conformity with FMP.
13. 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>10</sup>

**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.

### **"Fragmentation"**

**"Fragmentation"** means 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.

### **"Habitable Improvements"**

**"Habitable Improvement"** means a dwelling, guest-house, 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.

### **"Habitat"**

**"Habitat"** means 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.

### **"Mature Tree"**

**"Mature Tree"** means a tree having a diameter of \_\_\_\_\_ inches or more at a Height of five feet from ground level.

The term "Large Trees" may more accurately describe the resource to be protected.

Mature trees, depending on species and environment, may vary greatly in diameter. The term "Mature Trees" is included as a non-technical term preferred by some to suggest not only size but beauty as well.

The definition is used in conjunction with an expansion of the Conservation Objectives in §1.04(a)(2) and the restrictive covenants in §4.02 or §5.02.

Mature Trees are defined in the Grant by their character and, thus, their numbers may increase over time. If, however, the individual trees to be protected have been determined and can be identified on the Easement Plan, use of the term "Specimen Tree" contained in

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(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 .

<sup>10</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.



these supplemental definitions may provide a better approach.

### **“Notice”**

“Notice” means a formal notification under this Grant in writing and delivered by one the following methods of delivery: (1) personal delivery; (2) certified mail, return receipt requested and postage prepaid; or (3) nationally recognized overnight courier, with all fees prepaid.

**Purpose.** You may use “Notice” as a defined term 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.** If you choose to make Notice a defined term, you 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.

### **“Owner Responsibility Claim”**

The phrase “Owner Responsibility Claim” is defined in alternative 3 under “Providing for Public Access” in the supplemental provisions.

### **“Owners’ Dispute Notice”**

The phrase “Owners’ Dispute Notice” is defined in alternative 3 under “Providing for Public Access” in the supplemental provisions.

### **“Preferential Tax Program”**

“Preferential Tax Program” means a 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.), 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 the commentary to §2.03). The definition may also be used when a Township is named as a Beneficiary (See the 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.

### **“Public Access Claim”**

The phrase “Public Access Claim” is defined in alternative 3 under “Providing for Public Access” in the supplemental provisions.

### **“Public Trail”**

“Public Trail” means a trail for use by the general public to be established within the Access Area.

This definition is provided for use when a grant of easement for public access is included in the Grant and the access includes a trail. See “Providing for Public Access” in the supplemental provisions.

The rules applicable to the Public Trail may need to be differentiated from the rules otherwise applicable to trails in general.

### **“Recreational Improvement”**

“Recreational Improvement” means an Improvement (whether or not roofed) used for the conduct of or in support of recreational activities permitted under this Grant. Site Improvements permitted under this Grant which are not used solely in support of recreational activities are regulated as Site Improvements, not Recreational Improvements.

### **“Recreational Use of Land and Water Act”**

“Recreational Use of Land and Water Act” means 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.

### **“Riparian Buffer”**

“Riparian Buffer” means a linear band of vegetation alongside a water body that helps protect the water body from the detrimental impacts of adjacent land uses, reduces erosion, and, if forested, provides shade, resulting in improved water quality and habitat.

### **“Specimen Tree”**

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

The definition is used in conjunction with an expansion of the Conservation Objectives in §1.04(a)(2) and the restrictive covenants in §4.02 or §5.02.

This definition is provided for use when a higher standard of care is to be applied to activities affecting specific trees identified in the Easement Plan. Contrast this definition with the one for Mature Trees (also found in



these supplemental definitions), which are defined by their character.

### **“Surface Use Agreement”**

**“Surface Use Agreement”** means 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 the surface use agreement and additional burdens of oversight and enforcement arising from extraction activities, uses, and Construction pertaining to Extraction Improvements.

### **“Top of the Bank”**

**“Top of the Bank”** means 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 a 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.

The second edition of *Applied River Morphology* (ISBN-13: 978-0965328906) was published in 1996.