

Model Conservation Easement Donation Agreement with Commentary

Second Edition

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Find the most recent version of this
document at ConservationTools.org

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Preface

Agreement Follows Informal Planning Stage

Most conservation projects begin with a series of communications, often face-to-face conversations, between the interested landowners and representatives of the land trust—everyone exploring what the project might look like and trying to ascertain whether their respective needs and goals can be met. The time and resources spent by landowners and land trusts in these initial explorations tend to be modest. However, there comes a point—if the parties have a serious interest in proceeding and have essentially finished conceptualizing and determining the feasibility of the project—that the next easement planning steps will require substantial investments of time and money. At this stage, a land trust may want assurance that it won't get stuck covering the expenses of going forward on the project if the landowners decide later not to complete the easement. And landowners may want assurance that the land trust is truly committed to the project before they incur further expense.

A donation agreement can provide these assurances. It can also serve other important functions:

- It can clearly spell out the remaining steps in the easement process and expectations.
- It can allocate responsibilities for costs and completion of tasks.
- While the landowners and land trust may believe, based on their less formal exchanges of information, that they share the same understanding of the project, this may not be so. The process of completing a donation agreement can smoke out potential differences in perspectives and minimize the potential for disputes as the project approaches completion.
- Landowners sometimes come to think that they are the customer and any good service provider should recognize that “the customer is always right.” An agreement can help dispel this notion, clarifying that the land trust, although friendly and reasonably accommodating, is serving its conservation mission, not the landowner.
- An agreement can help a land trust ensure that it is taking adequate precautions in avoiding tax shelter transactions prohibited by *Land Trust Standards and Practices*.

The Model

The [Model Conservation Easement Donation Agreement](#) is designed to serve the functions described above. A land trust may use it as is, make any number of customizations, or borrow from it to improve the organization's existing templates. The model puts into practice the research, analysis, and recommendations contained in the Pennsylvania Land Trust Association's guides, which are posted at [ConservationTools.org](#).

The commentary to the model is a resource, available to both land trusts and land owners, to explain the purpose of each provision in the model, refer the user to pertinent

publications for deeper or more expansive analysis of legal issues, and provide alternative and optional provisions.

The model is structured for use in *wholly donative conservation easement transactions*. For land transactions and sales and bargain sales of easements, other forms of legal documents described in the commentary are likely the better fit.

The model is crafted in conformance with Pennsylvania law. Users outside of Pennsylvania should consult with counsel to ensure conformance with the state laws applicable to the project.

Putting the Agreement in Context

The [Model Conservation Easement Donation Agreement](#) addresses issues that may arise in a conservation project in a direct and forthright manner. However, the direct approach may be intimidating to some laypersons. To minimize the risk that the prospective easement donors may be put off by the transition of the discussion to business terms, the land trust should:

- Introduce and discuss many of the terms informally with the landowners well in advance of presenting the agreement. For example, the land trust should address the land trust's funding needs and project costs early on in discussions; and
- Present the agreement to the landowners in person and/or enclosed with a personalized letter.

The most important point is to help the landowners see the terms of the agreement in context: the conservation project can only go so far without a mutual understanding of the steps required to complete the project and the expectations of landowners and land trust to provide and pay for those tasks.

Whether delivered in person or enclosed in a personal letter, the land trust will undoubtedly want to:

- Thank the landowners for their interest in conservation;
- Communicate the scenic and natural resources of the property valued by the land trust; and
- Assure the landowners of the land trust's desire to move forward with the project.

The land trust also may want to make the following points:

- The agreement does not obligate the landowners to donate the conservation easement nor does it obligate the Holder to accept the conservation easement. All are free at any time to withdraw without any further obligation.
- The landowners and their counsel are encouraged to familiarize themselves with the [Model Grant of Conservation Easement and Declaration of Covenants](#) available online at ConservationTools.org (or the easement document used by the Holder).

- To assure that the land trust will begin its tasks to move the conservation project forward, the signed agreement and initial contribution must be returned to the land trust.
- The schedule attached to the agreement identifies tasks for which the landowners are responsible. Among these tasks is obtaining subordination of existing mortgages. This can take some time and should be attended to promptly.
- If any of the contributions requested in the agreement are not affordable for the landowners, they should contact the land trust to discuss alternative means of funding the costs and expenses of preparing for the conservation project and funding long-term stewardship of the conservation easement.

Not an Engagement Letter

The agreement is intended to take the place of the document some land trusts refer to as an “engagement letter.” The term “engagement letter” suggests that the land trust has been engaged by the landowners as an agent or contractor to perform services for the landowners. Generally, this is not the case: The land trust is not engaged by the landowners; it is not performing services for the landowners. Rather, the land trust is a willing, but independent, participant with the landowners in the conservation project. If both the landowners and the land trust understand this from the beginning, potential confusion and conflict can be avoided.

Improve the Model

The Pennsylvania Land Trust Association welcomes suggestions for improving the model and commentary. Please share your thinking by emailing info@conserveland.org.

Acknowledgements

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Conservation Easement Donation Agreement

Agreement Date:

Holder:

Address:

Holder Representative:

Owners:

Address:

<p style="text-align: center;">Model Conservation Easement Donation Agreement</p> <p style="text-align: center;">2nd edition (v. 2018.01.26)</p> <p style="text-align: center;">Published by the Pennsylvania Land Trust Association at ConservationTools.org</p>
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Property

Street Address:

Municipality:

Parcel Identifier:

County:

State: Pennsylvania

Mortgage Holder (if any):

I. Background

1.1 Purposes of Agreement

The purposes of this agreement are:

- (a) To describe the steps that must be taken before the donation of a conservation easement on the above-described Property can be finalized.
- (b) To evidence the willingness and commitment of Holder and Owners, each party identified above, to work towards finalizing the easement donation and to allocate responsibility for payment and performance of the tasks needed to achieve that mutual objective.
- (c) To clarify the relationship of Holder to Owners and identify the legal status of each.

1.2 Holder

1.2.1 Holder is a Pennsylvania non-profit corporation and registered with the Pennsylvania Bureau of Charitable Organizations.

1.2.2 Holder is recognized by the Internal Revenue Service as a tax-exempt public charity under §501(c)(3) of the Internal Revenue Code.

1.2.3 Holder is an independent party pursuing this conservation project in furtherance of its mission. Holder has not, by this agreement or otherwise, been appointed the agent, advisor, fiduciary, or other representative of Owners.

1.3 Sketch Easement Plan

Holder has made a preliminary determination that the conservation of the Property as shown on the drawing attached to and incorporated into this agreement (the "Sketch Easement Plan") furthers the mission of Holder and is consistent with its policy for acceptance of conservation easements. The conservation objectives and restrictions for the areas identified as Highest Protection Area, Standard Protection Area, and Minimal Protection Area are described in the *Model Grant of Conservation Easement and Declaration of*

Covenants available at ConservationTools.org. If the Sketch Easement Plan shows an “Excluded Area,” this portion of the Property will not be subject to the easement.

1.4 **Owners**

1.4.1 **Objective.** Owners seek to conserve the Property as generally depicted in the Sketch Easement Plan.

1.4.2 **Federal Taxes.** [Owners initial the chosen alternative]

- (a) _____ Owners would like the easement donation to qualify as a charitable donation of a partial interest in real estate under the Internal Revenue Code and accompanying rules, regulations, and guidance (collectively, the “Code”).
- (b) _____ Owners understand that the easement donation is not intended to qualify as a charitable donation under the Code.

1.4.3 **Pass-through Entities.** [Owners initial the correct statement.]

- (a) _____ One or more of the Owners is a limited partnership, limited liability company, subchapter S corporation, or other entity identified as a pass-through entity for federal tax purposes (that entity, a “pass-through entity”).
- (b) _____ No Owner is a pass-through entity.

If both 1.4.2(a) and 1.4.3(a) are initialed, attached to and incorporated into this agreement is the “Supplement for Pass-through Entities” (the “Supplement”).

1.5 **Notification**

Owners who intend to claim a federal tax deduction for donation of the easement confirm that they have received notice from Holder of the following:

- (a) The project must meet the requirements of §170 of the Code and any other federal requirements to qualify the donation for a deduction.
- (b) Owners are responsible for the determination of the value of the donation.
- (c) The Code requires Owners to obtain a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than \$5,000.
- (d) The Holder is not providing Owners with individualized legal or tax advice.

1.6 **Professional Assistance**

1.6.1 **Owners’ Selection.** Owners understand that they must select their own advisors, including legal counsel and appraiser, to advise them. They will rely solely on the advice and counsel of their advisors, not the Holder, to determine whether the easement or any other feature of this transaction is in the best interests of Owners.

1.6.2 **No Promises by Holder.** Holder has not promised Owners that the donation of the easement will be completed by any particular date.

1.6.3 **No Representations by Holder.** Holder has made no representations as to the treatment, for federal tax purposes or otherwise, of the easement or any other cash or non-cash contributions made or to be made to Holder.

1.7 **Reliance**

Holder is willing to move forward with the project based upon its understanding that the following statements are complete and accurate:

- (a) There is no person, other than the undersigned Owners, who has any ownership or leasehold interest in the Property.
- (b) Owners are not obligated to donate the easement by any contractual arrangement or to satisfy any legal requirement.
- (c) Except for the lien of the Mortgage Holder (if any) identified above, the Property is not encumbered by any lien. Owners understand that Owners must obtain subordination or release of mortgage and other liens before the grant of easement can be finalized.
- (d) Any survey or environmental assessment of the Property in the possession of Owners has been furnished to Holder. Any lease, easement, or other servitude affecting the Property has been furnished to Holder. The Sketch Easement Plan shows, to the best of Owners' knowledge, the boundary of the Property; approximate locations of buildings, structures, and other improvements; public rights-of-way providing access to the Property; and private easements (utility or otherwise) affecting the Property.
- (e) To the best of Owners' knowledge, there are no hazardous or toxic wastes or debris, nor underground storage tanks, on or under the Property.

2. Initiating the Project

2.1 Owners' Election to Proceed

If Owners desire to proceed with the easement, they must forward the sum of \$_____ (the "Initial Contribution") to Holder together with this agreement signed by Owners.

2.2 Time Limit

Holder is not obligated to proceed unless and until the Initial Contribution is received and, if the Initial Contribution has not been received within one year from the Agreement Date, then Holder may decline to proceed or may require an increase in the Initial Contribution as a condition to proceeding with the project.

2.3 Defraying Costs

2.3.1 **Initial Contribution.** The Initial Contribution is intended to defray the costs and expenses of Holder in providing or paying for the items listed as the responsibility of Holder in the schedule entitled "Steps towards Completion of Conservation Easement" attached to and incorporated into this agreement (the "Schedule").

2.3.2 **Estimate Only.** Holder is willing to proceed with this conservation project but it expects its reasonable costs and expenses, both out-of-pocket and allocated staff time, to be defrayed by the Initial Contribution and, if needed due to unforeseen additional costs and expenses, additional contributions from Owners. Holder will endeavor to keep Owners informed of any circumstances that may result in Holder's original cost estimate, upon which the Initial Contribution set forth above is based, to be exceeded.

3. Preparing for the Conservation Easement

3.1 Steps Towards Completion

3.1.1 **Allocation of Tasks.** Once the Initial Contribution is received, Owners and Holder will proceed in good faith to complete the steps towards completion of the easement including

those listed in the Schedule. Each will keep the other advised as to the progress of items that are the responsibility of that party as indicated on the Schedule.

3.1.2 **Accounting for Services.** Holder is not obligated to invest time or resources to any task listed as the responsibility of Owners on the Schedule. If Owners request Holder's assistance on any of those tasks, Owners must reimburse Holder for its time and any costs and expenses incurred pursuing those tasks.

3.2 **Election Not to Proceed**

3.2.1 **By Owners.** Owners may elect at any time, by notice to Holder, not to proceed with the project and, upon receipt of such notice, Holder is also released from any further obligation to proceed with the proposed easement. Holder is under no obligation whatsoever to account to Owners or return to Owners any portion of the Initial Contribution regardless of the costs and expenses incurred by Holder as of the date of termination.

3.2.2 **By Holder.** Holder may elect at any time, by notice to Owners, not to proceed further with the project but only: if Holder determines that conditions of the Property discovered after the Agreement Date are not suitable for the conservation objectives; or the easement, as negotiated by Owners and their counsel, does not furnish Holder with an adequate means to attain those objectives; or the appraisal or other aspects of the easement transaction raise concerns that Holder's participation in the donation may violate its legal or ethical obligation to avoid participation in fraudulent or abusive transactions; or if the governing board of Holder fails to approve the terms of the final grant of easement or the amount and terms of payment of the Closing Contribution or Stewardship Funding Arrangements.

4. **Finalizing the Project**

4.1 **Payment Terms**

4.1.1 **Funding Requirements.** Holder requires, prior to and as a condition of Holder's acceptance of the easement, by either a Closing Contribution or Stewardship Funding Arrangements or a combination of the two:

- (a) Reimbursement for the balance (if any after application of the Initial Contribution and any additional contributions made for that purpose) of Holder's costs and expenses reasonably incurred or to be incurred in connection with this transaction; and
- (b) Provision for funding adequate to cover Holder's long-term costs associated with conservation easement stewardship.

4.1.2 **Closing Contribution.** A contribution (the "Closing Contribution") in the amount of \$_____ must be paid to Holder, by check drawn on good funds, prior to and as a condition of Holder's acceptance of the easement.

4.1.3 **Stewardship Funding Arrangements.** The post-closing funding commitments (the "Stewardship Funding Arrangements") set forth below must be evidenced by a recordable document (the "Stewardship Funding Covenant") delivered to Holder prior to and as a condition of Holder's acceptance of the easement. The Stewardship Funding

Covenant is to be in the form of the [*Model Stewardship Funding Covenant* available at ConservationTools.org] and recorded against the Property immediately following the easement.

4.1.4 **To Be Determined.** If the blanks provided above for the Closing Contribution or Stewardship Funding Arrangements have not been filled in with dollar amounts or “none” at the time of signing this agreement, Owners and Holder agree to negotiate in good faith a Closing Contribution and/or Stewardship Funding Arrangements sufficient to satisfy Holder’s above-described funding requirements. If the Closing Contribution and Stewardship Funding Arrangements have not been agreed upon within 60 days following the Agreement Date, then Holder has the right to suspend proceeding with the project until such time as agreement is reached. Upon reaching agreement, the Closing Contribution and Stewardship Funding Arrangements are to be inserted into this agreement and initialed on behalf of Owners and Holder.

4.1.5 **Adjustment.** If the Closing Contribution or Stewardship Funding Arrangements have been set at a time when the easement has not been fully negotiated or when Holder’s costs and expenses arising from this transaction are not fully known, the Closing Contribution and/or Stewardship Funding Arrangements will be adjusted if and to the extent reasonably required to account for:

- (a) Changes to the easement materially increasing Holder’s stewardship obligations; and
- (b) Costs and expenses greater than Holder’s estimate on which the Initial Contribution was based (and not otherwise reimbursed by contributions to Holder).

4.2 **Conditions Precedent to Closing**

Holder is not obligated to accept the easement unless and until Owners deliver to Holder all the items listed below. Where applicable, documents must be in the form approved by Holder, properly signed and in form for recording:

- (a) The grant of easement with all exhibits attached and accompanying Baseline Documentation certified to be true, correct and complete.
- (b) The Closing Contribution in the amount set forth above or otherwise approved by Holder.
- (c) The Stewardship Funding Covenant as set forth above or otherwise approved by Holder.
- (d) The Mortgage Subordination accompanied by evidence satisfactory to Holder that no unpaid tax or other liens encumber the Property as of the Easement Date.
- (e) Any other documents or items required to be produced by Owners on the Schedule or the Supplement (if any) or otherwise reasonably required for completion of the easement donation.

4.3 **Closing Procedures**

4.3.1 **Location.** Closing will be held at the office of the Holder on a date mutually agreeable to Holder and Owners.

4.3.2 **Counterparts.** At least three counterparts of the grant of easement and Stewardship Funding Covenant must be originally signed so that each party has a fully executed counterpart and at least one counterpart is available for recording.

4.4 **Federal Tax Issues**

If the grant of easement is intended to be a charitable donation for federal tax purposes, the following subsections apply:

4.4.1 **Acknowledgment.** Holder will deliver to Owners, upon completion of closing, an acknowledgment, in accordance with the Code, of the donation of the easement and other cash contributions.

4.4.2 **Form 8283.** It is Owners' obligation to prepare and, at least 30 days in advance of any deadline set by Owners, submit to Holder the fully complete IRS Form 8283, signed by the appraiser and accompanied by the appraisal supporting the charitable contribution claimed by Owners.

4.4.3 **Appraisal Concerns.** If Holder has substantial concerns about the appraisal or the appraised value of the easement, Holder may:

- (a) Decline to sign IRS Form 8283.
- (b) Postpone signing IRS Form 8283 until Owners produce additional substantiation of value satisfactory to Holder.
- (c) Require Owners to produce an opinion of counsel engaged by Owners confirming that the conservation easement donation qualifies as a qualified conservation contribution under the Code.

INTENDING TO BE LEGALLY BOUND, Owners and Holder have signed this agreement as of the Agreement Date.

[Name of Holder]

By: _____
Authorized Representative

Owner:

Owner:

Steps Towards Completion of Conservation Easement

Item	Responsible Party
Mortgage subordination	Owners
Appraisal	Owners
Survey - Property	
Survey - Protection Areas	
Legal descriptions	
Staking	
Resource inventory	
Environmental review ¹	
Title commitment ²	
Preliminary Easement Plan	
Baseline documentation	
Grant of conservation easement, first draft	Holder
Grant of conservation easement, final draft	
Final Easement Plan	
Legal review (Holder) ³	Holder
Legal review (Owner)	Owners
Closing Contribution	Owners
Stewardship Funding Covenant	Holder
Recording	
Title policy	
Form 8283	Owner
Acknowledgment letter	Holder

This document is based on the
Model Conservation Easement Donation Agreement (v. 2018.01.26)
provided by the Pennsylvania Land Trust Association
and published at 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.

¹ Holder's estimate on which Initial Contribution is based assumes no environmental concerns are noted and no follow-up is necessary. Any cleanup is to be performed by Owners at Owners' expense.

² Holder's estimate assumes search of only one chain of title and that search does not disclose any off-record conveyances, severance of subsurface rights, lack of access, adverse claims, or other issues that cannot be resolved by delivery of Owner's title affidavit.

³ Holder's estimate includes maximum of two hours to discuss, negotiate, and/or revise at the request of Owner or Owner's counsel.

Supplement for Pass-Through Entities

A donation of a conservation easement by a pass-through entity may be disallowed as a charitable contribution for federal tax purposes if it is not a true donation but a vehicle to allow investors in the pass-through entity to claim tax deductions greatly exceeding their investment (that vehicle, a “conservation tax shelter”). IRS Notice 2017-10 alerts people to these conservation tax shelters.

Holder has an ethical obligation to avoid participating in conservation tax shelters. The following representations and agreements address this ethical obligation:

1. To induce Holder to participate in this transaction, Owners represent that they have reviewed with their tax advisors IRS Notice 2017-10 as applied to the facts and circumstances pertaining to the easement donation contemplated by this agreement and have concluded that contribution of the easement is not intended to be, and in fact will not be, a conservation tax shelter.
2. Owners acknowledge that Holder may at any time, whether before or after acceptance of the conservation easement, withdraw from further participation in any transaction that Holder determines may be inconsistent with Holder’s ethical obligations to avoid participation in conservation tax shelters. Holder may refuse to sign IRS Form 8283 or other acknowledgement of the easement donation and may disclose to IRS or other governmental agencies information pertaining to the easement donation.
3. The rights of Holder set forth in this Supplement are in addition to Holder’s rights to terminate elsewhere under this agreement. If Holder exercises its rights to withdraw from this transaction, Owners are not entitled to any reimbursement or return of any payment or contribution made by Owners under or with respect to this agreement.
4. Owners commit to keeping Holder informed of the facts or circumstances that may be pertinent for Holder to decide whether the easement contribution will be viewed as a conservation tax shelter. As of the Agreement Date, Owners represent that the below statements are complete and accurate. Owners have a continuing duty to promptly update the information set forth below and, in any event, within five days after updated information is requested by Holder.
 - a. The pass-through entity is comprised solely of family members. Initial here ____ if applicable.
 - b. The Property, and each investor’s interest in the pass-through entity, was acquired more than 36 months before the anticipated Easement Date. Initial here ____ if applicable.
 - c. The value of the charitable contribution is, or is anticipated to be, not greater than \$1,000,000. Initial here ____ if applicable.
 - d. The name of the appraiser engaged by Owners to value the conservation easement contribution is _____. A complete and accurate copy of the appraisal report produced by such appraiser will be delivered to Holder not more than 5 days after issuance by the appraiser and, in any event, at least 30 days before closing of the easement contribution.
 - e. A complete and accurate copy of the partnership agreement, operating agreement, or other document governing the ownership of the pass-through Owner has been

delivered to Holder or, if not available as of the Agreement Date, will be delivered to Holder at least 30 days before closing of the easement contribution.

- f. The following information pertaining to investors in the pass-through entity has been furnished to Holder or, if not furnished as of the Agreement Date, will be delivered to Holder at least 30 days before closing of the easement contribution. No investor in the pass-through Owner is projected to receive, and will not in fact receive, the benefit of a charitable deduction for federal tax purposes attributable to the easement donation that is equal to or greater than 250% of such investor's basis in its ownership interest in the pass-through entity.

Name of investor:

Percentage ownership interest in the pass-through entity:

Basis of investor's interest in the pass-through entity:

Name of investor:

Percentage ownership interest in the pass-through entity:

Basis of investor's interest in the pass-through entity:

- 6. Pursuant to IRS Notice 2017-10 Owners and their material advisors (as defined in the Notice) are required to submit to the IRS a disclosure statement describing the conservation tax shelter.
 - a. Owners confirm that neither Holder nor any officer, employee, or agent of Holder has acted as a material advisor with respect to the easement donation.
 - b. Owners assume all responsibility for such notices or disclosures as are necessary or desirable to comply with the Code. Owners agree to indemnify, defend and hold the Holder harmless from any claims, costs, expenses, fines, penalties, or other liabilities incurred by Holder or for which Holder may be liable under applicable law pertaining to the failure to give notice to IRS as and when required pursuant to IRS Notice 2017-10. This provision survives closing of the easement donation.

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Commentary to the Model Conservation Easement Donation Agreement

General Instructions

When in Doubt, Check the Commentary. The purpose of each provision is explained and, often, variations are provided to address alternatives that may be useful in particular situations.

Guides. Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by the Pennsylvania Land Trust Association and made available at no charge at ConservationTools.org.

Structure Tracks Model. The model follows a simple outline structure and the commentary follows the same pattern to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to the same section 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 under the guidance of legal counsel.

Disclaimer Box. Once a document based on the model has been prepared or reviewed on behalf of Holder by an attorney licensed to practice law in the applicable state, you may delete the box toward 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 periodically for updates to the model.

Match the Tool to the Transaction-Type

Donations of Easements. The [Model Conservation Easement Donation Agreement](#) is structured for use in *wholly donative conservation easement transactions*.

Sales and Bargain Sales. For a sale or bargain-sale of an easement, a better choice to document understandings and commitments is either a purchase and sale agreement or a purchase option. The guide [Purchase Options](#) describes creative ways to use purchase options to move conservation efforts forward, and the [Model Grant of Purchase Option with Commentary](#) is a tool for obtaining them. The Pennsylvania Land Trust Association also

provides the [Model Conservation Transaction Addendum](#) for use in conjunction with Pennsylvania Association of Realtors purchase and sale agreement forms.

Donations by Will. The *Model Conservation Easement Donation Agreement* may be used to document the terms under which the Owners intend to donate a conservation easement in their wills:

- The signed agreement (including the Sketch Easement Plan) can be incorporated into the will by reference to evidence the material terms of the conservation easement to be donated by the personal representatives of the decedent.
- The Owners should include in their wills direction to their personal representatives to increase the cash contributions and other funding arrangements set forth in the agreement to reflect changes in currency value to ensure that the Holder will have the means necessary to accept the responsibilities created by the easement.
- For further information, see the guide [Donation by Will](#).

Conveyances of Land. For a sale, bargain-sale, or donation of land, a purchase and sale agreement or a purchase option is an appropriate tool for documenting understandings and commitments.

Basic Document Information

Title

Abbreviation Used in Document. The Conservation Easement Donation Agreement is referred to as “this agreement” throughout the text. As such, when customizing, be careful to only use the term “this agreement” when referring to the whole document.

Evolution of Title. The original version of this document, published in 2010, was entitled “Donation Memorandum” to avoid using the term “agreement.” The Internal Revenue Service was, at that time, challenging the deductibility of conservation easements and accompanying cash contributions required by the terms of a binding contractual commitment. The title was chosen to avoid inference that the document was a contract binding the Owners to make a contribution. Subsequent court decisions support the position that a legally binding commitment to grant an easement, accompanied by a cash payment required for easement acceptance, does not automatically disqualify the easement or the cash payment as charitable contributions for federal tax purposes. Thus, the 2012 edition (the “Preliminary Agreement Regarding Conservation Easement Donation”) replaced the nomenclature of “memorandum” with “agreement.” This 2017 edition shortens the title to “Conservation Easement Donation Agreement” but does not change the intent of the document—to govern the process of moving towards a donation without binding Owners to make the donation or Holder to accept the easement.

Agreement Date

Purpose. To begin the time when the agreement applies to Owners and Holder.

Holder

Purpose. To identify the proper legal name of the Holder and contact information for the Holder's project representative.

Contact Information. Furnish as much contact information (mobile, e-mail, etc.) as desired.

Owners

Purpose. To identify the full legal names of the persons who own the land intended to be conserved. *See* article 1 of the commentary to the [Model Grant of Conservation Easement and Declaration of Covenants](#) for additional information needed when these names are not identical to those on the last deed of record.

All Owners. Ordinarily all Persons holding title to the Property are expected to join in the agreement. If all the Owners have not joined in the agreement, the Holder may want to protect its investment of time and resources in the project by requiring, prior to a certain date, satisfactory evidence that the other Owners have approved the project and have authorized the signing Owners to move forward with it.

Property

Purpose. To identify the Property or portion of the Property that will be subject to the easement. This is the same information that will be inserted into the draft conservation easement document. *See* article 1 of the commentary to the [Model Grant of Conservation Easement and Declaration of Covenants](#), for additional information.

Mortgage Holder (if any)

Purpose. Insert the name of the holder(s) of any existing mortgages or other liens on the Property. These must either be removed or subordinated at the time of acceptance of the conservation easement. For further information, *see* the guide [Mortgage Subordination](#) and the [Model Mortgage Subordination and Commentary](#).

Main Body of the Agreement

I. Background

Purpose. To provide information and to define terms that will be used in the agreement.

1.1 Purposes of Agreement

Purpose. To identify the purposes of the agreement. The model is an agreement as to the *process* of the donation transaction and commitments being made by Holder and Owners as to this process rather than a legally binding obligation *to donate*. It helps Holder and Owners avoid misunderstandings as to their legal relationship and the responsibilities of each party to reach the shared goal of an easement donation.

1.2 Holder

Purpose. To incorporate into the agreement information about the Holder, its intentions with respect to the conservation project and its understanding as to the role it will play in pursuing the easement donation. The relationship set by the agreement is a collaboration between two independent actors, moving forwards in tandem in furtherance of their own aims and objectives. Neither is obliged to take direction from the other.

1.3 Sketch Easement Plan

Proximate Description of the Gift. At the stage when the agreement would be signed, the Holder and Owners probably won't know with precision the restrictions that will be necessary to achieve the easement's conservation objectives, the exact areas to be subject to those restrictions, and other easement details. However, for each to commit the resources necessary to move forward, they need to share some understanding of what the easement entails. By setting forth that the conservation objectives and restrictions will track with those contained in a model used by Holder and roughly identifying those areas to which the objectives and restrictions will apply, the Holder and Owners can achieve the necessary basic understanding.

Form of Easement Grant. You may tailor the model to reference whatever easement form, conservation objectives, and restrictions are preferred. The model's standard provision references the widely used [Model Grant of Conservation Easement and Declaration of Covenants](#) published by the Pennsylvania Land Trust Association. This model provides standard sets of rules for each of three protection areas: Highest Protection Area, Standard Protection Area, and Minimal Protection Area. The Sketch Easement Plan preliminarily identifies the locations of these protection areas within the Property. Thus, the Sketch Easement Plan, read in conjunction with the [Model Grant of Conservation Easement and Declaration of Covenants](#), defines the anticipated outcome of the conservation project.

Level of Detail. While it is desirable for the Sketch Easement Plan to be as detailed as possible, there is no need to wait for a survey to become available. Aerial photographs readily available online can be annotated to show the approximate locations of protection areas. Note any land to be excluded from the easement as "Excluded Area." Note the approximate location of any Highest Protection Area ("HPA"). Note the approximate location and acreage of the Minimal Protection Area ("MPA"). Note if any additional MPAs will be reserved for future designation. The remainder of the Property will be Standard Protection Area ("SPA").

Excluded Area. The Owners should discuss with the Holder, their appraiser, and their tax professionals the advantages and disadvantages of excluding a portion of the Property from the easement versus including it as Minimal Protection Area.

Other Forms. If another form of easement grant will be delivered at closing, revise this section to incorporate a description of the intent of the conservation easement and the natural and scenic resources to be preserved. Example:

Sketch Easement Plan. Holder has made a preliminary determination that the conservation of the Property predominantly as open space (the “Open Space Area”) but for a five-acre “Building Area” around certain existing improvements as shown on the attached drawing (the “Sketch Easement Plan”) furthers the mission of Holder and is consistent with its policy for acceptance of conservation easements. Also attached to this agreement is the standard form of easement grant used by Holder. This standard form describes the permitted and prohibited uses that will be applied to the Open Space Area and the Building Area in the easement grant to be delivered to Holder at closing.

1.4 Owners

Purpose. To incorporate into the agreement information about the Owners and their intentions with respect to the conservation project.

1.4.1 **Objective.** This provision establishes that Owners share Holder’s objective to conserve the Property as per the Sketch Easement Plan. As the parties and their professional advisors drill down into the details, the project described in the easement grant, and the final Easement Plan incorporated into it, will evolve from, but not be identical to, the conservation project depicted in the Sketch Easement Plan. At times, when forward progress may become stymied by too much attention to detail, it may be worthwhile to remember the original intent of the transaction.

1.4.2 **Federal Taxes.** This provision clarifies whether the Owners intend the donation of the conservation easement to qualify as a charitable deduction for federal tax purposes.

- (a) If alternative (a) is selected, Holder will work with Owners and their counsel to conform the easement grant and other aspects of the conservation project to applicable Code requirements.
- If Owners are unsure whether they will claim the grant of conservation easement as a charitable deduction, they should select alternative (a) and notify Holder later if they change their intent.
 - If the acquisition of the easement is part donation, part purchase and sale (in other words, a bargain sale), the transaction is usually documented by a modified purchase and sale agreement or purchase option reflecting the understanding of the parties that the stated purchase price is intended to be less than fair value. *See “Match the Tool to the Transaction-Type” above.*

- (b) Owners should initial alternative (b) in all cases in which alternative (a) has not been selected. The absence of Code compliance concerns may allow greater flexibility in the planning and documentation of the conservation project.

1.4.3 **Pass-through Entities.** This provision identifies whether one or more Owners is a pass-through entity.

Incorporating the Supplement. If one or more Owners is a pass-through entity *and* the Owners would like to qualify for a federal tax deduction for a charitable gift, the Supplement is to be incorporated into the agreement.

Purpose of Supplement. The Supplement helps Holder with the ethical obligation to avoid participation in conservation tax shelters as addressed by IRS Notice 2017-10 and Standard 10 of [Land Trust Standards and Practices](#).

Notice 2017-10. The Internal Revenue Service issued Notice 2017-10 to alert prospective easement donors of its intent to scrutinize conservation easement donations made by certain entities described as “pass-through entities” that use promotional materials offering prospective investors the possibility of charitable deductions greatly exceeding their investments in a conservation project.

Standard 10. The Land Trust Alliance urges land trusts to avoid fraudulent or abusive transactions and, in the 2017 edition of its [Land Trust Standards and Practices](#), establishes an ethical duty to decline to participate in a transaction that furnishes excessive tax benefits to investors in the Owner. The Supplement is intended to elicit facts and circumstances known to the Owners that may suggest whether the proposed donation raises ethical concerns to be considered by Holder before proceeding with the transaction. Factors indicating whether a transaction may be of concern are taken from the Land Trust Alliance’s Tax Shelter Advisory and items included in §10.C.4. of the 2017 edition of [Land Trust Standards and Practices](#).

1.5 Notification

Purpose. To incorporate into the agreement the notices required to be given by the Holder to prospective donors, in writing and early in project discussions, as set forth in Practice 10.A.1. of [Land Trust Standards and Practices](#).

Delivery of Appraisal. The notice requirement under Practice 10.A.1.d. is omitted in this §1.5 because a more specific requirement as to the time when the appraisal must be delivered to Holder is covered in §4.4.2 of the agreement.

State Tax Benefits. The notices under Standard 10.A.1. apply not only to easement donors who may claim a federal income tax deduction but also to those entitled to a state income tax deduction or state tax credit. If your state has such incentives, you must modify §1.5 of the model to include those tax benefits as well:

- In the opening sentence, after “federal tax deduction” add: “and any applicable state tax deduction or state tax credit.”

- In subsection (a), expand “any other federal requirements” to read “any other federal or state requirements.”

1.6 Professional Assistance.

1.6.1 **Owners’ Selection.** The Owners are advised to get the advice they need to move forward with the transaction from their own advisors whom they select. If, at the Owners’ request, the Holder furnishes names of advisors familiar with conservation transactions, the Holder is doing so for information purposes only. Alternatively, the Holder may direct the Owners to the [experts directory](#) maintained by the Pennsylvania Land Trust Association.

1.6.2 **No Promises by Holder.** The Holder cannot promise that the transaction will be completed within a particular deadline. There are too many contingencies that are outside the Holder’s reasonable control. However, there may be exigent circumstances (for example, an estate tax filing) when speed is of the utmost importance. In that case, the best alternative is to substitute the following:

Closing Timeline. Owners and Holder understand that, if closing of the transaction does not occur by _____, it may not occur at all. Accordingly, both the Owners and the Holder agree to use good faith, reasonable efforts to complete the donation of the easement on or before that date.

Document Management. The guide [Management of the Document Preparation Process](#) describes ways to expedite documentation, thus saving both time and money.

1.6.3 **No Representations by Holder.** There should be no exceptions to this rule: the Holder never gives tax, legal, or other advice to the Owners and if, for whatever reason, a representative of the Holder makes a statement pertaining to any such matter, the Owners have no right to rely upon it.

1.7 Reliance

Purpose. To elicit from the Owners facts about the land that the Holder has relied upon in making its preliminary determination that this is a project worth pursuing.

Ask Questions Early. In advance of preparing the donation agreement, the Holder should ask the Owners about the representations to be contained in this section. If a representation as presented in the model would not be accurate, it should be addressed in the drafting of the agreement as described below.

Exceptions. If any of the statements is not factually correct or requires clarification, there are a few ways to proceed:

- Exceptions can be added, where appropriate, to the statements in this section; or
- A letter or other writing memorializing corrections or clarifications can be incorporated by reference into the section; for example, by adding the following to

the end of the opening sentence: “except and only to the extent otherwise described in Owners’ letter to Holder dated _____.”

- (a) **Ownership.** If any title issues are disclosed by the Owners in response to this representation, the Holder may want to limit its investment in time and resources until satisfactorily assured that the Owners signing the agreement have the legal capacity to grant the easement.
- (b) **Voluntary Grant.** If the Owners are under a contractual or legal obligation to donate, the Holder will not be able to recognize the donation as a charitable contribution due to the application of the Internal Revenue Service’s *quid pro quo* rules. For further information, *see* the guide [Pledges and Donation Agreements](#).
- (c) **Liens.** The Agreement assumes that there may be a mortgage lien on the Property that will need to be subordinated as a condition of Closing. If the Owners disclose tax liens, judgment liens, or multiple mortgages, the Holder may want to limit its investment in the project until satisfactorily assured that the Owners will be able to clear these encumbrances in time for Closing. For further information, *see* the guide [Mortgage Subordination](#) and the accompanying [Model Mortgage Subordination with Commentary](#).
- (d) **Property Information.** The Holder wants to have at least as much information as the Owners have with respect to the Property.
- (e) **Property Condition.** The prospects for a successful conclusion of the project diminish when there are significant environmental conditions to be addressed before easement acceptance.

2. Initiating the Project

Extending an Offer. When the Holder submits a signed copy of the agreement to the Owners, the Holder has extended to the Owners an offer to proceed with the conservation project on the terms described in the agreement.

Reasonable Period of Time. If nothing else is said, the law provides that the offer remains open a reasonable period of time for acceptance by the Owners. Because no one knows what a reasonable period of time is until tested in court, good business practice is to specify the time within which the offer must be accepted or will be deemed withdrawn (§2.2).

2.1 Owners’ Election to Proceed

Purpose. To set two necessary conditions for Owner’s acceptance of Holder’s offer: Holder’s receipt of the agreement signed by the Owners and receipt of the Initial Contribution.

Initial Contribution. The Initial Contribution is the amount estimated by the Holder to be reasonably required to defray its anticipated costs and expenses in completing its tasks as

set forth in the “Steps Towards Completion of Conservation Easement” (the “Schedule”) attached to the agreement.

Affordability Issues. If the Initial Contribution requested in §2.1 is not affordable for the Owners, there are a number of avenues to explore:

- seeking reimbursement for a portion of the Holder’s costs from other sources;
- dividing the Initial Contribution into installments as discussed in “Phased Contribution” below;
- if the conservation project is of high value, the Owners’ lack of financial resources is documented, and the Holder has the means, then funding all or a portion of the Holder’s investment from the Holder’s existing assets; and
- extending credit to the Owners for all or a portion of the Initial Contribution under any one or more of the deferred payment strategies discussed in the guides [Introduction to Stewardship Funding Arrangements](#) and [Legal Considerations for Stewardship Funding Arrangements](#).

Testing Commitment. Conservation organizations are typically willing to invest time in meeting with the Owners, walking the Property, evaluating the resources worthy of protection, and other preliminary matters. But, at some point, they need to know that the Owners are sufficiently committed to the project to donate a sum sufficient to defray the Holder’s investment of time and money in the project or, if they cannot afford to do so, explore other arrangements. One of the purposes of the Initial Contribution is to assure the Holder of the Owners’ commitment.

2.2 Time Limit

Purpose. To clarify for both the Owners and the Holder what is a reasonable period of time for the Holder’s offer to remain open for acceptance by the Owners.

Project Commencement. The time for the Owners’ acceptance of one year in §2.2 may be lengthened or shortened. The Holder may have other commitments it needs to attend to if this project is not commenced within a particular period of time. Likewise, the Holder’s estimate of its costs and expenses upon which the Initial Contribution is based may change if the project is not promptly commenced and completed within a reasonable time.

No Time Limit. A specific time for acceptance is recommended; however, if the Holder does not choose that alternative, the following may be substituted for the text of §2.2.

Holder has not set a specific time for acceptance. Holder reserves the right, exercisable at any time upon notice to the Owners, to withdraw its offer to proceed under the terms of this Agreement or change the terms under which it is willing to proceed including an increase in the Initial Contribution.

2.3 Defraying Costs

Purpose. To incorporate the Schedule entitled “Steps Towards Completion of Conservation Easement” into the agreement and to state the conditions under which the Holder is to proceed with this project.

Schedule. The Schedule attached to the model is intended to be adapted by each Holder to reflect its policies and procedures. The Schedule is discussed in more detail in §3.1 below.

2.3.1 **Initial Contribution.** The Holder typically needs to have its costs and expenses (including staff time) defrayed by contributions from the Owners to proceed with a conservation project.

Phased Contribution. The Owners sometimes do not want to make an up-front contribution sufficient to defray the Holder’s costs and expenses through closing of the donation. Perhaps, as of the Agreement Date, there is doubt whether the tax benefit of donating the conservation easement is at least sufficient to defray anticipated costs associated with the donation. In that case, the Owners can make an Initial Contribution sufficient to defray the costs of preparation of a draft grant of conservation easement and Easement Plan to submit to their appraiser and/or tax advisor for a preliminary evaluation of the tax, estate planning, or other benefits to them of proceeding. The following provision can be substituted for the text of §2.3.1 to identify the steps in the Schedule that the Holder is willing to proceed with based upon the Initial Contribution and calling for an additional contribution as a condition precedent to moving forward with the remaining steps of the project:

Initial Contribution. The Initial Contribution is intended to defray, among other things, the costs and expenses of the Holder in providing or paying for the items listed as “Phase 1” in the schedule entitled “Steps Towards Completion of Conservation Easement” attached to and incorporated into this document (the “Schedule”). The Owners understand that if they want the Holder to proceed further with the project, they will be expected to make an additional contribution of \$_____ to defray the costs and expenses anticipated to be incurred by the Holder in connection with its remaining tasks identified in the Schedule.

Estimate Only. The Initial Contribution is intended to be the Holder’s good-faith estimate of reasonably foreseeable costs and expenses; however, a number of factors (often in the control of the Owners rather than the Holder) can result in costs and expenses reasonably incurred exceeding the estimate. Title and survey issues; significant departures from the terms of the [Model Grant of Conservation Easement and Declaration of Covenants](#); revisions to the Easement Plan to meet the Owners’ land planning, tax planning, and estate planning goals; and many other factors can escalate costs. The model provides that the Holder does not assume the risk of these escalations.

Other Sources of Reimbursement. If the Holder intends to seek reimbursement in whole or in part for its costs and expenses from a source other than the Owners, a third

paragraph can be added to §2.3 to clarify how that reimbursement amount impacts the Owners' obligations, if at all.

Grant Assistance. Holder will seek reimbursement from sources other than Owners to defray up to \$_____ of its anticipated costs and expenses. The stated Initial Contribution has been established based upon the assumption that Holder will receive this assistance. If this assistance is not available, Owners are [not] responsible for contributing the shortfall required to fully defray Holder's costs and expenses.

2.3.2 Capping Contributions. Sometimes the Owners' financial circumstances make it impossible for them to contribute more than a fixed amount, if anything, towards the Holder's costs and expenses. In that case, another subparagraph can be added to §2.3 as follows:

Cap. Holder agrees that the aggregate amount of contributions requested from Owners in connection with the preparation for and acceptance of this easement (other than Stewardship Funding Arrangements) shall not exceed \$_____.

The cap is a short-term solution to the Owner's immediate cash flow issues that, if not addressed by the cap, would preclude them from donating the easement. When a cap is requested, the Holder's long-term funding needs must be discussed and, if possible, addressed by deferring or spreading payment over time using any of the means furnished in the guides [Introduction to Stewardship Funding Arrangements](#) and [Legal Considerations for Stewardship Funding Arrangements](#) or the accompanying [Model Stewardship Funding Covenant and Commentary](#).

3. Preparing for the Conservation Easement

Purpose. To describe the process by which the Owners and the Holder will move forward with their respective tasks towards the goal of project completion.

3.1 Steps Towards Completion

Purpose. To structure the collaboration between the Owners and the Holder to achieve their mutual goal of conserving the Property. The key to the collaboration is the commitment of the Owners and the Holder to perform their respective tasks described in the Schedule and to keep each other advised of their progress.

3.1.1 Allocation of Tasks. The Schedule lists a generic set of tasks that are applicable to most easement donations. The model identifies an appropriate responsible party for several of the tasks but leaves most of the assignments blank. A responsible party should be identified for each task before finalizing an agreement. At a minimum, all items needed only for tax purposes (e.g., appraisal and Form 8283) should be assigned to the Owners. The rationale is that the Holder's conservation purposes are not furthered by the Owners' desire to claim a charitable contribution for federal tax purposes.

- **Tasks and Deductibility.** Court opinions have varied in the past few years as to the deductibility of cash contributions to the Holder when at least some of the tasks performed by the Holder were viewed as services performed for the benefit of the Owner. More recently, a pragmatic approach has evolved that looks at whether the investment of time and resources by the Holder in items arguably benefitting the Owners was “significant” or not. If “insignificant,” the fact that time spent on the activity was not separately accounted for and deducted from the acknowledged donation will not, by itself, disqualify the payment as a charitable contribution.
- **How to Avoid the Issue.** Court decisions on this issue are discussed in [Pledges and Donation Agreements](#), which also provides a number of alternatives for the Holder to avoid involvement in the issue, among which is the strategy adopted in §3.1.2 below: maintaining a separate time and expense accounting for services provided for the benefit of the Owner.

3.1.2 **Accounting for Services.** The Owners often want, or need, help with their tasks and, if they do, §3.1.2 provides that any assistance provided by the Holder on these matters will be billed to the Owners on a fee for service basis.

- **Separate Accounting.** Separate accounting puts the Holder in a position to acknowledge all of the Initial Contribution as a charitable donation for federal tax purposes (if services performed for the Owners will be billed separately) or to deduct the value of services performed from the balance of the acknowledged contribution for federal tax purposes. See the guide [Pledges and Donation Agreements](#) for a more expansive discussion of this topic.
- **No Tax Deduction.** If the Owners will not seek a charitable deduction against federal taxes for the Initial Contribution, then separate accounting by the Holder for the Holder’s tasks as contrasted with the Holder’s services will still be necessary in order for the Holder to properly classify revenues on its federal tax return.

3.2 Election Not to Proceed

Purpose. To describe the terms governing withdrawal from the project by the Owners (§3.2.1) or the Holder (§3.2.2).

3.2.1 **By Owners.** So long as the Owners have met their obligations to contribute funds to defray the Holder’s costs and expenses, the Owners are completely free to decide not to proceed with the project at any time. Any contributions made to the Holder become the funds of the Holder for use in furtherance of its charitable mission and, as such, are never returned to the Owners.

3.2.2 **By Holder.** The Holder’s rights to withdraw under §3.2.2 must be read in conjunction with the statements made in §1.3 to the effect that the Holder has preliminarily determined that the project meets its criteria for project acceptance. Withdrawal after acceptance of the Initial Contribution may still occur if changes in circumstances or additional information change the basis on which the Holder’s offer to move forward

with the project was extended. Ordinarily, the governing board of the Holder reserves the right to approve, prior to acceptance, the terms of the fully negotiated transaction in its entirety. The authority of staff to negotiate changes requested by the Owners is subject to that final approval by the governing board or, in some cases, a designated committee of the board. The guide [Authorization of Real Estate Transactions: Rules and Process for Nonprofits](#) discusses this topic in detail. Holder may also withdraw to avoid participation in a fraudulent or abusive transaction.

4. Finalizing the Project

4.1 Payment Terms

Purpose. To evidence the agreement of the Owners and the Holder as to the funding required by the Holder to complete this conservation project and to set the terms of payment.

- 4.1.1 **Funding Requirements.** The Initial Contribution was an estimate. If the Holder's actual costs and expenses are greater than the Initial Contribution, the first priority is full reimbursement to the Holder. In addition, the Holder needs to set aside funds from this and other conservation transactions to have a reserve available for monitoring, administration, and, if necessary, enforcement. For further information, see the guide [Costs of Conservation Easement Stewardship](#).
- 4.1.2 **Closing Contribution.** The Closing Contribution may not be fully agreed to as of the Agreement Date because the transaction has not developed sufficiently to arrive at a firm estimate of future stewardship needs. In that case, §4.1.4. of the agreement provides a path for the parties to continue negotiating this item and, when a mutually acceptable number is arrived at, provides a method for the parties to evidence their agreement later by inserting the number and initialing. The sooner this is completed, the better.
- 4.1.3 **Stewardship Funding Arrangements.** Stewardship Funding Arrangements, as described in the [Model Stewardship Funding Covenant](#), are payments to be made following easement acceptance. A variety of alternatives are available to meet the needs of the Owners and the Holder. Stewardship Funding Arrangements complement the Closing Contribution. Both need to be considered as two variables to be adjusted back and forth, and alternatives considered, until a mutually satisfactory arrangement is reached.
- For more information, see the guides [Introduction to Stewardship Funding Arrangements](#) and [Legal Considerations for Stewardship Funding Arrangements](#).
 - To review the model document designed to implement the selected Stewardship Funding Arrangements, and a menu of potential payment structures to consider, see the [Model Stewardship Funding Covenant](#) and its accompanying commentary.
- 4.1.4 **To Be Determined.**

Unresolved Matters. This subsection addresses the circumstance where the agreement is signed before the Owners and the Holder have set the applicable Closing Contribution or Stewardship Funding Arrangements. For this situation, it lays out the process for addressing the unresolved matters. (If the spaces for the Closing Contribution and Stewardship Funding Arrangements have been left blank, it also clarifies that this does not mean “zero”: the Holder has not agreed to waive the Closing Contribution or Stewardship Funding Arrangements.)

More Time. The Holder may, of course, extend the 60-day period if negotiations are progressing satisfactorily but, if not, the Holder has the right to suspend its participation in the project until such time as agreement is reached.

4.1.5 **Adjustment.** An agreed-upon Closing Contribution and Stewardship Funding Arrangement may require adjustment if circumstances change before easement acceptance. Two circumstances are given in the model when adjustment is needed:

- (a) **Changed Circumstances.** Changes in the easement may result in greater stewardship burdens; for example, increases in the maximum number of Lots or maximum number of Minimal Protection Areas are likely to increase administration and enforcement issues. Sometimes the parties have reached an understanding of how the adjustment will be handled and, in that case, a clarification may be added as in the examples below:

Increase at Closing. The Closing Contribution has been calculated on the basis that Property will not be subdivided. The Closing Contribution will be increased by \$5,000 for each additional Lot permitted under the easement.

Conditional Payment. The Closing Contribution has been calculated on the basis that the Property will not be subdivided. If the easement permits division into additional Lots, a payment of \$5,000 is due upon the first Transfer of any Lot separate from the remainder of the Property. This Stewardship Funding Arrangement must be evidenced and secured by a Stewardship Funding Covenant delivered at closing and recorded immediately after the easement.

- (b) **Increase in Costs and Expenses.** The Initial Contribution was based upon an estimate. The Holder will endeavor to keep its costs reasonable but, as indicated by footnoted items in the Schedule, there are a number of variables outside the control of the Holder: extensive negotiations, requests for changes and document revisions; and unanticipated survey, title, and other issues that may, and often do, arise.

4.2 Conditions Precedent to Closing

Purpose. To memorialize that, even if requisite approvals under §3.2.2 are obtained, the Holder is under no obligation to accept the conservation easement unless all of the listed items are delivered by the Owners.

Checklist. The provision also serves as a checklist for the Owners, the Holder, and their respective counsel to prepare for closing.

- For a more extensive checklist prepared for conservation transactions (including conservation easements), see the [Model Checklist for Real Estate Transactions](#).

Closing by Delivery. Sometimes the Owners do not see the need to attend an in-person closing where documents are signed, deliveries are checked off a closing checklist, and checks are written and passed across a table. The list functions as a way to determine when, in fact, the transaction is closed. Delivery of a signed grant of easement is not sufficient without the other items as well.

4.3 Closing Procedures

Purpose. To address reasonable expectations about the location and conduct of closing.

4.3.1 **Location.** The default location is the Holder’s office. The expectation is that the Owners will physically attend the closing, although that is not always the case.

4.3.2 **Counterparts.** At least three original counterparts are signed at Closing. The Owners and the Holder will each have one and one will be sent for recording (and returned to the Holder).

4.4 Federal Tax Issues

Purpose. To alert Owners and Holder of additional items to be delivered if the grant of conservation easement is intended to be a charitable donation for federal tax purposes.

4.4.1 **Acknowledgment.** The Internal Revenue Code requires substantially contemporaneous acknowledgment of the donation of the conservation easement and any other contributions made in connection with that donation.

4.4.2 **Form 8283.** To support their claim for a charitable donation, the Owners must include Form 8283, signed by the appraiser and the Holder, with their federal tax return.

4.4.3 **Appraisal Concerns.** If Holder is concerned about the appraised value of the donated easement, this section provides Holder several safeguards against violating its legal or ethical obligations even if Holder has already accepted the easement. If Holder becomes aware of the appraisal problem before easement acceptance, Holder may also exercise the right in §3.2.2 to withdraw from the transaction.

Closing Matters

Closing. 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. Rather than risk that the mutual promises contained in the agreement won’t be seen as consideration under the law, the model includes a legally sufficient substitute for consideration. The phrase *intending to be legally bound* is a valid substitute for consideration in the Commonwealth of Pennsylvania (but not necessarily other states).

Signature by Owners. The Owners can sign the agreement and return it at any time but that does not constitute a notice to proceed to the Holder unless accompanied by the Initial Contribution.