

Model

Maintenance and Operation Agreement

with Commentary

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Preface

This model document with commentary is intended to help local governments and nonprofit organizations better define their partnerships for providing outdoor recreational opportunities to the public and lessen the possibility of misunderstandings when carrying out their respective activities, tasks, and duties.

The model provides a useful starting point, but users will want to adapt it to match their concerns and interests. Not all articles and sections presented will be relevant to a particular situation. Delete unneeded material and modify the remaining content to reflect the particular circumstances.

Legal Review and Disclaimer

Patricia L. Pregmon, Esq., reviewed the model and commentary to ensure their general conformance with Pennsylvania law; however, the material should not be construed or relied upon as legal advice or legal opinion in regard to any specific facts or circumstances. Any agreement drafted with assistance of this model should be completed with the guidance of legal counsel to help ensure that the agreement accomplishes what the parties intend without unintended consequences.

Notes

Brackets “[...]” and underlines “__” in the model indicate places where you must insert appropriate text.

Commentary is presented in blue. Commentary text uses Gill Sans 11 pt. Commentary headings use Gil Sans **18 pt** or **11 pt bold**.

Agreement content is presented in black. Agreement text uses Palatino Linotype 10.5 pt. Agreement article and section headings are presented in **Helvetica bold 12 pt and 10.5 pt**.

Acknowledgements

Andrew M. Loza authored this document.

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Contents

Title

Opening Recital

Background

Location

Goal of the Municipality

Goal of the Organization

Other Statements that Might be Found in the Background

The Agreement

Article 1. Term of Agreement

1.01 Initial Term

1.02 Automatic Renewal

1.03 Termination

Article 2. Permission to Provide Facilities and Programs

2.01 Improvements

2.02 Operation

2.03 Divergence from Plans

Article 3. Ownership

Article 4. Improvements

4.01 Compliance with Law

4.02 Signs

4.03 Costs of Construction

Article 5. Responsibility for Operations and Maintenance

5.01 Routine Maintenance

5.02 Sanitation

5.03 Municipal Responsibilities Regardless of Time of Year

5.04 Organization Responsibilities Regardless of Time of Year

5.05 Shared Responsibilities Year-Around

Article 6. Program Coordination

6.01 Good Faith

6.02 Communication

Article 7. Releases by Volunteers and Participants

7.01 Releases

7.02 Records Retention

Article 8. Indemnity and Insurance

8.01 Organization Indemnifies

8.02 Losses and Litigation Expenses

8.03 Applicable Times

8.04 Insurance

Article 9. Miscellaneous

9.01 Notices

9.02 Documentation Requirements

9.03 No Assignment

9.04 Severability

9.05 Counterparts

9.06 Entire Agreement

9.07 Governing Law

9.08 Incorporation by Reference

Closing

Title

Maintenance and Operation Agreement

Choosing a title. The above title is but one of many possibilities. Choose a title for the document that best characterizes its nature and what you seek to accomplish with it. Other possible titles include:

Park Improvement and Use Agreement

Use Agreement

Cooperative Agreement

Facility Operations Agreement

Subtitle. To facilitate quick identification of the document, you may add additional detail indicating the particular facility that is the subject of the agreement or the parties to the agreement. For example:

“regarding Soccer Facilities and Programming in Jane Schmain Park”

“regarding the Terrific Trail in Pleasant Valley”

“between Happy Township and Happy Athletic Club, Inc.”

Opening Recital

THIS AGREEMENT dated as of _____ (the “Agreement Date”) is by and between _____, having a principal address at _____ (that municipality, the “Municipality”), and [*insert full legal name of the organization*], a Pennsylvania non-profit corporation with its principal address at _____ (that corporation, the “Organization”).

Purpose. The opening recital identifies the parties to the document, their respective addresses for the purpose of giving notices, and the effective date of the document.

Date. The date can be added in hand writing at the time of signing.

Background

Purpose. The Background informs the reader of the basic information necessary to understand the subject matter of the document.

No whereas clauses. The Background could be restated in a series of “whereas clauses” conjoined with a series of “ands”; however, modern legal practice is to state the facts supporting the intentions of the parties in a background section with the facts set out as simple declarative sentences.

Content. The Background at minimum must describe the location of the land subject to the agreement and the goals of the parties.

Defined terms. The Background also serves as a place to define particular terms that are used later in the document.

Background

Location

Identify the location of the municipal park, trail, or other open space that is the subject of the agreement. For example:

Municipality is the owner of *[insert name of park, trail corridor, or other open space¹]* (the “Site”), the location of the facilities and programs, existing or planned, that are the subject of this agreement.

Another example:

The facilities and program that are the subjects of this agreement are located in all or a portion of the *[insert name of park]* described in exhibit A (whatever portion, the “Site”).

Site. As is done in the examples above, be sure to label your description of the location as ‘the “Site”’ when describing it. The term *Site* is used throughout the agreement.

Less than whole park. If the Organization’s activities and responsibilities are confined to a particular area of a park, rather than the entirety of the park, you will want to clearly identify that particular area in exhibit A so that there is no question as to its boundaries within the park.

Goal of the Municipality

Identify the goal of the Municipality in entering the agreement, for example:

The Municipality seeks to expand the recreational opportunities available to the public at the *[insert name of park]* by partnering with a private party that has the resources to build, operate, and maintain recreational facilities at the Site that result in an overall enhancement of the public benefits provided by the *[insert name of park]* (those facilities, existing or planned, described in exhibit B, the “Facilities.”)

Facilities. As is done in the example above, be sure to label your description of the facilities as ‘the “Facilities”’ when describing them. The term *Facilities* is used throughout the agreement.

Defining Facilities. The description of the facilities may be as long or as short as needed to articulate the important characteristics of those facilities and minimize the potential for misunderstandings. What may seem clear at the time the agreement is signed may be much less so in the ensuing months and years, especially if the individuals involved with each party change. Since the description may contain graphics or may be lengthy, the description is placed in an exhibit. You may, if you prefer, place the full description in the main body of the agreement and eliminate the need for an exhibit. For example:

The Municipality seeks to make available to the public at the Site a trail and ancillary structures such as benches, bike racks, and signage (those facilities, collectively the “Facilities”) for bicycling, walking, and other non-motorized (except when addressing universal access needs) recreational uses by partnering with a private charitable organization that has the resources to build, operate, and maintain the Facilities for the public benefit.

Consistency with public park purposes. The Donated or Dedicated Property Act² requires that parkland must be used for the purpose for which it was donated or dedicated.³ Thus, any municipal partnership with a private party should be focused on continuing or enhancing the public recreational benefits provided by the park.

Goal of the Organization

Identify the goal of the Organization in entering the agreement, for example:

Organization seeks, solely for charitable purposes, to construct, rehabilitate, operate, and maintain Facilities in the Park and, in association with those Facilities, to provide *[describe recreational programming which will be made available to the public, e.g., "outdoor recreational programming, more specifically organized soccer for youth in the Municipality and surrounding areas"]* (that programming, described in detail in exhibit C, the "Program").

Another example:

Organization seeks to construct, rehabilitate, operate, and maintain Facilities in the Park to support its program that helps children with special needs to participate in organized team sports with an aim of promoting sportsmanship and friendship (that programming, described in detail in exhibit C, the "Program").

Program. As is done in the examples above, be sure to label your description of the program as 'the "Program"' when describing it. The term *Program* is used throughout the agreement.

Less Detail. If you don't want to describe the Program in an exhibit, you may delete "described in detail in exhibit C" and add additional detail as appropriate within this statement.

Other Statements that Might be Found in the Background

The Organization has a mission of providing structured outdoor recreational programming to youth regardless of income, social class, race, ethnicity, creed, or sexual identity.

Revenue limitations make it difficult for the Municipality to assume the additional maintenance and operational expenses of providing *[insert activity]* in *[insert name of park]*.

To advance its mission of *[insert mission]*, the Organization seeks to construct and maintain Facilities and conduct programs using those Facilities in *[insert name of park or trail corridor]*.

Organization's use of the Site is consistent with the public park uses for which the *[insert name of park]* is dedicated.

The Agreement

Having established the background behind the agreement, the following statement tells readers that the parties have agreed to the terms and covenants that follow to accomplish their respective goals.

The Municipality and Organization agree as follows:

Article 1. Term of Agreement

1.01 Initial Term

This agreement becomes effective on the date first written above and remains in effect for *[insert five or other number]* years.

A multi-year initial term provides the parties and funders of recreational improvements with assurances of stability and continuity in the initial years of the agreement.

1.02 Automatic Renewal

After the initial term, this agreement will automatically renew for an additional one-year term upon each expiration date.

Automatic renewal eliminates the potential hassle of each party seeking timely authorizations and signing new documents for a new term. The seeming permanence of automatic renewal is tempered by the termination provision that follows.

1.03 Termination

After the initial term, either the Municipality or Organization may terminate this agreement by giving *[insert 30 or some other number]* days prior notice to the other party.

The termination provision only applies after the completion of the initial term. After the initial term, the provision provides each party great flexibility to unilaterally terminate the agreement if arrangements are no longer satisfactory.

If you want to provide the parties time to better prepare for a unilateral termination of the agreement, then the following provision may be more appropriate:

After the initial term, either the Municipality or Organization may terminate this agreement effective on the next automatic renewal date by giving notice to the other party at least *[insert 60 or some other number]* days in advance of the renewal date.

Article 2. Permission to Provide Facilities and Programs

2.01 Improvements

The Municipality permits the Organization to build, improve, or maintain Facilities at the Site as detailed *[insert "in exhibit B" or "above" as appropriate]*.

If the plan for Facilities at the time of the agreement lacks the detail desired by the Municipality for one or more items, you can further specify that the pending development plan must be approved the Municipality, for example:

The Organization must submit a plan for _____ and receive approval by the Municipality before obtaining government approvals required under the law and commencing construction.

2.02 Operation

The Municipality permits the Organization to conduct its Program at the Site.

2.03 Divergence from Plans

- (a) The Organization must notify the Municipality of changes in construction or maintenance plans that would result in material changes in the Facilities as compared to their description under this agreement.
- (b) The Organization must notify the Municipality of planned changes in the Program that would result in material changes in the Program as compared to its description under this agreement.
- (c) The Municipality will not unreasonably withhold approval of Organization's request for changes. It is not unreasonable for Municipality to reject or withhold approval of changes if those changes would result in reduced access for the general public, increased environmental harm, or material changes in the types of facilities or recreational programs offered.
- (d) If the Municipality does not approve changes within sixty days of receipt of notice, the Organization's request is deemed disapproved.

This article provides permission to the Organization to take certain actions regarding the Municipality's land. Those actions are pre-identified to ensure that the Organization's actions are consistent with the public interest. Recognizing the impossibility of perfectly planning for the future, the article also provides a mechanism for the Organization to propose and the Municipality to approve deviations from the initial plans.

The Municipality should establish a clear internal policy and procedure for addressing potential requests for changes.

Article 3. Ownership

The Municipality will retain all legal and equitable ownership of the land and the buildings, structures, and other improvements made to the land by the Organization under this agreement.

If the Organization is to hold ownership of one or more structures, extend the sentence as follows: "with the exception of the following Facilities: _____."

Article 4. Improvements

4.01 Compliance with Law

- (a) The Organization will act in good faith to complete Facilities in compliance with the federal Americans with Disabilities Act.
- (b) The Organization will act in good faith to complete Facilities in compliance with all other laws. Permissions provided by the Municipality under article 2 do not preclude the need for the Organization to seek and obtain approvals required by municipal ordinances.

Alternatively, the Municipality may be given an explicit and substantial role in ensuring compliance with laws, for example, by substituting the following provisions:

- (a) The Organization will act in good faith to comply with the federal Americans with Disabilities Act (the "ADA") but will rely on the Municipality's review of Facilities plans, construction, and maintenance to assure compliance.
- (b) The Organization will act in good faith to comply with all other laws but will rely on the Municipality's assistance in preparing plans and applications that will conform with municipal ordinances.

This section addresses regulatory requirements. In contrast, article 2 addresses the requirements (if any) established by the agreement for the Municipality's approval of plans and changes to plans. The approvals under article 2 are separate and distinct from municipal approvals that may be required by the Municipality's ordinances.

4.02 Signs

The Organization will not place signs at the Site without approval by the Municipality in regards to the size, number, location, and content of the signs.

4.03 Costs of Construction

The Organization is responsible for providing or paying for materials, labor, tools, equipment, light, power, transportation, utilities, and permitting necessary to build and improve Facilities under the agreement.

If the Municipality is to be responsible for some costs of construction, extend the sentence as follows: “with the following exceptions: _____.”

Exceptions might include Facilities for whose construction the Municipality will be receiving a state grant.

The section may be expanded, if appropriate, to include an understanding about the Municipality’s potential to assist with some elements of construction, for example:

The Municipality may, in its discretion, assist with the delivery or costs of one or more construction items by providing, for example, tools, equipment, or materials.

Article 5. Responsibility for Operations and Maintenance

The many variables that come into play in a public-private partnership for recreation lead to a myriad of possible arrangements of responsibilities. This article presents, as an example, one arrangement covering a wide range of issues. However, it is not intended to endorse one arrangement over another. Adjust the items and their arrangement to fit your situation.

5.01 Routine Maintenance

- (a) Routine maintenance includes the following items:
 - Litter clean up.
 - Maintaining athletic fields including lines and turf management.
 - Basic yardwork including grass cutting, bush trimming, clearing tree debris, and leaf raking.
 - Watering.
 - Remediating vandalism.
 - Keeping the Site in a neat and attractive condition.
- (b) The Organization is responsible for routine maintenance of the Site and the Facilities during the Organization’s Program seasons.
- (c) The Municipality is responsible for routine maintenance of the Site outside of the Organization’s Program seasons. The Municipality is also responsible for routine maintenance at times during the Program season when the Municipality runs its own organized activity on the Site and in regards to items listed below that remain the Municipality’s responsibility regardless of season.

5.02 Sanitation

The Organization is responsible for providing and maintaining temporary sanitation facilities during its Program seasons in support of its Program.

5.03 Municipal Responsibilities Regardless of Time of Year

- (a) The Municipality will remove trash and materials to be recycled that are located in and adjacent to trash and recycling receptacles.
- (b) The Municipality will remove yard waste collected by the Organization.
- (c) The Municipality will perform emergency relief work such as cleanups after flooding and removing trees that present a hazard to property or public safety.
- (d) The Municipality will maintain the parking lot (e.g., asphalt sealing and repair).
- (e) The Municipality will provide water service to the Site during the warm season.

- (f) The Municipality is responsible for underground utilities.
- (g) The Municipality will provide normal police services to the Site. The Organization has no responsibility to provide additional security services.

5.04 Organization Responsibilities Regardless of Time of Year

- (a) The Organization will maintain all above-ground structures on the Site.
- (b) _____

5.05 Shared Responsibilities Year-Around

- (a) _____
- (b) _____

Article 6. Program Coordination

6.01 Good Faith

The Municipality and Organization will each work in good faith to cooperate in the coordination of the Program with the Municipality’s other possible interests in using the Site. In respect for the Organization’s contributions to enhancing public recreational opportunities at the Site, the Municipality will strive to avoid holding events, programs, and activities at the Site that would conflict with the Organization’s Program to the extent reasonably possible; however, in the case of conflict, the Municipality’s use of the Site takes priority.

If the Municipality is aware of events, programs, or activities that it will want to hold on the Site, you may want to note those items here, so that each party has a clear understanding of how the Site might be used.

6.02 Communication

The Municipality’s *[insert title of position]* will be the Municipality’s principal contact regarding communication and coordination of schedules. The Organization’s *[insert title of position]* will be the Organization’s principal contact regarding communication and coordination of schedules.

If either the Municipality or Organization will be given primacy in scheduling use of the Facilities and posting calendars, detail the arrangements here or in a section 6.03 established for this purpose.

Article 7. Releases by Volunteers and Participants

7.01 Releases

The Organization must request and receive from each volunteer and other individual that participates in construction or maintenance of the Facilities a signed release substantially in the form of the *Model Release Agreement* published by the Pennsylvania Land Trust Association or other form approved by the Municipality.

The *Model Release Agreement* published at http://conservationtools.org/library_items/1254 (and the associated guide *Release of Liability* published at <http://conservationtools.org/guides/130>) helps organizations reduce the risk of being held responsible for injuries or property damage associated

with organizing volunteer, educational, recreational, and other events and activities. The release and guidance also helps the owner of land opened for recreation in reducing risk.

The provision does not require people who simply participate in the Organization's recreational activities to sign a release. Some programs are too informal to be able to reliably obtain releases, or the trouble to collect them isn't warranted given the sporadic nature of attendance, for example, a drop-in program for playground play. Also, people don't want to exclude a kid just because the parent or guardian wasn't available to sign a release.

If the Program is relatively formal, perhaps a little league or summer camp, the provision could be modified by inserting after Facilities: "or participates in the Program." If less formal, a second sentence, such as the following could be added:

The Organization also will endeavor to request and receive a signed release from each volunteer and other individual that participates in the Program.

7.02 Records Retention

The Organization must safely store the releases in its records until such time as the releases no longer have applicability under the law.

Article 8. Indemnity and Insurance

8.01 Organization Indemnifies

The Organization must indemnify and defend the Municipality against all Losses and Litigation Expenses (both terms defined below) arising out of or relating to: (a) a breach or violation of this agreement or law applicable to actions permitted to the Organization under this agreement; and (b) personal injury (including loss of life) and property damage occurring on or about the Site arising from the negligence or wrongful acts or omissions of the Organization, its employees and contractors, if and to the extent not caused by the negligent or wrongful acts or omissions of the Municipality, its employees and contractors.

Reflecting what appears to be typical practice, the default agreement does not provide for the Municipality's indemnification of the Organization.

8.02 Losses and Litigation Expenses

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

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

8.03 Applicable Times

The Organization's indemnification of the Municipality as set forth in this article applies in regard to incidents occurring at the Site during the term of the agreement, and the indemnification for such incidents survives the end of the agreement. The Organization does not indemnify the Municipality for incidents occurring at the following times:

- [example: outside the soccer playing seasons during which the Organization runs its Program]

- [example: during activities and events principally organized by the Municipality or another entity in cooperation with the Municipality]

8.04 Insurance

The Organization and Municipality must maintain commercially reasonable policies of liability insurance regarding personal injury and damage to personal property with contractual liability endorsement to provide insurance coverage for that party's indemnity, if any, under this agreement.

Indemnification provides little value to the indemnified party if the one providing the indemnification doesn't have the financial means to do so, thus the importance of an insurance endorsement covering the indemnity.

Article 9. Miscellaneous

9.01 Notices

Notice given pursuant to this agreement must be in writing and delivered to the party's address stated at the beginning of this agreement or other address provided by notice.

9.02 Documentation Requirements

No approval of an action required by this agreement, waiver of the enforcement of the terms of this agreement, or amendment of this agreement's terms by the Municipality or Organization is valid or effective unless it is in writing and signed by an authorized signatory for the party. This requirement may not be changed by oral agreement.

9.03 No Assignment

No assignment of the Organization's rights under this agreement is permitted.

9.04 Severability

If a provision of this agreement is determined to be invalid, illegal, or unenforceable, the remaining provisions of this agreement remain valid, binding, and enforceable. To the extent permitted by the law, the parties waive application of any provision of the law that renders any provision of this agreement invalid, illegal, or unenforceable in any respect.

9.05 Counterparts

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

9.06 Entire Agreement

This is the entire agreement of the parties pertaining to the subject matter of this agreement. The terms of this agreement supersede in full all prior statements and writings between the parties pertaining to the subject matter of this agreement.

9.07 Governing Law

The laws of the Commonwealth of Pennsylvania govern this Agreement.

9.08 Incorporation by Reference

Each exhibit attached to this agreement is incorporated into this agreement by this reference.

Closing

INTENDING TO BE LEGALLY BOUND, the Municipality and Organization, by their respective duly authorized representatives, have executed this agreement on the date first written above.

Witness/Attest:

The Municipality

_____ (SEAL)
[insert name of Municipality's authorized person]
[insert title]

_____ (SEAL)
[insert name of Municipality's authorized person]
[insert title]

The Organization

By: _____ (SEAL)
[insert name of Organization's authorized person]
[insert title]

**This Model Maintenance and Operation Agreement
(v. 2017.08.29) is provided by the
Pennsylvania Land Trust Association
and published at ConservationTools.org.**

¹ Going forward, “park” will be used as a shorthand for “park, trail corridor, or other open space.”

² Act of December 15, 1959, P.L. 1772, No. 670

³ Unless the use “is no longer practicable or possible and has ceased to serve the public interest,” in which case the municipality can petition the orphans’ court for relief.