

# Pennsylvania Conservation Easement & Commentary

a model document and guidance

*Prepared by the*  
Pennsylvania Land Trust Association

*with support from the*

William Penn Foundation  W I L L I A M P E N N  
F O U N D A T I O N

*and the*

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



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[www.conserveland.org](http://www.conserveland.org)

4/20/2006 edition

## Introduction

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

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

The model is tailored to Pennsylvania state law, and the PA Department of Conservation and Natural Resources has approved its use for DCNR grant projects. Chester County uses it for its conservation program, and others are expected to follow.

The model sets a strong standard for easement drafting. With continued input from users, it will continue to provide Pennsylvanians with the state-of-the-art for many years to come.

## Comments Requested

To maintain the model as the state-of-the-art, we will update it once a year. ***We encourage you to suggest improvements for the next edition!***

Please suggest cleaner language, optional and alternative provisions, and structural adjustments. We also encourage you to identify issues in need of further investigation.

Comments may be directed to Andy Loza at [aloza@conserveland.org](mailto:aloza@conserveland.org).

## Acknowledgements

Financial support from the Pennsylvania Department of Conservation and Natural Resources Bureau of Recreation and Conservation and the William Penn Foundation makes this endeavor possible!

## Notes on Second Edition

This is the second edition of the *Pennsylvania Conservation Easement & Commentary*. The first edition was published in July 2005 and a *public beta* was distributed in April 2005.

The 1<sup>st</sup> edition continues to stand as a model of excellence. Differences between 1<sup>st</sup> and 2<sup>nd</sup> editions are relatively minor. Nevertheless, improvements have been made, and we encourage people to use the 2<sup>nd</sup> edition for projects that have not advanced far in the negotiation process. You can view the differences between editions at [www.conserveland.org/model\\_documents](http://www.conserveland.org/model_documents).

The 2<sup>nd</sup> edition model is a page shorter thanks to deletions of redundant or superfluous text and tweaks in formatting. The 2<sup>nd</sup> edition commentary, on the other hand, features five additional pages of alternative and optional provisions.

## The Future

In addition to seeking comments in preparation for a next edition, the Pennsylvania Land Trust Association plans to develop a series of modules that will provide supplemental guidance and alternative easement provisions to address various resource protection issues in greater depth. Forestry, agriculture, water resources, biodiversity and public access are among the topics to be addressed. Suggestions for other topics are welcome.

PALTA also plans to implement a document assembly program at [www.conserveland.org](http://www.conserveland.org). Users will be able to automatically generate customized easements by answering a series of questions at the website. This will enable users to easily discard easement content they do not need, add optional content and choose alternative provisions as appropriate.

Documents can be generated in Word, PDF and other formats. Users also will be able to save their settings and change their answers as they desire.

# COMMENTARY

## to the

# Pennsylvania Conservation Easement

### (April 20, 2006 edition)

#### General Instructions

- Users of the *Pennsylvania Conservation Easement* are encouraged to read through the commentary at least once. The commentary follows the same Article and Section structure as the easement to make cross-referencing easy. To address different situations, the commentary often suggests alternative language to that found in the model or suggests deleting sections altogether. The commentary also explains the purposes behind many provisions.
- The *Pennsylvania Conservation Easement* and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The *Pennsylvania Conservation Easement* must be revised to reflect the specific circumstances of the particular conservation project under the guidance of legal counsel.
- **S&P.** Standard 9. Practice A. of the 2004 edition of *Land Trust Standards & Practices* published by the Land Trust Alliance (hereafter referred to in this Commentary as S&P) requires the land trust to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.
- **Disclaimer Box.** Once a document based on the *Pennsylvania Conservation Easement* has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the Commonwealth of Pennsylvania, the box at the bottom of the signature page that begins “This document should not be construed or relied upon as legal advice...” may be deleted.
- **Other States.** Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.
- In the commentary, titles in bold preceded by numbers refer to sections of the same title in the model. Bullets preceding text indicate a comment. Text without bullets varies with the context, covering alternative or optional text to add as well as excerpts from other documents.
- **Updates.** Check [www.conserveland.org](http://www.conserveland.org) periodically for updates to the *Pennsylvania Conservation Easement & Commentary*.

#### Preliminary Matters

##### Margins

- Several counties (Montgomery and Chester, for example) require a minimum 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right and bottom margins. (However, page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5 inch by 11 inch paper. Many counties require type size not less than 10-point. The model has been formatted to conform to these requirements.

##### Header

- In the final version of a document prepared using the model as the base, it is good practice to remove the header “Revised through: [date].” In MS Word, click on *View*, then *Header and Footer*, delete the phrase and close.

### **Title of Document**

- Some land trusts prefer the title “Grant of Conservation Easement and Declaration of Covenants” which is acceptable.
- The title “Deed of Grant of Conservation Easement and Declaration of Covenants” is sometimes used; however, this title may result in confusion with deeds conveying fee simple title and, as it is unnecessary to describe the type of grant, one of the other options is preferable.
- There is a growing belief in the land trust community that it would be preferable to have a substitute phrase for the term “conservation easement”. PALTA has suggested “land conservation agreement” as a possible alternative. The rationale for this change is to eliminate a needless source of confusion and misconception that, if a conservation easement is granted, the Holder (and perhaps the public) will have a continuing right of way over the property to enter at will and/or actively use the property. Most people, lawyers and non-lawyers alike, are unfamiliar with the concept of a “negative” easement – the right to compel an owner *not* to do something on his property. The vast majority of easements (other than conservation easements) grant affirmative rights of way to travel over or to maintain improvements on the property of another. If a land trust desires to discontinue use of the term “conservation easement”, the Pennsylvania Conservation Easement can be adapted fairly easily to substitute “Land Conservation Agreement” as the title; substitute “this Agreement” for “this Conservation Easement” throughout the document and substitute “Agreement Date” for “Easement Date” throughout the document. In places that refer to Owners “granting a conservation easement”, Owners instead would grant to Holder in perpetuity Enforcement Rights with respect to the covenants and restrictions contained in the Agreement. The term “Enforcement Rights” is defined in Article I of the model.
- The title “Conservation Servitude” is also a possible option. The Restatement of Servitudes (Third) (a recently published summary of legal principles recommended by respected authorities) uses the term “conservation servitude” rather than conservation easement. The term “servitude” is an umbrella term for all types of promises that are binding on future landowners as well as the landowner making the promises. So both easements and restrictive covenants are included within a single concept.
- The addition of the word “Agricultural” before “Conservation Easement” may help to assure preferential tax treatment under certain Preferential Tax Programs. For example, the Preserved Farmland Tax Stabilization Act provides for assessment at the land’s restricted farmland value for lands under agricultural conservation easements whether the agricultural conservation easement was donated or sold and whether the agricultural conservation easement is held by a municipality or a land trust. For further information, *see* Land Savers, Conservation Easements at [www.greenworks.tv/landsavers/webcast-conservationeasements2.htm](http://www.greenworks.tv/landsavers/webcast-conservationeasements2.htm). Agricultural conservation easements also qualify for reimbursement of costs from the Pennsylvania Department of Agriculture under the Land Trust Reimbursement Grant Program authorized under Act 15 of 1999. The program will reimburse qualified land trusts up to \$5,000 for expenses incurred in the acquisition of agricultural conservation easements. These expenses include appraisal costs, legal services, searches, document preparation, title insurance, closing costs, and survey costs. The subject property must meet certain minimum criteria published in the 10/28/00 PA Bulletin. The Bureau of Farmland Protection has advised PALTA that while the Department does not require the document to be titled “Agricultural Conservation Easement” to qualify for the Land Trust Reimbursement Grant Program, it is important that it be readily apparent in the document that agricultural lands are in fact being protected.

### **Opening Recital**

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

### **Easement Date**

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

**Undersigned Owner or Owners**

- Insert names exactly as set forth in the deed by which the undersigned Owners acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into the Owners, it is good practice to recite the off-record facts to clear up the apparent gap in title. The customary practice is to recite these facts either in the Background section or at the end of the legal description attached as Exhibit “A”.
- All owners as of the Easement Date must join in the 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.
- The relationship of multiple Owners to each other may be added here but is not necessary for recording or other purposes. Example: X and Y, husband and wife or X and Y, as joint tenants with rights of survivorship.
- If a Person other than an individual is granting the Conservation Easement, a phrase identifying the type of entity and state in which the Person was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania limited partnership.
- The model has been constructed to use the term “Owners” rather than “Grantor” or “Grantors”. This term was chosen to avoid any confusion about whether specific provisions were intended to apply only to the Persons signing the document or to subsequent owners of the Property as well. If a provision is intended to apply only to the Person signing the Conservation Easement, the phrase “the undersigned Owner or Owners” is used. In this limited case, some land trusts may prefer substituting the term Grantor or Grantors for the phrase “undersigned Owner or Owners” where this phrase is used in the model. In all other cases, the term “Owners” (always plural) is used. This arrangement of setting apart the undersigned Owner or Owners from all Owners present and future also has the practical advantage of not requiring conversion of plural to singular or vice versa throughout the document depending upon whether one or more than one persons signed the document.

**Holder**

- The full legal name of the Holder (including Inc. or Incorporated if part of the legal name) should be inserted here.
- A phrase identifying the type of entity and state in which the Holder was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania non-profit corporation.
- “Grantee” may be substituted for “Holder” but is not recommended for several reasons. First, the term “Holder” avoids any possible confusion in the future between the land trust that signed the document and a subsequent transferee who becomes the “Holder” but was never the “Grantee” of the original document. The second reason is that the terms Owners and Holder are more distinctive and recognizable than Grantor and Grantee whose similarity in spelling can sometimes be confusing.
- Other parties to the document can be added here, if desired; however, the model has been constructed to name additional “Beneficiaries” (if any) in Article I. It is not necessary for purposes of giving public notice of the content of the document to name additional Beneficiaries in the opening paragraph.

**Article I. Background**

- **Purpose.** The purposes of Article I “Background” are to inform the reader of the factual information necessary to understand the subject matter of the document and the intentions of the parties in entering into a legally binding relationship. The material in the Background section should never be used to set forth enforceable restrictions on the Property.
- **Articles and Sections.** The model has been structured in Articles and Sections rather than a list of paragraphs. There are several practical reasons for this. One reason is to encourage additional provisions to be clustered with similar provisions instead of adding them to the end where they may be missed in a quick review. Another reason is to avoid wherever possible cross-references to specific

paragraphs. A common drafting error is to add or delete paragraphs and not check whether cross-references are still correct. This structure seeks to minimize the opportunities for that error to occur.

- **Whereas Clauses.** The content of Article I can be restated as a series of “Whereas” clauses; however, modern legal practice is to state the facts supporting the intentions of the parties in a “Background” section. The facts are then set out as simple declarative sentences rather than a series of “whereas” clauses conjoined with a series of “ands”.

### 1.01 Property

- **Purpose.** The purpose of this Section is to identify the land that will be bound by the terms of the Conservation Easement.
- **Conservation Area.** If the undersigned Owner or Owners and the Holder intend the Conservation Easement to apply only to a portion of the Property, change the caption of §1.01 to “Property; Conservation Area”; substitute the following for the first two sentences in §1.01; and replace “Property” with “Conservation Area” throughout the *remainder* of the document *following* §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 Conservation Easement and is described in Exhibit “A”.

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

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

- **S&P.** Practice D. of Standard 9 of S&P requires that the land trust determine the boundaries of every protected property through legal descriptions, accurately marked boundary corners or, if appropriate, a survey.
- **Street Address:** Insert a street address if available; otherwise, try to identify by acreage and frontage along a certain road or roads. Example: 100 acres more or less north side of \_\_\_ Road west of the intersection of \_\_\_ Road and \_\_\_ Road.
- **Municipality:** Insert the city, township or borough in which the Property is located. This may or may not be the name of the town used for mailing address purposes.
- **County:** Identification of the county is required for recording purposes. If the Property is located in more than one county, it is important to have multiple originals signed so as to permit recording to occur simultaneously in both counties.
- **Parcel Identifier:** The Tax Parcel Identification number for the Property is required for recording in most if not all counties. Some counties also require a Uniform Parcel Identification number. *See* Uniform Parcel Identifier Law (21 Pa. Stat. §§331-337). Some counties charge additional recording fees to note the tax parcel number and/or uniform parcel identifier number on the document presented for recording if not furnished in the document itself or the legal description attached as Exhibit “A”.
- **Acreage:** Insert the number of acres comprising the Property.

### 1.02 Conservation Plan

- **Purpose.** The purpose of this section is to incorporate a separate document (the Conservation Plan) into the text of the Conservation Easement. A Conservation Plan must be incorporated into the model Conservation Easement unless the entirety of the Property is in the “Highest Protection Area” or the “Standard Protection Area”. See Commentary to §1.03 for a detailed explanation of the three levels of

restriction used in the model – the Highest Protection Area, the Standard Protection Area and the Minimal Protection Area.

- **Identification of Areas.** The relevant areas should be identified on the Conservation Plan with sufficient specificity to locate them on the ground, sometimes with the assistance of other materials included in the Baseline Documentation.
  - Aerial photographs and topographical maps frequently provide sufficient information to differentiate the Highest Protection Area from the Standard Protection Area.
  - The Minimal Protection Area may require surveying if it is not feasible to establish it by reference to existing natural features or survey points. The Minimal Protection Area should be marked with permanent markers on the ground prior to the Easement Date or, if later, in any event prior to construction of Improvements.
- **DCNR Requirements.** The Pennsylvania Department of Conservation and Natural Resources (the “DCNR”) has advised that, for conservation easements acquired through funding provided by the DCNR, the survey plat constituting the Conservation Plan must show the boundary of the Property (or Conservation Area, as the case may be) by metes and bounds and must provide a calculation of the acreage within the State Program Area. See § 1.07(b) below for a further description of the State Program Area.
- **S&P.** Standard 9. Practice D. of S&P provides that, if an easement contains restrictions that are specific to certain zones or areas within the property, the locations of these areas should be clearly described in the easement and supporting materials and can be identified in the field.
- **Exclusion of Minimal Protection Area.** The question often arises whether a Minimal Protection Area should be included or excluded from the property subjected to the Conservation Easement. The Regulations (§ 1.170A-14(v)) provide that “a deduction will not be allowed for the preservation of open space under § 170(h)(4)(A)(iii), if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation. See 1.170A-14(e)(2) for rules relating to inconsistent use.” On the one hand, by excluding the area subject to future development, the undersigned Owner or Owners and the Holder avoid falling afoul of this limitation. On the other hand, by excluding the area, the Holder loses the right to exert some control over the future use and development of the Minimal Protection Area so as to protect other conservation values outside the Minimal Protection Area. The model is written to cover the entire Property. If the Minimal Protection Area is excluded from the Property, follow the directions under the Commentary to § 1.01 for describing a “Conservation Area” that is less than the entirety of the Property.
- **Establishment of Minimal Protection Area after Easement Date.** If one or more of the Minimal Protection Areas permitted under the Conservation Easement have not been established as of the Easement Date by reference to the Conservation Plan, add the following to § 1.02:
 

Minimal Protection Area A has been established as of the Easement Date in its location shown on the Conservation Plan. Minimal Protection Area B may be established after the Easement Date [within the area identified as “Designation Area” on the Conservation Plan] under applicable provisions of Article II. *The phrase within the brackets is omitted if a “Designation Area” is not the selected alternative as discussed in Article II of this commentary.*
- **Plan Identification Information.** Since recorded versions of plans are sometimes reduced to the extent that not all the notes are legible, it is good practice to identify the plan with some specificity in the Background section so that there is no question as to the plan that was intended as the Conservation Plan. Example: “Attached as Exhibit “B” is a plan of the Property prepared by \_\_\_ dated \_\_\_ entitled \_\_\_ plan number \_\_\_” or “Attached as Exhibit “B” is a plan of the Property prepared by the Holder dated \_\_\_ based upon a survey prepared by \_\_\_ dated \_\_\_ entitled \_\_\_.” A full size copy of the plan will, of course, be kept on file as part of the Baseline Documentation.
- **Multiple Plans.** Some land trusts attach a site plan as well as the Conservation Plan. If that is desired, it is advisable to incorporate them as Exhibits “B-1” and “B-2” so as to keep the identification of subsequent Exhibits uniform.

- **S&P.** Standard 8. Practice G. of S&P provides that all land and easement projects should be individually planned so that the property's important conservation values are identified and protected, the project furthers the land trust's mission and goals, and the project reflects the capacity of the organization to meet future stewardship obligations.

### 1.03 Conservation Objectives

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

#### (a) Resource Protection Objectives

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

##### (i) Water Resources

- Add a brief description of the water resources on or about the Property that are more fully described in the Baseline Documentation. Example:

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

##### (ii) Forest and Woodland Resources

- Add brief description of forest, woodland and vegetative resources on or about the Property that are more fully described in the Baseline Documentation. Example:

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

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

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

##### (iii) Wildlife Resources

- Add brief description of Native Species found on or about the Property that are more fully described in the Baseline Documentation and/or the potential of the Property to provide habitat for Native Species.
- Example: The Highest Protection Area contains approximately \_\_\_ acres of unbroken, deep woods habitat within which the following Native Species have been observed: \_\_\_\_\_. The edge between the woodlands and field areas provides cover for species adapted to more sunlight such as \_\_\_\_\_. The following rare or endangered species have been observed on or about the Property: \_\_\_\_\_.

##### (iv) Scenic Resources



- Add 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 Conservation Easement will extend the panorama of protected open space within the \_\_\_ Valley to approximately \_\_\_ acres.

**(v) Sustainable Land Uses.**

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

The Property is located within an area that historically has been devoted to Agricultural uses; however, development pressures have interspersed residential development with Agricultural uses to the detriment of productive agriculture. This Conservation Easement and others applicable to properties in the vicinity of the Property are intended to preserve an economically viable area devoted to Agricultural production.

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

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

**(vi) Compatible Land Use and Development**

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

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

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

**(b) Goals**

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

**(i) Highest Protection Area**

- Designate as “Highest Protection Area” those portions of the Property that should remain forever wild or largely undisturbed. If Agricultural use (including grazing) or Forestry use for commercial timbering is contemplated, the area should be designated as “Standard Protection Area” not “Highest Protection Area”. There may or may not be any habitat worthy of being protected as Highest Protection Area within a Property. However, to protect water resources, PALTA recommends that areas within at least 50 and preferably 100 feet from the edge of a stream or other watercourse on the Property should be identified as “Highest Protection Area”. See, for example, the recommendations in *Riparian Forest Buffers* (Welsch, 1991), Forest Resources Management, USDA Forest Service, Radnor, PA, NA-PR-07-91, available on-line at [http://www.na.fs.fed.us/spfo/pubs/n\\_resource/riparianforests/Tab%20II.htm](http://www.na.fs.fed.us/spfo/pubs/n_resource/riparianforests/Tab%20II.htm).

**(ii) Standard Protection Area**

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

**(iii) Minimal Protection Area**

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

**1.04 Baseline Documentation**

- **Purpose.** The purpose of this section is to incorporate the Baseline Documentation into the text of the Conservation Easement even though it is not attached to the recorded documentation. Because it is not attached to the recorded document, it is imperative that the definitive baseline report be signed by the undersigned Owners and the Holder with a notation identifying the report as the Baseline Documentation referred to in the Conservation Easement between Owners and the Holder dated \_\_\_\_.
- **Necessity.** Baseline documentation is required for compliance with the Code and Regulations (*see* §1.170A-14(g)(5) of the Regulations) but it is also critical whether or not the Conservation Easement was donated to the Holder. For this reason, it is separated from other Code and Regulation requirements in Article I.
- **Obligation to Prepare.** Common practice is for the Holder to prepare the Baseline Documentation; however, under the Regulations it is the obligation of donor (the undersigned Owner or Owners) to make available to donee (the Holder) *prior to the time the donation is made*, documentation sufficient to establish the condition of the Property as of the Easement Date.
- **Items Included.** According to the Regulations, the documentation *may* include: (A) USGS maps, (B) map of the area drawn to scale showing Existing Improvements, vegetation and identification of flora and fauna, land use history (including present uses and recent past disturbances) and distinct natural features such as large trees and aquatic areas; (C) aerial photograph at an appropriate scale taken as close as possible to the Easement Date; (D) on-site photographs taken at appropriate locations on the Property. The on-site photographs should be keyed to a location map of the Property and dated and signed by the

photographer. To monitor restrictions on the Standard Protection Area properly, Baseline Documentation in support of a donation of a Conservation Easement based upon the model should include a computation (individually and in the aggregate) of Impervious Coverage of Existing Improvements within the Standard Protection Area as of the Easement Date.

- **S&P.** Standard 2. Practice G. of S&P provides that land trusts should adopt by board resolution a written records policy that governs how the organization and transaction records are created, collected, retained, stored and disposed. Among the critical records covered by the policy are the baseline documentation reports for all conservation easements held by the land trust. Standard 9. Practice G. provides that pursuant to its records policy, the land trust must keep originals of all irreplaceable documents essential to the defense of each transaction in one location and copies in a separate location. Original documents should be protected from daily use and are secure from fire, floods and other damage. Baseline documentation should also include a report of the steps taken by the land trust to identify and document whether there are hazardous or toxic materials on or near the property. Land trusts are required to take these steps, as appropriate for the project, to conform to Standard 9. Practice C. of S&P. Standard 11 Practice B requires that for every easement, the land trust has a baseline documentation report that includes a baseline map prepared prior to closing and signed by the landowner at closing. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgment of interim data that for donations meets Regulations are signed by landowner at closing.

### 1.05 Structure of Conservation Easement

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

### 1.06 Federal Tax Items

- **Purpose.** All of the requirements for qualification as a Qualified Conservation Contribution have been merged into this Section. If there is no donation, the Section can be simply deleted or (to be sure there is a meeting of the minds between Owners and the Holder on this issue) retain the caption and replace the text with the following: “The undersigned Owners and Holder confirm that the grant to the Holder of this Conservation Easement is not intended to be a Qualified Conservation Contribution under the Code and Regulations”.
- **Mandatory.** All of the requirements *must* be satisfied in order to qualify for charitable deduction. Two other requirements are dealt with outside this Section because they ought to apply to all Conservation Easements whether or not donated. These requirements are included in the model as §1.04 (Baseline Documentation) and §5.01(b) (requiring subordination of any liens affecting the Property as of the Easement Date).
- **S&P.** Standard 10 of S&P provides that the land trust must work diligently to see that every charitable gift of a Conservation Easement meets federal and state tax law requirements. However, Standard 10 Practice C. clarifies that the land trust should not make assurances as to whether a particular conservation easement will be deductible, what monetary value of the gift the Internal Revenue Service and/or state will accept, what the resulting tax benefits of the deduction will be, or whether the donor’s appraisal is accurate.

**(a) Qualified Conservation Contribution**

- **Bargain Sale.** In the case of a bargain-sale of the Conservation Easement, the donation has been made “in part.” See §5.01(c) of this commentary for the section captioned “Purchase Price” that is to be added to the model Conservation Easement whenever the Conservation Easement is purchased in whole or in part.

**(b) Public Benefit**

- **Public Benefit Tests.** The conservation values described in the Conservation Objectives should describe facts and circumstances particular to the Property that will serve to substantiate qualification under one or more of the categories of public benefit set forth in §170(h) of the Code and the Regulations; for example, preservation of open space with scenic views visible from a public right-of-way, preservation of open space in furtherance of public policies; or preservation of a relatively natural habitat. For an in-depth discussion, see Small, Stephen J. *The Federal Tax Law of Conservation Easements*. If desired by the undersigned Owner or Owners and Holder, a sentence may be added to §1.06(a) identifying the category or categories of public benefit under which the Conservation Easement is intended to qualify; for example: “This Conservation Easement qualifies as a public benefit by (i) preserving a relatively natural environment as described in the Conservation Objectives; and (ii) preserving open space in furtherance of the public policies identified in Exhibit “\_\_\_”.
- **Model Approach.** Recitations of public policy statements have been omitted from Article I of the model because they tend to be lengthy and the approach taken by the model is to focus on resource protection goals and to keep the document as brief and easily readable as possible.
- **Summary as Exhibit.** Land trusts are encouraged to attach a summary of public policy statements into the Conservation Easement as an Exhibit. Neither the Code nor the Regulations require inclusion of this material in the body of the Conservation Easement; however, public policy statements may be useful for future interpretation of the intentions of the parties.
- **Example.** Add to the end of the “Public Benefit” paragraph: “Attached as Exhibit “\_\_\_” is a summary of the public policy statements and other information supporting the public benefit of the terms of the Conservation Easement in addition to the conservation values described in the Conservation Objectives.”
- **PALTA Website.** PALTA intends to publish on its website ([www.conserveland.org](http://www.conserveland.org)) examples of public policy statements adopted by various federal, state and local governmental bodies.
- **S&P.** Standard 8. Practice D. of S&P provides that the land trust should evaluate and clearly document the public benefit of each land and easement transaction and how the benefits are consistent with the mission of the organization. If the transaction involves public purchase or tax incentive programs, the land trust satisfies and federal, state or local requirements for public benefit. Standard 8. Practice C. provides that, for land and easement projects that may involve federal or state tax incentives, the land trust should determine that the project meets the applicable federal or state requirements, especially the conservation purposes test of the Code and Regulations. Both of these Standards should be read, however, in conjunction with Standard 9. Practice B. which provides that the land trust should refrain from giving specific legal, financial and tax advice and should recommend in writing that each party to a land or easement transaction obtain independent legal advice.

**(c) Mineral Interests**

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

**(d) Property Right**

- **Application of “Proportionate Value” Rule.** “The rule works like this. Assume a property has a value of 100 before an easement and a value of 80 after an easement. The easement has a value of 20 and therefore is worth 20% of the value of the entire property.” (Small, Stephen J., *The Federal Tax Law of Conservation Easements, Fourth Edition*, 1997, p. 16-5)
- **Application to §6.04.** Under Article VI, the Holder is entitled to compensation in a broader range of circumstances than “extinguishment”. If the undersigned Owner or Owners received a federal tax benefit for the donation, the Proportionate Value is required to be paid to Holder rather than the measure of compensatory damages in Article VI so as to conform to the Regulations. It is good practice for the Holder to keep a record of the Proportionate Value established as of the Easement Date in the Baseline Documentation.

**(e) Notice Required under Regulations**

- **Purpose.** The purpose of this subsection is to avoid the possibility of non-compliance with §1.170A-13(g)(4)(ii) of the Regulations, which provides as follows: “In the case of any donation referred to in paragraph (g)(4)(i) of this section, the donor must agree to notify the donee, in writing before exercising any reserved right, *e.g.*, the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the property”.
- **Review.** The approach taken by the model is to require Review (which includes both notice and approval) prior to activities with a potential for adverse impact similar to the example given in the Regulations. The Regulations only require notice (not review or approval) but apply to undefined set of activities that *may* adversely impact conservation interests. Accordingly, this provision for notice is included solely for the purpose of assuring strict compliance with the Regulations and not as a substitute for Review where required under Articles II, III and IV.

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

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

**OPTIONAL SUBSECTION:**

- It is good policy to evidence in a writing signed by undersigned Owner or Owners prior to or at the time of the donation, that the Holder has not promised any particular tax treatment of the donation of the Conservation Easement. The recommendation of PALTA is to document that understanding as soon as possible in an engagement letter or donation agreement; however, the Holder may want to include a provision to that effect in the Conservation Easement either in addition to or in substitution for an earlier agreement. If so, the following provision may be added to §1.06:

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

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

- (i) The undersigned Owner or Owners have not relied upon any information or analyses furnished by Holder with respect to either the availability, amount or effect of any deduction, credit or other benefit to Owners under the Code, the Regulations or other Applicable Law; or the value of this Conservation Easement or the Property.
- (ii) The undersigned Owner or Owners have relied solely upon their own judgment and/or professional advice furnished by the appraiser and legal, financial and accounting professionals engaged by the undersigned Owner or Owners. If any Person providing services in connection with this Conservation Easement or the Property was recommended by Holder, the undersigned Owner or Owners acknowledge that Holder is not responsible in any way for the performance of services by these Persons.
- (iii) The donation of this Conservation Easement is not conditioned upon the availability or amount of any deduction, credit or other benefit under the Code, Regulations or other Applicable Law.

### 1.07 Beneficiaries

- **Purpose:** The purpose is to identify (and limit) the universe of Persons having a “third-party right of enforcement” defined in the Conservation Easements Act as follows: “[a] right provided in a conservation easement to enforce any of its terms, granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.”
- **Rights.** The particular rights each Beneficiary has with respect to the Property are set forth in Article V.
- **No Beneficiary.** The model’s default provision states that “As of the Easement Date, no Beneficiaries of this Conservation Easement have been identified by the undersigned Owner or Owners and Holder.” This statement clarifies that there is no Person who can claim that the Person was an intended Beneficiary. Should the parties want to name a Beneficiary in the future, all that is needed is a simple Amendment identifying a Beneficiary under Article I and specifying the rights of that Beneficiary under Article V.
- **Acceptance.** The Conservation Easement Act requires Beneficiaries to sign the Conservation Easement (or record a separate document of acceptance) to evidence their acceptance of the rights and duties. The text of the relevant provision of the Conservation Easements Act is as follows:

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

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

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

#### (a) Land Trust Beneficiary

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

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

**(b) State Beneficiary**

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

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

- (i) The State Program Area is defined as follows: [insert description such as: “the entirety of the Property”; “the entirety of the Conservation Area”; “the entirety of the Highest Protection Area”; or “that portion of the Property identified as “State Program Area” on the Conservation Plan”].
- (ii) The rights and powers vested in the Department as Beneficiary of this Conservation Easement are set forth in Article V and may be enforced by the Department and its successors, in perpetuity.

- **Other State Programs.** If another Pennsylvania state program is funding the acquisition and the relevant department desires to be named a Beneficiary, the following provision could be used (insert name of Department and name of funding program):

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

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

**(c) County as Beneficiary**

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

This Conservation Easement 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 Conservation Easement, collectively, as the “County Program”). The portions of the Property as to which County funds have been used to purchase this Conservation Easement are referred to, collectively, as the “County Program Area”.

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

The purchase price or portion of the purchase price funded by County for this Conservation Easement is the sum of \$\_\_\_\_\_ (the “County Contribution”). The County Program Area does not include any

acreage within any Minimal Protection Area. Accordingly, the County Contribution does not include any funding for acquisition of the Conservation Easement with respect to the Minimal Protection Area.

- **County Supplement.** Some County Programs require the incorporation of certain terms or information into each County-funded Conservation Easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all County-funded conservation easements. If an exhibit is to be incorporated, add the following to the model provision and add the County Supplement to the list of Exhibits incorporated into the Conservation Easement under §7.12.

Attached as Exhibit “\_\_\_” (the “County Supplement”) is a rider to this Conservation Easement containing certain provisions that must be incorporated into this Conservation Easement 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 Conservation Easement as applied to the County Program Area.

**(d) Township Beneficiary**

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

This Conservation Easement 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 Conservation Easement, collectively, as the “Township Program”). The portions of the Property as to which Township Funds have been used to purchase this Conservation Easement are referred to, collectively, as the “Township Program Area”.

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

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

- **Township Supplement.** Some Township Programs require the incorporation of certain terms or information into each Township-funded Conservation Easement. To maximize uniformity, these standard terms can be set forth in a standardized exhibit to be attached to all Township-funded conservation easements. If an exhibit is to be incorporated, add the following to the model provision and add the Township Supplement to the list of Exhibits incorporated into the Conservation Easement under §7.12.

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

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



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

- **Implementing a Township Program.** For additional information on Township Programs, *see* “Implementing a Municipal Open Space Program” a publication of Heritage Conservancy available by link from the PALTA website ([www.conserveland.org](http://www.conserveland.org)).

**ADDITIONAL SECTION, IF APPLICABLE:**

**1.08 Administrative Agent**

- **County or Township as Holder; Land Trust as Administrative Agent.** The approach taken by the model is that only one Person should be identified as Holder. Any number of governmental and non-governmental Qualified Organizations can be named as Beneficiaries but, ultimately, when a decision has to be made, the Holder must make the decision and take responsibility for the reasonableness of its decision. If a County or Township is not satisfied with a right of prior consultation and instead requires a veto power on Review, then the County or Township (rather than the land trust) should be named as the Holder and, in that case, the land trust might be named as an Administrative Agent under the following provision which would be added as §1.08.

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

- See §5.07 of the commentary to view additional provision necessary to implement the Administrative Agent.

**Article II. Subdivision**

- **Purpose.** The purpose of Article II is to regulate separation of ownership or control the Property for several reasons:
  - To avoid fragmentation of habitat.
  - To maintain sufficient acreage in single ownership to support Sustainable Agriculture and Sustainable Forestry uses.
  - To maintain uniformity in appearance for aesthetic reasons.
  - To avoid the enforcement problems arising from a multiplicity of owners.
  - To control allocation of rights and limitations among lots.

**2.01 Prohibition**

- **Broad Definition.** The definition of Subdivision in Article VIII is intended to cover any kind of separation of ownership or control.
- **Transfer of Existing Lot.** The definition of Subdivision for purposes of the model includes transfer of an Existing Lot. The reason is to treat the entirety of the Property for purposes of the Conservation Easement as if it were one lot and then make the list of permitted Subdivisions in Article II the universe of permitted transfers. If, in a particular case, Owners and Holder want to recognize Existing Lots, then simply add “Transfer of an Existing Lot” as a permitted action in a new subsection under §2.02. This makes the intentions of the parties clear. Conservation Easements that do not deal with this issue are frequently very difficult to interpret and apply to specific fact situations.
- **Transfer by Lease.** Transfer of possession and control of land by lease is included as a Subdivision. This is consistent with the definition of Subdivision in the Pennsylvania Municipalities Planning Code and many local ordinances.

- **Transfer by Condominium Unit.** Some Owners attempt to circumvent restrictions on Subdivision by creating condominium units. The definition of Subdivision controls these transfers as well.

## 2.02 Permitted Subdivision

- **Purpose.** The list in §2.02 should be the universe of permitted exceptions from the general prohibition in §2.01. It is critically important for uniform administration of Conservation Easements based on the model that land trusts *not* alter the definition of Subdivision to remove transfers that they customarily permit. Just add those permitted transfers to the list in §2.02.

### (a) Lot Line Change

- **Some Review.** The model permits Owners to realign lot lines as a matter of right without any Review so as long as there is no material decrease in the acreage of the Property. Other lot line changes require Review.
- **No Review.** If a land trust does not want to review any lot line changes, simply delete the phrase “subject to Review” from the provision.
- **All Review.** If a land trust wants to exercise rights of Review over any lot line change, the phrase “subject to Review” should be moved to the beginning of the paragraph.

### (b) Transfer to Qualified Organization

- **No Review.** The model permits transfer to a Qualified Organization without Review by Holder. Some land trusts may want to add “subject to Review” at the beginning of the paragraph.
- **Conservation Purpose.** The conservation purpose of the transfer is included so that the transfer to the Qualified Organization cannot be used as an intermediate step to circumvent Subdivision controls.

### (c) Agricultural Lease

- **Purpose.** This provision is provided to permit transfer of care, custody and control of land by lease for the specified purposes.

### (d) Separate Minimal Protection Areas

- **Purpose.** The following provision can be added as subsection (d) to §2.02 so as to permit separate ownership of Minimal Protection Areas. Also add to Article VIII of the Conservation Easement the definition of “Preferential Tax Programs” provided in Article VIII of this commentary.

Subdivision to create an additional Lot containing Minimal Protection Area B (i) in the location (if any) shown on the Conservation Plan; or (ii) subject to Review, in a location or other configuration of the Lot that is of 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.

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

## 2.03 Subdivision Requirements

- **Purpose.** To provide Holder with the information necessary to administer the Conservation Easement and exercise enforcement Rights as applied to multiple Lots.

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

- Some land trusts may want to exercise rights of Review to determine whether allocations determined by Owners are reasonable.

**(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 requirements of the Conservation Easement, an Amendment is not necessary. Subdivisions that vary from the requirements of the recorded Conservation Easement should be documented by Amendment.

**ADDITIONAL SECTION, IF APPLICABLE:****2.04 Establishment of Minimal Protection Areas**

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

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

In addition to Minimal Protection Area A shown on the Conservation Plan, two (2) additional Minimal Protection Areas (Minimal Protection Area B and Minimal Protection Area C) may be established after the Easement Date in compliance with this Section.

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

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

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

### Article III. Improvements

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

#### 3.01 Prohibition

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

#### 3.02 Permitted Within Highest Protection Area

- **No Highest Protection Area.** If there is no Highest Protection Area, there are two drafting alternatives. The first alternative is to leave the caption for §3.02, delete the remainder of the section and state: “No Highest Protection Area has been designated within the Property”. The second alternative (if references to Highest Protection Area have been deleted from Article I), is to delete this section in its entirety. In either case, move “Existing Improvements” and “Existing Agreements” to §3.03.
- **Conformity for Review.** PALTA recommends the first alternative noted above because uniform numbering of sections will streamline administrative review not only for the Holder in the course of monitoring numerous Conservation Easements but also for Beneficiaries who must review the text of numerous Conservation Easements based on the model.
- **Review Function.** The “compare documents” function in Word can be used to highlight all changes made in a particular Conservation Easement compared to the model. While the revised Conservation Easement is open, go to the “Tools” menu, click on “Compare and Merge Documents” and select the stored version of the model. Also check the “legal black lining” option so that deleted text is visible.

##### (a) Existing Improvements

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

The dwelling identified as an Existing Improvement within the Highest Protection Area may, at the election of Owners by notice to Holder, be removed from the Highest Protection Area and, in that case: (i) Owners are not entitled to replace that Existing Improvement within the Highest Protection Area; but (ii) will be permitted to replace the Existing Improvement within the Minimal Protection Area or, subject to Review, within the Standard Protection Area without counting against limitations otherwise applicable to Improvements in that area.

##### (b) Existing Agreements

- **Purpose.** Existing Agreements are entitled to priority over the Conservation Easement under Applicable Law so there is no point in trying to control the exercise of those rights by Persons who are not a party to the Conservation Easement.
- **S&P.** Standard 9. Practice H. of S&P provides that the land trust should investigate title to each property for which it intends to acquire title or an easement to be sure that it is negotiating with the legal owners and to uncover liens, mortgages, mineral or other leases, water rights and/or other encumbrances or matters of record that may affect the transaction.

**(c) Additional Improvements**

- **Purpose.** Additional Improvements within the Highest Protection Area should be limited to those that the Holder has determined are consistent with Conservation Objectives for this highest level of protection. If the list is materially expanded, the Holder should consider whether designation as Highest Protection Area is, in fact, appropriate.
- **Additions to List.** The model is constructed with a very limited list of Additional Improvements in the Highest Protection Area. Because the list of items is so limited, additional limitations such as those provided for the Standard Protection Area were not considered necessary. However, if the list in this section is expanded to include items with the potential for significant Impervious Coverage, then a “Limitations on Additional Improvements” section similar to that provided for the Standard Protection Area should be added as well.
- **Fences.** Some land trusts may want to further limit fences, etc. 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. Also consider whether a Height restriction would be appropriate for the same reasons or to maintain scenic views. Example: “Fences must not exceed \_\_\_ feet in Height and must be constructed of post-and-rail or other open weave construction that preserves scenic views described in the Conservation Objectives.”
- **Signs.** Some land trusts may want to further limit signage to “a reasonable number of Regulatory Signs along the perimeter of the Property.” If an easement for a Public Trail is being incorporated into the Conservation Easement, this provision may need to be expanded to include Regulatory Signs associated with the Public Trail. See Article V of this commentary for sample Public Trail provision.
- **Trails.** Frequently limitations are imposed on the width of trails. Some land trusts limit to a relatively narrow width (such as 4-6 feet). Other land trusts prefer a wider path (particularly when used as a bridle path) so it is less likely to become rutted. If a right-of-way for a Public Trail is being incorporated into the Conservation 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 VIII includes the requirements for compliance with the Americans with Disabilities Act. For information on ADA accessibility requirements with respect to a Public Trail, see “Outdoor Accessibility”, The Back Forty Anthology (Summer 2003 Volume 9, No. 1) published by Hastings School of Law.
- **Wet Areas.** The model imposes a Review requirement on Improvements within Wet Areas because of the heightened environmental concerns. Note that including “stream access structures” implies that livestock would be permitted to enter Wet Areas to access the stream. Omit if that is not intended.

**3.03 Permitted Within Standard Protection Area**

- **No Standard Protection Area.** If there is no Standard Protection Area, elect one of the alternatives described in §3.02 above.
- (a) Permitted under Preceding Sections**
- **Purpose.** The model uses a cumulative approach so as to avoid repetition. Anything permitted in the Highest Protection Area is automatically permitted within the Standard Protection Area. Anything permitted in the Standard Protection Area is automatically permitted within the Minimal Protection Area.
- (b) Additional Improvements**
- **Interpretation.** Additional Improvements are limited in this subsection by the requirement that the Improvement be related to the uses and activities permitted within the Standard Protection Area.
  - **Example.** A detention basin or septic system required for residential use of the *Minimal* Protection Area would not be permitted in the *Standard* Protection Area under the model provision.
  - **Notice.** Some land trusts may want to add a requirement to notify Holder of material (for example, 500 square feet or more) increases in Impervious Coverage whether or not Review is required; for example:

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

- **Expansion of List.** Specifically add other Improvements that may be permitted consistent with Conservation Objectives for Standard Protection Area
- **Possible Expansion Items.**
  - (i) Septic system to service Improvements within the Minimal Protection Area if not reasonably feasible to install entirely within the Minimal Protection Area.
  - (ii) Utility Facilities to service Improvements within the Minimal Protection Area if not reasonably feasible to install entirely within Minimal Protection Area.

**(c) Limitations on Additional Improvements**

- **Height.** Limitations on Height of Improvements serve several purposes – first, is to protect the flight paths of birds and second is to preserve scenic views. Exceptions can be made for silos, windmills, etc. in appropriate cases where agricultural needs outweigh other concerns.
- **Impervious Coverage.** Impervious Coverage limitations are aimed primarily at protecting water resources and assuring continued availability of agricultural soils. Limitations per roofed structure are aimed at avoiding agri-business type installations and to minimize the intrusion of Improvements on scenic views.

**3.04 Permitted Within Minimal Protection Area**

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

**(a) Permitted under Preceding Sections**

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

**(b) Additional Improvements**

- **Interpretation.** Besides Residential Improvements, the rule established in the model allows Improvements within the Minimal Protection Area to support Agricultural, Forestry and other activities permitted within the Standard Protection Area and Highest Protection Area.
- **Example.** A Minimal Protection Area could serve as a staging area for Forestry uses in more restricted portions of the Property.
- **Example.** A Minimal Protection Area could be established to confine the location of additional Site Improvements needed to support outdoor recreation or camping uses within the Standard Protection Area.

**(c) Limitations on Additional Improvements**

- **Purpose.** The limitations listed in the model seek a balance between attaining the Conservation Objective of promoting compatible land uses and maintaining marketability and economic viability of the Property as a whole.
- The model is constructed so that the land trust may elect from several alternatives:
  - Limit the number of Improvements that can be used for residential purposes whether wholly or partly by limiting the number of Improvements that may contain Dwelling Units under §3.04(c)(i).
  - Limit intensity of residential use by limiting the number of Dwelling Units permitted within the Minimal Protection Area under §4.05(d)(i).
  - Limit both Improvements and use.

- Not limit numbers of Residential Improvements or Dwelling Units within the Minimal Protection Area. To exercise this election, delete both §3.04(c)(i) and §4.05(d)(i). Also delete the definition for “Dwelling Units” from Article VIII.
- **Intensity of Residential Use.** A limitation on Improvements in §3.04 is a limitation on Construction. The general rule of Applicable Law pertaining to servitudes is that a limitation on Construction is not a limitation on use and vice versa. The Holder may regulate the intensity of residential use (i.e., how many Dwelling Units are permitted per Minimal Protection Area or per Improvement within the Minimal Protection Area), under §4.05.
- **Height.** Height limitations are frequently imposed even in the Minimal Protection Area so as to protect Improvements from intruding on scenic views and to avoid endangering birds in flight. If a Minimal Protection Area is located within a scenic vista described in the Conservation Objectives, the Holder may want to impose a more restrictive Height limitation within portions of the Minimal Protection Area; for example, “No Improvements greater than four (4) feet in Height are permitted within \_\_\_ feet of the public right-of-way of \_\_\_\_.”
- **Impervious Coverage.** Impervious Coverage limitations may be added if the Minimal Protection Area is so large that limitation becomes necessary; however, the preferred alternative is to keep the Minimal Protection Area of a reasonable size such that, assuming a high degree of Impervious Coverage within the Minimal Protection Area, the overall Impervious Coverage limitation on the Property would, nevertheless, be in acceptable range. If an Impervious Coverage limitation is desired, tailor the limitation to the Conservation Objective furthered by it. For example, if the Minimal Protection Area is a farmstead and preservation of Agricultural uses is a key Conservation Objective, the Holder may want to add: “Impervious Coverage associated with Residential Improvements must not exceed a maximum of \_\_\_ square feet exclusive of driveways and walkways.”
- **Guideline for Acceptable Range.** Guidelines for federal funding programs limit Impervious Coverage on properties of greater than 50 acres to two (2%) percent and, for properties of 50 acres or less, a maximum of 1 acre but not greater than six (6%).
- **Limitation on Habitable Improvements.** Some land trusts find limiting Habitable Improvements (Improvements that can be used for human habitation) to be useful. Residential Improvements, the focus of the model, encompasses both Habitable Improvements and accessory residential structures. If a land trust desires to include limitations of this type, a definition of “Habitable Improvements” has been included in Article VIII of this commentary for this purpose. The particular limitations desired by the Holder are to be added under 3.04(c). For example:
  - (i) Not more than two Habitable Improvements (whether Existing Improvements or Additional Improvements) are permitted within the Minimal Protection Area.

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

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

##### **4.01 Prohibition**

- **Purpose.** This provision is intended to dovetail into the goals set forth in the Conservation Objectives; i.e., to reconcile increasing levels of human activity with the resource protection goals of the Highest Protection Area, Standard Protection Area and Minimal Protection Area. The emphasis on Sustainable

Agriculture and Sustainable Forestry is to insure that permitted activities are consistent not only with Conservation Objectives but also with the requirements of §1.170A-14(e) of the Regulations. Under subsection (2) of that section, the phrase “exclusively for conservation purposes” is interpreted to mean that a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a state program for flood prevention and control would not qualify under this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming, if under the circumstances, those uses do not impair significant conservation interests.

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

#### 4.02 Density Issues under Applicable Law

- **Purpose.** PALTA urges land trusts to consider and adopt policies concerning whether or not Conservation Easements entered into by the land trust are intended to limit density or intensity of use of other land not included in the Property. The provisions of §4.02 deal with these issues.

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

- **Purpose.** This provision is intended to preclude use of the Property to meet open space requirements or other land development ordinance criteria affording a bonus of some sort in exchange for retention of open space. The provision is also intended to prohibit Owners from profiting from the sale of sewage capacity (EDU’s) earmarked for the Property by transferring the EDU’s for use to increase development outside the Property.
- **Open Space Plan.** In appropriate circumstances, this provision will need to be altered when, in fact, an agreement to vest the Enforcement Rights in the Holder is being used in connection with a land-use approval so as to assure governmental agencies (prior to or as a condition of zoning relief) that open space will be protected in perpetuity. For example, a Township may require as a condition of approval of planned residential development that the developer enter into a conservation easement with a non-profit conservation organization to assure administration of the terms by conservation professionals. In those cases, the Township would, presumably, want Enforcement Rights as a Beneficiary and the Conservation Easement would be recorded prior to the developer turning over ownership of the community open space to the homeowners’ association.

##### (b) Transferable Development Rights

- **Issue.** Land trusts should consider whether or not, as a matter of policy, Conservation Easements entered into by the land trust extinguish transferable zoning rights created under a transferable development rights ordinance enacted under the authority granted by the Pennsylvania Municipalities Planning Code.
- **Zoning Rights.** A transferable rights ordinance allows the municipality to create a scheme that essentially issues licenses for a certain overall limit on density within the municipality; then designates some areas as receiving areas (i.e. targeted for development) and some areas as no development areas. Since there is a limited universe of licenses, a market for such licenses should develop and Owners within an area designated for no development should be able to recoup the negative impact of the restrictive zoning ordinance by selling their zoning density to owners within areas targeted for development.
- **Argument for Extinguishment.** A compelling argument for eliminating these rights can be made when the Conservation Easement is being purchased using public funds. Essentially, the Conservation Easement has been purchased once and ought not to be the subject of a subsequent sale. Whether or not a sale is involved, some land trusts adopt a policy of extinguishing transferable development rights on the grounds that the purpose of the Conservation Easement is to prohibit further development not only on the



Property but wherever else it may occur in the township by virtue of zoning rights granted under a transferable development rights scheme.

- **Argument against Extinguishment.** The potential economic benefit to the Owners by sale of zoning density may help to support Sustainable Agricultural or Sustainable Forestry activities and does no harm to maintenance of Conservation Objectives with respect to the Property subjected to the Conservation Easement.
- **Drafting Alternatives.** If a land trust decides not to extinguish transferable development rights, §4.02(b) can be deleted or replaced with an affirmative statement such as: “This Conservation Easement is not intended to extinguish any existing or future rights of Owners to sell or otherwise transfer zoning or density under a transferable development rights ordinance enacted under the authority of the Pennsylvania Municipalities Planning Code.”

#### 4.03 Permitted Within Highest Protection Area

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

##### (a) Existing Agreements

- Activities, uses and disturbances of resources that a Person has a right to do under an Existing Agreement are permitted as a matter of right anywhere within the Property. Land trusts should obtain title information to determine what rights Persons have to disturb natural resources within the Property by exercise of rights under Existing Agreements.

##### (b) Disturbance of Resources

- **Purpose.** The purpose of this section is to describe those activities that are consistent with the habitat protection and other Conservation Objectives for the Highest Protection Area.
- **Hazardous Conditions.** The provision in subsection (i) is intended to shield the Holder from liability for personal injury or property damage occurring on or about the Property by trees limbs falling or similar hazards. Land trusts who are concerned that this provision creates a loophole for unwarranted interference with trees and other resources should consult with their legal counsel and insurance representatives before changing the provision.
- **Review.** Except for the provision pertaining to hazardous conditions in subsection (i) (which should be permitted without Review to avoid liability), land trusts may use their discretion whether or not the land trust wants to condition other activities on “subject to Review”.

##### (c) Release and Disposal

- Releasing, depositing and disposal of materials are human activities prohibited within the Highest Protection Area except for fertilizers and brush piles. Some land trusts may want to expand the permitted list to include herbicides and biological agents, compost piles and piling of timber or other products derived from Sustainable Forestry activities permitted within the Highest Protection Area. The preferred alternative is to handle these items as “subject to Review” under subsection (b)(vii) so that the land trust is given the opportunity to determine whether the location and intensity of the activity is consistent with Conservation Objectives.

**(d) Recreational and Educational Uses**

- The model avoids using the phrase “passive recreational use” as there does not appear to be any consensus of opinion on the meaning of that phrase.
- Hunting, fishing and other uses listed in this paragraph are permitted activities anywhere within the Property. This does not mean that public access must be given for these purposes. If Owners and Holder desire to establish an easement or license vesting a public right of access for these activities, they must either do so by separate agreement or by adding a section to Article V granting public access. *See* commentary to Article V re: “Grant of Public Access”. Whether or not formally granted, Owners may want to permit public access for deer hunting purposes on an informal basis. Harvesting the deer herd may be desirable to keep deer population at a level consistent with Conservation Objectives to encourage and maintain the growth of healthy and biologically diverse woodland.

**4.04 Permitted Within Standard Protection Area**

- **No Standard Protection Area.** If there is no Standard Protection Area, and references to Standard Protection Area in Article I have been deleted, then the entirety of §4.04 may be deleted. If not, retain the caption for §4.04, delete the remainder of section, and insert “No Standard Protection Area has been designated within the Property”. *See* discussion in commentary to §3.01.

**(a) Permitted under Preceding Sections**

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

**(b) Agriculture, Forestry and other Disturbance of Resources**

- **Purpose.** The purpose for the limitations within the Standard Protection Area is to be sure that Agricultural, Forestry and other open space uses preserve quality and quantity of soil and water resources.
- **Grazing.** Rather than relying on the general limitation on intensity and frequency of use in §4.01, some land trusts prefer a specific standard to determine when permitted grazing use becomes overgrazing. Example: Add to subsection (i): “Not more than one Animal Unit per 1.5 acres of fenced pasture is permitted.” A definition of “Animal Unit” has been provided in Article VIII of the commentary for this purpose.
- **Equestrian.** Rather than relying on the general limitation on intensity and frequency of use in §4.01, some land trusts may add a provision requiring Review of equestrian uses involving public participation such as shows, clinics and competitive events.
- **Forestry.** The approach taken by the model is that Woodlands within the Standard Protection Area may be the subject of Sustainable Forestry but not converted to Agricultural Uses. Delete if the understanding is that Woodlands within the Standard Protection Area can be converted to Agricultural uses; for example, by clear cutting.
- **Soil Conservation Plan.** The model does not require Review of a Soil Conservation Plan since that is the one type of Resource Management Plan that is prepared under and must conform to the requirements of Applicable Law.

**(c) Release and Disposal**

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

**(d) Recreational and Open Space Uses**

- **Purpose.** The purpose of this section is a catch-all provision that allows (besides Sustainable Agricultural and Sustainable Forestry uses) a number of active, but non-commercial, open-space and recreational uses within the Standard Protection Area.

- **Vehicular Use.** Some land trusts may not want to be burdened by the obligation to enforce a restriction on vehicular use (such as all-terrain vehicles and snowmobiles). Others may want to restrict these uses for resource protection purposes.
- **Non-Commercial.** The term “non-commercial” as applied to recreational uses is required to qualify the grant of the Conservation Easement for exemption from estate taxes under §2031(c) of the Code.

#### 4.05 Permitted Within Minimal Protection Area

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

##### (a) Permitted under Preceding Sections

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

##### (b) Disturbance of Resources

- **General Rule.** The general rule of the model is that any trees, shrubs or herbaceous materials may be cut, mowed, cleared or removed within the Minimal Protection Area.
- **Specimen Trees.** The general rule needs to be modified if Specimen Trees have been identified within the Minimal Protection Area. Example: “No cutting or removal of Specimen Trees is permitted. Subject to Review, pruning of Specimen Trees in accordance with Best Management Practices is permitted.” A definition of “Specimen Trees” has been provided in Article VIII of the commentary for this purpose.

##### (c) Release and Disposal

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

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

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

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

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

## 5.01 Grant to the Holder

### (a) Grant

- **Purpose.** This section describes the necessary conditions to create a legally binding conveyance of an interest in real property whether or not consideration is present.
- **Unconditional and Perpetual.** The grant to the Holder must be both unconditional and perpetual to qualify as a charitable deduction under §1.170A-14(b)(2) of the Regulations. Conditional delivery is not sufficient; for example, if a signed document is delivered in escrow to a third party (a title company, for example) the document is not effective until released from escrow.
- **Recording.** Recording in the Public Records is necessary to make the covenants binding upon future owners who do not otherwise know about the terms of the Conservation Easement but the grant is complete once the document is signed and unconditionally delivered. Standard 9. Practice I. of S&P requires that all land and easement transactions are legally recorded at the appropriate records office according to local and state law.
- **Consideration.** The phrase “intending to be legally bound” is a valid substitute for consideration (that means it makes a promise to make a gift as enforceable as other contracts) under the Uniform Written Obligations Act, 33 Pa. Stat. §6.
- **Grant and Convey.** The words “grant and convey” have a special meaning in real estate law. When an Owner grants and conveys that automatically means that the Owner warrants that he or she owns the property (or interest in the property) being conveyed in fee simple and has a right to convey the property.
- **Conservation Servitude.** According to the Restatement (Third) of Servitudes, a “conservation servitude” is a servitude for conservation purposes. A servitude is promise that is binding upon future owners of the property. Conservation purposes 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.

### (b) Superior to all Liens

- **Subordination of Liens.** Subordination of any Lien affecting the Property as of the Easement Date is required for compliance with the Code and Regulations but, even if no charitable contribution is being claimed, Holder would want assurance that the Conservation Easement could not be extinguished by foreclosure of a Lien prior in right to the Conservation Easement. This would certainly be true in the case of a purchased Conservation Easement; the Holder would want the purchase price applied first to satisfy outstanding Liens. Standard 9 Practice H of S&P provides that mortgages, liens and other encumbrances that could result in extinguishment of the easement or significantly undermine the important conservation values of the property must be discharged or properly subordinated to the easement.
- **Code Requirement.** A Qualified Conservation Contribution must be enforceable in perpetuity under §170(h)(5)(A) of the Code. Under Regulation §1.170A-14(g)(2) this requirement is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee’s rights.
- **Time.** Owners should be advised of this requirement early in the process. Satisfaction of this requirement frequently requires substantial time and effort.
- **Form.** PALTA intends to make available a model form of subordination on its website [www.conserveland.org](http://www.conserveland.org). No particular form is required by the Regulations.
- **Acceptance of Lien.** A Holder could exercise its business judgment to accept a Conservation Easement under and subject to an outstanding Lien provided that no tax benefit was being sought. Some of the factors influencing the decision to take that risk would be: the relative value of the Lien to the value of the Property; the creditworthiness of the Owners; and the financial resources of the Holder if, in a worst

case scenario, Holder had to purchase the outstanding Lien so as to prevent extinguishment of the Conservation Easement upon foreclosure.

**ADDITIONAL SUBSECTION, IF APPLICABLE:**

**(c) Purchase Price**

- Add subsection (c) “Purchase Price” to §5.01 whenever the Conservation Easement is purchased in whole or in part.

The undersigned Owner or Owners acknowledge receipt of the sum of \_\_\_\_\_ (the “Purchase Price”) in consideration of the grant of this Conservation Easement to Holder. The Purchase Price has been paid in full to the undersigned Owner or Owners on the Easement Date.

**5.02 Rights and Duties of Holder**

- **Standard of Care.** Note that in this section the Holder not only has the right but also the obligation to perform the tasks listed below. Whenever a Person owes a duty to another, the Person has the obligation to perform the duty in good faith and with a standard of care that a reasonably prudent person would use. The following section (§5.03) lists rights that the Holder may but is not obligated to perform.
- **S&P.** Standard 2 Practice F. of LTA Standards requires that each Conservation Easement accepted by a land trust be reviewed and approved by the board of the land trust with timely and adequate information prior to final approval.

**(a) Enforcement**

- **Regulations.** The right of enforcement is both a right and a duty under Regulation §1.170A-14(g)(5)(D)(ii). The Holder must have a right to enforce the conservation restrictions by appropriate legal proceedings including, but not limited, to the right to require the restoration of the Property to its condition as of the Easement Date.
- **S&P.** Standard 6. Practice G. of S&P requires the land trust to have a secure and lasting source of dedicated funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements. Standard 11 Practice A. provides that the land trust must determine the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure those funds and has a policy committing the funds to this purpose. Standard 11. Practice E. requires the land trust to have a written policy and/or procedure detailing how it will respond to a potential violation of a conservation easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense.

**(b) Inspection**

- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires the Holder to have the right to enter the Property at reasonable times for the purpose of inspecting the Property to determine if there is compliance with the terms of the donation.
- **S&P.** Standard 11 Practice C. of S&P requires the land trust to monitor its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity. Inspection is also required prior to acceptance of a Conservation Easement under Standard 8. Practice E. of S&P.

**(c) Review**

- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires Owners to notify the Holder prior to the exercise of any reserved right, e.g., the right to extract certain minerals, which may have an adverse impact on the conservation interests associated with the qualified real property interest.

- **S&P.** Standard 11. Practice F. of S&P provides that the land trust must have an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.

**(d) Interpretation**

- **Regulations.** This duty is not specifically required under the Regulations; however, most land trusts perform these tasks in the ordinary course of administration of a conservation easement.
- **S&P.** Standard 11 Practice D of S&P requires the land trust to maintain regular contact with owners of easement properties. When possible, the land trust should provide landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures.
- **Alternatives.** Some Owners want to limit the universe of those Persons who can request administrative responses under this subsection to Owners and Persons approved by Owners. This is particularly if there is an obligation to reimburse the Holder's time in consultation with these Persons. Owners understandably do not want others to run up a bill on Owners' account without their knowledge and consent. On the other hand, the Holder frequently must spend considerable time in consultation with real estate agents and title companies when a property is changing ownership and ought to be compensated for that time. Consider adding: "If Persons other than Owners request the administrative determination under this section, the Holder is not entitled to reimbursement of administrative costs under this Article for such consultations unless approved by Owners".

**5.03 Other Rights of the Holder**

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

**(a) Amendment**

- **Policy for Amendment.** PALTA urges land trusts to formulate and adopt a policy on Amendment. PALTA intends to publish on its website ([www.conserveland.org](http://www.conserveland.org)) examples of Amendment policies adopted by land trusts in Pennsylvania. For an explanation of private benefit rules, refer to §501(c)(3) of the Code and associated Regulations.
- **S&P.** Standard 11 Practice I. of S&P provides that the land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

**(b) Signs**

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

**5.04 Review**

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

**(a) Notice to the Holder**

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

**(b) Notice to Owners**

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

**(c) Failure to Notify**

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

**(d) Standard of Reasonableness**

- The approach taken by the model is to require the Holder to act reasonably in discharging its duty to Review. The rationale for this approach is that courts are unlikely to sustain a “sole and arbitrary standard”. However, to avoid the risk that a court might hold the Holder to a standard of commercial reasonableness, the model provides a standard of “ecological reasonableness”.

**5.05 Reimbursement**

- The approach taken by the model is to correlate the obligation of Owners to reimburse with the obligations of the Holder to enforce, inspect, review and interpret under §5.02. Note that expenses under §5.03(a) entitled “Amendment” are not automatically covered. These should be handled as part of the Amendment agreement.

**ADDITIONAL SECTION, IF APPLICABLE:****5.06 Beneficiaries**

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

**(a) Land Trust Beneficiary**

- If a land trust will be named a Beneficiary in §1.07, the specific rights to be held by that land trust are to be listed in §5.06. The land trust relationship can range from “back-up grantee” (only the right of enforcement in (i) below is granted) to “co-holder” (all four rights listed below are granted).
- Model provision:  
Owners and Holder grant to the Land Trust Beneficiary the following rights and benefits with respect to this Conservation Easement:
  - (i) The right to exercise Holder’s rights and duties under this Conservation Easement should Holder fail to uphold and enforce in perpetuity the restrictions under this Conservation Easement.
  - (ii) A right of prior consultation with Holder when Owners request Review under Article V.
  - (iii) A right of prior approval of any Amendment of this Conservation Easement.
  - (iv) A right of prior approval of any transfer of Holder’s rights under this Conservation Easement.
- **S&P.** Standard 11. Practice H. of S&P provides that a land trust who regularly consents to being named as a backup or contingency Holder should have a policy or procedure for accepting conservation easements from other land trusts and has a plan for how it will obtain the financial resources and organizational capacity for conservation easements that it may receive at a future date.

**(b) State Program**

- If the DCNR has been named as a Beneficiary as described in §1.07 of this commentary, add the following provisions to §5.06 of the Conservation Easement:

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

**(c) County Program**

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

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

- (i) The right to exercise Enforcement Rights or to compel transfer of Holder’s Enforcement Rights to another Qualified Organization should Holder fail to uphold and enforce in perpetuity the restrictions applicable to the County Program Area under this Conservation Easement.
- (ii) A right of prior consultation with Holder when Owners request review under Article V.
- (iii) A right of prior approval of any Amendment of this Conservation Easement to determine whether the Amendment permits uses of the County Program Area not permitted under the County Program.



- (iv) A right of prior approval of any transfer of Holder's rights under this Conservation Easement with respect to the County Program Area other than to the Land Trust Beneficiary.
- **Accounting of Stewardship Funds.** At least one County wants to expand the right granted in subsection (i) above to include the following:
 

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

**(d) Local Program**

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

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

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

**ADDITIONAL SECTION, IF APPLICABLE:**

**5.07 Administrative Agent**

- **Land Trust as Administrative Agent.** If a land trust has been named as Administrative Agent as described in §1.08 of the commentary, add the following provision to Article V of the Conservation Easement:
 

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

**ADDITIONAL SECTION, IF APPLICABLE:**

**5.08 Grant of Public Access**

- **No Requirement for Public Access.** Public access is not required except when required as a condition of public grants funding acquisition of the Conservation Easement. A grant of public access can be helpful to support the public benefit test applicable to charitable donations of Qualified Conservation Contributions. The grant of this easement in the nature of a right-of-way may be to the Holder or one or more of the Beneficiaries.
- **Grant of Right-of-way to Holder or Beneficiary.** If the Holder and/or one or more of the Beneficiaries is to be granted a right-of-way to install a Public Trail within the Property as a condition of funding or otherwise; and if the right-of-way has not been established in the Public Records by a separate easement agreement between Owners and the Holder or Beneficiary, then, the grant can be incorporated into Article V by adding the following provision and by adding to the Conservation Easement the definitions for "Public Trail" and "Trail Area" set forth in Article VIII of this commentary. *See*, the Model Trail Easement Agreement and commentary available online at the PALTA website ([www.conserveland.org](http://www.conserveland.org)). If a Beneficiary (such as Township or County) is intended to be vested directly with the rights and

responsibilities of controlling usage of the Public Trail, then it may be preferable to establish the grant of public access by signing and recording a separate Trail Easement Agreement identifying Township or County as Holder.

- **Example of Provision Establishing Trail Area:**

By signing this Conservation Easement and unconditionally delivering it to Holder, the undersigned Owner or Owners, intending to be legally bound, grant and convey to Holder an exclusive easement and right of way over, under, and across the Trail Area in perpetuity for the purposes and subject to the limitations set forth below.

- (a) Purpose**

- The Trail Area may be used only for non-commercial recreational, educational and open-space purposes.

- (b) Limitations on Use**

- Use of and activities within the Trail Area must conform to the requirements of Article IV of this Conservation Easement. Access to the Trail Area by the general public is further subject to the following limitations:

- (i) The Public Trail may be used only for walking, horseback riding, cross-country skiing, nature study and the like. Motorized vehicles are prohibited except in the case of emergency or in connection with Construction and maintenance of the Public Trail, patrol of the Trail Area or by persons confined to motor-driven wheelchairs.
      - (ii) Use is limited to the hours between dawn and dusk.
      - (iii) Smoking or lighting of fires is prohibited.
      - (iv) Consumption of alcoholic beverages is prohibited.
      - (v) Trapping and hunting are prohibited.
      - (vi) Swimming and fishing are prohibited.
      - (vii) Holder may impose additional reasonable limitations upon the time, place and manner of use so as to regulate access to the Trail Area.

- (c) Limitations on Construction**

- Construction within the Trail Area must conform to the requirements of Article III of this Conservation Easement and is further limited as follows:

- (i) Holder must notify Owners prior to commencement of initial Construction of the Trail and prior to any relocation of the Trail within the Trail Area.
      - (ii) Owners are not responsible for costs associated with Construction and maintenance of Improvements within the Trail Area.

- (d) Reserved Rights of Owners**

- The easement for Public Trail granted to Holder in this Section is exclusive. This means that Owners have no rights to enter or use the Trail Area except to exercise rights accorded to the general public and except as specifically set forth below in this Section:

- (i) Owners may cut trees or otherwise disturb resources to the extent reasonably prudent to remove or mitigate against an unreasonable risk of harm to Persons on or about the Trail Area; however, Owners do not assume any responsibility or liability to the general public for failing to do so.
      - (ii) Owners reserve the right to install fencing, at Owners' expense, along the perimeter of the Trail Area subject to compliance applicable requirements of Article III.

- (iii) Owners may close public access to the Trail Area for public safety reasons from Monday after Thanksgiving through the month of December so as to reasonably accommodate hunting by or under control of Owners within the Trail Area.

(e) **Recreational Use Act**

The grant of public access under this Section is intended to be interpreted so as to convey to Owners and Holder all of the protections from liability provided by the Pennsylvania Recreational Use of Land and Water Act, 68 P.S. §477-1 et seq., as amended through the applicable date of reference, or any other Applicable Law that provides immunity or limitation of liability for owners or possessors who make their property available to the public for recreational purposes.

- **Purpose and Limitations.** The list is comprised of typical public trail uses but can be varied to reflect special circumstances. For example, bicycling may be appropriate on some trails but not on others; for example, on Steep Slopes within Woodland Area.
- **Limitations.** This is a list of limitations frequently requested by Owners to assure that use of the Public Trail will be compatible with their use of the Property. The list has not been approved or disapproved by the DCNR or any County.
- **Recreational Use Statute.** The Recreational Use Statute immunizes landowners from liability for personal injury (including death) occurring on or about the landowner's property to anyone who enters the property for recreational purposes so long as no charge is made for the entry and there is no willful or malicious failure to guard or warn against a dangerous condition.
- **Time, Place and Manner of Entry.** Examples of reasonable limitations on time, place and manner of entry would be prohibiting animals or requiring animals to be leashed; prohibiting picking flowers or cutting vegetation; prohibiting picnicking, alcoholic beverages or loud noise.

## Article VI. Violation; Remedies

### 6.01 Breach of Duty

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

### 6.02 Violation of Conservation Easement

- **Purpose.** This section sets forth the procedure for enforcement of the Conservation Easement.
- **Persons Responsible.** Do not alter this provision to create a connection between the violation and some act or failure to act by Owners. A violation is a violation whether or not caused by Owners. Tenants, invitees and trespassers can violate the restrictive covenants set forth in the Conservation Easement. It is up to Owners to maintain control over the Property; however, see commentary §6.07 captioned "No Fault of Owners".

(a) **Notice**

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

**(b) Opportunity to Cure**

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

**(c) Imminent Harm**

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

**6.03 Remedies**

- **Purpose.** The purpose of this section is to describe the specific remedies that the undersigned Owners and the Holder agree are appropriate if a violation should occur in the future.
- **Enforceability of Waivers.** Land trusts and their counsel need to keep in mind that not all promises of the undersigned Owners are binding upon future Owners of the Property who did not, themselves, make the promise. The rule developed by case law over many centuries required that the promise had to be about something pertaining to the land itself. For example, the restrictive covenants in Articles II, III and IV are unquestionably binding upon future Owners. On the other hand, it is highly questionable whether a court would enforce against future Owners waivers of procedural or constitutional rights just because the Person signing the Conservation Easement 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.
- **Arbitration; Mediation.** Provisions for arbitration and/or mediation are sometimes added to conservation easements; however, it is doubtful that the undersigned Owner can waive the constitutional right of future Owners to a trial by jury so requirements for mandatory arbitration or mediation may be of limited usefulness in a conservation easement. Land trusts who want to insert provisions for arbitration or mediation should consult with counsel and choose an effective and enforceable provision. For information on arbitration and mediation, consult the website of the American Arbitration Association ([www.adr.org](http://www.adr.org)) which provides a “Practical Guide to Drafting Dispute Resolution Clauses”.

**(a) Coercive Relief**

- **Purpose.** Relief in the nature of a court order forcing a Person to do or refrain from doing certain activity is a special remedy that under Applicable Law usually requires a showing that other relief will not suffice to make the Person harmed by the activity whole.
- **Restatement.** The Restatement recommends special treatment for a conservation servitude held by a governmental body or a conservation organization: it is enforceable by coercive remedies and other relief designed to give full effect to the purposes of the servitude without the showing otherwise required under Applicable Law.

**(b) Civil Action**

- This remedy is intended to furnish the Holder with a judgment for a specific sum of money that the Holder is entitled to collect from Owners. The judgment automatically creates a lien on the real property of Owners in the county in which the judgment is entered and can be enforced against any assets of

Owners. The amount of the judgment will be set by the court in the reasonable amount necessary to compensate the Holder for Losses, Litigation Expenses and other sums owing by Owners under the Conservation Easement.

**(c) Self-Help**

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

**6.04 Modification or Termination**

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

**(a) Compensatory Damages**

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

**(b) Restitution**

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

**(c) Application of Proceeds**

- Required by §1.170A-14(g)(6)(i) of the Regulations.

**6.05 Remedies Cumulative**

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

**6.06 No Waiver**

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

**6.07 No Fault of Owner**

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

**6.08 Multiple Owners; Multiple Lots**

- **Purpose.** To give some comfort to Owners that they are not responsible for violations on portions of the Property that they do not control.
- **Joint and Several.** Some forms provide for joint and several liability of Owners that could result in an unfair result under certain circumstances. For example, two Owners own two different lots within the Property. X is wealthy and Y has no assets but the lot. Y is in violation of the Conservation Easement. Under a provision that simply states "all Owners are jointly and severally liable", the Holder could collect the entirety of its Losses and Litigation Expenses from X.

**6.09 Multiple Owners; Single Lot**

- **Purpose.** This provision means that, if two Owners own the Property 50% each, the Holder can collect from either or both of the Owners even if one pays more than 50%. The paying Owner can collect from the non-paying Owner under the doctrine of subrogation, but it is not the Holder's problem.

**6.10 Continuing Liability**

- **Purpose.** Many forms have a requirement for prior notice of a transfer but there is really no remedy if the transferring Owner fails to do so. This provision is intended to provide a compelling incentive for the Owners to obtain a certificate of compliance prior to a transfer.
- **S&P.** Standard 11 Practice D. of S&P requires the land trust to establish and implement systems to track changes in land ownership.

**Article VII. Miscellaneous**

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

**7.01 Notices**

- The purpose of this Section is to provide a procedure for the giving of formal notices under the Conservation Easement.

**(a) Form of Notices**

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

**(b) Address for Notices**

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

**7.02 Governing Law**

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

**7.03 Assignment and Transfer**

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

**(a) By the Holder**

- **Purpose.** The limitations on the Holder's ability to transfer its interest are required under §1.170A-14(g)(6)(1) of the Code.
- **Notice.** Some Owners request prior notice and rights of approval as to the identity of the proposed transferee. Rights of prior notice may be given to Owners if the Holder desires to do so. That will give Owners the opportunity to contact the Holder for additional information and, perhaps, suggest other choices.
- **Example.** The Holder must notify Owners within 30-days prior to the assignment of the identity and address for notices of the Qualified Organization who has agreed to assume the obligations of the Holder under this Conservation Easement.
- **Rights of Approval of Transferee.** The question often arises whether Owners should be given a right of prior approval over the identity of the proposed transferee Qualified Conservation Organization. The rationale in support of that argument is that the Owner selected a particular Holder anticipating a good working relationship with that Holder. If Holder can transfer at will to any Qualified Conservation Organization, the expectations of Owner regarding that good working relationship may not be met. The argument against that position is that it is inappropriate to bind the Holder to continuing holding a Conservation Easement that may not be consistent with its mission in the future. Alternatives can be negotiated that provide a mechanism for Owners to object to a particular transferee and suggest another Qualified Conservation Organization willing to accept the transfer of the Conservation Easement.
- **S&P.** Standard 9. Practice L. of S&P provides that if the land trust transfers a conservation easement, the land trust must consider whether the new Holder can fulfill the long-term stewardship and enforcement responsibilities, ensures that the transaction does not result in a net loss of important conservation values and, for donated properties, ensures that the transfer is in keeping with the donor's intent.

**(b) By Owners**

- **Purpose.** Owners can freely transfer their interest in the Property; however, they can only transfer under and subject to the Conservation Easement whether or not specifically mentioned in the deed of transfer.
- **Restraint on Transfer.** Restraints on the free transferability of real estate are frequently not enforceable under Applicable Law. This is why the model does not purport to require 30-days prior notice to the Holder or issuance of a satisfactory Certificate of Compliance as an impediment to transfer. Instead see §6.10 Continuing Liability which is intended to serve as a powerful incentive for Owners to notify the Holder of the intended transfer and seek issuance of a compliance certificate.

#### 7.04 Binding Agreement

- **Purpose.** To set forth the understanding of Owners and the Holder that the Conservation Easement is not just the agreement of the undersigned Persons but binds and benefits all Persons who succeed to their respective interests.
- **Voluntary.** When a Conservation Easement is donated in whole or in part, it may be helpful to add a provision along the lines of the following to underscore that the donation was knowing and voluntary.

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

#### 7.05 No Other Beneficiaries

- **Purpose.** To limit the universe of Persons who may claim to have an enforceable right to object to any Amendment. Normally contracting parties may modify or terminate a contract by subsequent agreement. However, if a third party beneficiary has enforceable rights, the parties cannot do either without the beneficiary's consent if the beneficiary's rights have been vested.

#### 7.06 Amendments, Waivers

- **Purpose.** This provision has several purposes. First, it puts Owners on notice that they should never rely on an oral statement of an employee or other representative of the land trust that is contradictory to the terms of the Conservation Easement. Second, it puts land trusts on notice of their need to inform staff or other Persons performing monitoring or administrative duties of the limits of their authority.
- **Authorization.** Land trusts need to establish what authorization is needed for Amendments, waivers or consents.
- **Amendment.** Ordinarily, an Amendment needs to be approved by the Board or other governance committee that approves acceptance of the Conservation Easement. An Amendment is signed with all of the formalities required of the original Conservation Easement and is intended to be recorded in the Public Records. An Amendment permanently changes the terms of the Conservation Easement.
- **Consent or Waiver.** A discretionary consent or waiver (even if in writing) does not constitute an Amendment. It is granted for a particular purpose and only for a limited time due to extraordinary circumstances not contemplated under the Conservation Easement. For example, a forest fire or extended drought may necessitate Owners taking extraordinary measures not specifically permitted under the terms of the Conservation Easement. The terms of the Conservation Easement remain unchanged but the Holder waives its right to invoke its remedies under Article VI. A consent or waiver should always be memorialized in writing but it can simply be a letter from the Holder to Owners in response to a written request from Owners to the Holder requesting a waiver to permit specified activities for a specific period of time.

#### 7.07 Severability

- **Purpose.** If the provisions of a document are dependent on each other, then if one fails they all fail. The provision set forth in this section is intended to avoid application of that rule – if one provision fails (for example, the Holder is not permitted a self-help remedy under Applicable Law) the others remain in full force.

#### 7.08 Counterparts

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



## 7.09 Indemnity

- **Purpose.** The Property is not in the care, custody or control of the Holder. The Holder needs to be protected from claims that are the responsibility of the Owners in the first place so that Owners (or their insurer) will defend those claims without the need for the Holder to furnish its own defense and incur Litigation Expenses.
- (a) **Violation**
  - Among other liabilities under Applicable Law, this provision is intended to avoid Litigation Expenses in case the Holder is named as a potentially responsible party with respect to an alleged violation of environmental laws on or about the Property.
- (b) **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.
  - Sometimes the issue arises when public access is granted under Article V whether this indemnity extends to the Public Trail. A suggestion in this case is to add at the end: “other than claims as to which Owners are entitled to immunity under the Recreational Use Statute”.

## 7.10 Guides to Interpretation

- **Purpose.** The provisions of this section are intended to assist future readers of the document to interpret it correctly.
- (a) **Captions**
  - **Purpose.** This provision is self-explanatory; however, drafters need to be aware of the consequences of falling afoul of this provision. You cannot rely on a caption to convey meanings that are not in the text itself.
- (b) **Glossary**
  - **Purpose.** It is good practice to delete those terms provided in Article VIII that were not used in the Conservation Easement as modified to reflect particular circumstances. However, if that does not occur, the error should not be allowed to affect the interpretation of the document.
- (c) **Other Terms**
  - **Purpose.** These provisions avoid needless repetition of phrases.
- (d) **Conservation Easement Act**
  - **Purpose.** The purpose of this paragraph is to state the intention of the undersigned Owners to grant to the Holder all rights, powers and privileges accorded to the holder of a conservation easement under Applicable Law.
- (e) **Restatement of Servitudes**
  - **Purpose.** The purpose of this paragraph is to increase the likelihood that a court interpreting this Conservation Easement, should there be any doubt as to the correct interpretation of a provision, will look to the Restatement of Servitudes as the better view of the law applicable to conservation servitudes.

## 7.11 Entire Agreement

- **Purpose.** The written text of the Conservation Easement signed by Owners and the Holder is final and definitive. Whatever was proposed in previous drafts and said in previous negotiations is of no further consequence in interpreting the intentions of the parties.
- **Representations in Prior Agreement.** Holder may want to modify this Section if there are any representations, warranties or agreements contained in an engagement letter or donation agreement that are intended to survive the grant of the Conservation Easement.

**7.12 Incorporation by Reference**

- **Purpose.** The provision serves several purposes (1) it avoids needless repetition of phrases; and (2) it serves as a handy list to check which Exhibits need to be attached to the document.
- **Additions.** Add additional Exhibits that have been incorporated into the text. Some possibilities are:  
 Exhibit “\_\_\_” Public Policy Statements.  
 Exhibit “\_\_\_” Review Requirements  
 Exhibit “\_\_\_” Mortgage Subordination  
 Exhibit “\_\_\_” County Supplement  
 Exhibit “\_\_\_” Township Supplement

**7.13 Coal Rights Notice**

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

**Article VIII. Glossary**

- **Purpose.** To keep all defined terms in one Article for convenience of reference. All initially capitalized terms not defined in Article I should be defined in the Glossary not in the body of the Conservation Easement. Occasionally, exceptions to this rule are appropriate and, in that case, cross-reference the definition in the Glossary. The phrase “Other Defined Terms” may be substituted for “Glossary”, if desired.
- **Commentary.** Article VIII of the commentary includes all of the following:
  - Definitions of initially capitalized terms used in alternative provisions included in the commentary (but not in the model). Definitions of initially capitalized terms are intended to be legally binding on the parties to the document.
  - Definitions of terms used in the model (but not initially capitalized) are included in the commentary for informational purposes only. These are terms familiar to conservation professionals that may or may not be familiar to Owners or their counsel.
  - Commentary is “bulleted” so as to differentiate it from definitions.

**8.01 Access Drive(s)**

- See commentary §3.02(c).

**8.02 Additional Improvements**

- See commentary to Article III.

**8.03 Agricultural Improvements**

- See commentary to §3.03(b).

**8.04 Agricultural**

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

**8.05 Amendment**

- See commentary to §7.06.

**8.06 Animal Unit**

One thousand pounds (live weight) of any animal.

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

**8.07 Applicable Law**

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

**8.08 Beneficiary**

- See commentary to §1.07.

**8.09 Best Management Practices**

- See definition of Resource Management Plan. The phrase can also be used to provide a standard for activities permitted without a Resource Management Plan. See, for example, §4.03(b).
- The recommendations of the Natural Resource Conservation Service of the United States Department of Agriculture for key conservation practices are available online at <http://www.nrcs.usda.gov/technical/ECS/agronomy/core4.pdf>.
- The recommendations of the Pennsylvania Department of Environmental Protection for watershed management (including erosion and sedimentation requirements) are available online at:
- <http://164.156.71.80/WXOD.aspx?fs=0442d740780d00008000049b0000049b&ft=1>.
- Forest Stewardship Council principles and criteria are available online at [http://www.fscus.org/standards\\_criteria](http://www.fscus.org/standards_criteria).
- The Sustainable Forestry Initiative Standard 2005-2009 is available online at <http://www.aboutsfb.org/SFBStandard2005-2009.pdf>.
- The National Standards and Guidelines for the Forest Stewardship Program established by the United States Department of Agriculture (Forest Service) are available online at <http://www.fs.fed.us/spf/coop/library/FSP%20National%20Standards%20&%20Guidelines.pdf>. For implementation of standards and guidelines into a forest management plan, see “Planning for Forest Stewardship – a Desk Guide” available online at <http://www.fs.fed.us/spf/coop/library/Forest%20Stewardship%20deskguide.pdf>.
- The American Forest Foundation’s Standards of Sustainability for Forest Certification (2004-2008) are available online at [http://65.109.144.60/cms/test/26\\_34.html](http://65.109.144.60/cms/test/26_34.html).
- Best Management Practices for Pennsylvania Forests, prepared by the Best Management Practices Task Force under the auspices of the Forest Issues Working Group, Shelby E. Chunko, editor, is available online at <http://pubs.cas.psu.edu/FreePubs/pdfs/uh090.pdf>.

**8.10 Biological Diversity**

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

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

- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

### **8.11 Biological Integrity**

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

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

### **8.12 Buffer**

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

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

### **8.13 Barnyard Runoff Controls**

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

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

### **8.14 Code**

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

### **8.15 Conservation Easements Act**

- *See commentary to §7.10.*

### **8.16 Conservation Cover**

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

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

### **8.17 Conservation Cropping Sequence**

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

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

### **8.18 Conservation Tillage System**

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

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

### **8.19 Construction**

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

**8.20 Contour Farming**

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

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

**8.21 Cross Slope Farming**

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

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

**8.22 Default Rate**

- A factor of two percentage points over prime has been included in the definition in Article VIII; however, this can be varied by agreement of the parties. The purpose is to provide an incentive to prompt payment but not be so high as to constitute a penalty.

**8.23 Dwelling Unit**

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

**8.24 Ecosystem**

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

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

**8.25 Existing Agreements**

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

**8.26 Existing Improvements**

- This definition is sufficient if, in fact, there is an exhaustive list of Existing Improvements included in the Baseline Documentation. It is also acceptable for land trusts to list Existing Improvements here assuming the list is relatively short.
- Example: “Existing Improvements as of the Easement Date are as follows: \_\_\_\_.”

**8.27 Existing Lot**

- See definition of Subdivision in this Article as well as commentary §2.02.

**8.28 Forestry**

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

**8.29 Fragmentation**

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

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

**8.30 Habitable Improvements**

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

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

**8.31 Habitat**

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

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

**8.32 Height**

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

**8.33 Impervious Coverage**

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

**8.34 Improvement**

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

**8.35 Indemnified Parties**

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

**8.36 Invasive Species**

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

**8.37 Lien**

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

**8.38 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) (hereafter referred to in this commentary as *Negotiating Boilerplate*).

**8.39 Losses**

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

**8.40 Lot**

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

**8.41 Market Value**

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

**8.42 Native Species**

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

**8.43 Owners**

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

**8.44 Patch**

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

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

**8.45 Person**

- The definition avoids the need for repetitious phrases.

**8.46 Preferential Tax Program**

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

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

**8.47 Proportionate Value**

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

**8.48 Public Trail**

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

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

**8.49 Qualified Organization**

- This is the definition provided in the Code.

**8.50 Regulations**

- The definition includes future changes to the regulations.

**8.51 Regulatory Signs**

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

**8.52 Residential Improvements**

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

**8.53 Resource Management Plan**

- There are many ways to describe a Resource Management Plan. This definition emphasizes that the plan is, in the first instance, prompted by what the Owners want to do on their Property. The RMP is then developed so as to accommodate, to the extent consistent with Conservation Objectives, the Owners’ desires so long as the methodology complies with Best Management Practices.

**8.54 Review**

- *See* commentary to Article V.

**8.55 Review Requirements**

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

**8.56 Site Improvements**

- The definition is intended to encompass all kinds of Improvements that are not buildings.

**8.57 Soil Conservation Plan**

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



- The source of this definition is the DEP Manual for Agriculture.

#### **8.58 Specimen Tree**

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

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

#### **8.59 Steep Slope Areas**

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

#### **8.60 Subdivision**

- See commentary to Article II.

#### **8.61 Sustainable**

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

#### **8.62 Trail Area**

The area designated the “Trail Area” on the Conservation Plan.

- This definition is provided for use when a “Grant of Public Access” has been included in Article V. The Trail Area will usually be wider than the actual Public Trail to be established within the Trail Area. Sometimes the definition is varied to include the approximate width or maximum width of the Trail Area.

#### **8.63 Utility Improvements**

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

#### **8.64 Wet Areas**

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

#### **8.65 Woodland Areas**

- This definition can be varied depending upon whether or not hedgerows are important to Conservation Objectives. The term is used in §4.04 (b) to identify those portions of the Standard Protection Area that (a) if wooded as of the Easement Date, are intended to remain covered with tree canopy (even if timbered) and are not intended to be converted to Agricultural uses; and (b) if not wooded as of the Easement Date, are intended to remain uncultivated so as to permit succession to woodland.

### **Closing Matters**

- **Closing:** The phrase “INTENDING TO BE LEGALLY BOUND” is especially important where there is no consideration being given for the donation because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania. The term “consideration” means something of value given in return for a promise.

- **Witness/Attest:** It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Easement Date. *See* commentary to opening recitals of Conservation Easement.
- **Exhibits.** Check that all Exhibits referenced in the Conservation Easement are attached to the Conservation Easement before it is signed and recorded in the Public Records. *See* commentary to §7.12.

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