Conservation Easement Donation Agreement

Agreement Date:

Model Conservation Easement

Donation Agreement

2nd edition (v. 2018.01.26)

Published by the Pennsylvania Land Trust Association at [ConservationTools.org](http://conservationtools.org/).

Holder:

Address:

Holder Representative:

Owners:

Address:

Property

Street Address:

Municipality: County:

Parcel Identifier: State: Pennsylvania

Mortgage Holder (if any):

# Background

## Purposes of Agreement

The purposes of this agreement are:

1. To describe the steps that must be taken before the donation of a conservation easement on the above-described Property can be finalized.
2. 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.
3. To clarify the relationship of Holder to Owners and identify the legal status of each.

## Holder

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

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

### 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.

## 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.

## Owners

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

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

1. \_\_\_\_\_\_\_\_\_ 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”).
2. \_\_\_\_\_\_\_\_\_ Owners understand that the easement donation is not intended to qualify as a charitable donation under the Code.

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

1. \_\_\_\_\_\_\_\_\_ 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”).
2. \_\_\_\_\_\_\_\_\_ 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”).

## 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:

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

## Professional Assistance

### **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.

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

### **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.

## Reliance

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

1. There is no person, other than the undersigned Owners, who has any ownership or leasehold interest in the Property.
2. Owners are not obligated to donate the easement by any contractual arrangement or to satisfy any legal requirement.
3. 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.
4. 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.
5. To the best of Owners’ knowledge, there are no hazardous or toxic wastes or debris, nor underground storage tanks, on or under the Property.

# Initiating the Project

## 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.

## 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.

## Defraying Costs

### **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”).

### **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.

# Preparing for the Conservation Easement

## Steps Towards Completion

### **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.

### **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.

## Election Not to Proceed

### **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.

### **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.

# Finalizing the Project

## Payment Terms

### **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:

1. 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
2. Provision for funding adequate to cover Holder’s long-term costs associated with conservation easement stewardship.

### **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.

### **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.

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### **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.

### **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:

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

## 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:

1. The grant of easement with all exhibits attached and accompanying Baseline Documentation certified to be true, correct and complete.
2. The Closing Contribution in the amount set forth above or otherwise approved by Holder.
3. The Stewardship Funding Covenant as set forth above or otherwise approved by Holder.
4. The Mortgage Subordination accompanied by evidence satisfactory to Holder that no unpaid tax or other liens encumber the Property as of the Easement Date.
5. 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.

## Closing Procedures

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

### **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.

## Federal Tax Issues

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

### **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.

### **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.

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

1. Decline to sign IRS Form 8283.
2. Postpone signing IRS Form 8283 until Owners produce additional substantiation of value satisfactory to Holder.
3. 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]](#footnote-1) |  |
| Title commitment[[2]](#footnote-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]](#footnote-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](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.

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.

1. 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.
2. 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.
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. [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
3. Holder’s estimate includes maximum of two hours to discuss, negotiate, and/or revise at the request of Owner or Owner’s counsel. [↑](#footnote-ref-3)