

**COMMENTARY TO THE BASE MODEL OF
RHODE ISLAND MODEL OPEN SPACE CONSERVATION EASEMENT (2019)**

The Rhode Island Land Trust Council works with the land conservation community to develop and maintain a library of model documents and accompanying commentaries to assist people and land conservation organizations with land conservation projects.

Connecticut Land Conservation Council developed a Model Conservation Easement and Commentary in 2014 and updated it in 2019. The RI Land Trust Council is grateful to Connecticut Land Conservation Council for allowing the adaptation of the Connecticut Model Conservation Easement and Commentary to Rhode Island. This Commentary and the Model Conservation Easement have been revised to reflect Rhode Island statutes.

The Connecticut Model Conservation Easement and accompanying Commentary were the product of thorough research and scrutiny by legal professionals and other conservation practitioners working in Connecticut (“Working Group”).^[1]

The Commentary provides optional and alternative provisions as well as the reasoning behind each of the model's provisions and guidance in applying the model to particular circumstances.

For this Commentary, it is important to understand the context. Statutes are often amended.

Note that changes in tax laws and Internal Revenue Service interpretations and rulings are frequent. Please review the model language carefully and always consult with your attorney when drafting a conservation easement and for other guidance. Guidance may sometimes be available from the Department of Attorney General with respect to existing Conservation Restrictions.

Rhode Island Land Trust Council thanks the Connecticut Land Conservation Council for their extensive work drafting the Model Conservation Easement and Commentary and allowing its modification for Rhode Island. We thank the members of the Rhode Island Model Conservation Easement Working Group for their work adapting the Connecticut models to Rhode Island: Stephen A. Haire (Moore, Virgadamo & Lynch), Gregory S. Schultz (Rhode Island Attorney General's office), Charles Allott (Executive Director Aquidneck Land Trust), Rupert Friday (Executive Director, Rhode Island Land Trust Council).

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Use of the Model Easement, Options and Commentary

This commentary and the Model Easement and Options are intended as an aid for drafters and negotiators of conservation easements. It is intended to be informational and aspirational. It is not intended to and does not impose new obligations on land trusts and should not be cited as a reference for such purposes. Land trusts are private property owners and should and do have the same rights and privileges as other real property owners. It is not intended to be used by easement violators or other wrongdoers as a justification for their trespasses and encroachments, violations of common law or statute, or other misdeeds. There will be language throughout the Model Easement that can be used dependent upon the nature of the grant and possible intended contribution under the Internal Revenue Code.

Conservation Easements: In General

“Conservation easements” (the general American term for legal agreements that property owners make to protect the conservation interests of their land, the terms of which “run with the land” despite changes in ownership), which also may be called Qualified Conservation Contributions (IRS terminology for conservation easements that may be eligible for deductions), are, in Rhode Island, called “conservation restrictions” by statute. Rhode Island General Statutes § **34-39-2(a)** states:

"Conservation restriction" shall mean a right to prohibit or require a limitation upon or an obligation to perform acts on or with respect to or uses of a land or water area, whether stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of the owner of the area or in any order of taking, which right, limitation, or obligation is appropriate to retain or maintain the land or water area, or is appropriate to provide the public the benefit of the unique features of the land or water area, including improvements thereon predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space, wildlife, or forest use, or in other use or condition consistent with the protection of environmental quality.

Title 34, Chapter 39 of the General Laws of Rhode Island, as amended, contains the purpose and authority for Conservation Restrictions and Preservation Restrictions. This enactment also contains provision for enforcement, release, and amendment. Title 45, Chapter 36 of the General Laws of Rhode Island, as amended, contains provisions for Conservation of Open Spaces by cities and towns. The Department of Environmental

Management is given powers and authority with respect to preservation of properties in Section 42-17.1-2.

Accordingly, whatever the document is called, its import is the same under Rhode Island law. We will generally call the form “the Model”, and the document created pursuant to the Model the “Easement”. The term “Easement” is the better known term than “conservation restriction”. The parcel of land, or in some instances the portion of the land, that is subject to the Easement is called the “Protected Property”. The Easement without options will be referred to as the Base Model.

Understanding the nature and composition of conservation easements makes them much more readable and sensible. It is said that when a party owns land it owns a bundle of rights, much like a “bundle of sticks”. One stick may be the right to walk on the property, another to build on it, another to farm it, another to have guests, etc. When a conservation easement is granted, the landowner transfers to the land trust or municipality some of those sticks (property rights). Generally throughout this Commentary, for ease of discussion, we will assume that Grantee is a land trust (a charitable organization whose mission includes conservation of land).

In some cases, the land trust is given affirmative rights, such as the right to have a trail for public use on the property, or to mow the fields to keep them open. Generally though, as to the landowner, the conservation easement is a “negative” easement that prohibits the landowner from doing certain things. Also, the rights retained by the landowner may be conditioned (such as requiring that the landowner seek approval of the land trust prior to building certain structures).

What the land trust acquires is really an obligation to enforce a promise by the landowner to refrain from doing those things that the easement prohibits. The one affirmative right that is essential to all conservation easements is the right of the land trust to enforce the easement.

A typical conservation easement held by a land trust may restrict the right to subdivide the property. This means that the landowner has relinquished the subdivision "stick." This does not mean that the land trust has been granted the right to subdivide the property. Quite the contrary. By accepting the Easement, the land trust has taken on the obligation to see that the property is not subdivided, the stick has been “broken” and the land trust holds the pieces as proof.

Types of Conservation Easements

Conservation easements vary depending upon the resource being protected. There are three basic types of such easements: 1) “forever wild”(where the landowner retains few, if any, rights to change the natural and current condition of the property), 2) hybrids with specific uses reserved to the landowner, and 3) working lands (farmland or forestland) easements. Conservation easements may be further divided to those that are donated, those that are partially donated in bargain sale transactions, and those that are purchased at their fair market values. The Base Model establishes one set of limitations that applies throughout the Protected Property and is most appropriate for parcels with minimal use and few or no structures. A basic option sets out a portion of the Protected Property for building (the “Reserved Residential Area”). The Model does not address fully working lands or historic preservation easements which require a variety of structures, differing protection areas and commercial uses.

A Model Agricultural Conservation Restriction for Connecticut was developed as a project of the American Farmland Trust (AFT) in 2014, in partnership with the Connecticut Farmland Trust, Inc., Connecticut Land Conservation Council and several other project partners including the Connecticut Department of Agriculture. The primary purpose of that model is “to protect the agricultural soils, current and future agricultural viability, and agricultural productivity of the Protected Property in perpetuity”. Only to the extent that they are not inconsistent with the primary purpose, it is also the purpose of the Model Agricultural Conservation Restriction to protect the additional Conservation Values. Thus it has a prioritized purpose, heavily weighted toward agriculture. If the parties to an easement are primarily interested in the preservation of the agricultural use or potential of a particular parcel of land, it is recommended that the drafter consider use of provisions in the Connecticut Model Agricultural Conservation Restriction, as may be amended from time to time. It is available on the Connecticut Land Conservation Council website: www.ctconservation.org under the Resources Tab as a Model Document. There is also language that could be added in the **Options** document. Any easement involving farming or other agricultural activities will need to be carefully drafted to add provisions to provide for farming keeping in mind best practices, Right to Farm laws, and agri-tourism, among components. Transactions involving USDA or RI DEM will bring other requirements along with funding.

Each transaction is different and may have one or more entities involved in preservation. Depending on funding sources as well as the partners in preservation of a particular parcel, there may well be specific provisions that will need to be included. This should be determined as soon as possible so that discussions with the property owner can cover the nature and types of terms. For the most part, conservation restrictions will be hybrid as referenced herein.

THE BASE MODEL PROVISIONS:

THE INTRODUCTORY PARAGRAPH

The Model document starts by setting forth the parties with enough particularity that they will not be confused with other persons or entities. The Grantor is the owner of the property that is giving up the rights. Importantly, the term “Grantor” also includes all successors in ownership of the Protected Property. The Grantee is the recipient of those rights, or as discussed above, the enforcer of the Easement, and this term also includes successors to the Grantee if the Easement is assigned or otherwise transferred to another holder.

A title search should be completed early in the Easement negotiation process in order to determine that the stated Grantor (whether sole owner, individual or individuals, corporation or other entity, trust, or estate) is truly the owner of the Protected Property with full and complete right to legally convey away a legal interest in the Protected Property. A title commitment should be obtained. The Title Commitment will fulfill several necessary elements. It will specify current owner(s), contain a legal description (which may be replaced by new survey); specify title status; identify matters to be resolved prior to closing; and specify items required for owners to convey the Conservation Easement whether, individuals, corporations, limited liability companies, partnerships, limited partnerships, trusts, estates, or other entities. This could include depending on owner, Certificates of Good Standing, Votes, Consents, and other required authority documents. Grantor’s execution and delivery of the Easement is a conveyance of an interest in real property. If there are mortgages or liens on the property, they must be released or “subordinated” (made lower in priority) to the Easement so that the Easement cannot be terminated by a foreclosure of those mortgages or liens. This is both an IRS requirement for deductibility, a Land Trust Alliance Standards and Practices requirement, land trust accreditation requirement and a sensible requirement to assure protection of the perpetual nature of the Easement.

RECITALS

The Model then moves on to the Recitals, often known as the “Whereas Clauses” or “Premises”. The Recitals set forth the facts and circumstances which explain the matters on which the transaction is based. The Recitals section performs a number of important functions. This Model dispenses with the traditional legal term “Whereas” before each clause, in order to make the document more readable. However drafted, this section is important in setting the context for the Conservation Easement, impacts, and qualification.

Legal Description of Property

The initial Recitals set forth a detailed description of the Protected Property. This allows, if necessary, the “Property” to be the larger parcel of land when only a portion is to be protected. The Protected Property does not have to be the entire building lot or legal

parcel. Placement of the Easement on a portion of the larger property does not constitute a subdivision.

The first Recital paragraph references the legal description of the Protected Property, which is to be attached as Schedule A. If the Easement is only on a portion of Grantor's property, care must be taken in preparing the legal description, and a new survey may be needed. Consideration should be given to including description of entire parcel of which the Protected Property forms a part and adding a defined term for such larger parcel. Additional care must also be kept in mind for subdivision and other restrictions important for the particular project. The Legal Description may come from title examination materials, title commitment, or survey to be recorded.

Although the Base Model does not include minimal protection areas such as reserved residential areas, farmstead building areas, or working lands areas, establishment of limited protection areas may be made if careful modifications are made in drafting. A Reserved Residential Area Option has been added to the Options.

Grantee's Capacity

The second set of Recitals identifies Grantee's capacity to receive the Easement. Alternative clauses identify either a governmental unit or a land trust. Such provisions are no different from any other real estate transaction such that it is essential for title counsel be involved. As previously stated, throughout this Commentary, for ease of discussion, we will assume that Grantee is a land trust.

Traditional legal principles disfavor perpetual restraints on the use of property. The Conservation Easement enabling legislation made conservation easements perpetually enforceable § 34-39-3 (c). "The restrictions shall not be subject to the thirty year limitation on restrictive covenants provided in § 34-4-21."

It is therefore essential that the Easement be held by an eligible entity.

Rhode Island Title 34, Chapter 39 sets forth and contains protective provisions for conservation restrictions and preservation restrictions.

Conservation Values Clauses

The Recitals then go on to set forth the significant conservation values (also known as conservation interests) that the Easement will protect. "Conservation Values" becomes a defined and therefore capitalized term. These clauses tell everyone who may have to interpret the document - land trust personnel, landowners, and judges - why protection of the Protected Property is important and what specifically is so important about it. This group of Recitals, which may be many paragraphs, forms the basis for the specific terms of the document (although the terms should be clear without reference to the Recitals clauses). The IRS terminology of "conservation interests" option was intentionally included in the definition of Conservation Values so that term does not need to be repeated throughout the Model whenever protection of Conservation Values is addressed.

However, if there Grantor does not intend to have the transaction qualify for a tax deduction, then the Easement may omit this optional language. Conservation Easement drafting should always start with an honest analysis of what you are trying to protect and that should be incorporated in the Recitals along with the goals of each party

The Recitals are the place to convince people of the value of protecting this land. These should not be clauses full of generalizations without specific information about the Protected Property. The drafter should remove or qualify inapplicable Recitals and add as much detailed information about the specific significant conservation interests of the Protected Property as possible. Conservation interests which are not intended to be protected in perpetuity should not be included. The Model separates Conservation Values to be protected by the Easement into five main Recital groupings: Scenic Enjoyment, Habitat Preservation, Outdoor Recreation and Education, Water Quality Protection, and Public Policy. These groups mimic the main “Conservation Purposes” recognized by the IRS (although Water Quality Protection is a subset of the other groups). The “Conservation Purposes Test” and is set forth in Treasury Regulations §1.170A-14(d).

Only conservation purposes included in the Conservation Purposes Test are a valid basis for a deduction. In each instance, consider which Purposes are applicable. This does not mean you should omit from the Recitals other reasons why the Protected Property is valuable from a conservation perspective, but in order for Grantor to appropriately claim a deduction, the Easement must promote one or more of the relevant purposes that the IRS would recognize. Every such reason should be fully identified and be included.

The Water Quality Protection Recital section is not a separate part of the Conservation Purposes Test, but furthers all of the other Conservation Purposes. It has been set out as a separate Recital section to emphasize its importance and to make sure that water issues are not missed in the enumeration of the conservation virtues of the Protected Property. All of these Recitals have many possible variations depending on the qualities of the Protected Property. The Water Quality Protection group may include references to protection of ponds, streams, rivers, wetlands or coastal resources.

The IRS recognized Conservation Purposes are as follows:

1. The donation is for the scenic enjoyment of the general public and will yield a significant public benefit. Scenic enjoyment is defined very broadly but visual access is required. It is not enough to protect a beautiful vista if no one but the property owner can see it. There would be no public benefit. If this purpose is included in the document, the drafter must be careful to avoid retention of grantor rights which could violate this purpose (such as the right to build a stockade fence which would obstruct the view from public ways) or to place appropriate limitations on their exercise.

2. The donation is for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. Access is not mandatory when habitat is being

protected. The known presence of a species of conservation need or endangered habitat should be documented in the Baseline Report for inclusion of this Conservation Purpose.

The Rhode Island Department of Environmental Management (RIDEM) website contains the Rhode Island Wildlife Action Plan which has maps that identify the state's Conservation Opportunity Areas and a useful listing of species and habitats of greatest conservation need. RIDEM and the U.S. Fish and Wildlife Service have policies to finance and encourage protection of these species and habitats. Protection of such species and habitats on the property supports not only this second part of the Conservation Purposes test, but also would be in furtherance of public policies under the Public Policy Purpose #4 below.

3. The donation is for the preservation of land area for outdoor recreation by, or the education of, the general public. This test is not met unless the recreation and education is for the substantial and regular use of the general public. Even if more general access is not granted to the land trust, drafters will frequently include periodic and supervised access to the property for trail walks, educational functions etc. in easements to further this purpose, to further the land trust's mission and to garner public support for the preservation of the property.

4. The donation is for the preservation of certain open space (including farmland and forest land) pursuant to a clearly delineated federal, state, or local governmental conservation policy that will yield a significant public benefit. This is the category of conservation purpose most often utilized to validate the charitable deduction of an easement.

There are many policies for preservation of conservation lands. A general policy is only the start of the inquiry; facts must be established to show that the specific property being protected falls directly within the policy and yields a public benefit. Examples of some policies specific to Rhode Island are:

Provisions of Comprehensive Community Plan in the City/Town where property located; other City/Town approved policies or designated protections, state enactments approving/designating management areas for environmental or water quality protection; and the Conservation Opportunity Zones identified in the Rhode Island Wildlife Action Plan.

General policies may be cited but policies that specifically list the Protected Property as worthy of protection are optimal. Examples of such specific policies include town plans of conservation and development and open space plans. If the plans do not specifically reference the Protected Property, the parties may seek a specific certification or resolution from the relevant municipal agency that the Protected Property is "worthy of protection for conservation purposes" (See Internal Revenue Code Reg. §1.170A - 14(d)(4)(iii)(A)). An additional way to show that the preservation of the Protected Property fulfills a government conservation policy is to establish facts clearly placing the property within the policy.

5. The donation is for the preservation of a historically important land area or a certified historic structure. The last conservation purpose recognized by the IRS to justify a deduction is historic preservation. The Model does not include this purpose because of its limited applicability and its need for specialized drafting. There are particular IRS rules which apply to the protection of historic structures.

Under this standard, the Protected Property must be national register criteria land, or a building listed in the National Register or located in a registered historic district and certified by the Secretary of the Interior to be of historic significance to the district. Special rules may apply. Accordingly, this conservation purpose is rarely applicable. A reference to the historic nature of a property and/or its buildings would nevertheless be useful to show its importance to the community and the reason, from the perspective of the parties, for any particular restrictions protecting the historic nature of the property.

It is important to reiterate that the IRS recognized conservation purposes are not the only conservation purposes the parties may wish to recite. Other important conservation interests that are to be protected by the Easement should not be ignored even if they are not recognized by the IRS. There is no requirement that IRS recognized conservation purposes be stated in the document, only that the Easement meet them. Most practitioners, however, believe it is a wise practice for the Easement document to clearly state how the Easement, as it applies to this particular property, meets the Conservation Purposes Test. It is important to note that a deduction for the donor is *not* the purpose of any easement.

Defining Conservation Values

Of great importance in the Recitals is defining the term “Conservation Values.” As previously stated, the term Conservation Values is a term of art that is the collective term, a short-hand, for the compelling reasons Grantor and Grantee are protecting the land: its scenic, recreational and ecological resources, and its importance from a public policy perspective and to the community. Conservation Values are defined in the Recitals, and should be further documented in the Baseline Report.

Importance of Baseline Report

The Recitals and Paragraph 19.10 reference the documentation of the Conservation Values by a collection of information known as the Baseline Report. The Baseline Report is a necessary and required adjunct documentation of the Conservation Values. The IRS and best practices require that the conservation interests of the Protected Property be documented in a Baseline Report and certified by the parties.

The Baseline Report (often called the Baseline Documentation Report or Baseline) is a set of documents establishing the condition of the property at the time of the execution of the Easement; it can in the future be used to document the condition of the Protected Property for enforcement purposes and to illuminate the intent of the parties. The

Baseline Report informs and emphasizes to the owner what is being protected, and creates an institutional memory of the intent of the Easement for the land trust. This document should not be, though often is, just a dry recital of the ecologically relevant facts and the location of existing structures.

It is advantageous if the Baseline Report conveys the human history that informs the preservation of the land. It may constitute the only facts available many years in the future to say why preservation of the land is important from a human perspective and what the intent of the donor was. It may be the one thing that convinces a judge faced with the current human individual landowner and an institutional land trust, of the value of continuing to uphold an ancient document.

The Baseline Report should be complete at execution of the Easement, and signed at that time, and is required to be such by the IRS and Land Trust Alliance *Standards and Practices*. Optimally, it is completed before that time, and informs the drafting of the Easement, particularly the Recitals. One reason for completing the Baseline Report early in the Easement acquisition process is that special provisions may need to be made in the Easement language to protect the conservation values identified by the Baseline Report.

One further point about the Baseline Report: the Baseline Report is seldom recorded in the land records. Indeed, it may not be in a form that is recordable. The Working Group felt the Baseline Report should not be referred to as “incorporated by reference” in the Easement. As a separate unrecorded document, it is subject to being lost over time and should be carefully and safely archived by the land trust. The Baseline Report also may become less relevant over time as the condition of the property changes. It is separate from the “four corners” of the Easement and reliance on it is subject to the argument that it should not be used to interpret the Easement; the Easement should speak for itself.

Accordingly, practitioners should not rely wholly on the Baseline Report for important information about interpretation of the Easement. The Easement should stand by itself (or with recorded maps particularly referenced in the Easement) on important issues, including the location of building areas.

The Baseline Report should not be confused with monitoring or stewardship reports. Monitoring reports are periodic (usually annual) checks on the condition of the Protected Property and inspections for Easement violations. The Baseline Report should also not be confused with Management Plans which are plans outside of the Easement, made periodically to set forth how the property owner or the land trust, if it has the necessary authorization, will manage the Protected Property on a daily and long range basis. Management Plans also apply to fee simple (land protection entity owned) properties. Not every Protected Property subject to an Easement has a Management Plan, but the land trust should produce monitoring reports on a regular basis as optimum documentation of the state of the Protected Property. That said, the land trust is a private property owner like any other property owner and is not under additional obligations to fend off malefactors by monitoring or boundary marking.

THE GRANTING CLAUSE

The Granting Clause is the formal clause where the transfer of property rights occurs and the consideration (e.g. purchase price) for the Easement is set forth. The parties as stated above need to be properly designated and all authority documents need to be obtained prior to closing and recording. The Land Trust and/or governmental unit will work with legal counsel to determine which of the documents need to be recorded.

This clause also states the statutory authority for the transfer (the conservation easement enabling statutes Title 34, Chapter 39 and Title 45, Chapter 36 of the General Laws of Rhode Island, as amended.), the particular nature of the interest being conveyed, and that it is intended to be construed as a charitable use. This helps to establish that the applicability of Section 34-39-3(d) which provides that “The attorney general, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in such restrictions.”. Thus, even when the Easement is not a gift, but is a fair market value purchase, it would be enforceable by the Attorney General, and Rhode Island law specifically designates the attorney general to protect the public interest. See also Section 34-20-1.1 as additional rights for land owners or conservation restriction holders of open space land to bring legal actions.

If there is consideration being paid, then the amount of the consideration needs to be specified and real estate conveyance tax needs to be paid. If a gift, a recitation of gift needs to be made referencing that tax stamps are not required.

There are consequences to a conservation easement being categorized as a charitable use. The operative principle of charitable trust law is that the Grantor’s expressed and implied intent must be honored. The advantages of this status include that the Attorney General is empowered to enforce the terms of a conservation easement and the land trust may thus have an ally in protecting the property. The donor similarly has increased certainty that his or her wishes will be carried out. The disadvantage is that modification of the Easement may be difficult or prohibited, even when it would provide a conservation positive outcome and that the Grantor and Grantee agree.

For this reason, it is quite important to consider the inclusion of discretionary consent and amendment clauses in the Easement (and other documentation), as provided in the Base Model and discussed later in this Commentary. Such clauses clearly establish the intent of the donor to grant to the land trust the power to manage and change the details of the Easement consistent with the Purpose and certain requirements.

Such provisions should be carefully drafted. If there are provisions for consent, there should be defined limited rights and procedures for consent. Any amendment or release will be subject to Section 39-34-5 and should also reference the holder's amendment policies and procedures.

1. THE PURPOSE

The Purpose Clause is set forth in Paragraph 1 and Purpose becomes a defined term. **The Purpose is the heart of the document.** It is the standard by which all things are measured (this should not be confused with the elements of the Conservation Purposes Test recognized by the IRS, previously discussed in relation to the Recitals.) Permitted and prohibited uses are measured by the Purpose and decision-making throughout the document is limited by the Purpose. Land Trust Alliance *Standards and Practices*, charitable trust law, and land trust internal policies and procedures often refer to the Purpose for direction. Each property is unique and the land trust must consider the drafting of the Purpose clause with great care.

The Purpose in the Base Model incorporates multiple aims to be weighed by the land trust and the document's interpreters in their decision making. The Purpose of the Model is not prioritized, so the mission of the particular land protection entity may play a factor in how the elements of the purpose are weighed.

Careful consideration should be given to possible conflicts between the various elements of the Purpose, particularly if agriculture is included. Drafters may wish to consider prioritizing of conservation values and considerations listed in the definition of Purpose and to consider the appropriateness of use of a working lands (agriculture) conservation easement.

2: DEFINITIONS

The Purpose is followed by a Definitions section. Defined terms are capitalized throughout the document. The definitions may be referred to whenever the term is used in the document. In the Model, the definitions are broadly worded and may be limited elsewhere in the document. Though a term may include a number of uses, the particular paragraph that uses that term may substantially limit its applicability.

The Definitions section is put early in the Model so that it is easy to find and performs a Table of Contents function. Some documents have no Definitions section but contain the definitions within the primary or first paragraph referring to each term, with internal cross references whenever the term is used. Although these are valid approaches, the use of cross referencing is a frequent source of errors, since as revisions to the documents are made, cross references may be overlooked.

The Model is a hybrid of these approaches. In the Model, many definitions are included in the main or first paragraph that they relate to and the Definitions paragraph merely cross-references where the definition is located. This centralizes where cross reference checking is required and is intended to minimize the number of times flipping pages to the Definitions paragraph is needed. Wherever possible, the Model uses a defined term in the body of the document, to minimize the need for numerical cross reference checking.

3: LIMITATIONS AND PROHIBITED USES

Novice readers of conservation easements are often bewildered by their structure. There are several types of structures in use, but the Model roughly follows the Model Conservation Easement format found in the seminal The Conservation Easement Handbook – Managing Land Conservation and Historic Preservation Easement Programs (1988) which is the basis of many forms of Conservation Easement currently in use. Easements in Rhode Island are meant to be perpetual; and are drafted in light of the practical reality that it is nearly impossible to predict how subsequent events or peoples’ or communities’ actions may affect the Protected Property. The standard by which a conservation easement should be understood and enforced is whether the activity is consistent with the Purpose; if it is, the landowner may do it, if it is inconsistent, he or she may not.

Parties, however, generally would prefer things to be more particularly set out. Accordingly, because this standard is subject to wide interpretation, Paragraph 3 sets forth a broad list of prohibitions (the Limitations and Prohibited Uses) except as provided in Paragraph 4. Paragraph 4, Grantor’s Reserved Rights and Permitted Uses, is therefore the most important and variable part of any Easement. Once the interaction between the Purpose, Limitations and Prohibited Uses, and Grantor’s Reserved Rights and Permitted Uses, is understood, the document becomes more comprehensible.

Despite the inclusion of the “except as provided in Paragraph 4 below” qualification in the opening paragraph of Limitations and Prohibited Uses, persons unfamiliar with the structure still have difficulty grasping that the prohibitions are qualified by Grantor’s Reserved Rights and Permitted Uses; accordingly, we have repeated reference to the exception generically in applicable clauses in the Limitations and Prohibited Uses section even though duplicative. Some drafters will list the specifically applicable exceptions in each prohibited use paragraph, but this makes errors of omission and inconsistency more probable.

3.1 Subdivision. This typical provision prohibits the division of the Protected Property unless conveyed to another eligible entity. Any further exceptions should be listed in the Paragraph 4 Special Subdivision Rule and a cross reference may be inserted under this paragraph. Surveys are usually obtained and recorded prior to recording and survey description used. It is necessary to avoid describing the Protected Property as two or more recognized tax parcels as a tax sale on one tax lot only would be problematic.

3.2 Use for Development. This provision prohibits the stacking of development on other property due to the preservation of the Protected Property.

3.3 Prohibited Structures. This broad provision prohibits structures unless permitted in Paragraph 4.

3.4 Changes in Topography and Mining. This broad provision prohibits all manner of changes in topography (except as otherwise permitted in Paragraph 4). Invasive species are dealt with in paragraph 4.6.

3.5 Changes to Vegetation. This broad provision prohibits all manner of changes to vegetation (except as permitted in Paragraph 4), with reasonable exception for health and safety protection activities. IT MAY BE ADVISABLE TO INCLUDE THE MAINTENANCE CUTTING OPTION FOR THE RIGHT TO MAINTAIN EXISTING OPEN AREAS AND TRAILS. Careful documentation of existing trails and open areas should be made for retained rights related to their maintenance. This could be added to Section 4.6 or other applicable subsections of Section 4.

3.6 Pesticides. This restricts Pesticide use accept as provided in Paragraph 4.

3.7 Trash. This provision prohibits dumping and storage of trash and toxic substances on the property.

3.8 Pollution and Alteration of Water Resources. This protects water quality and natural water flow (except as otherwise permitted in Paragraph 4).

3.9 Recreational Vehicles. This provision broadly prohibits recreational vehicles (except as otherwise permitted in Paragraph 4). Optional language to be considered is whether to limit the prohibition to motorized vehicles or to extend it to mechanized vehicles (including bicycles) and whether to include horseback riding. In every case, special consideration should be given to whether and how the applicable prohibition can be enforced and whether it really is needed to further the Purpose of the Easement.

3.10 Commercial Recreational Activities. This provision broadly prohibits commercial recreational activities in accordance with the requirements for the estate tax reduction under the Internal Revenue Code. The drafter should consider whether the estate tax reduction is important enough to the landowner that it should be included, or whether to limit this to nonagricultural activities or to omit the paragraph altogether.

3.11 Other use. This catch-all provision prohibits any other use which may not have been listed, which would be inconsistent with or have an adverse impact on the Purpose.

4. GRANTOR'S RESERVED RIGHTS AND PERMITTED USES

This is the most important section to Grantor; it is where the rights specific to Grantor are set forth. Paragraph 4 makes clear that Grantor “reserves the right to undertake or continue any activity or use of the Protected Property not prohibited by this Easement and not inconsistent with the Purpose of the Easement”. The succeeding paragraphs go on to specifically enumerate the most important and known of those rights. The IRS code requires that the Grantor be obligated to notify Grantee before exercising any right that may have an adverse impact on the conservation interests associated with the Protected Property.

This is also an opportunity to require review in all instances and approval where appropriate. Some level of approval will help assure that any rights are exercised consistent with the Conservation Easement terms.

4.1 Mortgage and Convey Subject to Easement. This clarifies that Grantor retains the normal right to convey the property. This provision should be considered in light of, and coordinated with, the subdivision restrictions of Paragraph 3.1. and 4.7

Although duplicative, it is essential that the starting point has the Conservation Easement free of all mortgages and liens having priority over the Conservation Easement.

4.2 Existing Structures. Existing structures may be repaired and maintained. Rhode Island's iconic dry laid stone walls are protected here, though interior mortar may be utilized to prevent theft. If other types of walls are present, these should be addressed. It is critical to enforcement that the structures on the property that exist at the time of the grant are documented in the Baseline Report and/or maps.

4.3 Outdoor Recreational Activities. This provision has many variations. Grantee must thoughtfully consider the impact of the various activities on the Protected Property's Conservation Values as well as Grantee's willingness and capacity to enforce any particular provision.

4.4 Signs. Grantor may post the property for the listed typical management purposes.

4.5 Habitat Enhancement. Typical enhancement activities are allowed. Other such activities may be approved by the land trust or are permitted if recommended by a Qualified Natural Resource Professional (QRNP) approved by Grantee.

4.6 Invasive Species Removal. This is a minimally restrictive invasive species removal provision. It does not require that such activity be performed with professional assistance unless broad application of biocides is to be done. The activity must, however, be done in accordance with Best Management Practices and be accomplished in a manner with the least impact on non-target species.

It should be noted that a right of the land trust to do invasives management was not included in the Base Model, but such activity can always be done by a land trust with the consent of the landowner.

[4.7 Special Subdivision Rule. This is where special circumstances in which subdivision may be allowed may be added. If this is added, a reference to the paragraph should be added in 3.1 and 4.1]

5. GRANTEE'S RIGHTS

This section sets forth the rights of the land protection entity. Such rights include:

5.1 Right of Entry for Stewardship and Monitoring Purposes. The right of entry for monitoring and documentation of compliance. This right is only conditioned on Grantee making a reasonable effort to notify Grantor prior to entry, except in emergency circumstances. Facts, circumstances and the respective parties' availability and capacity are all very variable, so a specific type or time frame for notice was not included.

The land trust may wish to add a provision giving them the right to do invasives management. The right given Grantor in 4.6 can be adapted to such purpose.

Older easements often included, a seldom utilized broad provision stating, in effect, that Grantee may manage endangered species in accordance with a plan developed by a Qualified Natural Resource Professional. To include this right, see the Management by Grantee Option included in the Options.

5.2 Signs. Grantee is here given the right to install and maintain signs on the boundary of the Protected Property. Without this provision it is difficult for Grantee to locate boundaries in the field. This may be omitted if permanent features may make the bounds of the Protected Property obvious. Also, this may be a source of contention with Grantor, who may fear that such signs would be interpreted by the public to indicate public access. If this provision is included, Grantee should work with Grantor to make sure that Grantee is comfortable with the wording and placement of the anticipated signs.

6. NO PUBLIC ACCESS

This provision makes clear that the Easement does not create a right of access in the public. Sample alternate language is given in the Options for those situations where Grantor is permitting public access.

7. NOTICE AND APPROVAL

7.1 Notice. This provision sets forth information to be included in a required notice to Grantee. It is critical to identify when Notice and Approval are required. No room for doubt or interpretation is safe. While Grantor needs to have a level of assurance that the owner's goals can be met, protection of conservation values needs to be the first priority. The Model specifies that notice is required 90 days before the activity requiring notice. A land trust should carefully consider for itself the time frame to be used here, based on its internal capacity for timely review, including the frequency and regularity of board meetings. Some land trust boards only meet quarterly. Some land trusts are stewards for a large number of properties and may have many issues to deal with at one time.

7.2 Approval. This provision sets forth the standard to be used in acting on requests for activities required to be approved by Grantee. The land trust should carefully consider for itself the time needed (in the worst case scenario) for review,

including the frequency and regularity of board meetings and its other stewardship obligations.

Recent case law has found that “deemed approval” provisions (where if a decision is not made in a set time the request is deemed approved by the land trust) violate the perpetuity requirements for a deduction and accordingly, no exact time frame has been set for decision here. (*Hoffman Properties II LP V. Commissioner* 1413-15). Where a hard and fast time frame is important, a deemed denial provision may be considered. This model has a provision requiring approval prior to commencement of the activity. If any challenge to the approval process is brought, the Attorney General’s office should be notified so that it can determine what steps might be necessary to protect the public interest

7.3 Approval in Changed or Unforeseen Circumstances.

Careful consideration should be given to inclusion of this provision if the property owner will be claiming a charitable contribution to the IRS. Nothing should be included which places the conservation restriction in doubt. Even the most careful drafting is no guaranty that the IRS will not find that the language prevents the Easement from qualifying for a deduction. **This section has been left in but without recommendation to use.**

The Approval in Changed or Unforeseen Circumstances provision validates, empowers and recognizes the inherent administrative discretion that Grantee has to interpret and enforce the Easement and to respond to changing technology and changing ecology and other unforeseen circumstances. It recognizes that the terms in the easement are based on a certain set of facts and assumptions which may not be accurate or stay accurate over time. This Approval is designed to be used in situations which are probably temporary, and in scale or magnitude do not arise to the level of requiring an amendment. Grantee’s discretion is, however, substantially limited as set forth in the paragraph and in accordance with current case law. In Rhode Island, keep in mind Section 34-39-5 which sets standards for amending conservation easements and approvals that are necessary.

The traditional title of this paragraph “Discretionary Consent” has been changed to minimize any confusion between the term and the various other types of discretion to be exercised by the land trust in administering the Easement.

If an Approval in Changed or Unforeseen Circumstances clause is not being included in an Easement, the drafter(s) of the Easement should be especially careful to build in other flexibility provisions to the document such that it will withstand changed circumstances, changed technology and changed environmental factors. To the extent that the activity is fully consistent with the terms of the Conservation Easement, then there may well be inherent ability to interpret. And if the activity may impact conservation values to any extent, then there will likely be no substitute for Court approval and consultation with the Attorney General.

8. COSTS AND LIABILITIES

8.1 In General. This clarifies that the normal responsibilities of ownership remain with Grantor landowner.

8.2 Taxes. This states the traditional principle that the landowner continues to be responsible for the payment of all taxes despite Grantee having some real property ownership interest in the property.

8.3 Indemnification by Grantor. Grantor is responsible to release, hold harmless, and defend Grantee for accidents which may occur on the property unless they are caused by Grantee's negligent acts or misconduct, or arise out of Grantee's workers' compensation obligations.

8.4 Indemnification by Grantee. This reciprocal provision requires that Grantee release, hold harmless, defend and indemnify Grantor for damages from Grantee's activities on the Protected Property, other than those caused by Grantor or arising out of Grantor's workers' compensation obligations.

The inclusion of indemnification by Grantee is frequently debated in the land trust community, particularly if no public access is provided for by the Easement. A landowner is responsible generally for the condition of his or her land as to all guests and invitees and, accordingly, keeps it insured. It is argued that there is no reason to change this obligation if there is a conservation easement on the property and indeed, Grantee is taking on a big responsibility in holding the Easement and defending it in perpetuity. The provision was included in the Model because landowners view it as a fairness issue and liability will generally be decided in accordance with established principles of law, regardless of the inclusion or exclusion of this paragraph.

8.5 Acts Beyond Grantor's Control. This provision makes clear that Grantor is not liable for matters beyond its control. The provision provides a path to enforcement under such circumstances.

9. GRANTEE'S REMEDIES

Grantee shall give a thirty day notice to Grantor when it becomes aware of a violation of the Easement. This provision details the enforcement actions Grantee may thereafter take if the violation is not corrected.

9.1 In General. This provision broadly gives the Grantee the right to preserve and protect the Conservation Values.

9.2 Enforcement. This provision broadly gives Grantee the right to prevent activities inconsistent with the Purpose whether by Grantor or third parties, to require restoration when a violation occurs and to enforce the Easement by all appropriate legal proceedings. The IRS Code requires that the Easement include the right to require the

restoration of the property to the condition it was in at the time of the donation. Further provisions in the Easement elaborate on these rights.

9.3 Emergency Enforcement. This provides that no notice or cure period (the time allowed to fix or “cure” a violation) is required in emergency situations.

9.4 Forbearance Not a Waiver. This is standard language that a delay in enforcement of the Easement shall not prevent later enforcement. Rhode Island statute Section 34-39-3 provides protections on account of any doctrine that might cause termination of the restriction and §34-7-9 provides that land held or preserved by a nonprofit corporation or nonprofit association for purposes of conservation, open space, or cemetery is not subject to adverse possession or prescription. But courts still consider other factors in enforcement actions. See also § 34-39-3(a).

10. COSTS

10.1 Grantee’s Entitlement to Costs of Enforcement. The Base Model requires that if a court of competent jurisdiction or other legal entity finds Grantor to be in violation of the Easement, Grantor shall pay Grantee’s costs of enforcement, including attorney’s fees. This is contrary to the typical American principle that each party bears its own expenses of litigation. It is important that the section be clear that “Grantor” is also responsible for its agents and that costs of enforcement is intended to broadly include related costs such as arbitration and drafting expenses related to enforcement. The paragraph also specifically states that if Grantor prevails, the reimbursement does not become reciprocal. There is good reason for the costs provisions not to be reciprocal. Not only is this not a consumer or commercial context, but rather the conservation easement requires the land trust to protect a charitable use. The land trust is responsible for upholding it in perpetuity. A reciprocal provision would be a huge burden to a land trust responsible to enforce, and a windfall to a landowner that was able to purchase expensive legal representation.

Inclusion of Grantee’s entitlement to costs of enforcement creates a powerful financial incentive for Grantor to avoid or correct violations. Note that Grantor need not reimburse Grantee for litigation costs if Grantee does not prevail in a dispute. Thus Grantee is still deterred from taking unreasonable or unclear positions, because if it does not prevail it shall not recover its costs.

The Model’s provision is consistent with Rhode Island’s particularly favorable statute with respect to enforcement. §34-20-1.1, provides that upon a finding of encroachment on land subject to a conservation easement, the court shall order the violator to restore the land to its condition as it existed prior to such violation. In addition, the court may award reasonable attorney's fees and costs, injunctive or equitable relief, and damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars.

It is the common practice not to have a reciprocal provision requiring Grantee to indemnify Grantor landowner in enforcement actions by the land trust. Grantee is charged with enforcing the Easement; Grantor is not. Since the obligations of the parties are not reciprocal, the liabilities should not be. The expense and public relations ramifications to Grantee of pursuing a frivolous action is a substantial deterrent to any such suit. If a Grantor indemnification provision is still needed, the following language is suggested:

Grantee agrees to reimburse Grantor for all costs of suit, including reasonable attorneys' fees, incurred by Grantor in defense of any claim or action brought by Grantee in connection with any alleged violation hereof by Grantor, provided that Grantee acknowledges in writing that such claim or action was commenced by Grantee with actual knowledge that the allegations therein were materially untrue or if an arbitrator or court of competent jurisdiction, as the case may be, affirmatively determines that Grantee was acting unreasonably or frivolously in initiating a legal action to enforce this Easement and such action was commenced by Grantee with the actual knowledge that the allegations made therein were materially untrue.

However, for the previously stated reasons, and to encourage uniformity and discourage land trust shopping, not including any Grantor reimbursement is the preferred route in drafting.

10.2 Non-Enforcement Costs. Land trusts are increasingly adopting amendment policies that require the Grantor to pay for the costs associated with amendment requests or require an administrative fee for such requests. Several legal cases have reviewed the land trust's right to such costs, including the types of costs and how they are calculated. This paragraph establishes the right of the land trust to require reimbursement of the non-monitoring costs related to the administration of the easement, broadly worded to try to avoid parsing of which costs are reimbursable. The reimbursement is written to be discretionary with the land trust ("Grantee may require.") so that the land trust may waive any or all of such costs. The land trust may wish to adopt a formal policy specifically identifying good cause criteria such as: hardship, contributing errors by Grantee, costs covered through a separate project or other grant, or if additional land is conserved.

11. TITLE

These are standard warranty covenants as to ownership by Grantor. By this paragraph, Grantor warrants that he or she has good title to convey the Easement. If there are mortgages or liens on the Protected Property, they must be released or subordinated (made lower in priority) to the Easement in a recorded document, so that the Easement cannot be terminated by a foreclosure of those mortgages or liens. This is both an IRS requirement for deductibility, and a sensible requirement for protection of the perpetual nature of the Easement. Strict IRS rules and case law govern the nature of the subordination. If a deduction is not being sought, a grantee may, after weighing the risks

and benefits, and requirements if they are accredited, choose to accept an easement without subordination of a mortgage.

12. GRANTOR’S ENVIRONMENTAL WARRANTY AND HOLD HARMLESS

Grantor warrants no knowledge of environmental issues (which is not a guarantee that there are no environmental issues). Grantor agrees to pay any expenses incurred by the land trust if there is a claim based on a spill of Hazardous Materials, although, generally speaking, even if such a spill had occurred, the land trust would not be found liable regarding it, unless it had possession, custody and control of the Protected Property or had caused the spill. Regardless of whether this provision is included, the land trust should perform due diligence investigation of the property to minimize the risk of late discovery of environmental issues. Consider whether the Hold Harmless language is essential to the transaction.

13. DURATION; PARTIES SUBJECT TO EASEMENT

This reiterates that the Easement is binding on all successors in interest and “runs” with the ownership of the Protected Property. Except for liability for acts or omissions occurring prior to transfer, the previous owner is no longer responsible for compliance with the Easement terms. The new owner steps into the shoes of the previous owner and all responsibility is transferred.

14. SUBSEQUENT TRANSFERS

This paragraph emphasizes that the provisions of the Easement carry over to and are binding upon every subsequent owner if the property is transferred, and that reference to the Easement should be put in the transferring document, and prior notice given to the land trust before the conveyance. The purpose of the prior notice is so the land trust can make sure that the transferee (new owner) is aware of the Easement and the land trust has an opportunity to establish a relationship with the new owner and perform appropriate monitoring of the new owner’s actions on the Protected Property. Lack of such notice in no way impacts the enforceability of the Easement.

15. NO EXTINGUISHMENT THROUGH MERGER

This paragraph clarifies the intent that if Grantee were to acquire the full ownership (“fee simple”) interest in the Protected Property, the land trust would still be bound by the restrictions in the Easement. Common law holds that if the owner of property metaphorically holds all the “sticks” of ownership, all of the property rights in that property merge together and any easements or other restrictions on use disappear. IRS regulations require that easements be perpetual, despite changes in ownership, so a merger provision is advised. Rhode Island § 34-39-3 differs from common law with respect to conservation and preservation restrictions in that it specifically provides protection with respect to merger, tax delinquency, and other doctrines of property law which might cause the termination of the restriction

16. ASSIGNMENT

This paragraph sets forth the assignable nature of the Easement, appropriate holders of the Easement, and filing requirements. Some parties may wish to designate an appropriate back-up Grantee here, who would hold the Easement if Grantee is dissolved. Even if the designated back-up Grantee agrees to such designation at the time of the grant, it is not guaranteed that they will accept the assignment or be available to do so many years in the future.

17. LIMITATION ON AMENDMENT

The land trust community has learned through hard experience that a well-crafted amendment clause can be useful to assist the conservation easement to withstand the test of time and to avoid needless legal expense for amendments that all stakeholders agree would have a positive effect on the conservation purpose. The Land Trust Alliance has been recommending the inclusion of amendment clauses for many years, and accredited land trusts have been required to have a written amendment policy. A well-crafted amendment clause makes it clear that the easement is intended to be a living document that may change to keep it viable in perpetuity. It states who has authority to make such amendments and under what conditions an amendment is permissible. An amendment clause is not, however, a license to modify an easement in a way that is inconsistent with the Purpose, would impair net Conservation Values, or would violate charitable trust laws (which require, in brief, adherence to the charitable purpose of a charitable use) and such clauses make this clear. A land trust should never take actions, amendments or otherwise, that constitute impermissible private benefit or private inurement or violate law. Land trusts that hold conservation easements are advised to have amendment policies to guide their decision-making on these matters. The Land Trust Alliance report *Amending Conservation Easements: Evolving Practices and Legal Principles* is a useful resource in formulating such a policy (Alliance Amendment Report) The document, as amended, as well as other related information may be found on the Alliance website <http://www.landtrustalliance.org>.

In recent years, controversy has arisen over whether to include an amendment clause in an easement as the IRS has been challenging the deductibility of easements containing amendment provisions, claiming that the easement is then no longer “perpetual”. A recent case, Pine Mountain Preserve v Commissioner 151 T. C. No. 14, December 27, 2018 has found that a provision allowing amendments, provided that they are “not inconsistent with the conservation purposes of the donation” did not prevent the easement from satisfying the granted-in-perpetuity requirement of the IRS code. That case will likely be appealed and there may be further precedent on this issue forthcoming. The Model includes a paragraph that endeavors to appropriately allow but limit amendments consistent with the current law. It should be noted that if there is no amendment clause, it does not mean that the Easement cannot be amended, the document just gives no guidance on the process. Rhode Island § 34-39-5 requires court approval of an amendment that “materially detracts from the conservation or preservation values

intended for protection". An amendment that materially detracts from a specific conservation or preservation value intended for protection may be approved only when it is found by the court that the proposed amendment creates a net gain in the overall conservation or preservation purpose for which it was intended; and is consistent with the conservation or preservation purposes expressed by the parties in the restriction and the public conservation or preservation interest.

Included in the model, is a savings provision that will void any approval to the extent inconsistent with Court or governmental determination.

18. EXTINGUISHMENT

Because the Easement is a perpetual grant of an interest in real property, if the Easement is taken by eminent domain or otherwise extinguished, the land trust is entitled to the fair value of its interest. This is an IRS requirement and it is also a sensible requirement to compensate the land trust. This also particularly protects the Easement because without it, a subsequent landowner would have a particularly strong interest in trying to terminate, or in assisting others to terminate, the Easement by eminent domain or otherwise. Original grantors of Easements generally have a strong conservation ethic; subsequent landowners may not have a similarly strong belief in the Purpose of the Easement.

It had become common practice to include in the extinguishment section a clause excluding the value of improvements made by the landowner after the date of the grant of easement. A recent case, (PBBM-Rose Hill, LTD v. Commissioner No. 26096-14 (Oct. 7, 2016)), disallowed a deduction which provided that the value of after easement improvements were excluded from calculation of the land trust's proportional share. Although this is a fair provision, the Model does not include that provision on the judgment that the risk of far in the future extinguishment involving new structures is small, but the risk of a current disallowance of a charitable donation is much larger. It is hoped that this impractical precedent will be revised as soon as possible. If no deduction is sought, the clause related to after-easement improvements can be inserted.

Rhode Island § 34-39-5 requires court approval for termination with a finding "by the court that the conservation or preservation restriction does not serve the public interest or publicly beneficial conservation or preservation purpose, taking into account, among other things, the purposes expressed by the parties in the restriction." There are potential instances where extinguishment may nonetheless be applicable.

19. GENERAL AND MISCELLANEOUS PROVISIONS

These provisions set forth general interpretation rules for legal agreement including:

19.1 In General. Rhode Island law is controlling.

19.2 Liberal Construction. The Easement will be interpreted to advance its Purpose.

19.3 Severability. If any one provision is invalid, the whole document does not become invalid.

19.4 Entire Agreement. Oral agreements etc. are superseded by the written Easement.

19.5 Re-recording. Although Rhode Island law makes easements perpetual even if they fall outside the normal 40+ year scope of a title search, Grantee, as the holder of the conservation easement may still wish to re-record the Easement so that it continues to appear within a title search of the Protected Property. Doing this would put purchasers of the Protected Property on actual notice of the Easement and avoid arguments with subsequent purchasers.

19.6 Governmental Approvals. This confirms that the Easement does not (and cannot) override governmental regulations. This is true whether it is granted to a land trust or a municipal entity.

19.7 Captions. The captions have no effect upon construction or interpretation.

19.8 Counterparts. It is often difficult to get all owners and the land trust in the same room at the same time to sign all necessary Easement-related documents. This language verifies that the documents may be signed separately and on different copies, and taken together constitute one document.

19.9 Notices. This sets forth the parties mailing addresses and establishes that modern forms of electronic notice are permitted. Because notice may be accomplished by courier or Marshal service, actual residential addresses, if different, should be included.

19.10 Baseline Report. See discussion related to the Baseline Report in the Recitals section of the Commentary.

20. ECONOMIC HARDSHIP

This paragraph clarifies that economic hardship is not a basis for overturning the Easement or its terms.

21. NO TAX ADVICE

This paragraph clarifies that the land trust is not responsible for the donor receiving or not receiving a claimed deduction. Indeed, this area of the law is constantly evolving and

no one can reasonably guarantee 100% how the IRS will act with regard to any particular deduction.

22. RECITALS AND EXHIBITS INCORPORATED HEREIN

This paragraph arises from informal IRS guidance. The provision is intended to assure that recitals and exhibits are treated as operative provisions, and not dismissed as purely precatory (non-binding) interpretive guidance.

23. This paragraph contains provisions related to Rhode Island Non-resident withholding.

24. ACCEPTANCE AND ACKNOWLEDGMENT OF EASEMENT

It is best practice to have the holder accept and acknowledge its responsibilities and obligations under the Conservation Easement.

IRS regulations require that every donation over \$250 to a charitable organization be acknowledged in writing by the recipient, and such writing must include a statement that no goods or a service was provided in consideration for the gift. The acknowledgement in the Model is not intended to replace that writing (usually a letter), but is intended to serve as a failsafe if such requirement is inadvertently overlooked. This language should not be included if the Easement is conveyed in a bargain sale transaction unless the purchase price is stated in the Granting Clause. The purchase price paid by the land trust would be considered to be goods and services that would reduce Grantor's tax deduction. If the conveyance is acknowledged to be a fair market value purchase, this provision should be omitted.

SIGNATURES

All parties should sign and, as documents are being recorded, should be properly acknowledged. Form of acknowledgement dependent upon the nature of the individual and/or entity signing.

Schedule A - The property description of the Protected Property needs to be attached to the Easement.