

Trail Easements



A landowner may convey to another person the rights to create a trail, open it for public use and maintain it without the owner giving up ownership and enjoyment of the land through which the trail passes.

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Introduction

No Loss of Ownership

By donating or selling a trail easement to a trail group, land trust, municipality, authority or other charitable or governmental entity (the "holder" of the easement), landowners ("owners") may make their land available for a public trail for walking, running, bicycling or other recreational or transportation purposes without having to subdivide the land or lose ownership and control of the land.

Easement Document Sets the Terms

In the trail easement document that establishes the easement, the owners and holder may set the terms governing how the trail is built, maintained and used. For example, the terms may address matters such as:

- How wide is the trail? What is its location?
- Are bicycles allowed? Horses? Picnicking?
- May bike racks or trash cans be installed?
- Will landscaping be installed to discourage people from leaving the trail?
- What are the hours of trail operation?

The trail easement document may also clarify the owners' rights and other matters, addressing such questions as:

- May the owners temporarily close the trail for hunting? Timber harvests? Manure spreading?
- Who is liable if there is an accident?

A Tool that Stands the Test of Time

After being signed by both the owners and the holder, the easement document is recorded in the county recorder of deeds office to ensure that future owners are informed of the easement. The easement, which is an interest in real property, remains in force even if the land subject to the easement changes hands.

The laws underpinning trail easements are well established. Numerous charitable organizations and governments have successfully used trail easements to provide trail experiences to the public.

The Ingredients

The creation of a trail easement mainly requires a meeting of minds between the owners and the holder as to the character of the intended trail and the rights each will hold in the land. Then the understanding they have reached is incorporated into an easement document prepared or, if a model document is used, at least reviewed by an attorney to ensure that the document is customized to the particular facts and circumstances of the project.

Model Easement Documents

The Pennsylvania Land Trust Association has created model documents¹ for securing land for public trails. The three models are described and compared and contrasted below. (The models are used for examples throughout the text, but the guide covers issues common to all trail easements, whether or not they utilize one of the models.)

Model Trail Easement Agreement

The [Model Trail Easement Agreement](#) (the “Model”), now in its 3rd edition, has seen adoption by organizations in and outside of Pennsylvania since the Model’s debut in 2007. It is the generally preferred model because it resolves, in the easement document, many of the questions that can arise over time when owners and holder have interests in the same land. The model is designed to minimize potential future conflict by addressing head on those areas where misunderstandings and disagreements are most likely to occur over the years, absent direction from the document.

¹ The Pennsylvania Land Trust Association develops and maintains model documents for the benefit of owners, charitable organizations, government and their respective legal counsels. These models are periodically updated to reflect user experiences and advances in the field. The most recent editions are posted at ConservationTools.org. A commentary accompanies each model and explains the reasoning behind each provision, provides alternative and optional language, and includes guidance on applying the model to particular circumstances.

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

Model Grant of Trail Easement

The [Model Grant of Trail Easement](#) (the “Short Form”) is pages shorter than the [Model Trail Easement Agreement](#). This brevity is the principal advantage of the Short Form—useful for when trail organizations encounter owners whose paramount concerns are the length and complexity of the easement document. However, before deciding to use it, owners and holder should understand the issues that are not addressed in it—issues that may arise when two entities hold concurrent interests in the same real estate—and the potential consequences of omitting that material.

If owners or holder decide that the [Model Grant of Trail Easement](#) does not address all of the issues that they want to address but brevity remains a paramount consideration, then they generally will be better served by selectively deleting material from the [Model Trail Easement Agreement](#) rather than trying to tack on provisions to the Short Form.

Model Grant of Conservation Easement

If the owners and holder wish to conserve the land through which the trail is to pass, then a grant of conservation easement could be used to establish a trail easement as well as a conservation easement. The commentary to Article V of the [Model Grant of Conservation Easement and Commentary](#) (the “CE Commentary”) includes at §5.07 a provision (the “CE Trail Provision”) that, when added to the conservation easement document, grants a right of way to the holder of the conservation easement for a public trail. The section below entitled “Achieving Conservation and Public Access” reviews the advantages and disadvantages of including a trail easement within a conservation easement as contrasted with achieving conservation and public access purposes via two separate legal documents.

Legal Basics

Right to Use for Easement Purposes

An easement is a right to use a certain area of land for a particular purpose. Once an easement is granted, the owners are free to use the land subject to the easement (the “easement area”) but not for purposes inconsistent with the easement purpose. To ensure that the owners and the holder mutually understand which uses are, or are not, consistent with easement purposes, the easement document often includes provisions (called covenants) aimed at resolving potential disputes before they arise.

Easement and Covenants Running with the Land

The easement and the covenants *run with the land*. They don’t end with a change in land ownership. Both the owners that grant the easement and all future owners of the easement area are bound to observe the holder’s rights under the easement document. When the owners sign the easement document and file it in the public records, the holder has the right (whether the current owners like it or not) to enter or (if allowed in the easement document), permit others to enter the easement area *but nowhere else* and only for proper easement purposes *but no other purposes*. *Purpose* and *location* are the key components of any easement. Another hallmark of an easement (unlike a lease) is that the holder has no rights to possess or occupy the property—only the right to use it for the purposes and in the location set forth in the document creating the easement.

State Law

Each state has its own laws and practices. While the content of this guide is generally applicable across the country, the guide is written in the context of Pennsylvania law. Whether in or outside Pennsylvania, readers should not rely on it for legal guidance; rather, they should consult with their legal counsel before applying its content to their particular facts and circumstances.

Easement Location

Location Specified

Usually, an easement document—whether or not for public trails—identifies the easement area with specificity. Owners want to know that their control remains fully intact outside the easement area; holders want to avoid any dispute about where they can exercise their easement rights. Specificity may be achieved in a variety of ways including the following:

- The easement document may incorporate a plan or map showing the location and dimensions of the easement area on a boundary survey, topographical map, aerial photographic or other graphic description of the property.
- The easement document may provide a [metes and bounds](#) description of the easement area. The metes and bounds description could be created using a traditional survey or by using computer software that uses GPS (Global Positioning System) data. (Land descriptions using GPS coordinates alone have not achieved general acceptance by title insurers or public recording offices.)
- The easement document may include both a plan and a metes and bounds description. (Oftentimes this is the case.)
- The easement area may be described based upon clearly identifiable natural or artificial landmarks within the property, such as the high water mark of a stream or railroad tracks.
- The easement area may also be described as a corridor lying within a certain distance of the property’s boundary line.

Location to be Determined

Sometimes owners and holder are willing to establish an easement with the specific location of the easement area to be determined by mutual agreement in the future. This suggests trust and confidence between the owners and holder and hopefully leads to a mutually satisfactory determination of location. However, conventional wisdom in the law is that an agreement to agree is no agreement at all. Bringing some definition

to the easement area location is highly desirable to minimize the potential for future conflict.

Set a Location but Provide Ability to Relocate

The recommended methodology when multiple locations are under consideration is to set in the easement document at least one mutually agreeable easement area and provide for its relocation to another location identified by the holder to which the owners have no reasonable objection. A relocation would then be evidenced by an amendment of the easement document (recorded in the public records) to guard against future disputes regarding the location of the easement area. This methodology provides one party (the holder in this example) the option to designate the path subject to reasonable objection of the other. This is preferable to a vague stipulation of “mutual agreement,” which becomes problematic if the owners have one strongly preferred alternative and the holder has another.

Entrance and Exit Points Known

If the owners and holder have not gotten so far as to have an identifiable easement area but there is at least an understanding of the approximate locations of the entrance and exit points for a trail at the boundaries of the property, then the easement document may provide for the right of holder to determine the exact location of the trail connecting the two points. For example, the *easement area* could be defined as:

a corridor, not to exceed ___ feet wide, connecting the point identified as “East Entrance” and the point identified as “West Entrance,” the exact location to be determined by holder subject to the approval of owners, not to be unreasonably withheld or delayed.

The parameters of the discretionary location could also be included, such as: “Holder will use best efforts to avoid steep slopes and damage to mature trees when plotting the final location of the easement area.” When the final location is determined, good practice is to evidence that on the public record by recording a supplement to the easement document.

Location to be Changed

Sometimes the owners and holder will be aware, before signing the easement document, that the location of the trail will need to change with time—perhaps more than once. A provision can be included in the easement document to accommodate this, the terms tailored to the circumstances. For example, the provision could allow the owners to relocate the trail at the owners’ expense to a location reasonably acceptable to the holder or allow the holder to relocate the trail, with the parties sharing the expense, to a location reasonably acceptable to owners upon the occurrence of a specific event. Any number of variations are possible.

While not strictly necessary, documenting the new trail location via a recorded amendment to the easement document minimizes the potential for future misunderstanding or conflict. The owners and holder could rely on an unrecorded agreement—whether in print form or via email correspondence—as to the new location. However, there are traps for the unwary in this more casual approach; legal counsel is strongly advised.

If the easement allows changes in easement location, users will want to specify how often such a move can occur and under what conditions so that the trail is not moved unnecessarily often.

Width of the Easement Area

The easement area could potentially be as narrow as the trail itself. Or it could be sufficiently wide to allow flexibility in trail location, installation of landscaping and maintenance; or provide for off-trail uses by the public.

Wide Corridor

A wide easement area does not mean that the trail itself will be wide. The easement may be written to restrict the width of the trail’s [treadway](#) (cartway) within the wider corridor.

A trail corridor that is substantially wider than the trail itself may be desirable for a variety of reasons. A wider corridor could, depending on how the owners and holder choose to draft the easement document:

- Provide the holder with greater flexibility in trail maintenance;
- Give the holder some discretion to locate and, perhaps, relocate the trail within the confines of the corridor;
- Allow the holder to landscape around the trail to improve the trail's scenic character or to screen the trail from the rest of the owners' property;
- Accommodate the holder installing fences; or
- Enable the public to leave the trail to engage in bird watching or nature study.

Both the [Model Trail Easement Agreement](#) and the CE Trail Provision provide for a wider easement area within which a trail, not to exceed a certain number of feet in width, can be located. The default language of the Model confines public access to the trail only; the public does not have the right to go off the trail. In contrast, the CE Trail Provision allows the public to enter the wider easement area for nature study and bird watching.

Narrow Corridor

While the easement area could be limited to the width of the trail, this could preclude management activities by the holder that may be desirable from both the holder's and owners' perspectives, for example, making a minor adjustment to the trail's course to address erosion issues, managing vegetation, installing a fence or effectively maintaining the trail.

A narrow corridor may be perceived as minimizing the area in which the holder may exercise its rights. However, unless the easement document says otherwise, the rules applicable to interpreting easements and other [servitudes](#) would probably accommodate holder's need to use a wider area from time to time to perform reasonably necessary trail maintenance activities.

Easement Purpose

Setting the Purpose

An easement serves a purpose; the easement is the right and power of the holder to use someone else's

land for that specified purpose. The uses that may be made of the land, the activities that may be engaged in and the improvements that may be made—the purpose of the easement—must be addressed in the easement document.

Different owners will have different ideas of what constitutes acceptable use of their land by the holder and the public. Holders will bring to each trail project a varying set of goals regarding the public's use of the trail. The purpose of the trail easement may be tailored to meet the specific concerns of the owners and goals of the holder.

Degree of Specificity

The trail easement document may define the purpose of the easement in detail or may be quite general in its description.

Grant of Right-of-Way

PALTA's model trail easement documents all create a right-of-way over the identified trail. The purpose of any right-of-way is to provide a location to cross the property, which means that people exercising the right are supposed to keep moving, not loiter or engage in other activities.

Additional Detail

The Model and CE Trail Provisions continue beyond this simple grant to describe in detail the rights of the holder and the public as well as the retained rights of the owners.

In contrast, in the interest of brevity, the Short Form—like many simple trail easement documents—grants a trail easement but does not go into detail about the means that can be used to cross the property. This works as long as there is a meeting of the minds between the owners and holder as to what constitutes *trail use*, but what happens if “trail” means *footpath* to the owners and *pedestrian and/or vehicular access lane* to the holder?

Under Pennsylvania law, ambiguity or uncertainty generally will be resolved in favor of the holder. For example, if the easement document identifies walking and jogging as permitted uses in a list ending with “and other recreational uses,” a reasonable interpretation of the easement would include cross-country

skiing even if cross-country skiing is not specifically listed.²

Users of the Short Form and other such documents may believe that there is an implied agreement to work out differences in the future, but the rules of law applicable to [servitudes](#) do not read into an easement document the kind of covenant of good faith and fair dealing that is found in contract law. There is no legal obligation for the owners and holder to negotiate a reasonable compromise later. Instead, the applicable rule developed over centuries of cases is that, in the case of ambiguity, the easement will be interpreted most favorably to the holder.

Acceptable Activities

Both the [Model Trail Easement Agreement](#) and the CE Trail Provision list the specific facilities and uses permitted under the easement. Their default language provides for walking, hiking, jogging, bicycling and horseback riding as well as nature study and bird watching. This list may, of course, be lengthened or shortened to meet the concerns of owners and the interests of the holder. Owners uncomfortable with allowing horseback riding on the trail could eliminate it from the list of permitted uses. Conversely, an organization devoted to a single purpose—horseback riding, for example—may want an easement solely for that purpose. Sometimes a holder, perhaps concerned with damage to natural resources or trail surfaces that might be caused by bicycles or horses, will only be interested in an easement for walking, jogging and

similar pedestrian activities; other times the holder may be interested in having broad discretion as to the types of recreational activities that might take place on the trail in the future.

License for Activities and Improvements of Less Comfort to Owners

Consent to Activities on a Trial Basis

The [Model Trail Easement Agreement](#) offers a way to provide for activities and uses that owners may tentatively find acceptable but not be comfortable granting as permanent easement rights. As more fully discussed in Articles II and III of the [commentary to the Model](#), the owners may use the Model to grant a *license* rather than an easement for certain activities and uses.

Both easements and licenses are types of [servitudes](#)—covenants running with the land; however, easements are presumed to be perpetual and licenses are presumed to be terminable at will. A license enables the owners to condition their consent on compliance with certain standards as well as provides the owners the ability to withdraw their consent. For example, owners not comfortable with permitting unconditional access for horseback riding may be willing to allow access for members of an equestrian club provided the club takes responsibility to obtain releases and insurance coverage.

The license option in the Model provides the opportunity for owners to grant consent for some activities on a trial basis. Then, if no concerns arise, the owners and holder can later amend the easement document to move the activity from the license category to the easement category.

Another reason to use a license, rather than an easement, for a particular activity is that the owners may not want to permanently bind subsequent owners who may not have the same tolerance for the activity as the granting owners do. For example, the granting owners may be avid snowmobilers but recognize that some potential buyers of their property may find snowmobiling less acceptable than hiking. A license

² A broadly defined purpose can be a problem for the holder if it is then narrowed in the easement document to exclude undesirable uses that may be included in the more general term. For example, the word *recreation* can be defined to include anything that is done for amusement or in one's spare time. Few owners would agree to make their land available for recreational use if they understood that term to mean that anyone could do anything they chose to do in their leisure time. As a result, owners will often want to put limits on the broad grant by following it with a list of prohibited activities. A listing of prohibited activities in the easement document may imply that it is the holder's duty to see that the public abides by these limitations or lead to the inclusion in the easement document of an explicit provision *obligating* the holder to enforce the prohibitions.

for snowmobiling would then enable subsequent owners to withdraw consent or place conditions on consent as discussed above.

License for Improvements

If the holder wants to invest time and resources in installing improvements within the easement area, for example, the right to install benches, exercise stations, interpretation guides and the like, then the holder is advised to obtain an easement for these installations by listing them explicitly in the easement document. If the owners are not willing to grant a permanent easement, then the holder is advised to obtain a license that provides a term of duration sufficiently long to justify the initial investment and costs of removal.³ The Model allows users to easily take either the easement or license pathway.

License Trumps Claims of Prescriptive Easement

Although easements, like other real estate documents, are supposed to be in writing to be effective, courts have found that easement rights can become vested by regular use. The requirements for a finding that trespassing has ripened into a permanent easement are very similar to the ways [adverse possession](#) can ripen into ownership. If an individual, or the general public, crosses a portion of the owners' property on a regular basis over a long period of time, and owners do nothing about it, they may have trouble under the law reasserting their authority to control trespassing or public use.

³ Although the general rule is that a license is always terminable at will, there is a concept called an *irrevocable license* that is sometimes invoked when a person granted a license invests money in improvements in reliance upon it then, when the improvements are complete, the owners revoke their permission. In that case, the court exercising its equitable jurisdiction may require the owners to allow the holder to continue using the improvements for a period of time sufficient to amortize the investment. (Of course, it's best not to rely on the mercy of a court determining that an injustice was done to the holder when the holder has the opportunity to protect its interest from the start with an appropriate easement or license with minimal term.)

Permissive use, however, does not ripen into ownership or the permanent use rights known as a [prescriptive easement](#). Granting permission via a written license will cut off the claims of regular users adverse to the rights of owners so long as the minimum period of 21 years has not run. Take, for example, an easement document that provides an easement for hiking and bicycling but does not address horseback riding. If equestrians subsequently make regular use of the trail corridor, it is possible that their use could one day ripen into a permanent right to ride through the trail corridor. In contrast, if the easement document explicitly provides a license for horseback riding, then the risk of equestrian use ripening into a right is greatly diminished.

Addressing Owners' Concerns

Privacy and Security

Owners may be reluctant to grant an easement for public access due to concerns that their privacy and security will be impaired. The model easement documents use a variety of means to address these concerns by *confining* and *controlling* access and providing owners with the ability to set and enforce reasonable standards to define responsible use.

Confined Location

The model easement documents confine public access to a trail of a specified maximum width. The trail, or the easement area within which the trail must be located, must be in a location agreed to by the owners and specifically identified in the easement document. If the owners are not satisfied with the ability to treat anyone leaving the designated trail as a trespasser, the [commentary to the Model](#) provides in §2.02 an option to require the holder to install fencing to separate the easement area from the remainder of the property.

Limited Uses

The [Model Trail Easement Agreement](#) and the optional public access provisions of the [Model Grant of Conservation Easement](#) limits public access to those recreational uses agreed upon by the owners and holder in the easement document.

Setting Standards

The easement document can set appropriate standards for responsible recreational use to avoid harm not only to persons and private property but to the natural environment as well. For example, the [commentary to the Model](#) provides in §4.02(e) the option to add a list of standards placing reasonable limits on time, place and manner of entry to avoid inappropriate exercise of the rights granted with that easement.

Enforcing Standards

Both the owners and the holder have the right to enforce the terms under which access is permitted under the easement. A person who leaves the designated easement area is a trespasser, as is anyone who is using the area for other than permitted uses. So too is anyone who isn't abiding by the standards for use set forth in the easement document. The owners not only have all of the rights to deal with trespassers as are available under applicable law but they can also call upon the holder to assist in maintaining responsible use in accordance with the terms of the easement document. Responsible user groups, such as hiking, cycling or equestrian associations, can also be called upon to assist in enforcing appropriate standards.

Trail Easements May Reduce Trespass

By providing trails for public use, owners may reduce trespass and its attendant problems.⁴ Several factors play into this result:

- Public access brings responsible people to the property—people who want to respect and care for the land they are enjoying.
- Responsible users provide eyes on the property that discourage would-be trespassers from engaging in activities previously invisible to the public eye.
- Some of the people who had been trespassing will prefer to act responsibly and, given rules on time, place and manner of entry, will abide by them to

⁴ For example, studies in Sweden and Maine have shown that owners who voluntarily grant a dedicated right of access for snowmobiling in a particular location experience less conflict with snowmobilers as a result.

merit the privilege of legally accessing the property.

In addition, by entering into an easement with a responsible public or private nonprofit, the owners can shift some of the burdens of controlling access and managing risks to the holder.

Use and Occupancy

Continuing Use Consistent with the Grant

If the easement document does not provide otherwise, the law applicable to easements and other [servitudes](#) allows the owners to continue to use the easement area provided that the use is not inconsistent with the grant.

The Short Form does not specifically address owners' continuing rights of use but, since it doesn't state otherwise, owners would have continuing rights of use.

The CE Trail Provision states that:

The easement for access is non-exclusive. Owners may continue to use the Easement Area in accordance with the terms of this Grant so long as Owners' use is consistent with the rights granted in this section and does not prevent or impair access to the Easement Area for the purposes described above...

The footnote to this subsection provides document drafters with an option to specify particular activities that will not be considered "inconsistent with the grant."

Specifically Reserved Rights

The Model and its commentary provide a number of ways to document the understanding of the owners and the holder as to the owners' reserved rights with respect to the easement area.

To develop the understanding, a sensible approach begins with the owners identifying activities they want to allow within or in the vicinity of the easement area that may be viewed as inconsistent with the grant (for example, farming, forestry, hunting and shooting) and improvements that may be necessary or desirable to install within the easement area in the future. The owners and the holder then work to balance the own-

ers' interests with the holder's desire to maintain safe public access to the trail.

Exclusive Use of Easement Area

In some cases it may be appropriate to vest in the holder the right to exclusive use⁵ of the easement area. Exclusive use gives the holder control of the easement area much the same as if the holder owned it. Along with control, the owners generally will expect the holder to take full responsibility for conditions within the easement area and injuries to trail users so long as the easement remains in effect.

The general rule established by a grant of exclusive use is that the owners are *not allowed* to use the easement area unless the holder otherwise agrees. Thus, the owners must never assume they can access the easement area—not even for purposes consistent with the exercise of holder's easement rights. The owners need to consider carefully whether any circumstances are foreseeable in which they may need to access the easement area and, if so, reserve rights to cover those circumstances in the easement document.

Removing Trespassers

Anyone who enters the easement area and engages in an activity not within the scope of permitted uses, or who engages in a permitted activity but not within the easement area, is a trespasser and can be barred from entering or ousted from the property just as any other trespasser can be ousted. The safest way to remove trespassers is to request the assistance of the local police but the remedy of self-help, if it can be done without violence or confrontation, is also a legally permitted method to exercise easement rights.

⁵ A grant of exclusive use makes sense when any activities the owners are likely to engage in within the easement area are expected to be inconsistent with the easement purposes. For example, a trail easement project may have two objectives: first, to allow public access to the trail treadway for recreation; and, second, to allow the holder to plant and maintain a wildflower garden within the remainder of the easement area outside the treadway. Any activity by the owners—even walking—will interfere with the holder's rights to pursue its landscaping project; thus, a grant of exclusive use is reasonable under the circumstances.

Liability

Owners and holders are both interested in minimizing liability related to personal injury and property damage. Several guides available at ConservationTools.org cover this subject:

- [*Reducing Liability Associated With Public Access*](#). Public access to property for recreational uses—such as hiking, bird watching, fishing and hunting—raises concern about the possibility of liability on account of injury to a recreational user. Pennsylvania law provides some protection. Also there are practical steps that can be taken to minimize risk of liability.
- [*Pennsylvania's Recreational Use of Land and Water Act: Statutory Protection for Property Owners Who Open Their Land to the Public*](#). Pennsylvania's Recreational Use of Land and Water Act limits the liability, resulting from personal injury or property damage, of owners who make their land available to the public for recreation free of charge.
- [*Indemnity Agreements and Liability Insurance: Protection From Claims Brought by Third Parties*](#). An individual or organization's risk of being held liable for personal injury or property damage may be shifted to another party who agrees to accept the risk and who holds liability insurance or sufficient assets to back up the acceptance of the risk. A release agreement guards against a successful lawsuit by the person signing the release; an indemnity agreement, in contrast, ensures that if some other person sues, the indemnifying party will be responsible for handling the claim.
- [*Release of Liability: A Tool for Managing the Risk of a Volunteer or Participant in an Activity Suing the Activity's Organizer or Host*](#). The risk of being held responsible for injuries or property damage associated with organizing volunteer, educational, recreational and other events and activities (or opening up property for the same) may be minimized by having those who wish to participate sign a release agreement. The [*Model Release Agreement*](#) accompanies the guide.

Universal Accessibility

The subject of trail accessibility for all people, including those with physical disabilities—of planning, designing, building, maintaining and managing universal access trails—is covered at length in the guide [Universal Access Trails and Shared Use Paths](#), available at [ConservationTools.org](#). The [Model Trail Easement Agreement](#) is designed to help users comply with Americans with Disabilities Act requirements for accessibility.

Tax Benefits for Donors

Federal Income Tax Deduction

The donation of a trail easement by owners to a holder *may* qualify as a charitable donation of a partial interest in real estate for federal income tax purposes if certain conditions are met. This guide does not attempt to explain all the requirements for receiving a federal tax deduction and is not a substitute for competent tax counsel. However, requirements, roughly stated, include but are not limited to the following:

- The easement is freely donated rather than fulfilling a condition for a government approval or made in exchange for other goods and services.
- The trail easement makes the land available to the general public for substantial and regular recreational or educational use.
- The recipient of the gift (the holder) is a qualified organization – a governmental entity or a non-profit entity that (a) has a perpetual existence; (b) is established as a public charity for the purpose of preserving and conserving natural resources, natural habitats, environmentally sensitive areas and other charitable, scientific and educational purposes; (c) has the funds and commitment to enforce the easement in perpetuity; and (d) is duly authorized to acquire and hold the easement under applicable law.
- The recipient of the easement acknowledges the donation in a letter contemporaneous with the donation.

- The donor has prepared an appraisal of the value of the gift. The IRS has specific rules governing the completion of a qualified appraisal.

Even if a gift of a trail easement could qualify as a tax-deductible donation, in some cases it will not make sense for the owners to pursue the deduction. For example, the costs of documenting the charitable deduction may exceed the tax benefit if the difference in the value of the land owned by the landowners (not just the easement area but the entirety of their landholdings in the vicinity of the easement area) before versus after the donation is not significant.

Federal Estate Tax Benefit

The donation of a trail easement that qualifies for a federal income tax deduction may also provide a federal estate tax exemption under §2031(c) of the Internal Revenue Code. Whether this exemption is worth pursuing depends on the particular facts and circumstances at the time of the donor's death. In order to preserve the option of using the benefit, the easement should include a provision that prohibits commercial recreational uses within the easement area to the extent those uses would conflict with the tax code provision.

Commentary Includes Tax Provisions

The commentary to the [Model Trail Easement Agreement](#) includes provisions that may be added to the Model to enable owners to pursue federal tax benefits for a trail easement donation. Since, in many cases, such benefits won't be pursued, either because the easement is being sold or because the effort needed to qualify for the benefits outweighs the potential benefits, the provisions are located as options in the commentary rather than in the Model itself.

Communicating Tax Matters with the Owners

It is reasonable for a holder to inform owners that federal tax benefits *might be available* for the donation of a trail easement if that organization is qualified to receive a tax-deductible donation under federal regulations. However, the holder should not assure owners that a donation of a particular trail easement will result in federal tax benefits. The holder needs to

keep in mind that it is easy for owners to recollect a discussion of federal tax benefits as a guarantee or promise by the holder, so care needs to be taken in communications. A prudent holder takes measures to avoid misunderstandings regarding tax benefits. For one, as is described in the [commentary to the Model](#), the trail easement document should include a provision that the owners/donors represent, warrant and covenant to the holder that:

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

The holder is also well served by documenting that it has not promised any particular tax treatment of the donation in a donation agreement or other written communication signed by the owners in advance of the donation.

Identifying the Grantee of Easement

Rights of Public Access Vest in Holder

The model easement documents grant rights of public access, but they do not grant those rights directly to the public. Instead, the granting language is carefully drawn to vest in the holder the right to make the trail

available to the public. The reason is to avoid the application of the [public trust doctrine](#). When the public is found to have an interest in real estate, the Attorney General of the Commonwealth of Pennsylvania, acting for and in behalf of the public, has a right to weigh in on such matters as whether the trail can be relocated by mutual agreement of the owners and holder and any other changes to the agreed-upon arrangements set forth in the document. The intent of the model documents is to vest in the holder the right to make decisions concerning the easement area. (If a state agency funded the easement project, the holder still may need to consult or obtain approval from that agency to change provisions pertaining to public access, but the Office of the Attorney General need not be involved.)

Nonprofit Versus Government Holder

Trail easements may be held by nonprofit or government entities. The unique circumstances governing each trail project will dictate the best choice—if there is any choice in the matter at all—of the entity to hold the easement. However, all other things being equal, there is compelling reason to favor governmental entities, rather than nonprofits, as holders of trail easements.

Governmental Entities Have Additional Protection from Liability

Owners have the same statutory protections from liability available to them whether a nonprofit organization or government is identified as the holder. However, the holder's statutory protections will vary depending on the nature of the holder. While all types of holders can benefit from the protections provided by Pennsylvania's Recreational Use of Land and Water Act as well as the Rails to Trails Act and Equine Immunity Act, only government entities have access to the protection offered by two other statutes: As noted in the guide [Reducing Liability Associated with Public Access](#), the Commonwealth can assert immunity or limited liability under the Sovereign Immunity Act, and counties and local municipalities can similarly assert immunity or limited liability under the Political Subdivision Tort Claims Act.

Public Responsibility for Public Benefit

In the case of a government holder, if a court or jury finds liability, the burden of that liability can be borne by the public generally through the government's taxation powers. In the case of a nonprofit holder, the assets of the holder, including charitable contributions and funds set aside for other purposes, will be exposed to collection of a judgment. Even if proceeds of insurance policies are available to pay the claim, the nonprofit will bear the burden of increased premiums (if it is able to obtain insurance at all) for a long time to come.

Single-Member Nonprofit Organization

Land trusts and other charitable organizations must be careful to preserve their endowment and other funds dedicated to furthering their mission over the long term. If a claim for serious injury or death is for some reason not barred by immunity, insurance proceeds may not be sufficient to satisfy the verdict or settlement reached. While this may be unlikely, if it occurs, the funds that the holder needs to continue its programs and operations will be exposed to payments required by court order.⁶

One safeguard to explore draws from a common for-profit sector practice: A nonprofit charitable organization (the "founding organization") could create a single-member nonprofit organization, wholly controlled by the founding organization. The founding organization could then assign all public access easements to the single-member nonprofit organization, which would hold no other assets (which might be vulnerable in a lawsuit). The single-member nonprofit organization would be a named insured or named as additional insured on the policies of public liability insurance carried by the founding organization so as to provide insurance coverage and defense of claims

⁶ One possible aid for protecting an organization's assets is to add to the easement document a provision limiting holder's liability on its agreement to indemnify owners from claims to the insurance proceeds available to defend the claim. But, even if this was acceptable to owners, it only limits owners' recovery from holder for a judgment rendered against owners. It does nothing to limit holder's potential exposure for claims asserted directly against holder by the recreational user.

arising from the public access. The single-member nonprofit organization would *not* be recognized as a separate entity for federal tax purposes (meaning no extra tax filings), while limiting the founding organization's liability under state law. There is always the possibility of a court collapsing the two entities into one (a process known as "piercing the corporate veil") but separating higher risk activities from lower risk ones is a perfectly legitimate business strategy and there's no reason why nonprofits shouldn't use the strategy if it is determined that the benefits outweigh the trouble in establishing the arrangement. See [Reducing Liability Associated with Public Access](#) for more information.

Steps in the Acquisition Process

A trail easement document must be signed and recorded to permanently establish a right for a trail. But what is the process leading up to completing the real estate transaction? What should one do after initially broaching the matter with a landowner? The basic steps involved with acquiring a trail easement are much the same as any other type of real estate transaction. However, no one-size-fits-all approach exists for addressing the specific facts and circumstances attached to any particular project. This section provides the reader with a few broad guidelines that can help in moving a potential acquisition forward.

First, for some landowners it could be sensible when first sitting down with them to hand them a trail easement document for them to consider signing or modifying. However, more likely than not, it is best to begin with discussions about the character of the intended trail, any rights that the landowner may want to retain to the land and any other concerns. Then, put this information in writing to ensure that each party understands what is intended. Following this, one would then customize the appropriate model legal document to fit the situation.

A number of actions likely will have to occur to be able to finalize the document and ensure that the holder is, in fact, prepared to accept the easement: board authorization, fundraising, surveying, mortgage subordination, environmental review, appraisal and more. To ensure that a holder doesn't spend substan-

tial time, energy and money, only to find that the landowner no longer is willing to convey an easement, the holder may want to obtain a commitment from the landowner in the form of a purchase option or purchase and sales agreement.

The Pennsylvania Land Trust Association has produced a number of guides, available at ConservationTools.org, to assist organizations to address these various matters. The guides include:

- [*Authorization of Real Estate Transactions: Rules and Process for Nonprofits*](#). Within the bounds of state law and private standards of practice, a nonprofit organization has considerable flexibility in establishing policies and procedures regarding the authorization of real estate transactions.
- [*Purchase Options: Gaining the Right Without the Obligation to Acquire Property Interests*](#). A purchase option is a right to purchase or lease land or other property interests without any obligation to do so.
- [*Management of the Document Preparation Process*](#). When a document needs to be reviewed, edited and approved by more than one person, good document management and control practices help prevent time-consuming missteps and confusion for all the parties involved.
- [*Mortgage Subordination*](#). When a mortgage precedes an easement on a property, there is no guaranty of perpetual enforceability of the easement unless the mortgage holder (a bank or other entity that owns the loan) signs a document (sometimes called a “mortgage subordination”) that allows the easement to survive a foreclosure of the mortgage. While not easy or quick to obtain, careful preparation that addresses the concerns of the mortgage holder can expedite the process.
- [*Closing: Finalizing the Real Estate Transaction*](#). At closing, the transfer of the real estate interest, whether land or easement, is completed. This guide helps users organize and expedite the closing.

Achieving Conservation and Public Access

One Document or Two?

If a nonprofit organization or government seeks the right to locate a public trail on private property as well as permanently restrict development and uses of the property for conservation purposes, the question arises whether this is best accomplished in one legal document—a grant of conservation easement that includes trail provisions—or two documents—separate grants of trail easement and conservation easement.

Establishing the conservation easement and access easement via one legal instrument shows that both are components of a single, integrated, transaction. This single document approach may be attractive to owners who have little patience for reviewing and signing multiple legal instruments. However, this benefit must be weighed against two major disadvantages:

- Problems arise when two different grants of two different property interests are coupled together in one document. An *affirmative* access easement (the power to compel owners to make land available for a certain purpose) is fundamentally different from a *negative* conservation easement (the power to constrain the rights otherwise held by owners to order to achieve conservation purposes). The result is that provisions (such as an indemnity) that allocate risks for purposes of an access easement are not likely to be appropriate for purposes of a conservation easement and vice-versa.
- If at some time, the holder finds it desirable to separate responsibilities for enforcing the conservation restrictions on the land from the responsibilities for maintaining the trail for public use, such separation could prove difficult. For example, a land trust that holds a combined easement could not simply transfer the trail element of the combined easement to the local municipality, even if the municipality was operating an exemplary trail system. It would be necessary to draft new legal documents that would have to be agreed to and signed by the

then current owners, land trust and municipality. Depending on the specifics of the easement, the written approval of other beneficiaries and potentially the courts and attorney general might also be required.

Implementation

One-Document Approach

The Commentary to Article V of the [Model Grant of Conservation Easement](#) provides instructions for using the document to establish a trail easement.

Two-Document Approach

The establishment of trail and conservation easements can be tied together in one transaction, with the relationship between the two clearly delineated, using two separate easement documents. For example, it can be set forth in the trail easement document that the trail easement is subject to the [restrictive covenants](#) contained in the conservation easement document.

If using the [Pennsylvania Land Trust Association's](#) models, the trail easement document and the conservation easement document can be signed at the same time and integrated into a single transaction using the instructions found in the commentaries. Briefly stated:

- Insert into Article V of the Grant of Conservation Easement the "Separate Access Agreement" provision set forth in §5.07 of the [Model Grant of Conservation Easement commentary](#).
- If using the [Model Trail Easement Agreement](#), insert into its Article I, the provisions set forth in §1.04 of the Model Trail Easement Agreement commentary.
- If using the [Short Form](#), insert the provision set forth in ¶5 of the Short Form commentary.

Resources at ConservationTools.org

To find experts on the topics covered by this guide, see the right hand column of the on-line edition at <http://conservationtools.org/guides/show/56>. The on-line edition also contains the most up-to-date listing of related library items and guides.

Library Categories

[Trails & Public Access Easements](#)

[Conservation Easements](#)

[Liability Associated with Recreational Use](#)

Related Guides

[Pennsylvania Trail Design and Development Principles](#)

[Universal Access Trails and Shared Use Paths](#)

[Purchase Options: Gaining the Right Without the Obligation to Acquire Property Interests](#)

[Reducing Liability Associated with Public Access](#)

[Authorization of Real Estate Transactions: Rules and Process for Nonprofits](#)

[Management of the Document Preparation Process](#)

[Mortgage Subordination](#)

[Closing: Finalizing the Real Estate Transaction](#)

[The Nature of the Conservation Easement and the Document Granting It](#)

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Submit Comments

Share your thoughts regarding this guide with the Pennsylvania Land Trust Association: Do any subjects need clarification or expansion? Do you have other concerns or suggestions? Please call 717-230-8560 or email aloza@conserveland.org. Thank you.

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