

Model

# Consent, Non-Disturbance, and Subordination Agreement

with Commentary

## Second Edition

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**Pennsylvania Land Trust Association**  
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# Preface

## Challenge One: Protecting a Conservation or Trail Easement from Foreclosure

If a property is subject to a mortgage, a precautionary measure must be taken if the owners intend to grant a conservation or trail easement on the property. When a mortgage precedes an easement on a property, the possibility that one day the mortgage could be foreclosed poses a threat to the continued existence of the easement unless the holder of the mortgage (the “Mortgage Holder”) signs an agreement that allows the easement to survive a foreclosure.

In Pennsylvania, for example, a judgment lien obtained on a debt secured by a mortgage relates back to the date of recording of the mortgage. This means that when a judicial sale (e.g., a sale by the county sheriff) is held to pay off a judgment lien on this debt, the purchaser takes ownership of the property free and clear of all interests—including easements—recorded after the recording date of the foreclosed mortgage.

## Challenge Two: Providing for Tax Deduction

In cases where an easement will be donated in whole or in part, the federal tax code requires subordination of any mortgage if the owners are to qualify for federal tax benefits for a qualified conservation contribution.

## Addressing these Challenges

The [\*Model Consent, Non-Disturbance, and Subordination Agreement with Commentary\*](#) addresses the ongoing and nationwide challenge of obtaining agreements from banks and other mortgage servicing companies to:

- Assure that the easement will not be impaired by the exercise of the Mortgage Holder’s rights and remedies under the mortgage; and
- Assure conformance to the requirements of the [federal tax code applicable to qualified conservation contributions](#).

Since Mortgage Holders have no obligation to provide such assurances—when they do so they do it voluntarily—the model is designed to ask as little of Mortgage Holders as possible in establishing these assurances.

## Subordination May Be Unnecessary

If the owners will not be seeking tax benefits for making a qualified conservation contribution, then subordination is not generally necessary. In this case, the model can be simply modified to serve as a “Consent and Non-Disturbance Agreement.” Regardless of whether subordination is necessary or provided, a consent and non-disturbance agreement will ensure that an easement will survive a foreclosure.

## Scope and Wording Matter

In an attempt to ensure—beyond any possible doubt—the permanence of an easement, some holders of easements (“Easement Holders”) may only accept an agreement that completely and unconditionally *subordinates every right and remedy* of the Mortgage Holder to the rights and powers of the Easement Holder. This leads to the use of phrases like “subordinate in lien, priority, and effect” in proposed agreements, which often raise a red flag with lenders because they then must analyze every provision of the grant of easement to see if it could possibly jeopardize their right to receive loan payments as well as their other rights.

The [\*Model Consent, Non-Disturbance, and Subordination Agreement\*](#) avoids such draconian terms, doing only what is necessary to assure the permanence of the easement (and tax deductibility, if donated). The model comes from the position that, for the most part, the Mortgage Holder’s interest in maintaining a regular stream of loan payments operates separately from, and does not collide or compete with, the interest of the Easement Holder in protecting natural and scenic resources or providing a public trail. The model focuses on the circumstances in which these interests collide or

compete and seeks to resolve these issues with as little intrusion into the purview of the lender as possible.

## Use of the Model

[ConservationTools.org](http://ConservationTools.org) provides a [guide](#) for owners and Easement Holders that addresses consent, non-disturbance, and subordination, including how to approach the Mortgage Holder. The [Model Consent, Non-Disturbance, and Subordination Agreement](#) was prepared to provide the Owners and Easement Holders with a sample document to submit to the Mortgage Holder with the other information supporting the request as detailed in the guidance.

Some Mortgage Holders will want to use their own form. In that case, the model and commentary may be useful to evaluate whether the Mortgage Holder's document will provide the necessary assurances or whether changes must be made.

## Customize for the State

The rules pertaining to mortgage foreclosure vary greatly from state to state. The model, which was drafted for use in Pennsylvania, must be adapted to the laws, customs, and practices for the state in which it is to be used.

## Improve the Model

The Pennsylvania Land Trust Association welcomes suggestions for improving its models. Please email your comments to [info@conserveland.org](mailto:info@conserveland.org).

# Acknowledgements

Patricia L. Pregmon, Esq., and Andrew M. Loza are the authors.

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**Prepared by:**

Name:

Address:

Telephone:

**Return to:**

Name:

Address:

**Tax parcel(s):**

**Model Consent, Non-Disturbance, and  
Subordination Agreement**

**Second Edition, v. 2018.10.02**

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[ConservationTools.org](http://ConservationTools.org).

**Consent, Non-Disturbance, and Subordination Agreement**

**Mortgage Holder:**

**Mortgage:**

Loan #:

Date of Mortgage:

Date of Recording:

Book:

Page:

Instrument #:

**Mortgaged Property:**

Street Address:

Municipality:

County:

Parcel Identifier:

State: Pennsylvania

**Owners:**

**Easement Holder:**

**Address for Notices:**

INTENDING TO BE LEGALLY BOUND, the Mortgage Holder identified above covenants and agrees as follows for the benefit of the Owners identified above and the Easement Holder identified above.

**1. Consent**

The Mortgage Holder consents to the further encumbrance of the Mortgaged Property identified above by an easement in favor of the Easement Holder.

**2. Sale Subject to Easement**

The Mortgage Holder confirms and agrees that the easement shall survive any sale or other execution upon the Mortgage. The term "Mortgage" when used in this agreement includes all documents and instruments secured by the Mortgage. No sale of the Mortgaged Property by the Mortgage Holder, or by, through, or under the powers vested in the Mortgage Holder pursuant to the Mortgage, shall occur except under and subject to the easement. This covenant applies not only to a sheriff's sale or other judicial sale of the Mortgaged Property on account of a default or other violation of the Mortgage but also to any sale that directly or indirectly benefits the Mortgage Holder

as a creditor of the Owners or a secured creditor with respect to the Mortgaged Property. In furtherance of, but without limiting, this covenant, the Mortgage Holder agrees as follows:

- (a) The Easement Holder must not be named as an interest to be divested in any such sale.
- (b) Any such sale must be advertised as being held under and subject to the easement.
- (c) The Easement Holder has the right to post signage on the Mortgaged Property or otherwise inform the public that any sale or other transfer of the Mortgaged Property is under and subject to the easement.
- (d) The Easement Holder has the right to stay any sale advertised or scheduled in violation of the terms of this Agreement and the right to obtain injunctive relief to protect its interest in the survival of the easement in the event of any such sale, the loss of which is not compensable by damages.

**3. Share of Proceeds**

The Mortgage Holder acknowledges that the easement vests in the Easement Holder the right to receive a percentage share of any proceeds of condemnation or other event terminating or extinguishing the easement upon all or any part of the Mortgaged Property (that event, a “taking”). That percentage share (the “Proportionate Value”) is a constant equal to the fair market value of the easement divided by the fair market value of the Mortgaged Property as if it were not eased, those fair market values established as of the date of the grant of easement by appraisal dated not more than 60 days prior to the date of the grant. Notwithstanding anything to the contrary contained in the Mortgage, the Mortgage Holder agrees that proceeds of a taking shall be divided as and when received so that the Easement Holder receives the Proportionate Value of the proceeds and the Mortgage Holder (or Owners, as the case may be) receives the balance.

**4. Notices**

The Mortgage Holder agrees to use commercially reasonable efforts to notify the Easement Holder, at its address for notices identified above, of its intent to foreclose or otherwise sell or transfer the Mortgaged Property.

**5. Binding Effect**

This Agreement is both a contract and a covenant running with the land. The Mortgage Holder agrees that this agreement is binding upon the Mortgage Holder and its successors and assigns as owner of the Mortgaged Property or holder of any interest therein by, through, or under the Mortgage Holder. This includes any persons who at any time may own, or hold an interest in, the Mortgaged Property by, through or under the Mortgage Holder including any sale held on account of the Mortgage or the interest of the Mortgage Holder as a secured creditor with respect to the Mortgaged Property.

**6. Consideration**

The Mortgage Holder confirms that it has received legally sufficient consideration for this agreement and understands that the Owners and Easement Holder are relying upon this agreement in granting and accepting the easement.

INTENDING TO BE LEGALLY BOUND, the Mortgage Holder has signed this agreement as of \_\_\_\_\_, 20\_\_\_\_.

Witness/Attest: \_\_\_\_\_

Print Name:

Print Title:

This document is based on the  
**Model Consent, Non-Disturbance, and Subordination Agreement**  
(v. 2018.10.02)  
provided by the Pennsylvania Land Trust Association  
and published at [ConservationTools.org](http://ConservationTools.org).

The model on which this document is based should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. It should be revised under the guidance of legal counsel to reflect the specific situation.

COMMONWEALTH OF PENNSYLVANIA:

SS

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

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

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

Print Name: \_\_\_\_\_, Notary Public

# Commentary

## General Instructions

**When in Doubt, Check the Commentary.** The purpose of each provision is explained and, sometimes, alternative approaches are described and optional provisions provided.

**Guides and Models.** Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by the Pennsylvania Land Trust Association. Thanks to the Association's financial supporters, these are available free of charge at [ConservationTools.org](http://ConservationTools.org).

**Structure Tracks Model.** The model follows a simple outline structure and the commentary follows the same pattern to make cross-referencing easy. A heading preceded by a number in the commentary refers to the relevant paragraph in the model.

**Get Legal Counsel.** The model and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The model must be revised to reflect the specific circumstances of the particular project. Any document drafted with assistance of the model should be completed with the guidance of legal counsel to ensure that the document accomplishes what is intended without unintended consequences.

**Disclaimer Box.** Once a document based on a model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the applicable state, you may delete the box at the end of the model that begins "The model on which this document is based should not be construed or relied upon as legal advice...."

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

**Updates.** Check [ConservationTools.org](http://ConservationTools.org) periodically for updates to the models.

## Recording

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

**Margins.** Minimum margin requirements vary among counties; however, a typical requirement is a 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right, and bottom margins. (However, page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5-inch by 11-inch paper. The models are formatted to conform to these specifications.

**Preparer Information.** Pennsylvania law does not require that a lawyer or law firm be identified as the preparer of the document; however, legal review is nevertheless

important. *See* the note “Get Legal Counsel” above. Do not identify a lawyer as the “preparer” if the lawyer did not, in fact, prepare the particular document or was not given the opportunity to review *all of the changes* made to the document.

## Title

**Alternative Title.** The document is called “Consent, Non-Disturbance, and Subordination Agreement,” but some may want to avoid using that name out of a concern that the word *subordination* is most commonly understood to mean a complete reversal of priority, which may chill the Mortgage Holder’s willingness to consider providing the agreement. In that case, consider calling it “Mortgage Holder’s Agreement.”

**Rename If No Subordination.** As addressed in the commentary to ¶3, if subordination is unnecessary, delete ¶3 and retitle the document “Consent and Non-Disturbance Agreement.”

## Opening Section

**Purpose.** The opening section provides a space for entering information that varies with each project. The objective is to keep the remainder of the document unchanged.

**Mortgage Holder.** This may be the mortgage servicing company that owns the rights to service the mortgage rather than the person or entity who owns the rights to receive repayment of the debt. For further information on identifying the Mortgage Holder, see the [guide](#) at [ConservationTools.org](http://ConservationTools.org).

**Mortgage.** The loan number is not critical but is very helpful for the Mortgage Holder to identify the loan in question. Some recorders are now identifying documents by Instrument Numbers in addition to, or in lieu of, the traditional book-and-page identifications. It is very important to accurately note the mortgage recording information for purposes of giving the necessary public notice of the terms of the agreement.

**Mortgaged Property.** It is not necessary to attach a legal description of the Property. Use the same information as is set forth in the recorded mortgage unless a change in that information has occurred.

**Owners.** Identify the owners who will be the grantors of the conservation or trail easement. If there has been a change from the owners who were the borrowers/mortgagors on the mortgage document, explain the chain of events that resulted in these owners being vested with title to the Mortgaged Property.

**Easement Holder.** Identify the organization to which the owners will be granting the conservation or trail easement.

## I. Consent

**Guarding Against Default.** The model starts off with the consent of the Mortgage Holder to the recording of the grant of easement. Mortgage documents sometimes prohibit the Owners from further encumbering the Mortgaged Property. This provision guards against an inadvertent default under the mortgage due to the recording of the easement.

**Review for Conflict.** The Owners and the Easement Holder should review the mortgage to see if there are any provisions that might conflict with the terms of the grant of easement other than those addressed in the model agreement. If a standard form FNMA/FHLMC Security Instrument was used, that will be unlikely, but it's always a good idea to check. The requirements of a loan program aimed at farmers, for example, might conflict with the protections to be provided to an area of high biodiversity under the easement.

## 2. Sale Subject to Easement

The purpose of this paragraph is to protect the easement from automatic release (the legal term is divestiture) upon a judicial sale of the Mortgaged Property held on account of a default on the mortgage. The Easement Holder wants assurance that the Mortgage Holder and anyone purchasing from the Mortgage Holder, directly or via a sheriff's sale or other judicial sale (including a bankruptcy sale in which the Mortgage Holder participates as a secured creditor), will take title under and subject to the terms of the easement.

To further the protection of the easement from divestiture, the covenant:

- (a) Prohibits naming the Easement Holder as an interest to be divested in a sale
- (b) Requires that any sale of the Mortgaged Property must be advertised explicitly as being under and subject to the easement
- (c) Establishes the Easement Holder's right to inform the public
- (d) Establishes the Easement Holder's right to stay a sale and injunctive relief

### **(a) Prohibits naming the Easement Holder as an interest to be divested in a sale**

Pennsylvania rules governing judicial sales require notice to be given to junior liens and other interests to be divested by the sale. This provides an opportunity to petition the court to stay the sale if, perhaps inadvertently, the county sheriff has listed it for sale free and clear of the easement. The Easement Holder needs to be especially cautious if the Owners have filed for relief under federal bankruptcy laws. Under the rules applicable to bankruptcy, the trustee for the debtor has the power to void executory contracts (contracts not fully performed) and this power has been asserted to void servitudes that have ongoing benefits and burdens—for example, a covenant running with the land obligating the debtor to pay for road maintenance. Servitudes, including conservation easements, are not contracts and should not be interpreted as such.<sup>1</sup> (The guide [The Nature of the Easement and the Document Granting It](#) discusses the nature of a conservation easement as a servitude and not a contract or declaration of trust.)

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<sup>1</sup> The land trust community needs to be prepared to defeat a trustee's claim of executory contract the first time the issue arises.

**(b) Requires that any sale of the Mortgaged Property must be advertised explicitly as being under and subject to the easement**

Judicial sales are governed by the rule “buyer beware.” There is no obligation to disclose anything other than the most basic information: address, legal description, lien amount, and attorney for the plaintiff. The purpose of ¶2(b) is to avoid a dispute with purchasers who assert that, because the easement was recorded later in time, they understood it to be divested by the sale. The model’s advertisement requirement is not limited to public sales but applies to private sales as well.

**(c) Establishes the Easement Holder’s right to inform the public**

Signage provides the Easement Holder with the opportunity of furnishing additional information not included in the notice of sale posted by the county sheriff’s office, for example, the name and telephone number of the Easement Holder for additional information and to obtain a copy of the grant of easement and outstanding notices of violation.

**(d) Establishes the Easement Holder’s right to stay a sale and injunctive relief**

The purpose is to avoid a claim by the Mortgage Holder that the Easement Holder is not entitled to a stay or injunctive relief due to the availability of an action for damages. The Easement Holder’s claim for monetary damages may be minimal and the loss of protection of natural resource values (or, for a trail easement, public access) may be incalculable.

### 3. Share of Proceeds

**Purpose.** This paragraph assures that the Easement Holder will receive the Proportionate Value of proceeds of a condemnation or other taking, a requirement for a donation of a conservation easement to be a qualified conservation contribution for federal tax purposes. (See the commentary to the [Model Grant of Easement and Declaration of Covenants](#) §§1.07(e) and 7.03 and discussion below.)

**Delete If No Donation or Tax Benefits.** Delete the entirety of ¶3 if the Owners aren’t donating the easement or will not be seeking a federal tax deduction for a qualified conservation contribution. Also, retitle the document “Consent and Non-Disturbance Agreement.”

**Impact on the Mortgage Holder.** Since the Mortgaged Property is collateral for repayment of the debt, the Mortgage Holder does not want to lose its collateral in a taking without repayment of the debt. Under the law and barring agreement to the contrary, the Mortgage Holder typically receives all the proceeds of a taking necessary to repay the indebtedness in full—the Mortgage Holder gets paid first—then the Owners and the Easement Holder get what’s left. The model instead creates an arrangement where the Easement Holder receives a percentage of the proceeds as and when disbursed by the condemnor or another payor. Neither the Mortgage Holder nor the Easement Holder comes first.

## Payment of Proceeds

The ordering of the payment of proceeds from a taking could be arranged in three basic ways:

- **Mortgage Holder First.** As described under “Impact on the Mortgage Holder,” the Mortgage Holder could receive all proceeds necessary to repay the indebtedness before the Easement Holder can receive its share. This approach will not qualify the easement donation as a qualified conservation contribution.
- **Easement Holder First.** All proceeds could be paid first to the Easement Holder up to the Proportionate Value before *any* proceeds are paid to the Mortgage Holder (and Owners). The model does not take this approach, because it is less palatable to the Mortgage Holder than a *pro rata* arrangement.
- **Pro Rata.** The model creates an arrangement in which the parties receive their share of proceeds on a *pro rata* basis as and when disbursed by the condemnor or another payor. The Easement Holder’s percentage is the Proportionate Value, and the Mortgage Holder’s (and Owners’ after the Mortgage Holder is made whole) percentage is the difference between 100% and the Proportionate Value percentage.

**Uncertainties.** A number of easement donations have been disallowed as qualified conservation contributions in recent years by challenges based upon close scrutiny of the precise wording of provisions defining proportionate value<sup>2</sup> and proceeds (gross or net)<sup>3</sup>; timing of delivery of subordinations<sup>4</sup>; and assuring Easement Holder of its interest in proceeds in perpetuity.<sup>5</sup> As they seek to minimize the risk of a disallowed contribution, some users may wish to consider deleting the last sentence of ¶3, which specifies the *pro rata* arrangement, or substituting a sentence requiring direct payment of proceeds first to Easement Holder up to the amount of its Proportionate Value, and thereafter to the Mortgagee. Whether such approaches would do anything to lessen risk is unknown, although the latter approach is certainly more favorable to the gifted interest.

## Timing Problem for Appraisal

To comply with federal tax law, the appraisal on which the Proportionate Value is established must not be dated more than 60 days prior to the Easement Date. Prospective easement donors are well advised to start the process of obtaining a Mortgage Subordination long before that.

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<sup>2</sup> Carroll v. Commissioner, 146 T.C. (slip. op. at 26) (2016).

<sup>3</sup> PBBM-Rose Hill v Commissioner, No. 17-62076 (5<sup>th</sup> Cir. 2018) (“Rose Hill”).

<sup>4</sup> Minnick v. Commissioner, 2015 U.S. App. LEXIS 14097 (9<sup>th</sup> Cir. 2015).

<sup>5</sup> Kaufman v. Commissioner, 134 T.C.182 (2010), reconsideration denied, Kaufman v. Commissioner, 136 T.C. 294 (2011), *aff’d* in part, vacated in part, and remanded in part sub nom. Kaufman v. Shulman, 687 F.3d 21 (1<sup>st</sup> Cir. 2012).

### **No Exclusion of Proceeds Attributable to Improvements**

The Rose Hill case cited in the footnote above defines *proceeds* as “gross proceeds.” Thus, proceeds attributable to improvements (whether existing at the easement’s establishment or coming later) may not be excluded from the calculation of the Proportionate Value due Easement Holder.

### **No Exclusion for Costs and Expenses**

Given the IRS position in Rose Hill that *proceeds* means “gross proceeds,” it is doubtful that costs and expenses may be excluded from the calculation of Proportionate Value due Easement Holder. It’s unclear whether an Easement Holder could agree, if it chose to do so, to bear a share equal to the Proportionate Value percentage of actual costs and expenses incurred in connection with the condemnation or other extinguishment.

### **Proceeds of Insurance**

If the easement includes historic-preservation objectives, you must consult with counsel and customize the model to add provisions applicable to insurance proceeds as well as condemnation proceeds.

### **Code Is Not Instructive on Timing of Payment**

The [federal tax code](#) does not address payment arrangements for proceeds other than to require payment of the Proportionate Value upon a subsequent sale or exchange of the Property. Easement Holders would be ill advised to approve a payment timing that delays Easement Holder’s payment beyond the time that the condemnor is disbursing the proceeds. Waiting until a subsequent sale or exchange of the Property is a formula for trouble. Among the problems, the taking or other proceeding may have extinguished the easement leaving no evidence on the public record that the Easement Holder is entitled to any payment at all, a serious problem if payment to the Easement Holder doesn’t occur prior to a subsequent transfer of the Property.

The model provision avoids this credit and security risk.

## **4. Notices**

Timely receipt of notice to the Easement Holder will be critical to the Holder’s ability to act quickly to preserve its interest in the easement in the event of a judicial or other sale of the Mortgaged Property. Be sure the address for the Easement Holder in the information section that begins the document includes a street address for overnight delivery by commercial courier. Even if it is not named as an interest to be divested, the Easement Holder will want to make reasonable efforts to inform prospective purchasers of the applicable limitations on future use and development of the Mortgaged Property under the easement.

## **5. Binding Effect**

The purpose is to bind the Mortgage Holder to its promises and, upon recording, give notice that the promises are binding upon anyone who takes an assignment of the

Mortgage or who purchases the Mortgaged Property as a result of foreclosure of the Mortgage or judicial sale on account of the debt secured by the Mortgage (and anyone acquiring ownership after them).

## 6. Consideration

The purpose is to avoid a claim by the Mortgage Holder that its promises are void for lack of consideration. Knowledge of the reliance of the Owners and the Easement Holder on the promise will make it binding upon the Mortgage Holder.

## Closing Matters

**Closing Recital.** When a person making a promise gets nothing of value in return—receives no *consideration*—the law may not require the promise to be kept. The phrase *intending to be legally bound* is a valid substitute for consideration in the Commonwealth of Pennsylvania (but not necessarily other states).

**Date of Signature.** To make a qualified conservation contribution, the [federal tax code](#) requires that the document be recorded not later than the recording of the easement; thus, for those purposes, the date of signature cannot be later than the easement recording date.

**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.