

Trail Easement Agreement & Commentary

a model document and guidance

Prepared by the
Pennsylvania Land Trust Association

with support from the

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F O U N D A T I O N

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www.conserveland.org

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Introduction

The *Pennsylvania Trail Easement Agreement & Commentary* provides trail and conservation groups, government and landowners with a state-of-the-art easement agreement. It includes an expansive commentary covering alternative and optional agreement provisions and the reasoning behind it all. The model uses plain language and careful formatting to improve readability. Users can easily customize the agreement to handle a variety of potential trail types and uses.

The model best suits scenarios involving the establishment of a public trail through a narrow corridor. Where a trail is only a small part of a broader endeavor to protect many conservation values on a property, the PA Conservation Easement (available at <http://conserveland.org>) might be the better model.

(Since the law governing *trail easements* and the like is far more settled than that of *conservation easements*, the trail easement model does not need much of the language necessary for conservation easements.)

Shortness versus Perpetuity

We reviewed many easements in developing this model. Some were one or two pages long. While such shortness has allure, it comes at a high price. Matters fairly easy to agree on and memorialize in an easement can become quite difficult if left unaddressed. Landowners, easement holders and the public are all left vulnerable to uncertainty and unanswered questions – questions that likely will be answered by the legal system at considerable cost.

Consequently, we sought to identify the key issues that should be addressed in any trail easement. We then aimed for brevity in handling the issues. The result is a six-page base document (including signature page). If no tax deduction for donation is being sought, the base document can be shortened to five pages.

Comments Requested

The Pennsylvania Land Trust Association labels this version a *beta release*, because the model has not yet received broad public scrutiny.

While the model sets a standard of excellence in trail easement drafting, we expect that extensive public scrutiny and feedback will lead to a number of improvements.

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.

The Future

In addition to seeking comments in preparation for a next edition, the Pennsylvania Land Trust Association plans to develop additional guidance and language for incorporating public access options into the Pennsylvania Conservation Easement.

PALTA also plans to implement a web-based document assembly program at <http://conserveland.org>. Users will be able to automatically generate customized trail 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.

Acknowledgements

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DRAFT COMMENTARY

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

General Instructions

- Users of the *Trail Easement Agreement* 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 *Trail Easement Agreement* and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The *Trail Easement Agreement* must be revised to reflect the specific circumstances of the particular project under the guidance of legal counsel.
- 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) calls for land trusts to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.
- In the following 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.
- **Disclaimer box.** Once a document based on the *Trail Easement Agreement* has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the applicable state, the box at the bottom of the signature page that begins "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.
- Check conserveland.org periodically for updates to the *Trail Easement Agreement & 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.

Opening Recital

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

Agreement Date

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

Undersigned Owner or Owners

- Insert names exactly as set forth in the deed by which the undersigned Owners acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into the Owners, it is good practice to recite the off-record facts to clear up the apparent gap in title. The customary practice is to recite these facts either in the Background section or at the end of the legal description attached as Exhibit “A”.
- All owners as of the Agreement Date must join in the Agreement to be effective under Applicable Law 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 Agreement, 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 Agreement, 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 organization that signed the document and a subsequent transferee who becomes the “Holder” but was never the “Grantee” of the original document. The second reason is that the terms Owners and Holder are more distinctive and recognizable than Grantor and Grantee whose similarity in spelling can sometimes be confusing.

- Other parties to the document can be added here, if desired; however, the model has been constructed to name an additional Beneficiary (if any) at the end of 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; Grant of Easement

- **Purpose.** The purposes of this Article are first 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, and second to grant and convey the easement and right-of-way to the Holder.
- **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

- **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).
- **Acreage:** Insert the number of acres comprising the Property.

1.02 Trail Area; Trail Plan

- **Description of Trail Area.** The Trail Area may require surveying if it is not feasible to establish it by reference to setbacks from existing survey points or natural features such as streams.
- **DCNR Funding.** If a grant from the Pennsylvania Department of Conservation and Natural Resources (DCNR) is used to acquire the trail easement, check with DCNR to determine whether the boundary of the Trail Area may be referenced using setback descriptions or whether a metes and bounds description will be required.
- **Stream.** If the easement extends a certain number of feet from a stream, drafters may want to note that the Trail Area shall move consistent with any movement of the stream.
- **Trail Plan.** This Section incorporates a separate graphic document (the “Trail Plan”) into the Agreement. Aerial photographs and topographical maps can be used to provide a graphic depiction of the Trail and Trail Area if there is no survey.

- **Plan Identification Information.** Since recorded versions of plans are sometimes reduced to the extent that not all the notes are legible, it is good practice to identify the plan with some specificity so that there is no question as to the plan that was intended as the Trail Plan. Example: “Attached as Exhibit “B” is a plan of the Trail Area prepared by ___ dated ___ entitled ___ plan number ___” or “Attached as Exhibit “B” is a plan of the Trail Area prepared by the Holder dated ___ based upon a survey prepared by ___ dated ___ entitled ___”. A full size copy of the plan is kept on file by the Holder.

1.03 Trail

- If the Trail Plan shows the location of the Trail, add: “The [*approximate*] location of the Trail within the Trail Area is shown on the Trail Plan.”

1.04 Grant of Easement and Right-of-Way

- **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 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 Agreement 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.
- **Exclusive Easement and Right-of-Way.** The model Agreement is written as an “exclusive” easement that gives Holder alone the right to use and possess the Trail Area, even to the exclusion of the Owners. This is the approach that would be preferred by most Holders (and many Owners, too, to completely “divorce” themselves from maintenance and liability concerns). In Article III, the model provides for rights reserved by Owners. The commentary to Article III provides additional examples rights that Owners may wish to reserve.
- **Non-Exclusive.** Owners may prefer, instead, to grant Holder a “non-exclusive” easement and retain full rights of ownership and possession in the Trail Area but allow Holder to construct and manage the Trail. In this case, the word “exclusive” in §1.04 (“Grant of Easement and Right-of-Way) should be changed to “non-exclusive”; Article II should be retitled “Limitations on Holder”; Article III should be retitled “Limitations on Owners”; the sections listing Owner’s reserved rights in Article III should be deleted; and the following paragraph inserted after the caption of Article III:

The easement granted to Holder under this Agreement is non-exclusive. Owners agree to be bound by the following limitations:

Drafters would then list in Article III negotiated provisions limiting Owners’ rights, such as:

Owners may not enter the Trail Area when construction and maintenance activities could present a danger.

Owners may not install fencing that impairs scenic views from the Trail.

Owners may cut trees or otherwise disturb resources in the Trail Area only to the extent reasonably prudent to remove or mitigate against an unreasonable risk of harm to Persons on or about the Trail Area.

Owners may not impede access to or discourage use of the Trail Area except for the following reasons:

- (1) for forestry activities on the Property, for not more than fourteen (14) days every five (5) years; and Owners must immediately correct any damage to the Trail and Trail Area resulting from the timber harvest.
- (2) for public safety reasons from the Monday after Thanksgiving through the month of December so as to reasonably accommodate hunting by or under control of Owners within the Trail Area.
- (3) if the public's use of the Trail Area materially interferes with Owners' quiet enjoyment of the Property on a frequent, continuous basis, and measures taken by Holder do not, in Owners' reasonable opinion, sufficiently abate the interference, Owners may, after two (2) weeks written notice to Holder, close the Trail Area for a period not to exceed two (2) weeks to enable Holder to take corrective action.

Holder may not construct or grant rights-of-way, easements of ingress or egress, driveways, roads, utility lines, or other easements into, on, over, under, or across the Trail Area *that would materially impair the recreational use of the Trail Area. [OR: without the prior written permission of Holder. Holder shall not unreasonably withhold or condition Holder's permission, provided that granting permission would not materially impair the recreational use of the Trail Area and is otherwise not inconsistent with the purposes of this Agreement.]*

1.05 Purchase Price

- Delete this section if the easement is donated in full.

1.06 Liens and Subordination

- **Code.** A qualified conservation contribution must be enforceable in perpetuity under §170(h)(5)(A) of the Code. Under Regulation §1.170A-14(g)(2) this requirement is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.
- **Subordination of Liens.** Even if no charitable contribution is being claimed, Holder would want assurance that the trail easement could not be extinguished by foreclosure of a lien prior in right. 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.
- **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. No particular form is required by the Regulations.
- **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.

1.07 Existing Agreements

- **Existing Agreements.** If there are existing agreements affecting the Trail Area, they can be referenced in this sub-section and further described in an attached exhibit and added to §5.09 ("Incorporation by Reference").

- Existing agreements are entitled to priority over the easement to be executed under Applicable Law.
- Organizations should obtain title information to determine what rights Persons have to disturb the Trail Area by exercise of rights under existing agreements. 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.

1.08 Beneficiary

- **No Beneficiary.** The model Agreement is written as if no Beneficiary has been named at the time of execution. If a conservation organization or a state or local governmental entity is intended to be a Beneficiary, the statement in the model is to be deleted and a sections identifying each Beneficiary are to be added.
- **Acceptance.**
- **Adding a Beneficiary Later.** Should the parties want to name a Beneficiary in the future, all that is needed is a simple amendment identifying one of more Beneficiaries and specifying their rights.
- As shown in the text below, the rights given to a Beneficiary can be customized to the circumstance. Sometimes it will be desirable to give the Beneficiary many rights, sometimes one or two rights will be more appropriate.

(a) _____ Beneficiary

- Here is a generic Beneficiary provision that can be customized for many different situations:
 _____, a Qualified Organization (the "Land Trust/State/County/Township Beneficiary") is a Beneficiary of this Agreement. Owners and Holder grant and convey to the "Land Trust/State/County/Township Beneficiary" the following rights with respect to this Agreement: *[select all that apply]*
 - (i) The right to compel transfer of Holder's rights and duties under this Agreement to another Qualified Organization should Holder fail to make the Trail available for public recreation.
 - (ii) The right to exercise Holder's rights and duties under this Agreement should Holder fail to make the Trail available for public recreation.
 - (iii) The right of prior approval of any amendment of this Agreement.
 - (iv) The right of prior approval of any transfer of Holder's rights under this Agreement.
- If there is only one Beneficiary, the words "Land Trust, State, County, or Township" can be dropped and the entity can simply be called the "Beneficiary."
- The specific rights set forth in the Agreement supplement rather than replace the rights and remedies of state or local agencies under applicable programs and grant contracts. For example, if a grant contract requires prior approval by county of any amendment to the Agreement, then the land trust is contractually bound to seek county approval whether or not county has recorded an acceptance.

(b) Pennsylvania Department of Conservation and Natural Resources

- If DCNR has provided funding to acquire the easement in whole or in part, insert the following provision:

This easement was either acquired with, or donated as a match for, funds provided by the Pennsylvania Department of Conservation and Natural Resources under the [Environmental Stewardship and Watershed Protection Act, the act of December 15, 1999, P.L. 949, No. 68, as amended (27 Pa.C.S.A. §§ 6101 et seq.) OR Keystone Recreation, Park and Conservation Fund Act, the act of July 2, 1993, P.L. 359, No. 50 (32 P.S. §§ 2011 et seq.) OR other grant

legislation]. This easement is a conservation servitude over the property in perpetuity and as such is binding on all current and subsequent easement holders and their personal representatives, successors and assigns. The Department and its successors have the following rights with respect to this easement: a) the right to compel transfer of the easement holder's rights and duties 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.

- **Multiple State Departments.** A single easement could be used as a funding mechanism for several programs. For example, DCNR could fund a trail easement for recreational purposes, and the Pennsylvania Fish & Boat Commission could provide funds for fishing access. Each government agency would be a Beneficiary entitled to the rights specified for that Beneficiary.
- **County/Township Supplement.** Some County or Township funding programs require certain terms to be incorporated into each conservation or trail easement. If an exhibit is to be incorporated, add the following to §1.08 and add the County or Township Supplement to the list of exhibits incorporated into the Agreement under §5.09, ("Incorporation by Reference"):

Attached as Exhibit "___" (the "County/Township Supplement") is a rider to this Agreement containing certain provisions that must be incorporated into this Agreement as a condition of funding the County/Township contribution under the County/Township program. The terms and provisions of the County/Township Supplement supersede, to the extent of any inconsistency, the provisions of this Agreement.

- **Township as "Co-holder."** Act 153 of 1995, as amended by Act 4 of 2006, authorizes school districts, townships and counties to exempt certain 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. The millage freeze in Act 153 applies to municipally-eased properties that provide "open space property benefits," which include without limitation "the protection of ... planned ... recreation ... sites; [and] ... the protection ... of scenic resources." Thus, whether or not the Township contributes acquisition funding for the trail easement, it may be desirable to appoint the Township as a Beneficiary for purposes of qualifying the Township as a "co-holder" under preferential tax programs which may reduce Owners' property taxes.
- If the Township agrees to be named as a Beneficiary for those purposes, add the following provision:

As a Beneficiary of this Agreement, the Township agrees to be a co-holder of the easement granted under this Agreement for purposes of qualifying this Agreement for 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 or trail easement. As of the Agreement Date, examples 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.

1.09 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 administering this Agreement. Owners and Holder acknowledge that the duty of Administrative Agent is to provide inspection and review services in the ordinary course; to communicate decisions of Holder with respect to items needing interpretation; and to perform such other Trail-related construction and maintenance services as are requested by Holder under the terms of a separate agreement between Holder and Administrative Agent.

Article II. Limitations

2.01 Limitation on Activities and Uses

- **Purpose.** The introductory language after the heading of Article II limits the broad grant of the exclusive easement and right-of-way to Holder. Sub-section (a) limits the purposes for which the Trail Area may be used. Sub-section (b) imposes time, place and manner restrictions on use of the Trail Area by the general public. Sub-section (c) limits Holder’s ability to disturb vegetation and ground. Sub-section (d) provides Owners with certain assurances relating to Holder’s construction of the Trail.
- **Non-Commercial.** The term “non-commercial” as applied to recreational uses in sub-section (a) is required to qualify the grant of the easement for exemption from estate taxes under §2031(c) of the Code.
- **Other Uses.** The parties may want to add bicycling, mountain biking, in-line skating, fishing or other activities to §2.01(b)(i). Conversely, they may want to delete a use listed in the model.
- **Snowmobiles.** The parties may want to allow other uses conditionally: “Snowmobiles may be permitted within the Trail Area only by mutual agreement of Holder and Owners.”
- **Disturbance of Resources.** The parties may also want to allow: “Seasonal piling of brush and other vegetation by the Holder as reasonably necessary to accommodate maintenance of the Trail Area.”

2.02 Limitation on Improvements

- **Existing Improvements.** If the Trail Area contains existing improvements, insert a sub-section entitled “Existing Improvements” and list the improvements, noting that they are further illustrated on the Trail Plan (and in the Baseline Documentation, if any). Include in the Agreement guidance on what additions/replacements may be made and which party is responsible for the existing improvements.
- **Trail.** To avoid misunderstandings, it is good practice to mark the Trail Area on the ground prior to the Agreement Date and to install permanent markers prior to construction of the Trail. If the Trail Area is wide and the Owners want to have a buffer area between the edge of the Trail Area and the Trail, language can be added as follows:

The Trail must be located at least ____ (##) feet from the Trail Area boundary, excepting where the Trail enters and exits the Property.

- The intention to connect the Trail to a larger trail system in the future can be added to this sub-section.
- **Surfacing Material.** If one purpose of the trail is to provide a wilderness experience, surfacing options should be limited. Consider adapting the following language from the Wisconsin Dept. of Natural Resources standard easement:

A primitive hiking trail is one that blends with the natural surroundings and follows the natural contours of the land. It is made of local natural materials, with native surface tread

(mineral, soil, grass, or rock). Asphalt, limestone, gravel or other imported, non-naturally occurring, non-site specific material is not acceptable tread material. Trail facilities such as bridges or boardwalks are for site protection only. The tread of a primitive trail should not exceed 24 inches wide.

- **Other Material.** Non-porous surfacing that may be required by “Applicable Law” would encompass the Americans with Disabilities Act.

Article III. Reserved Rights of Owners

Additional Provisions: The following content may be added to Article III as desired by the parties:

- **Rights-of-Way.** If Owners want to retain the right to construct a crossing through the Trail Area, this specific right can be reserved in Article III:

Owners may construct, develop or maintain one driveway, not to exceed ___ (##) feet in width, from the public right-of-way of ___ Street to the Property which crosses the Trail Area in a location mutually agreed upon by Owners and Holder. Owners must submit a plan to Holder for approval at least 60 days in advance of construction. Holder’s approval of plans must not be unreasonably withheld. Holder’s approval or objection must be made within thirty (30) days of receipt of the plans or the plans will be deemed approved.
- Owners can reserve the general right to grant easements or crossings subject to Holder’s determination that it does not harm the Trail Area:

Except as specifically permitted under this Agreement, no rights-of-way, easements of ingress or egress, driveways, roads, utility lines, or other easements shall be constructed, developed or maintained into, on, over, under, or across the Trail Area without the prior written permission of Holder. Holder shall not unreasonably withhold or condition Holder’s permission, provided that granting permission would not materially impair the recreational use [*or scenic values*] of the Trail Area and is otherwise not inconsistent with the purposes of this Agreement.
- **Agricultural and Forestry Access.** To the extent that Owners engage in agricultural and/or forestry use of the Property, drafters may want to add:

Holder will consult with Owners to make provisions for access for agricultural or forestry equipment across the Trail Area at such locations as Owners may reasonably request. Owners must immediately correct any damage to the Trail and Trail Area resulting from such access.
- **Forestry in Trail Area.** If the Trail Area is wide, Owners may want to retain the right to timber it. Consider adding the following provision to the Agreement:

Owners may close public access to the Trail Area for not more than fourteen (14) days every five (5) years for forestry activities. Owners must immediately correct any damage to the Trail and Trail Area resulting from timber harvest.
- If the Holder wants more control over the timber harvest, add the following before the clause noted above:

Owners may engage in forestry activities in accordance with a resource management plan approved by Holder and designed to foster and sustain healthy forest and healthy soil. Owners must submit a timber harvest plan to Holder for approval at least sixty (60) days in advance of timber harvest for financial profit or at a scale that alters the character of the woodland. Holder’s approval of plans must not be unreasonably withheld. Holder’s approval or objection must be made within thirty (30) days of receipt of a plan or the plan will be deemed approved.
- **Agriculture in Trail Area.** If the Trail Area is wide, Owners may want to retain the right to conduct agricultural activities there. Consider adding the following provision to the Agreement:

Owners may plant and harvest crops and engage in other agricultural activities in the Trail Area so long as it does not materially impair the Trail and occurs at least ____ feet from the Trail centerline; provided, however, that Holder is not responsible for any damage to such crops by exercise of Holder's rights under this Agreement.

- **Fencing.** Although the model provides the Owners the right to install fencing at their expense, in some situations it may be more equitable for Holder to construct a privacy fence at its expense.
- **Fence Height.** The four-foot height limitation is specified for example purposes. A taller or shorter fence may be more appropriate to a particular situation.

Article IV. Federal Tax Items

- **No Charitable Deduction.** As indicated in the model, if there is no donation or if the undersigned Owner or Owners will not be pursuing federal tax benefits for the donation, the content below the caption of this Article can be deleted and replaced with the following:

The undersigned Owner or Owners and Holder confirm that the grant to the Holder of the easement under this Agreement is not intended to be a qualified conservation contribution under the Internal Revenue Code of 1986, as amended through the applicable date of reference.

4.01 Qualified Charitable Contribution

- **Purpose.** All of the requirements for qualification as a qualified conservation contribution under the Code have been merged into this Section.
- **Mandatory.** All of the requirements *must* be satisfied in order to qualify for charitable deduction.
- **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 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.
- **Bargain Sale.** In the case of a bargain-sale of the easement, the donation has been made "in part."

4.02 Definitions of Code and Regulations

- **Definition.** The words "Code" and "Regulations" are defined in this Section and not with the other capitalized terms in Article V because these definitions are necessary only if a charitable deduction is being sought.

4.03 Public Benefit

- **Summary of Policy Statements as Exhibit.** If the public policy statements are lengthy, they may be attached to the Agreement as an exhibit rather than including this material in the body of the Agreement. If this approach is taken, 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 easement granted under this Agreement.

- **PALTA Website.** PALTA intends to publish on its website (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.

4.04 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 in the Trail Area or the lack of commercial feasibility at the time of the contribution of surface mining the mineral interest.

4.05 Notice Required under Regulations

- This sub-section is important where the Agreement gives the Owners reserved rights that may negatively impact use of the Trail Area by the general public (e.g., timbering or excavation), or where the Trail Easement is written to be non-exclusive so that the Owner retains general rights of ownership and possession. The Code requires the Owner to notify Holder of the exercise of Owner's reserved rights that may harm the Trail Area's "conservation interests" (or, presumably, in the case of a deductible trail easement, the exercise of reserved rights that would harm the Trail Area's value for public recreational purposes). The *notice* required of Owner under this Section would not satisfy a provision that might be written into the Agreement requiring *review and approval* by Holder before any potentially harmful right could be exercised.

4.06 Baseline Documentation

- **Purpose.** The purpose of this sub-section is to incorporate the Baseline Documentation into the text of the Agreement even though it is not attached to the recorded documentation. Because it is not attached, it is important that the definitive baseline report be signed by the undersigned Owners and the Holder with a notation identifying the report as "the Baseline Documentation referred to in the Agreement between Owners and the Holder dated ____."
- **Necessity.** Baseline documentation is required for compliance with the Code and Regulations (see §1.170A-14(g)(5) of the Regulations).
- **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 the Owner at closing.

- **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 Trail Area as of the Agreement 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 Agreement 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 the Trail Area and dated and signed by the photographer. Other items could include documentation showing how the Trail fits into the municipal or county trail plan.

4.07 Trail Area 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.

4.08 Qualification under §2031(c) of the Code

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

Article V. Miscellaneous

5.01 Indemnity

- **Purpose.** Unlike a typical conservation easement where the Holder does not have care, custody or control of the eased property, Holders of an easement granting the public a right of access across Owners’ property generally assume management responsibilities for the Trail Area (and this Agreement is drafted with that assumption). The Owners need to be protected from claims that are the responsibility of the Holder so that Holder (or its insurer) will defend those claims without the need for the Owners to furnish their own defense and incur Litigation Expenses.

5.02 Recreation Use of Land and Water Act

- The Recreation Use of Land and Water Act states that: "an owner of land who ... invites or permits without charge any person to use such property for recreational purposes does not thereby ... [a]ssume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons." However, an owner may be open to liability "[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" or "in any case where the owner of land charges [an admission price or fee to] the person or persons who enter or go on the land for the recreational use thereof". Pennsylvania Recreation Use of Land and Water Act, 68 P.S. §§ 477-4 and 477-6.
- When the trail at issue is a Rail Trail acquired under the Rails-to-Trails Act, the following limitation on liability also applies: "an owner or lessee who provides the public with land under this act shall not ... become liable for any injury to persons or property caused by an act or an act of omission of a person who goes on that land." However, an owner may be open to liability "if there is any charge made or usually made for entering or using the trail[.] Pennsylvania Rails to Trails Act, 32 P.S. § 11.
- If the subject trail is a Rail Trail acquired under the Rails-to-Trails Act, the caption of this Section could be replaced with “Pennsylvania Rails-to-Trails Act; Recreation Use of Land and Water Act” and the following language could replace that in the model:

This Agreement is intended to be interpreted so as to convey to Owners and Holder all of the protections from liability provided by the Pennsylvania Rails to Trails Act, 32 P.S. § 5611 et seq., and the Pennsylvania Recreation 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 property available to the public for recreational purposes.

5.03 Amendment

- **Amendment.** An amendment ordinarily needs to be approved by the Board or other governance committee that approves acceptance of the easement. An amendment is signed with all of the formalities required of the original Agreement, is intended to be recorded in the Public Records, and permanently changes the terms of the Agreement. PALTA urges land trusts to formulate and adopt a policy on amendment. PALTA intends to publish on its website (www.conserveland.org) examples of amendment policies adopted by land trusts in Pennsylvania.
- **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.

5.04 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.

5.05 Assignment and Transfer

(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.
- **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 continue holding an 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 Agreement.
- **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 Agreement, whether or not specifically mentioned in the deed of transfer. This provision also sets forth the understanding of Owners and the Holder that the Agreement is

not just the agreement of the undersigned Persons but binds and benefits all Persons who succeed to their respective interests.

5.06 Severability

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

5.07 Entire Agreement

- The written text of the Agreement signed by Owners and the Holder is final and definitive. Whatever was proposed in previous drafts and said in previous negotiations is of no further consequence in interpreting the intentions of the parties.

5.08 Definitions of Capitalized Terms

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

5.09 Incorporation by Reference

- **Additions.** Add additional exhibits that have been incorporated into the text. Some possibilities are:
 - Exhibit “___” Public Policy Statements.
 - Exhibit “___” Review Requirements [where certain actions on the part of Owner or Holder need review or approval by the other party]
 - Exhibit “___” Mortgage Subordination
 - Exhibit “___” County/Township Supplement
 - Exhibit “___” Existing Agreements

Closing Matters

- **Closing:** The phrase “INTENDING TO BE LEGALLY BOUND” is especially important where there is no consideration being given for the donation because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania. The term “consideration” means something of value given in return for a promise.
- **Witness/Attest:** It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.
- **Signature lines.** Add as many signature lines as are necessary to accommodate the number of Owners and Beneficiaries who will be signing the Agreement. It is good practice to sign in black ink rather than blue ink so that signatures are legible on microfilm or microfiche.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Agreement Date. *See* commentary to opening recitals of Agreement.
- **Exhibits.** Check that all exhibits referenced in the Agreement are attached before it is signed and recorded in the Public Records.

Disclaimer Required by IRS Rules of Practice

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