

# CE Paragraph Databank

(June 1, 2009, last edited October 27, 2009)

This Databank is a work in progress assembled by the Stanford Conservation and Climate Change Drafting Committee and a number of CE attorneys and other professionals assisting in the work. See Stanford Institute for the Environment at <http://environment.stanford.edu/cgi-bin/index.php>. Additional paragraphs will be added as they become available, and existing paragraphs will be edited or commentary added when reasons to do so become apparent.

The Databank assumes its users are knowledgeable and thoughtful conservation easement professionals or volunteers. See Land Trust *Standards and Practices* 9E. It is not a teaching text. Instead, it offers source material and ideas, sometimes conflicting and inconsistent ideas, that may be appropriate to adapt into particular easements in certain circumstances. The Databank is also not legal advice; various paragraphs conflict, and many would be inappropriate to specific circumstances or under the law of particular States. There has been no effort to address special state law requirements. Moreover, every easement will require the addition of one or more unique paragraphs and revision of the sample paragraphs set out here to address the characteristics of the specific property and situation.

The Committee is concentrating its early effort on paragraphs that address climate change issues and the need to draft easements for perpetuity in a changing world. The Databank has been prepared specifically for donated perpetual easements and for land trusts. Although some paragraphs may be appropriate in other circumstances, and the Databank may be expanded in the future, the Committee has not included paragraphs specifically intended for mitigation or purchased easements. Many additional sample paragraphs are available in *The Conservation Easement Handbook*, by Elizabeth Byers and Karin Marchetti Ponte (2005) (The Trust for Public Land and The Land Trust Alliance) and its companion CD, and that source should be consulted often.

Paragraphs are drawn from multiple sources, and readers are invited and encouraged to send entire conservation easements or individual paragraphs to Ann Taylor Schwing at [ann.schwing@bbklaw.com](mailto:ann.schwing@bbklaw.com). Whatever the source, paragraphs will be revised to a uniform style with specific identifying information deleted before being included in the Databank. Please send any corrections or suggestions for edits, additional commentary, or other information that would assist the users. The Committee hopes to make this complete Databank available through The Land Trust Alliance when time permits Alliance personnel to review it and make a home for it.

Do not be daunted by the length of the Databank. No easement would use all of these paragraphs. In many instances, multiple examples of possible versions of a specific paragraph are provided to address different circumstances. Some version of certain paragraphs is mandatory in any easement, while others can be omitted entirely in

certain cases. As the Databank develops, guidance on these points may be added, but the Databank assumes that users have significant knowledge of easements and drafting requirements. See *Land Trust Standards and Practices* 9E. The paragraphs are also not equally desirable; when several paragraphs on the same subject are provided, they will appear roughly in order of greater conservation protection to lesser protection or in order of more beneficial to a land trust to less beneficial. Naturally, these decisions are matters of judgment on which reasonable minds may and probably do differ.

The Committee offers the following comments on uniform style and drafting principles:

- **Title.** Consider the title to use for the easement. Lay people do not know what a conservation easement is, so a future purchaser of the land may see reference to “Conservation Easement” or “Deed of Conservation Easement” on a title report and pay no attention. A title that conveys more information may reduce surprises and arguments of surprise. Examples would be “Deed of Conservation Easement Limiting Owners’ Uses” or “Restrictions on Owners’ Uses and Conservation Easement.” State law may limit your options, but a short title that prevents prospective buyers from arguing ignorance can prevent a lawsuit. Use of a short title is important because title reports often pick up only one line or only a limited number of characters.
- **Grantor – Owner – Granting Owner.** The Databank uses the terms “Granting Owner” and “Owner” to distinguish between the original grantor when only that owner is intended and all owners when the intent is to encompass both the original grantor and all later owners. Many easements use the term “Grantor” to include subsequent owners. A court might forgive a subsequent owner for not realizing that references to “Grantor” included all subsequent owners as well. Using the term “Owner” whenever the reference is intended to encompass both grantor and subsequent owners reduces the risk of credible testimony by a subsequent owner as to a belief that the provision did not apply to subsequent owners. Having both terms available enables easier distinction when a provision is intended to apply only to the original donor. This terminology does not supplant use of the routine boilerplate provisions defining terms and declaring applicability of the easement to subsequent purchasers of the land. Anyone using the Databank can freely use “Landowner” as an alternative to “Owner” and can elect not to make the distinction between “Granting Owner” and “Owner.”
- **Development Zone.** The Databank uses the term “Development Zone” but the term “Building Envelope” can be substituted if that term is preferred. Some think the term “Building Envelope” may connote a more limited disturbance to the land. Other options are “Limited Building Area” or “Limited Improvement Area.” For ease of drafting, it may be appropriate to define an “Agricultural Zone,” “Forever Wild Zone” “Natural Zone,” or other Zone or a “Resource

Management Area.” This drafting decision is highly dependent on the characteristics of the particular land and the anticipated permitted uses. Whatever decision is made, errors and ambiguities can easily develop from occasional misuse of the defined terms. As the easement nears completion, computer word searches for the defined terms can easily locate them all and permit the drafter to confirm use of the correct term in each location.

- **Agricultural Uses.** The databank uses the term “Agricultural Uses” in a few places. Again, use of defined terms in a consistent manner can ease the drafting process, shorten the easement and make it easier to understand.
- **Defined Terms.** It is essential that defined terms be defined correctly and then used consistently to avoid introducing errors and ambiguities into the easement. Defined terms used in the Databank include Easement, Granting Owner, Owner, Parties, Property, Agricultural Uses, Development Zone, Natural Zone, Forever Wild Zone, Easement Area, Commercial, Conservation Value. Using “Easement” in lieu of “Conservation Easement” will shorten most documents by a page.
- **Days.** Consider whether to specify some or all periods of days in the easement as business days rather than calendar days. If not, then build enough time into time periods to avoid impossible burdens if time periods include a three day weekend or the Thanksgiving weekend.
- **Notice and/or Approval Requirements.** Adding a requirement that the owner seek approval before exercising certain rights gives the land trust control over changes that may affect the land but also imposes on the land trust significant costs in time and, sometimes, money in evaluating the request, as well as risk of friction between land trust and owner. Establishing approval requirements also requires the land trust to address the requirements carefully or face potentially serious questions from the IRS that may affect the land trust’s tax exempt status. Use approval requirements judiciously. The Databank paragraphs often include approval language, but it should be understood as a signal to think about whether prior approval is necessary for this activity on this particular land. In other words, the fact that the land trust could impose a prior approval requirement on an activity does not mean the requirement is necessary to the protection of conservation values on a particular property. In some circumstances, a notice requirement may suffice. In many others, neither notice nor approval may be needed if the owner’s permission to act is properly defined. As an easement nears completion, a careful drafter may computer search for “notice” and “approv” to double check that the proper requirement is imposed in each instance.
- **Commentary.** Following particular paragraphs in blue and indented, the Databank provides commentary to explain special circumstances for using or avoiding the paragraph and other information unique to the paragraph.

Comments on preparing easement documents:

- **Justification.** Decide whether your organization wishes the text of its documents justified or not (ragged right). Both are entirely acceptable, but a combination of both in a single document is unattractive at best and can later be used (accurately or not) to argue as to the sources of different paragraphs. Similarly, make sure the margins are the same throughout the document.
- **Smart or dumb quotes.** – Again, for the same reasons, elect a style for your organization for quote marks and apostrophes and make sure the quote marks are uniform – either all straight or "dumb" marks or curly "smart" marks. Do the same for apostrophes ( ' or '). Not only does a random mixture look sloppy, but it also opens the door for an adverse owner to construct an argument later that certain paragraphs came from one source and others from a different source and that some consequence should ensue in the construction of the easement as a result.
- **Uniform capitalization.** Every effort is being made to ensure that all defined terms are capitalized. The opening section of the Databank sets out significant defined terms. Naturally, these terms will first appear early in an easement, often in the recitals, so the assumption of the Databank is that the definition will appear wherever the term first appears in a particular easement. At the end of the drafting process, a careful drafter will use the computer searching tool to search for each defined term to be sure it is capitalized. Inconsistency in the use of defined terms can enhance arguments that the document is ambiguous in a future lawsuit.
- **Paragraph numbers.** The paragraphs in the Databank avoid referring to other paragraphs by number because numbering is almost certain to change during drafting. For example, the Databank uses the formulation "permission of the Land Trust, as provided herein" instead of referring to "paragraph \_\_\_." This formulation is deliberate because edits late in preparation of the document that alter the paragraph numbering are common, and the risk of misnumbering cross-references is high. An erroneous misnumbering can readily result in later disputes as to interpretation. An alternative that also avoids use of specific numbers would be to refer to the paragraph captioned "Discretionary Approval" or "Notice and Approval." If you include references to paragraphs using their numbers in an easement, highlight the numbers in color to ensure that you check them at the end and correct as needed. A bad cross-reference is likely to be much worse when a dispute arises than a reference to the subject matter "as provided herein."
- **Numbers.** To make things uniform, decide whether numbers will be written out, expressed as numerals and not as words, or both.
- **Areas, Zones and the Property.** If the easement uses terms like Development

Zone, Agricultural Zone, Easement Area or the like, rather than or in addition to “Property,” check all references carefully to ensure that the correct term is used in each instance. Use the search tool to locate and check things like this at the end of drafting, rather than trusting your ability to skim through the document. Even one error can create ambiguity and sometimes fatal problems.

- **Global Changes.** Computers ease document preparation enormously, but they add the possibility for new errors. Any global change poses great danger. For example, a donor may decide not to include a portion of the parcel in the easement part way through the drafting process, causing the drafter to change “Property” to “Easement Zone.” A global change in these terms, however, may adversely impact access to the land under easement if the access route crosses the excluded land. Most drafters can identify other examples of errors from global changes. The few extra minutes to click each change may save a lawsuit later.
- **Notary forms.** If you are putting the notary forms on the signature pages, rather than relying on a title company, make sure you are using the latest version of the notary form. Statutory amendments alter the required form periodically.
- **Page Numbers.** Make sure that page numbers are set out on each page but do not include the exhibit pages in this numbering (an exhibit may need to be a separate document).

Various model easements adopt different approaches to ordering of the paragraphs, and the Databank has to appear in some order. The order of paragraphs below is not intended to reflect a rejection of the ordering used in different models, but only a recognition that there has to be some order and any order selected will differ from the order used in some models.

The important characteristic of the following paragraphs is that they adopt the approach recommended in *The Conservation Easement Handbook*, by Elizabeth Byers and Karin Marchetti Ponte (2005) (The Trust for Public Land and The Land Trust Alliance) to merge prohibitions and permissions so that all aspects of a particular use of the land are addressed in a single location. This approach has benefits for drafting and, in the future, for monitoring. Not all land trusts have adopted this approach. The paragraphs below can still provide ideas and possible language to be used in drafting, although more significant editing will be required. In either event, the essential drafting rule is to be very clear as to which provisions control if there is any possibility of conflict between permissions and prohibitions.

## **DEED OF CONSERVATION EASEMENT LIMITING OWNERS' USES**

### **RECITALS**

Identification of Granting Owner, Land Trust and others  
General information about the land, introduction of any Zones  
Factual recitals to establish public benefit, satisfaction of section 170(h)  
Baseline  
Granting Owner's intent  
Land Trust's intent/qualification

### **AGREEMENT**

#### **Grant and Acceptance of Easement**

#### **Purposes**

#### **Rights of Land Trust**

- (1) Protection
- (2) Entry
- (2/3) Entry and Enforcement
- (3) Enforcement
- (4) Access
- (4) Assignment of Owner's Access Rights
- (5) Signage
- (6) Interpretation
- (7) Protection
- (8) Reservation of Forest Carbon Services
- (9) Additional Rights

#### **Prohibitions, Restrictions and Reserved Rights**

- (1) Extinguishment of Development Rights
- (2) Subdivision
- (2) Lot Line Adjustments
- (3) Structures
  - (a)(1) Fences
  - (a)(2) Gates
  - (b) Residential Use Prohibited
  - (b) Permitted Residential Use(s)
    - (b)(1) Existing Single-Family Residential Dwelling
    - (b)(2) New Single-Family Residential Dwelling
    - (b)(2) Guest Houses/Granny Units
    - (b)(2) Adjustable Residential Development Zone
    - (b)(2) Residential Use of Development Zone
    - (b)(3) Expansion of Existing Dwellings [Structures]
    - (b)(3) Modification or Relocation of Building Envelope
    - (b)(4) Placement and Size of Replacement Structures
    - (b)(4) Preservation of Historic Structures
    - (b)(5) Accessory Structures, Pools, Tennis Courts, and the Like
  - (c) Agricultural Structures and Improvements
  - (d) Existing Farm Support Housing
  - (d) Agricultural Employee Housing
  - (e) Farm Stand/Winery/Other Production or Agricultural Sales Facility
  - (e) Commercial Agricultural Activities
  - (e) Winer

- (f) Caves
- (g) Signs
- (h) Art
- (i) Boating/Recreational Structures
- (j) Visual Screening
- (k) [Catchall]
- (l) Other Structures Prohibited
- (4) Utilities/Utility Services and Septic Systems
- (5) Surface Alterations Excepting Roads and Trails
- (5) Soil Disturbance
- (5) Removal, Mining and Extraction
- (6) Paving, Road Construction and Trails
  - (a) Existing Road
  - (a) Existing and New Roads
  - (b) Foot Trails
  - (c) Impervious Surface
- (7) Vehicles
- (8) Water
  - (a) Existing Well
  - (a) Existing Water System
  - (b) Replacement Water Supply
  - (a&b) Water Systems
  - (b) Water Resource Development
  - (b) Irrigation Improvements
  - (c) Watershed Enhancement, Creek Restoration and Aquifer Enhancement
  - (d) No Transfer of Water Rights
  - (d) Limited Transfer of Water Rights
  - (e) Pollution Prohibited
- (9) Trees and Other Vegetation
  - (a) General Rule
  - (b) Timber Harvest Plan
  - (b) Forest Management
  - (b) Forest Management Plan
  - (c) Use of Wood
  - (d) Additional Cutting
  - (e) Non-Native Exotics
  - (f) Protection of Existing Vegetation
  - (g) Harm to Vegetation
  - (h) Existing Meadow
  - (i) New Open Areas
  - (j) Fire
- (10) Trash and Debris, Storage and the Like
- (10) Dumping
- (11) Agricultural Use Prohibited
- (11) Agricultural Use Permitted
  - (a) Definition
  - (b) Prohibitions
  - (c) Standards and Practices
  - (d) Processing of Agricultural Residues
- (12) Commercial or Industrial Use

- (a) Definition
- (b) Ecosystem Functions
- (b) Ecosystem Services Credits
- (b) Property Resources Values
- (b) Mitigation Programs
- (b) Natural Resource Benefits
- (13) Recreational Uses
- (14) Hunting, Trapping and Guns
- (15) Amplified Sound and Outdoor Lighting
- (16) Other Activities
  - (a) Ecological/Scientific Research
  - (b) Educational Activities
  - (c) Weddings and Events
  - (d) Optional Management Plans
  - (e) Use of Pesticides and Herbicides
  - (f) Invasive Plant Removal
  - (g) Future Technology
- (17) Right to Privacy/Prevention of Trespass
- (18) Acts of God
- (19) Home Occupations
- (20) Wind, Solar, and Hydropower Energy
- (20) Renewable Energy Generation
  - (a) Commercial Energy Production
  - (b) Possible Future Commercial Energy Production
  - (c) Noncommercial Energy Production for Use on the Property
- (20) Renewable Energy/Ancillary Improvements
- (20) Ancillary Improvements
- (20) Alternative Energy/Communications Structures and Improvements
  - (a) Building Envelope
  - (b) \_\_\_\_\_ Area
  - (c) Location
  - (d) Easement Governs
- (21) Domestic and Wild Animals
- (21) Grazing
- (22) Boundaries
- (23) Reserved Rights Exercised to Minimize Damage

**Notice and Approval Process**

- (1) Notice of Intent To Undertake Activities or Uses
  - (a) Purpose
  - (b) Application
  - (c) Initial Response
  - (d) Costs
- (2) Land Trust's Approval
- (3) Inspection and Certification
- (4) Discretionary Approval
- (5) Notice of Land Trust's Obligations

**Land Trust's Approval or Withholding of Approval**

- (1) General
- (2) Land Trust Approval of Certain Uses or Activities
- (3) Land Trust Approval of Sites



- (4) Notice to Land Trust

#### **Land Trust's Remedies**

- (1) Notice of Violation; Corrective Action
- (2) Injunctive Relief
- (3) Damages
- (4) Emergency Enforcement
- (5) Scope of Relief
- (6) Costs of Enforcement
- (7) Forbearance
- (8) Waiver of Certain Defenses
- (9) Change of Conditions
- (9) Natural Events Beyond Owner's Control
- (9) Economic Hardship
- (10) Cumulative Remedies

#### **Public Access**

##### **Responsibilities of Owner and Land Trust Not Affected**

- (1) Costs, Legal Requirements, and Liabilities
- (2) Subsequent Liens on Property
- (3) Subsequent Encumbrances
- (4) Taxes
- (5) Upkeep and Maintenance
- (6) Liability for Operations and Conditions
- (7) Indemnification by Owner
- (8) Indemnification by Land Trust

##### **Representations and Warranties**

- (1) No Hazardous Materials Liability
- (2) Limited Status of Land Trust
- (3) Storage Tanks
- (4) Compliance with Law
- (5) Litigation, Proceedings and Investigations
- (6) Acts Beyond Owner's Control
- (7) Granting Owner's Title Warranty
- (8) Subordination
- (9) No Representation of Tax Benefits
- (10) Consideration

##### **Condemnation or Other Extinguishment**

- (1) Valuation
- (2) Application of Proceeds
- (3) Highest and Best Use
- (4) Extinguishment

##### **Transfers and Amendments**

- (1) Transfer of Easement by Land Trust
- (2) Subsequent Transfers by Owner
- (2) Subsequent Transfers by Owner and Transfer Fee
- (3) Estoppel Certificates
- (4) Additional Easements
- (5) Permitted Amendment
- (5) Permitted Amendment Agreed to by Original Granting Owner Only
- (5) No Amendment Permitted

##### **Perpetuation of Easement/Perpetual Duration/Perpetual Duration—No Merger**

**Notices**

**Recordation/Recordation and Effective Date**

**General Provisions**

- (1) Controlling Law
- (2) Liberal Construction
  - (a) Construction Favoring Validity
  - (b) Conflict in Conservation Values
- (1/2) Controlling Law and Liberal Construction
- (3) Significance of Recitals and Terms
- (4) Severability
- (5) Entire Agreement
- (6) No Forfeiture
- (7) Joint Obligation
- (8) Successors and Assigns
- (9) Termination of Rights and Obligations and Standing to Enforce
- (10) No Oral Approval
- (11) Reasonableness Standard
- (11) Mediation
  - (a) Purpose
  - (b) Participation
  - (c) Confidentiality
  - (d) Time Period
  - (e) Costs
- (12) Binding Arbitration
  - (a) Timing and Selection of Arbitrator
  - (b) Law Governing and Entry of Judgment
  - (c) Injunctive and Other Relief
  - (d) Costs
- (13) Captions
- (14) Counterparts
- (15) Representation of Authority of Signatories
- (16) Representation by Counsel
- (17) Appraisal; Tax Forms

Signature/Notary Blocks

Exhibits

## DEED OF CONSERVATION EASEMENT LIMITING OWNERS' USES

THIS GRANT DEED OF CONSERVATION EASEMENT ("Easement" or "Conservation Easement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2009, by \_\_\_\_\_, a \_\_\_\_\_ [State] \_\_\_\_\_ [citizen/corporation/partnership/limited partnership/] \_\_\_\_\_ ("Granting Owner" and "Owner") in favor of \_\_\_\_\_ LAND TRUST, a \_\_\_\_\_ nonprofit corporation ("Land Trust").

**Commentary.** See the introductory explanation of "Granting Owner." Another approach is to omit the date from the opening paragraph and rely on the dated signatures and the date of recordation. All signatories may not sign on the same date, and they may forget to fill in the date in the opening paragraph. Depending on state law, a challenge can be raised if the date here differs from the signature date(s) at the end. Although unlikely to succeed, any challenge is expensive and wastes time.

THIS COMPLETE AMENDMENT AND RESTATEMENT OF DEED OF CONSERVATION EASEMENT ("Easement" or "Conservation Easement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2009, by \_\_\_\_\_ a \_\_\_\_\_ [State] \_\_\_\_\_ [citizen/corporation/partnership/limited partnership/] \_\_\_\_\_ ("Granting Owner" and "Owner") in favor of \_\_\_\_\_ LAND TRUST, a \_\_\_\_\_ nonprofit corporation ("Land Trust"). This Complete Amendment and Restatement of Deed of Conservation Easement fully amends, restates, and replaces the Deed of Conservation Easement executed on \_\_\_\_\_ and recorded in the \_\_\_\_\_ County Official Records, Volume \_\_\_\_\_, Pages \_\_\_\_\_ ("Prior Easement"). All differences between the Prior Easement and this Easement are purposeful and reflect the [Granting] Owner's intent.

**Commentary.** Even if an amendment can be recorded affecting a single paragraph, the better approach for amendments of significance is to supplant the existing easement with a new one. A simple amendment is more easily missed in a title search and more easily forgotten by owner and land trust. Use of a complete restatement may also be important to establish a donor's right to an income tax deduction if the amendment includes an additional donation of land or rights. If a short form amendment is used, be sure to include an express confirmation and reaffirmation of the unaffected terms in the original easement.

### RECITALS

**Commentary.** Recitals are critical elements of any easement that identify the Property and parties, provide factual background, establish public benefit and other facts, to set out the intent of the parties, and to identify the baseline. Recitals or "Whereas" clauses are typically numbered or lettered. The following bare minimum format needs to be supplemented with significant factual information relating to the specific land, identified public benefits and conservation values, and so on.

### Identification of Granting Owner, Land Trust and others

The Granting Owner is the sole owner in fee simple of that certain real property

containing a total \_\_\_ acres, more or less, in \_\_\_\_\_ County, \_\_\_\_\_, commonly known as \_\_\_\_\_ [street address] \_\_\_\_\_, designated as \_\_\_\_\_ County Assessor's Parcel Number[s] \_\_\_\_\_ on the \_\_\_\_\_ County Assessor's Maps currently in effect, and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"). The term "Owner" refers to both the Granting Owner and to all subsequent Owners no matter how they may come to own part or all of the Property. Land Trust is the holder and owner of the Easement conveyed with this Deed.

**Commentary.** This paragraph will need to be revised to correspond to the facts and identify all the participants in the specific easement. The paragraph may also include information on any funders or other third parties that are interested. Each time an exhibit is identified, add it to the list of exhibits at the end so it is not forgotten when the final document is prepared for signing and recordation. Although arguably redundant given the usual boilerplate provisions, an early definition of "Owner" can reduce the risk of a credible claim of misunderstanding by a subsequent owner.

#### **General information about the Property, introduction of any Zones**

The Property consists of \_\_\_ acres of [\_\_\_prairie/forest/grassland/marsh/mixed woodlands\_\_\_] located in the \_\_\_\_\_ region of the State of \_\_\_\_\_.

The Property consists of \_\_\_ zones, a \_\_\_ acre portion of the property that will be kept forever wild/in a natural state ("the Forever Wild Zone"["Natural Zone"]) further described in paragraph \_\_\_ and Exhibit \_\_, a \_\_\_ acre portion of the property that will be used for Commercial Agriculture ("the Agricultural Zone") further described in paragraph \_\_\_ and Exhibit \_\_, and a \_\_\_ acre portion of the property that can be further developed ("the Development Zone") further described in paragraph \_\_\_ and Exhibit \_\_.]

**Commentary.** Not all easements need to define zones. If one or more zones are defined, it is essential to use the defined terms consistently and carefully. Errors can easily slip in during the editing and negotiation process, so a final check needs to be made before signing to ensure that the term "Property" and the specific zones are correctly used throughout the document. If defined zones are used, select terms that make sense. Forever Wild Zone may be inappropriate for land that has been heavily impacted by human use so that Natural Zone may be more appropriate. The word "Zone" is not magic, so one can refer to the Natural Area.

That portion of the Property covered and affected by paragraph \_\_\_ of this Easement is referred to herein as "\_\_\_\_\_ Easement Area."

**Commentary.** Rather than or in addition to using one or more zones, it may make sense to have the easement restrictions apply only to a portion of the Property. If the easement covers less than the entire parcel, be sure to provide for access for monitoring through the other parts of the parcel. Moreover, it may be important to address the entire Property rather than simply the Easement Area in certain of the easement paragraphs (for example, the grant of access for monitoring). Thus, one cannot use a global search and replace.

#### **Factual recitals to establish public benefit, satisfaction of section 170(h)**

**Commentary.** Naturally, these recitals are highly targeted to the specific land and environs and the specific Conservation Values.

Relatively Natural Habitat [§ 1.170A-14(d)(3)].

Open Space [§ 1.170A-14(d)(4)] with scenic enjoyment, agriculture, significant public benefit.

Recreation or Education [§ 1.170A-14(d)(2)].

Historical [§ 1.170A-14(d)(5)].

State Law and other governmental policy

This is not the place to be terse. Full exposition of relevant information in the recitals supports the land trust's decision to accept the easement, establishes the public benefits it serves, aids in future enforcement and serves a variety of similar purposes. IRS attorneys have noted how important it is to be quite specific and use extensive recitals to illustrate what is important about this particular property and why this particular easement qualifies. By definition, these factual recitals are site specific. They can best be prepared in conjunction with the baseline documentation, following on-site examination of the land and its surroundings and appropriate research. Substantial discussion of recitals and sample recitals can be found in *The Conservation Easement Handbook*, by Elizabeth Byers and Karin Marchetti Ponte (2005) (The Trust for Public Land and The Land Trust Alliance).

Individually and collectively, these \_\_\_\_\_ values comprise the "Conservation Values" of the Property.

**Baseline**

The specific Conservation Values of the Property, including the natural, ecological, scenic, agricultural, open space, and other characteristics of the Property, and its current use and state of improvement, are documented in an inventory of relevant features of the Property prepared by Land Trust with the cooperation of Granting Owner dated \_\_\_\_\_ on file at the offices of Land Trust and incorporated herein by this reference ("Baseline Documentation"), consisting of field reports, maps, photographs, and other documentation that the Parties all agree provide, collectively, an accurate representation of the Property at the time of this grant and that are intended to serve as an objective, though nonexclusive, information baseline for monitoring compliance with this Easement. The Baseline Documentation may be used by Land Trust to establish that a change in the use or character of the Property has occurred, but the existence of the Baseline Documentation shall not preclude Land Trust's use of other evidence to establish the condition of the Property as of the date of this Easement. The Parties further agree that, if a controversy arises with respect to the condition of the Property or a particular Conservation Value thereof, the Parties shall not be foreclosed from utilizing any other relevant document, survey, or report to assist in resolution of the controversy.

**Commentary.** See Land Trust *Standards and Practices* 11B; <http://www.landtrustaccreditation.org/pdf/11BGuidanceDocument.pdf>. Some land trusts prepare a short summary of the critical baseline information and record it as an exhibit to

the easement. Some record the entire baseline. Recordation of at least the critical information ensures that any subsequent purchaser cannot claim ignorance because recorded documents give constructive notice of their contents. Moreover, recordation of at least the essential maps and information provides a duplicate that should survive loss of the original and be admissible in court.

**OR**

Granting Owner and Land Trust have signed for identification purposes the report (the "Baseline Documentation"), to be kept on file at the principal office of Land Trust, that contains an original, full-size version of the survey or other graphic depiction of the Property and other information sufficient to identify on the ground the protected areas identified in this easement, that describes existing improvements, that identifies the Conservation Values of the Property, and that includes, among other information, photographs depicting existing conditions of the Property as of the date of this Easement.

**OR**

Documentation of Present Conditions. Pursuant to §1.170A-14(g)(5) of the Treasury Regulations and in order to document the condition of the Property as of the date of this Deed, a report has been prepared by \_\_\_\_\_ and dated \_\_\_\_\_ ("Present Conditions Report"). The Present Conditions Report contains a natural resources inventory and also documents the Conservation Values and the characteristics, current use, and status of improvements on and development of the Property. The Present Conditions Report is acknowledged by Granting Owner and Land Trust as an accurate representation of the Property at the time of the transfer. The Present Conditions Report has been provided to both Parties and will be used by Land Trust to assure that any future changes in the use of the Property will be consistent with this Easement. However, the Present Conditions Report is not intended to preclude the use of other evidence to establish the condition of the Property as of the date of this Easement.

**Commentary.** Be sure "Parties" is a defined term. Use Present Conditions Report or Baseline Documentation consistently.

**OR**

The parties acknowledge that Exhibits A through E (collectively "Baseline Documentation") reflect the legal description of the Property, existing uses, location, Conservation Values and Structures, Buildings, and Dwelling Units on the Property as of the date of this Easement. Owner hereby acknowledges that the attached Exhibits are sufficient to establish the condition of the Property at the time of the granting of this Easement. All Exhibits are hereby made a part of this Easement:

- Exhibit A: Legal description and boundary description consisting of \_\_\_\_ pages are attached hereto and made a part hereof.
- Exhibit B: A description of the Conservation Values is attached hereto and made a part hereof consisting of \_\_\_\_ pages.

- Exhibit C: An inventory of existing structures consisting of \_\_\_\_ pages is attached hereto and made a part hereof.
- Exhibit D: Color Digital Images of the Property are not recorded herewith but are kept on file at the principal office of Land Trust and are incorporated into this Easement as though attached hereto and made a part hereof. A list of the image numbers, vantage points, and image descriptions is recorded herewith. Exhibit D consists of \_\_\_\_ color digital images and \_\_\_\_ pages.
- Exhibit E: [Two] aerial photographs of the Property are recorded herewith. An additional \_\_\_\_\_ aerial photographs of the Property are not recorded herewith but kept on file at the principal office of Land Trust and are incorporated into this Easement as though attached hereto and made a part hereof.
- Exhibit F: A map showing the approximate location of attributes and Structures on the Property is attached hereto, consisting of 1 page.

**Commentary.** Custom in some parts of the U.S. is to record some or all of the foregoing portions of the baseline documentation. Recordation simplifies some aspects of later admissibility of the baseline into evidence and definitely ensures that later owners have notice of the recorded information. Recordation may add significant expense, however, and some documents, maps and photographs are not easily transformed into suitable size and form for recordation. Thus, the full baseline documentation will normally include additional documents even if portions of the baseline are recorded.

### **Granting Owner's intent**

Granting Owner intends that the Conservation Values of the Property be preserved and maintained by permitting only those uses of the Property that do not significantly impair or interfere with the Conservation Values. Granting Owner intends to make a charitable gift of the property interest conveyed by this Easement to Land Trust for the exclusive purpose of assuring that, under Land Trust's perpetual stewardship, the [open space character and agricultural, natural and ecological and scenic qualities] of the Property will be conserved and maintained forever.

Granting Owner and Land Trust recognize that changes in economic conditions, in agricultural technologies, in accepted farm and ranch management practices, and in Owner's situation may result in an evolution of Agricultural Uses of the Property, provided such uses are consistent with this Easement.

**Commentary.** This paragraph uses the defined term "Agricultural Uses" and should only be used in an easement that defines and uses that term. Additional provisions on economic change appear in the body of the Easement.

**OR**

Granting Owner and Land Trust recognize that changes in economic conditions,

in agricultural and forestry technologies, in generally accepted farm, ranch and forest management practices, and in the situation of Owner may result in an evolution of agricultural, silvicultural, and other uses of the Property, and such uses are permitted provided they are and remain consistent with the conservation purposes of this Easement and the protection of the Conservation Values in perpetuity.

Granting Owner intends that the Conservation Values of the Property be preserved and maintained by the continuation of land uses that do not significantly impair or interfere with those Conservation Values, with the overall goal and intent that the Property be maintained in as natural a state as possible subject to the permissible uses set forth herein, creating a charitable trust to benefit the people of the [County of \_\_\_\_\_ and the] State of \_\_\_\_\_.

**Commentary.** Omitting the final words that affirmatively state that the Easement creates a charitable trust will not prevent a charitable trust from being created. See, e.g., Uniform Conservation Easement Act, §3 cmt. (“because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements”); Restatement (3d) of Property: Servitudes §7.11 (2000) (recommending that modification and termination of conservation easements be governed by a special set of rules based on the charitable trust doctrine of cy pres); Restatement (3d) of Trusts §28 cmt. a (2003); Restatement (2d) of Trusts §348.1 cmt. f (1959) Uniform Trust Code §414 cmt; Amending Conservation Easements: Evolving Practices and Legal Principles (Land Trust Alliance 2007); McLaughlin & Weeks, In Defense of Conservation Easements: A Response to The End of Perpetuity, 9 Wyo. L. Rev. 1 (2009).

If one or more of the purposes of this Easement may no longer be accomplished, such failure of purpose shall not be deemed sufficient cause to terminate the entire Easement as long as any other purpose of the Easement may be accomplished.

**Commentary.** This paragraph could be included elsewhere in the easement, with the paragraphs on changes over time or on easement termination. Obviously, the paragraph does not work if there is only a single purpose to the easement. Most easements, however, can be drafted to serve multiple purposes.

Granting Owner further intends, as owner of the Property, to convey to Land Trust the monitoring and enforcement rights to preserve and protect the Conservation Values of the Property in perpetuity.

To effectuate the intentions of the Parties, Granting Owner intends to give to Land Trust a perpetual and irrevocable Conservation Easement over the Property, to create certain restrictive covenants and equitable servitudes for the benefit of Land Trust in gross that will bind and run with the Property, and to extinguish irrevocably and perpetually the right to develop the Property, except as expressly permitted in this Easement.

**Land Trust’s intent/qualification**

Land Trust is a \_\_\_\_\_ publicly supported nonprofit organization within the



meaning of \_\_\_[state statute]\_\_\_\_\_ and is a tax exempt “qualified conservation organization” within the meaning of sections 501(c)(3) and 170(h) of the Internal Revenue Code. Land Trust’s primary purpose is the preservation and protection of land in its natural, scenic, [historical, ]agricultural, forested, and/or open space condition. Land Trust agrees by accepting this grant to honor the intentions of the Granting Owner stated herein and to preserve and protect in perpetuity the Conservation Values of the Property for the benefit of this generation and the generations to come.

**Commentary.** A state enabling statute may define “holder” in a particular way or impose certain requirements that should be tracked in recital language.

**OR**

Land Trust has received and there remains in full force and effect a determination letter from the Internal Revenue Service, dated \_\_\_\_\_, a copy of which has been provided to Owner, to the effect that Land Trust is a “publicly-supported” organization described in sections 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code and is not a private foundation within the meaning of section 509(a) of the Code.

**OR**

Land Trust is qualified to hold conservation easements under the laws of the United States and the State of \_\_\_\_\_.

### **AGREEMENT**

1. **Grant and Acceptance of Easement.** For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and pursuant to the laws of the United States and the State of \_\_\_\_\_, including \_\_\_\_\_ sections \_\_\_ et seq., Granting Owner hereby voluntarily grants and conveys to Land Trust a Conservation Easement in perpetuity over the Property.

**Commentary.** Reference to the consideration for the easement may be required in some States as a matter of law. Donated easements do not involve an exchange of traditional consideration for the easement, so the language is potentially or actually inappropriate. The wording below avoids the issue and may be preferable.

**OR**

1. **Grant and Acceptance of Easement.** In consideration of the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to \_\_\_\_\_[state enabling statute]\_\_\_\_\_ and other applicable law, Granting Owner hereby voluntarily grants and conveys to Land Trust a Conservation Easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth, and Land Trust hereby accepts that grant and conveyance.

2. **Purposes.** The purposes of this Easement are to preserve and protect the Conservation Values of the Property as identified in the recitals set forth above and in

the Baseline Documentation, to prevent any use or condition of the Property that will significantly impair or interfere with the Conservation Values, and to retain the Property in its current condition in perpetuity. Granting Owner intends that this Easement will confine the use of the Property to activities that are consistent with the purposes of this Easement.

**OR**

2. **Purposes.** Granting Owner grants this Easement to Land Trust for the purpose of assuring that, under Land Trust's perpetual stewardship, [the agricultural productive capacity/ scenic beauty and] open space character of the Property will be conserved and maintained forever and that uses of the land that are inconsistent with these conservation purposes will be prevented or corrected. [The Parties agree, however, that the current uses of, and improvements to, the Property[, as described in the Baseline Documentation,] are consistent with the conservation purposes of [or are expressly permitted by] this Easement.]

**OR**

2. **Purposes.** The purposes of this Easement are to ensure that the Property will be retained forever in its natural, restored, or enhanced condition as contemplated by this Easement [and the Management Plan] and to prevent any use of the Property that will impair or interfere with the Conservation Values of the Property. Granting Owner intends that this Easement will confine the use of the Property to activities that are consistent with such purposes, including, without limitation, those involving the preservation, restoration and enhancement of native species and their habitats implemented in accordance with this Easement [and the Management Plan].

**AND?**

In particular, Granting Owner's primary purposes with this Easement are to protect the Property's natural and open space values by prohibiting \_\_\_\_\_ on the Property, prohibiting commercial agriculture on the Property, prohibiting commercial and industrial uses of the Property, and prohibiting the subdivision of the Property.

**Commentary.** There are several sample options here, but all must be revised to fit the specific facts.

**OR**

In particular, Granting Owner's primary purposes with this Easement are to protect the Property's agricultural values by prohibiting \_\_\_\_\_ on the Property, prohibiting subdivision of the Property, and prohibiting the construction of any [additional] residence or other buildings on the Property.

**OR**

In particular, Granting Owner's primary purpose with this Easement is to enable the Property to remain in productive agricultural use by preventing uses of the Property that will impair or interfere with its agricultural productive capacity, its soils, and its agricultural character, values, and utility. To the extent that the preservation of the other Conservation Values of the Property are consistent with such use, it is within the

purpose of this Easement to protect those values.

**Commentary.** This provision provides a ranking of purposes, enabling the easement to be applied when its paragraphs set out partially conflicting requirements. Some land trusts deliberately avoid setting out a ranking of conservation values. Certainly, a ranking would not be necessary in every easement, but there are circumstances in which a ranking, with or without qualifications, can prevent difficult internal conflicts within an easement that protects multiple conservation values.

#### **AND?**

In granting this Easement, Granting Owner has considered the fact that any use of the Property that is expressly prohibited by this Easement, or any other use as determined to be inconsistent with the purpose of this Easement, may become greatly more economically valuable than permitted uses, or that neighboring properties may in the future be put entirely to uses that are not permitted in this Easement. Granting Owner believes that any such changes will increase the benefit to the public of the continuation of this Easement. Both Granting Owner and Land Trust intend that any changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Easement. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment.

**Commentary.** The “and” and “or” options are paragraphs that might be used to add substance to the purposes clause. The specific circumstances of the donor, land trust and land will determine the level of detail and the content. This provision could also go in the recitals or another location.

3. **Rights of Land Trust.** To accomplish the purposes of this Easement, the following rights are expressly conveyed to Land Trust by Granting Owner:

(1) **Protection** – To identify, preserve and protect the Conservation Values of the Property.

(2) **Entry** – To enter upon the Property[, or to authorize any third party to enter upon the Property,] at reasonable times in order to monitor compliance with, inspect, observe, document (including but not limited to photographs, maps, GPS), and otherwise determine and enforce this Easement, using the right of access over any and all roads owned by Owner and any other access rights or easements permitting the entry by Owner or Land Trust to the Property; provided that, except in cases in which Land Trust determines that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, such entry shall be upon prior reasonable notice to Owner, and Land Trust shall not unreasonably interfere with Owner’s use and quiet enjoyment of the Property.

**Commentary.** If state law would permit any argument that the land trust’s right of entry did not extend to its agents and contractors, then this paragraph or the Successors and Assigns clause in paragraph 15 should be expanded to address the issue. Also consider whether to provide expressly for the land trust to be entitled to authorize law enforcement

to enter the Property. Finally, some owners will resist the right of “immediate entry to prevent, terminate, or mitigate a violation” but that right may be essential to protect the conservation values. Such owners may be satisfied by addition of the word “rare” before the word “cases.” See Land Trust *Standards and Practices* 11C.

**OR**

(2) **Entry**—To enter upon the Property to inspect, observe, document (including but not limited to photographs, maps, GPS), and study the Property for the purposes of (i) identifying the current uses and practices thereon, (ii) monitoring the uses and practices regarding the Property to determine whether they are consistent with this Easement, and (iii) otherwise enforcing this Easement. Except in cases where Land Trust reasonably determines that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, such entry shall be permitted no less than once a year at reasonable times, upon 72-hour prior notice to Owner, and shall be made in a manner that will not unreasonably interfere with the proper uses and quiet enjoyment of the Property. [Each entry shall be for only so long a duration as is reasonably necessary to achieve the purposes of this paragraph].

**Commentary.** Alter the “no less than once a year” language if there are reserved rights that may require more frequent monitoring, such as reserved rights to construct additional structures. Consider changing 72-hour notice to 24-hour notice or to reasonable prior notice.

**OR**

(2/3) **Entry and Enforcement**—To manage its responsibilities as holder of this Easement in order to uphold the purposes of this Easement, including, but not limited to, annual monitoring, such additional monitoring as circumstances may require, record keeping, and enforcement, for the purpose of preserving the Property’s Conservation Values[, agricultural productive capacity and open space character] in perpetuity. Failure of Land Trust to carry out these responsibilities shall not impair the validity of this Easement or limit its enforceability in any way. With reasonable advance notice (except in the event of an emergency circumstance or prevention of a threatened breach), Land Trust shall have the right to enter upon, inspect, observe, monitor and evaluate the Property to identify the current condition of, and uses and practices on the Property and to determine whether the condition, uses and practices are consistent with this Easement.

(3) **Enforcement**—To prevent or contain any activity on or use of the Property that is inconsistent with the purposes of this Easement[, to require that Owner’s reserved rights be exercised in a manner that avoids unnecessary harm to the Conservation Values of the Property protected by this Easement,] and to require the restoration of such areas or features of the Property as may be damaged by any inconsistent activity or use, pursuant to the remedies set forth below.

**OR**

(3) **Enforcement**—To enforce the rights herein granted; to prevent or stop, by

any legal means, any activity or use of the Property that, in the reasonable judgment of Land Trust, is inconsistent with this Easement; and to require restoration, to the condition that existed prior to such activities, of such areas or features as may have been damaged by such activities.

(4) Access – To use any recorded or prescriptive easement that now or in the future grants lawful access to or across the Property for any of the foregoing purposes.

**Commentary.** This language is appropriate if the easement covers the entire parcel. If not, reword the paragraph to ensure that there is access across the excluded land to reach the easement land. The easement will have to apply to the entire parcel at least to the extent of granting access rights, and it may be necessary to obtain additional recorded access rights as well.

**OR**

(4) Assignment of Owner's Access Rights – To use any and all access easements and rights-of-way, whether recorded or not, over the Property of others that individually or together provide Owner with legal, physical and other access to the Property. Owner shall execute any additional documents as may be necessary to evidence this assignment.

**Commentary.** As the Owner buys and sells land and as ownership of adjacent land changes, the scope of this right will change. At a minimum, Land Trust needs at least one recorded access to the easement land. Larger properties may need additional recorded access to ensure proper monitoring.

**OR**

(4) Assignment of Owner's Access Rights – In order to enable this Easement to be adequately monitored and enforced by Land Trust, Owner hereby irrevocably assigns to Land Trust the non-exclusive right to use any and all access easements and rights-of-way, whether recorded or not, over the Property or the property of others that individually or together provide Owner with legal, physical and other access to the Property. Owner further agrees to execute any additional documents necessary to evidence this assignment.

(5) Signage – To erect and maintain signs or other appropriate markers in one or more prominent locations on the Property acceptable to Owner, visible from a public road [or along boundaries], bearing information indicating that the Property is protected by Land Trust. The wording of the information shall be determined by Land Trust but shall clearly indicate that the Property is privately owned and not open to the public. Land Trust shall be responsible for the costs of erecting and maintaining such signs or markers.

**OR**

(5) Signage – To erect and maintain small unlighted signs or other appropriate markers visible from public vantage points and along boundary lines to identify Land Trust, inform the public that the Property is protected by this Easement and identify activities prohibited by the Easement.

**Commentary.** When appropriate, consider adding “advise the public that hunting, trapping, and other uses restricted by this Easement are prohibited” and/or a request for the public to contact Land Trust to report violations to the permitted communications.

(6) **Interpretation**—To interpret this Easement, apply this Easement to factual conditions on or about the Property, respond to requests for information from persons having an interest in this Easement or the Property, and apply this Easement to changes occurring or proposed within the Property.

**Commentary.** This provision may be partially duplicative of some of the boilerplate provisions, but it is broader in scope and affirmatively acknowledges that changes will occur over time and easement provisions will need to be interpreted.

(7) **Protection**—To require that all mineral, air and water rights as Land Trust deems necessary to preserve and protect the biological resources and Conservation Values of the Property shall remain a part of and be put to beneficial use upon the Property, consistent with the purposes of this Easement.

**Commentary.** This provision may be unnecessary if the prohibitions against subdivision are broadly worded or other prohibitions cover this point.

(8) **Reservation of Forest Carbon Services**—To hold, market, and transfer any and all rights related to the Forest Carbon, including but not limited to mitigation credits or offsets, now present or existing in the future, and the right to report such mitigation credits or offsets to any relevant public or private regulatory/oversight body or registry whether pursuant to a voluntary system or created by local, federal, or international law or regulation, which rights arise from or are generated by or from the Property on or after the date of this Easement (collectively, the “**Forest Carbon Services**”). The Forest Carbon Services retained hereunder shall specifically include, but shall not be limited to, the right to hold, reserve, report, market or retire any greenhouse gas mitigation credits or offsets that may be generated upon the Property, and other types of mitigation credits or offsets that arise from the production of Forest Carbon. Land Trust shall have the absolute discretion in determining the purchaser(s) and/or recipient(s) of any Forest Carbon Services and the consideration for such Forest Carbon Services shall inure to the sole benefit of Land Trust.

**Commentary.** Consider whether Land Trust or owner should receive the consideration. If the owner, then this provision should appear later in the easement. If Land Trust, then some of the similar later provisions might also be moved here. If the various examples below that specifically relate to climate change grant rights to Land Trust, they should be included in this paragraph or otherwise set out unambiguously..

(9) **Additional Rights**—To exercise such additional rights as may be reasonably necessary to effectuate the purposes of this Easement.

**Commentary.** This “elastic clause” is quite broad and accords Land Trust significant protection against an unduly restrictive interpretation of other rights paragraphs. Many other types of rights might be included in the rights paragraph if appropriate.

4. **Prohibitions, Restrictions and Reserved Rights.** The Property shall be used in a manner consistent with this Easement. [The Property may be used as affirmatively permitted in this Easement or in accordance with the restrictions and prohibitions set forth herein.] Any activity on or use of the Property that is inconsistent with the purposes of this Easement is prohibited. **[All uses are prohibited, except for those expressly allowed by this Easement.]** Granting Owner reserves all rights accruing from Granting Owner's ownership of the Property, including the right to engage in, or to permit or invite others to engage in, all uses of the Property that are permitted herein or are neither expressly prohibited herein nor inconsistent with the purposes of this Easement. Ownership rights include the right to sell, lease, or otherwise transfer the Property to anyone Owner chooses, as well as the right to privacy and the right to exclude any member of the public from trespassing on the Property. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited, expressly permitted, or qualifiedly permitted as set forth. Nothing in this Easement relieves Owner of any obligation or restriction on the use of the Property imposed by federal, state, and local laws, regulations and requirements.

**Commentary.** In some parts of the country, donors may resist the prohibited "unless expressly permitted" option; it is most likely to be acceptable for forever wild easements. It is essential that the easement be clear whether everything is permitted except the prohibited acts or everything is forbidden except the permitted acts. Any ambiguity opens the door to potential disputes.

(1) **Extinguishment of Development Rights.** Except as otherwise reserved to Owner in this Easement, all development rights appurtenant to the Property are hereby released, terminated and extinguished, and development rights may not be used on or transferred to any portion of the Property as it now or hereafter may be bounded or described, or to any other property adjacent or otherwise, or used for the purpose of calculating permissible lot yield of the Property or any other property. This Easement shall not create any development rights.

**OR**

(1) **Extinguishment of Development Rights.** Granting Owner hereby grants to Land Trust all development rights except as specifically reserved in this Easement, that were previously, are now or hereafter allocated to, implied, reserved, appurtenant to, or inherent in the Property, and the Parties agree that such rights are released, terminated, and extinguished, and may not be used on or transferred to any portion of the Property as it now or later may be bounded or described, or to any other property adjacent or otherwise, or used for the purpose of calculating permissible lot yield of the Property or any other property. This Easement shall not create any development rights.

(2) **Subdivision.** The division, subdivision, de facto subdivision, or partition of the Property, including transfer of development rights, whether by physical, legal, or any other process, and including the lease of any portion less than one hundred percent (100%) of the Property for a term in excess of twenty (20) years is prohibited.

**Commentary.** There are multiple reasons to prohibit subdivision, including avoiding the enforcement problems and additional monitoring expenses arising from additional owners, maintaining sufficient acreage in single ownership to support agricultural uses, and avoiding fragmentation of habitat. Especially if use of certain parcels is severely limited, those parcels should not be sold separately because their severe restrictions would increase the risk that a court might terminate the easement. Consider, however, whether to permit subdivision for the purpose of transferring a portion of the Property to an appropriate organization for use for park, nature preserve, public trail or other conservation purposes. Some farm leases are for longer than 20 years and may be for less than the entire Property, so that language may need to be adjusted.

**OR**

(2) **Subdivision.** The legal or de facto subdivision of the Property or use of the Property to accomplish any legal or de facto subdivision of any other existing assessor's parcel or to create a separate and legal parcel from any other existing assessor's parcel is prohibited, including, but not limited to, any such subdivisions or establishment of separate legal parcels by (i) certificates of compliance, (ii) "separate for assessment purposes" designations or (iii) lot line adjustments.

**OR**

(2) **Subdivision.** Owner agrees the Property has \_\_\_\_ existing legal parcel(s). Owner will not apply for or otherwise seek recognition of additional legal parcels within the Property. Owner shall continue to maintain the legal parcels comprising the Property, and all interests therein, under common ownership, as though a single legal parcel. If merger of parcels is permitted in the future, Owner is entitled to merge one or more of the parcels.

**Commentary:** This paragraph and the next are for properties consisting of multiple parcels that cannot be formally merged for some reason. Formal merger may reduce property taxes, and formal merger is typically preferable because the county will then enforce the prohibition on subdivision.

**OR**

(2) **Subdivision.** The Property is currently comprised of [multiple] [number] legal parcels, all owned by Granting Owner. Unless otherwise permitted by Land Trust, Owner shall maintain all of the parcels comprising the Property, and all interests therein, under common ownership, as though a single legal parcel in perpetuity. Subdivision of any of the parcels, recording of a subdivision plan, partition of any of the parcels, certificates of compliance, lot line adjustments or any attempt to divide any of said parcels into two or more legal parcels without prior approval of Land Trust as provided below is prohibited.

**Commentary:** This paragraph is for properties consisting of multiple parcels that cannot be formally merged for some reason.

**AND/OR**

(2) **Lot Line Adjustments.** Notwithstanding the foregoing, Granting Owner [Owner] may undertake a [single] lot line adjustment with the adjacent parcel currently



designated as \_\_\_\_\_ for the purposes of \_\_\_\_\_ [e.g., providing access to the Property]\_\_\_\_\_. Granting Owner [Owner] may also undertake lot line adjustments with any adjacent parcels provided that (a) the current total acreage of the Property shall not be decreased, and (b) the Conservation Values of the Property shall be further conserved or enhanced by the lot-line adjustment, (c) no new development rights are created, and (d) prior approval has been obtained by Land Trust as set forth below.

**Commentary.** Grantor may not wish to give the right to a later owner. Nail down the location of the lot line adjustment if possible with maps, reference to the northeast corner of the Property, or other specific facts on the ground. The conservation values of the adjacent properties may/should also be considered in any lot line adjustment.

**OR**

(2) **Lot Line Adjustments.** Lot line adjustment may be permitted solely with the prior approval of Land Trust as set forth below[[only] for purposes of maintaining or enhancing agricultural practices or productivity on the Property]. [Granting Owner] shall take no steps towards lot line adjustment unless and until Land Trust approves the request.

(3) **Structures.** Placement, construction, installation, reconstruction or expansion of any structures, buildings, additional roads or access routes, or other manmade improvement of any kind (including, without limitation, buildings, fences, parking lots, billboards, signs, mobile homes, modular structures, caves, towers) is prohibited, except as expressly permitted in this paragraph or paragraph \_\_\_\_\_. A structure includes anything constructed or erected, the use of which requires permanent location on the ground or attachment to something having a permanent location on the ground. Before undertaking any construction, erection, installation or placement that requires advance approval, Owner shall notify Land Trust and obtain prior written approval from Land Trust as required below. "Improvement" shall not refer to trees, vines, or other living improvements planted for agricultural [or landscaping] purposes, whether or not stakes are required to support the plants, nor shall it refer to minor irrigation improvements necessary or desirable to irrigate the Property for agricultural purposes, all of which may be made without the approval of Land Trust. "Minor irrigation improvements" are those that are either smaller than \_\_\_\_\_ or seasonal [temporary] in nature and that do not significantly affect Conservation Values.

**Commentary.** The definition of "structure" may need to vary. The key is to address all possible structures, identify all permitted structures and forbid all other structures. Define "temporary" if that term is used. If replacement and/or expansion of a structure is permitted, then the size and characteristics of the structure need to be well defined in the Easement and the baseline. If replacement is not permitted, then the Easement should address restoration of the site when the structure is no longer to be used. Some provisions may apply to all structures—such as "Owner shall maintain the traditional, rustic and primitive appearance and character of the existing buildings and their setting."—Absent very good documentation in the baseline, provisions such as this are difficult to enforce and may present more problems than benefits.

(a)(1) **Fences**—Existing fences may be repaired and replaced[, and new fences may be built] anywhere on the Property for purposes of reasonable and customary agricultural management and protection of crops, livestock and wildlife, and for security of farm produce, livestock, equipment, and improvements on the Property, and to define boundaries [without any further approval of Land Trust].

**Commentary.** Approval might be required for new fencing but not for repair and replacement of existing fencing in some cases, or approval might be required for fencing outside the Development Zone. Restrictions on use of mesh fencing may be appropriate to preserve animal corridors. Boundary fencing may be treated separately or differently, as may fencing that is visible from public roads, parks and other public places. Any property with a residence will normally need some fencing rights for household gardens, dog runs and the like. Depending on the visibility of permitted fencing and the character of the easement, consider height restrictions, scenic detriment, impact on visibility of historic structures or other things, loss of open space character, and the like. Any decision on fencing is highly fact specific.

**OR**

(a)(1) **Fences**—Maintenance of existing boundary fencing and installation of new boundary fencing are permitted [so long as the fencing does not inhibit the free movement of deer and other native wildlife into, out of, and within the Property]. [Replacement of existing boundary fencing and any new boundary fencing by Owner shall be with fencing designed to minimize harm to, and allow the passage of, [native] wildlife. Fencing material shall be in a form that will not substantially impede the movement of wildlife, air circulation, or other natural conditions or interfere with any scenic conservation values intended to be protected by this Easement.]

**OR**

(a)(1) **Fences**—Owner may repair, replace or install fencing as desired within the Development Zone. Any installation of fencing outside of the Development Zone is prohibited other than to protect endangered or threatened species when approved by Land Trust as not harmful to the Property or [native] plants and animals thereon. Despite the foregoing, Owner may install fencing and gates on or as close as reasonably practicable to Property boundaries and at Property entrance roads for security purposes.

**OR**

(a)(1) **Fences**—Any installation of mesh fencing within the Property is prohibited other than (1) to enclose areas for short periods of time for research purposes, (2) to protect endangered or threatened species, (3) to contain up to \_\_\_ domestic fowl, (4) to protect a household garden from animal predation, and for like purposes[, all as approved by Land Trust as not harmful to the Property or plants and animals thereon].

**Commentary.** Consider whether Trust approval is necessary for any or all of these fences or gates, depending on size, visibility, harm to natural areas, habitat, wildlife

corridors or other features. Consider whether to limit the location of certain fences to a Development Zone or to limit the prohibition to the portion of the Property that is outside the Development Zone. Consider whether to limit the height of any or all fences.

(a)(2) Gates—Gates are permitted in any permitted fence but may not exceed \_\_\_\_ by \_\_\_\_ feet.

**Commentary.** Consider limiting the lighting, signage, number, and type of construction, especially for gates visible to the public.

**OR**

(a)(2) Gates—Gates are permitted at Property boundaries but may not exceed \_\_\_\_ by \_\_\_\_ feet. Cattle guards may be placed at \_\_\_\_\_. Gates may also be placed in the fence around the household garden and at \_\_\_\_\_[ and at such other locations as Owner and Land Trust may agree].

**Commentary.** Consider limiting the lighting, signage, number, and type of construction, especially for gates visible to the public.

(b) Residential Use Prohibited—Any residential use of, or activity on, the Property is prohibited.

**Commentary.** Be sure to include detailed recitals supporting intent to prohibit all residential use and protective provisions such as paragraphs affirmatively acknowledging that economic use of the land has been greatly diminished. Courts are reluctant to enforce severe prohibitions of this sort, so inclusion of self-serving paragraphs that make the grantor's intent very clear are valuable. Especially with an elderly donor, consider making a videotape of the donor explaining the prohibition and the reasons for it.

**OR**

(b) Permitted Residential Use—The following residential use is permitted:

(b)(1) Existing Single-Family Residential Dwelling—The existing single-family dwelling depicted on the map in Exhibit \_\_ may be repaired[, reasonably enlarged] or replaced at the depicted location entirely within the Development Zone shown in Exhibit \_\_ without further approval of Land Trust [so long as the dwelling does not exceed \_\_\_\_ square feet measured \_\_\_\_\_/so long as the structure is no taller than \_\_\_\_ feet measured from ground level at its highest point]. No other residential structures may be constructed or placed on the Property [except for agricultural employee housing as permitted below].

**Commentary.** Consider imposing other restrictions depending on location, visibility and other circumstances. Identify and address appurtenant structures (garage, shed, swimming pool and cabana, gazebo, decks, patios, and so on) specifically or generally as appropriate to the Property. Consider requiring the residence to be relocated to a designated location more protective of Conservation Values if the residence is destroyed or so severely damaged as not to be repairable.

Consider whether to make “residential uses” a defined term. Many model easements use 35 feet as the maximum height, but the height limit should consider the specific location. If the term “reasonably enlarged” is used, it must be defined. All of these options on size, height, and the like need to be negotiated and better defined based on the specific needs of the individual land.

**OR**

(b)(1) Permitted Residential Uses—Owner reserves the right to use structures already existing on the Property at the time this Easement is executed for residential or recreational use, as long as such use is not inconsistent with the purposes of this Easement. Specifically, Owner reserves the rights to occupy, repair, or otherwise use the residential structure [and other existing buildings] located on the Property at the date of this Easement. This includes the right to maintain, renovate or replace the same residential structure to a maximum height of one (1) story above the natural ground level and to a maximum “footprint” area of one and a half times its existing “footprint” area as of the effective date of this Easement.

**OR**

(b)(2) New Single-Family Residential Dwelling—No more than one new single-family residential dwelling, together with reasonable appurtenances such as garages and sheds, may be built on the Property. [This dwelling and appurtenant structures shall be located in the Development Zone indicated on Exhibit B. OR This dwelling shall be located where indicated on Exhibit B, and appurtenant structures shall be located no more than \_\_[250]\_\_ feet from this dwelling.] Owner may relinquish the right to construct the new residential dwelling referred to herein at any time.

**Commentary.** Consider defining and limiting the number, nature, location and size of reasonable appurtenances more specifically. There is less need for specificity when the Development Zone is not visible to the public and when the Zone is very small. If the Development Zone is not defined, use the Adjustable Zone paragraph. Be sure to address the placement and character of the road to this new residence and its water and utilities and other needs. Consider adding some of the (b)(1) restrictions to govern the new residence. Define the location of any new residence if at all possible to ensure that it causes as little harm to conservation values as possible.

**AND/OR**

(b)(2) Guest Houses/Granny Units—No guest house or granny unit or similar residential use is permitted.

**Commentary.** Alternatively, a single guest house or granny unit (or perhaps more than one) might be permitted. If so, all the issues of placement, size, nature and so on that apply to the principal residence apply to the guest house or granny unit.

**OR**

(b)(2) Adjustable Residential Development Zone—Before Owner may apply to the

County for the first time for any permit to construct any residential improvements, Owner, at Owner's sole expense, shall cause a qualified surveyor to prepare a legal description for an area not to exceed \_\_\_ compact and contiguous acres to be known as the "**Development Zone**" and to place permanent monuments identifying such. A map of the Property, attached hereto as Exhibit \_\_, indicates the approximate location of the Development Zone contemplated by the Granting Owner as of the date of this Easement. The surveyed area and its corresponding legal description shall reasonably conform to the approximate area shown on Exhibit \_\_. The surveyor's map showing the monumented area shall be submitted to Land Trust for its review and approval as set forth herein. Once surveyed, the map shall be recorded.

Granting Owner reserves the right to change the location of the Development Zone before it is surveyed or monumented so long as (i) the new location of the Development Zone does not diminish the Conservation Values of the Property beyond the contemplated improvements that were to be located within the Development Zone indicated in Exhibit \_\_; (ii) the new Development Zone does not exceed \_\_\_ acres, and (iii) Granting Owner obtains prior written approval from Land Trust[, which approval shall not be unreasonably withheld and shall take the conservation values and Easement purposes into consideration].

**Commentary.** A gerrymandered snake of an area would be contiguous, so consider how to define the nature of the Development Zone to minimize its impact on the particular land. The reference to "compact and contiguous" acres is one approach, but it leaves a lot of wiggle room. Consider whether the Zone can be limited to a segment of the entire property. There is less need for specificity when the Development Zone is not visible to the public and when the Zone is very small. Be sure to address the road to new structures and their water and utilities and other needs. Pull provisions as needed from the earlier paragraphs to limit the use of the Development Zone.

**AND/OR**

(b)(2) **Residential Use of Development Zone**—Owner may engage in unrestricted residential use of the Development Zone to the extent permitted by all applicable \_\_\_\_\_ County ordinances and any other applicable federal, state, and local laws, regulations, and requirements except (i) no [nonresidential] [industrial use or] activity shall occur in the Development Zone, (ii) no more than \_\_\_ primary residence[s, one Second Unit and one Guest Cottage], as those terms are defined in \_\_\_\_\_ County Code sections \_\_\_\_\_ in their current form, copies of which are attached as Exhibit \_\_, shall be permitted in the Development Zone, and (iii) all development shall be constructed in a manner to prevent any [minimize] visibility [from \_\_\_\_\_ road/park \_\_\_\_\_]. [The total interior floor space of the Guest Cottage shall not exceed \_\_\_[1,000]\_\_\_ square feet and the total interior floor space of the Second Unit shall not exceed \_\_\_[1,200]\_\_\_ square

feet.]

**Commentary.** Consider whether to permit home occupations (addressed below) and, if so, do not forbid nonresidential use of the Development Zone. Consider whether the restrictions should be based on the law current at the time of signing the Easement (in which case attach a copy as an exhibit) or the law as it may change from time to time. Consider defining and limiting the nature, location and size of new structures more specifically if possible. There is less need for specificity when the Development Zone is not visible to the public and when the Zone is very small. Be sure to address the road to new structures and their water and utilities and other needs. Pull provisions as needed from the earlier paragraphs to limit the use of the Development Zone.

**OR**

(b)(3) Expansion of Existing Dwellings [Structures] –

**Commentary.** Expansion may be forbidden, permitted so long as expanded structures do not exceed \_\_\_ square feet, permitted so long as structures remain one story, permitted so long as the footprint remains unchanged, permitted so long as the footprint doesn't exceed specified percentage of existing footprint, permitted with approval of Land Trust or permitted on some other basis. Clarity is the key, coupled with careful documentation of existing conditions in the baseline. There is usually less need to prohibit expansion or to be specific as to permitted expansion when the Development Zone is not visible to the public and when the Zone is very small. Be sure to address any road, water, utilities and other needs that may be associated with a permitted expansion.

**AND/OR**

(b)(3) Modification or Relocation of Building Envelope – Owner and Land Trust acknowledge that the boundaries of the Building Envelope may have to be adjusted from the configuration shown on the Map to moderate the effect of changing ocean levels [changes in river/creek location over time] and/or erosion of the Property [, as well as other climate change effects]. Owner and Land Trust agree to cooperate in making boundary adjustments, provided that any adjustments shall not result in an increase or (without Owner's approval) in a decrease in the number of structures or lots permitted hereunder or alter other rights or obligations otherwise recognized or imposed under this Easement. [If the boundaries of the Building Envelope are relocated pursuant to this paragraph, construction of any replacement residence may occur anywhere within such revised area, without regard to limitation to construction substantially within the existing footprint.]

**Commentary.** Consider a paragraph such as this whenever an Easement grants rights anywhere near an ocean, river, creek or in a location where erosion may occur such as along a bluff as changes over time may affect the exercise of the rights. Use the bracketed "as well as" clause carefully or edit it to be more narrow to fit the circumstances. Edit the second bracketed material as needed for the topography and circumstances.

(b)(4) **Placement and Size of Replacement Structures**—If the existing permitted structures are destroyed or damaged beyond repair, replacement structures of similar size and character may be built in conformity with law so long as \_\_\_\_\_. [the footprint remains unchanged, the structures are limited to one story, the structures are built within the designated Development Zone, the structures do not exceed \_\_\_\_ square feet, Land Trust approval of differences is obtained as set forth herein ....]

**Commentary.** If there are any structures on the Property, address what happens if they deteriorate or are destroyed. Prohibit replacement if possible. Provide for their replacement with structures in a different location when appropriate, as may occur for example if the existing location is in the scenic viewshed and the required replacement location is behind a hill. Consider defining and limiting the nature and size of replacement structures as specifically as possible. For example, depending on the land, it may be beneficial to require an existing taller structure be replaced, if at all, with a shorter one that is not visible or less visible from public roads or parks. There is less need for specificity when the Development Zone is not visible to the public and when the Zone is very small. Be sure to address the road to replacement structures and their water and utilities and other needs.

(b)(4) **Preservation of Historic Structures**—The \_\_\_\_\_ structure (“Building”) identified on Exhibit \_\_ shall at all times be maintained in the same or better structural condition and state of repair as that existing on the effective date of this Easement. Unless the Building is destroyed or damaged beyond repair, this obligation to protect and maintain shall require the preservation, rehabilitation, restoration, and/or reconstruction of the barn whenever necessary in accordance with the United States Secretary of the Interior’s *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, and *The Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes* (36 C.F.R. 68). If these Standards are abandoned, Owner and Land Trust may apply reasonable alternative standards subject to any requirements imposed by the Internal Revenue Service or the National Park Service in connection with Historic Preservation, Conservation, and Scenic easements and/or properties listed on the National Register of Historic Places.

(i) Owner agrees to assume the cost of continued maintenance and repair of the Building in accordance with the recommended standards in the Secretary of the Interior’s *Standards*, so as to preserve the architectural, historical, and archeological integrity of the features, materials, appearance, workmanship, and environment in order to protect and enhance those qualities that made the property eligible for listing in the National Register of Historic Places.

(ii) Any alterations that may affect the historical or archeological integrity of the Building must have prior written approval of Land Trust. Unless the Building is destroyed or damaged beyond repair, Owner shall not construct, demolish, alter, nor remodel any portion of the Building. Owner shall not increase or decrease the

height of the facades or the Building, adversely affect the structural soundness and safety of the Building or its facades or permit any significant reconstruction, repair, repainting or refinishing of the exterior of the Building that alters its state from its existing condition. Owner shall not construct additions to, or chemically or abrasively clean or sandblast the Building, nor construct any new building or structure in or on or move the Building, nor erect, construct, or move anything on the Property (except only temporarily) that would encroach on the open space and area surrounding the Building or interfere with a view of the Building or be incompatible with its historic or architectural character. Owner may not erect any structures or appurtenances that would in any way obstruct the view of the Building from \_\_\_\_\_ Road.

**Commentary.** The Building needs to be specifically identified on a map and in the baseline in full detail as to its significant and historic elements. Consider whether to require Land Trust agreement that the Building has been destroyed or damaged beyond repair as a subsequent Owner may use less severe damage as an excuse to destroy the Building. One option would be to look to the sudden damage or loss that would qualify for a loss deduction pursuant to Internal Revenue Code §165(c)(3) (construed without regard to Owner's legal status, trade, or business or any applicable dollar limitation). For one definition of facade: "The term "façades" includes doors, door frames, windows, window sashes, window frames and casings, dormers, porch, siding material, foundation stones, steps, roof profiles, chimney profiles and materials."

(b)(5) Accessory Structures, Pools, Tennis Courts, and the Like—Recreational structures and other accessory structures may be constructed within the Development Zone so long as \_\_\_\_\_.

**Commentary.** Define and limit accessory structures more specifically as appropriate to the particular land. Limit to recreational structures not otherwise prohibited in the easement. Consider placement, size, height, prohibition of kitchen/outdoor kitchen, prohibition of bathroom or electricity, prior approval of Land Trust—all the considerations identified above for other structures should be revisited here. Be sure to address any road, water, utilities and other needs that may be associated with a permitted expansion.

(c) Agricultural Structures and Improvements—Existing agricultural structures and improvements as shown in Exhibit \_\_\_ may be repaired, reasonably enlarged, [enlarged up to \_\_ percent] and replaced at their current locations for agricultural purposes without further approval from Land Trust]. New buildings and other structures and improvements to be used solely for agricultural production on the Property, including barns, equipment sheds, and improvements to be used for agricultural production purposes or sale of farm products predominantly grown or raised by Owner on the Property, but not including any dwelling or farm labor housing, may be built within the Development Zone depicted in Exhibit \_\_[, without further approval of Land Trust]. Any [other] agriculture production or marketing-related structures may



be constructed, repaired, enlarged or replaced only with the written approval of Land Trust as provided herein.

**Commentary.** If the term “reasonably enlarged” is used, it must be defined. All of these options on size, height, and the like need to be negotiated and better defined based on the specific needs of the individual land. Consider requiring replacement structures to be built at a better location.

**AND?**

Owner may construct a single-story utility shed provided that said utility shed shall not exceed \_\_\_[500]\_\_\_ square feet total interior floor space and provided that said the utility shed is constructed on the existing concrete pad. If the existing concrete pad is no longer usable, a replacement concrete pad may be constructed so long as the replacement concrete pad is located in substantially the same location as the existing concrete pad.

**Commentary.** Provide for destruction of the existing pad? This paragraph is illustrative as the kinds of structures needed will vary across the country. The kinds of restrictions on placement, size, height, access, and so on need to be addressed for any structure.

**AND?**

Owner may construct one building for Agricultural Uses on the Property in accordance with all then-applicable federal, state, and local laws, regulations and requirements, provided that this building shall be no greater than \_\_\_[1,500]\_\_\_ square feet in total interior floor space and may be used solely for storage of crops or livestock raised on the Property or storage of agricultural equipment and supplies necessary for raising or harvesting crops and livestock on the Property. The permitted agricultural building shall not be used, under any circumstances, for storage, processing, marketing, or sale of products made from crops or livestock, even when such products have been made from crops or livestock raised on the Property.

**Commentary.** Use only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here.

**AND?**

New buildings and other structures and improvements to be used primarily for agricultural production as defined above and not to be used for any dwelling or Farm Support Housing as defined below may be built on the Property within the “\_\_\_\_\_ Area” identified on Exhibit \_\_. New buildings, structures or improvements proposed for locations outside the “\_\_\_\_\_ Area” may be built only with the approval of Land Trust.

(d) **Existing Farm Support Housing** – All existing dwellings or structures used to house farm tenants and employees, as shown on Exhibit \_\_, may be repaired[, reasonably enlarged] and replaced at their current locations [with the approval of Land Trust].

**Commentary.** If the term “reasonably enlarged” is used, it must be defined. All of these options on size, height, and the like need to be negotiated and better defined based on the specific needs of the individual land. Consider requiring replacement structures to be built at a better location.

**AND?**

(d) Agricultural Employee Housing—No agricultural employee housing may be constructed or placed on the Property without advance written approval of Land Trust. Land Trust may only grant approval if Owner can demonstrate to Land Trust’s satisfaction that such agricultural employee housing is reasonable and necessary for the agricultural operation of the Property. Any agricultural employee housing must be located entirely within the Development Zone as established in Exhibit \_\_\_.

**OR**

(d) Agricultural Employee Housing—New dwellings or structures to be used primarily to house tenants or employees engaged in agricultural production on the Property (“Farm Support Housing”) may be built on the Property, provided they are located entirely within the Development Zone as established in Exhibit \_\_\_. Farm Support Housing shall not be subdivided from the Property under any circumstances.

(e) Farm Stand/Winery/Other Production or Agricultural Sales Facility—Owner may engage in Commercial activities related to Agriculture production/processing [within a permitted Structure] of agricultural products, a majority of which are produced on the Property or another property owned by Owner, into derivatives thereof; the Commercial retail and/or non-retail sale of Agricultural products and derivatives, a majority of which are produced on the Property or on a property owned by Owner;

(e) Commercial Agricultural Activities—Owner may engage in Commercial activities related to Agriculture inside of Structures [as that term is defined below] used for Agriculture (for example, farm machine repair shop or seed and mineral shop), and seasonal or occasional outdoor Commercial activities that are accessory to the agricultural uses of the Property (for example, hay rides, corn maze, farm animal petting zoo, pick your own produce) and sale of Agricultural products produced off of the Property but associated with such seasonal or occasional activities (for example, the sale of apple cider on a hay ride), and Commercial services related to Agriculture limited to equestrian sports, events, and shows, boarding, the training of horses/ponies and riders, and the provision of recreational or therapeutic riding opportunities.

**Commentary.** Each of these activities presents significant monitoring and other issues, including traffic, parking, public access, and scenic impairment. These would need to be addressed by other provisions defining the location of activities, frequency, numbers of participants, and so on.

**AND/OR**

(e) **Commercial Activities** – Permitted commercial activities and uses shall be limited in scale to those appropriate to the size and location of the Property and shall not harm the Conservation Values. The following Commercial activities and uses are permitted:

- (1) Commercial activities within permitted residential units (for example, ongoing activities such as a professional office or an at-home child day care; or occasional activities such as fundraisers or benefits);
- (2) Commercial activities related to Agriculture inside of Structures used for Agriculture (for example, farm machine repair shop or seed and mineral shop);
- (3) seasonal or occasional outdoor Commercial activities that are accessory to the Agricultural uses of the Property (for example, hay rides, corn maze, farm animal petting zoo, pick your own produce) and sale of Agricultural products produced off of the Property but associated with such seasonal or occasional activities (for example, sale of apple cider on a hay ride);
- (4) production/processing (within a permitted Structure) of Agricultural products, a majority of which are produced on the Property or another property owned by Owner, into derivatives thereof;
- (5) Commercial retail and/or non-retail sale of (i) Agricultural products, a majority of which are produced on the Property or on another property owned by Owner; or (ii) derivatives produced pursuant to the preceding paragraph;
- (6) Commercial services related to Agriculture limited to equestrian sports, events, and shows, boarding, training of horses/ponies and riders, and provision of recreational or therapeutic riding opportunities; and
- (7) Commercial Passive Recreational uses operated by a resident on the Property, or by Owner. Structures associated with these uses must be permitted herein. Any Commercial Passive Recreational uses shall be limited to a de minimis amount.

**Commentary.** This paragraph is borrowed substantially from the Maryland Environmental Trust Model Easement, available at <http://www.dnr.maryland.gov/met/modeasement.pdf>. Each of these activities presents significant monitoring and other issues, including traffic, parking, public access, and scenic impairment. These would need to be addressed by provisions defining the location of activities, frequency, numbers of participants, and so on. Be sure the defined terms are defined in the final easement.

**OR**

- (e) **Winery** – The construction or placement on the Property of a winery or other structure used for production, tasting or sale of wine is prohibited.
- (f) **Caves** – No caves may be constructed on or under the Property.

OR

(f) Caves—One [or a specified number of] caves may be constructed on or under the property within the Development Zone as established in Exhibit \_\_. The cave[s] shall not be used, under any circumstances, for processing, marketing, or sale of products made from crops or livestock, even when such products have been made from crops or livestock raised on the Property. Cave spoils shall not be deposited on any part of the Property.

OR

(f) Caves—Construction, maintenance, repair, renovation, replacement, and use of caves for \_\_\_\_\_ storage to the extent permitted by, and in accordance with, all applicable \_\_\_\_\_ County ordinances and all other applicable federal, state, and local laws, regulations, and requirements, so long as such caves do not exceed \_\_\_\_\_ (\_\_,000) square feet of interior floor space and so long as wine and wine storage is exclusively for wine produced at the winery then in existence on the Property and so long as any entry or exit to the caves is not constructed in the \_\_\_\_\_ Zone. The cave[s] shall not be used, under any circumstances, for processing, marketing, or sale of products made from crops or livestock, even when such products have been made from crops or livestock raised on the Property. Cave spoils shall not be deposited on any part of the Property.

(g) Signs—The construction, maintenance or placement of any signs on the Property greater than \_\_\_\_ inches in width by \_\_\_\_ inches in height is prohibited except (i) to advertise the Property for sale or rent, (ii) to post the Property to control unauthorized entry or use, (iii) to identify the Property, (iv) to provide directional or interpretive information, (v) to exercise First Amendment rights through temporary political signs [near a residence], or (vi) to post notice of the Easement. All signs shall comply with all applicable federal, state, and local laws, regulations, and requirements. Commercial signs (including billboards) unrelated to permitted activities conducted on the Property are prohibited.

**Commentary.** Consider whether to limit the total number of signs of one or all types. Other possible reasons for signs might include (1) state solely the name and/or address of the Property and/or the Owner; (2) advertise the Agricultural uses of the Property; (3) advertise the goods or services sold or produced in accordance with permitted Commercial uses of the Property; (4) commemorate the history of the Property, its recognition under local, state or federal historical registers, or its protection under this Easement or federal, state or local environmental or game laws; (5) provide directions to permitted uses and Structures on the Property; and/or (6) address hunting, fishing, or trespassing (including signs for the purpose of delineating Property boundaries).

(h) Art—The construction, placement, display, repair and removal of art and sculptural pieces out of doors is [permitted/prohibited].

**Commentary.** Absent some justification for a different rule, art can generally be permitted in the Development Zones and generally be prohibited in forever wild and natural areas. Consider limiting the location or size, use of any lights, risks presented from lightning, visibility from outside the easement land, and other issues.

(i) **Boating/Recreational Structures**—The construction, use, maintenance, renovation, expansion, or replacement of boat docks and piers in the existing lake [river] is [permitted/prohibited].

**Commentary.** Consider limiting the location or size or other characteristics of any permitted replacement structure.

(j) **Visual Screening**—To maintain the scenic view of the Property from \_\_\_\_\_Road/Street/Etc. as set forth as a Conservation Value in the recitals and baseline documentation, Owner shall not erect, construct, assemble, or plant visual screening, including stockade fences, tall berms and hedges or other plantings, that would, in Land Trust’s sole discretion, substantially block or diminish views of the Property from public roadways or waterways.

(k) **[Catchall]** —

**Commentary.** Other structures to consider: decks, camping platform, water tanks, pipes, stone walls, well and cover, feed troughs, picnic tables, outdoor kitchens, erosion control, pumps, pump houses, habitat enhancement devices such as birdhouses and bat houses, footbridges, stream crossing structures and stream access structures, internet reception and radio/cell towers, parking lot (additional parking spaces), barn, stable, silo, spring house, green house, hoop house, corrals, hayracks, stock tanks or centerpivot sprinklers, riding arena (indoor or outdoor), horse walker, manure storage pit, storage buildings, feeding and irrigation facilities, ramps, storage sheds, cabanas, tennis courts, bocce ball courts and roads to any structures—consider the broadest definition of structure and address any issues. At a minimum, be sure the easement addresses all existing structures and the types of structures that appear on similar properties in the vicinity. Also consider whether utilities are permitted for structures as utilities entail additional impact (electrical/water lines and rights of way, access roads). See *The Conservation Easement Handbook* for more ideas and provisions.

(l) **Other Structures Prohibited**—Except as provided in paragraphs 3.5, 4.4 and 4.13, no other structures may be constructed or placed on the Property.

(4) **Utilities.** The installation of new, or extension of existing, utilities (including, without limitation, water, sewer, septic tanks and systems, power, fuel, and communication lines and related facilities) is prohibited, except

- (a) as necessary for Agricultural Uses [as that term is defined herein]
- (b) to service permitted residential uses in the Development Zone
- (c) to service other permitted structures and improvements, or

(d) for permitted uses pursuant to Paragraphs \_\_\_ and \_\_\_; or

(e) as permitted in paragraph \_\_\_ below.

**Commentary.** As worded, this permission is very broad and would permit utilities to cross sensitive habitat or scenic areas. Consider limiting the location of utility rights of way to a specific corridor or to the shortest distance, requiring relocation of existing rights of way to more suitable locations if significant changes are made, or imposing other requirements to protect and enhance other Conservation Values. The nature of the restrictions is necessarily site-specific. Note that this paragraph includes water, a subject that might be excluded here if more detailed water provisions below are used in the easement.

**OR**

(4) Utility Services and Septic Systems. Wires, lines, pipes, cables or other facilities providing electrical, gas, water, sewer, communications, or other utility services to the structures permitted herein may be installed, maintained, repaired, removed, relocated and replaced [in substantially the same locations documented in the Baseline Documentation], and Owner may grant easements over and under the Property for such purposes with the approval of Land Trust. Septic or other underground sanitary systems serving the improvements permitted herein may be installed, maintained, repaired or improved. No such easement may be permitted to cross the Property for the benefit of a parcel not subject to this Easement [or another easement granted by this Granting Owner].

**Commentary.** See above. A more extensive definition of utilities is ““Utilities” includes, but is not limited to, satellite dishes, electric power lines and facilities, sanitary and storm sewers, septic systems, cisterns, wells, water storage and delivery systems, telephone and communication systems and renewable energy systems (including but not limited to solar energy devices on a Structure; geothermal heating and cooling systems, also known as ground source heat pump; wind energy devices; systems based on the use of Agricultural byproducts and waste products from the Property to the extent not prohibited by governmental regulations; and other renewable energy systems that are not prohibited by governmental regulations).

(5) Surface Alterations Excepting Roads and Trails. Any alteration of the surface of the land, including, without limitation, the excavation, addition, dredging, deposit, or removal of soil, sand, gravel, rock, peat, or sod is prohibited, except

**[the following are various options one could select, not all intended to be used]**

as necessary for Agricultural Uses, so long as the Conservation Values and agricultural productivity of the soils are not harmed.

**Commentary.** Use only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here.

**AND/OR**

as necessary for permitted residential uses.

**Commentary.** Consider whether to make “residential uses” a defined term.

**AND/OR**

as necessary for the [construction and] maintenance of permitted roads.

**Commentary.** Different views exist as to the treatment of the margins of roads. One option is to specify how far one can clear from the center of roads. Consider any viewshed requirements on placement of a new road. Consider replacement of the road.

**AND/OR**

as necessary for permitted construction, or for permitted road and trail maintenance.

**AND/OR**

as minimally necessary to continue the normal management of the Property as described in the Baseline Documentation.

**Commentary.** Consider building in a mechanism for permissible change of management practices to occur over time and be documented in an updated baseline.

**AND/OR**

as necessary for the construction of additional improvements as permitted herein.

**AND/OR**

as minimally necessary for the uses permitted by Paragraph \_\_\_.

**AND/OR**

as required for fire trails and emergency needs.

“Alteration of the surface of the land” shall include filling, dumping, excavating, draining, dredging, mining, drilling, removing or exploring for or extraction of minerals, loam, soil, sands, gravel, rocks or other material on or below the surface of the Property, altering the surface or general topography of the Property, and depositing or accumulation of soil, trash, ashes, refuse, waste, bio-solids or any other material. Owner shall not explore for, develop, or extract minerals, metals, or hydrocarbons by any mining method, surface or otherwise, on the Property.

**Commentary.** The final sentence may be more restrictive than required. If any exploration and extraction are permitted, address location, size, character, access, restoration and other issues.

**[optional addition]**

No disturbance of the soil shall occur within \_\_\_[100 feet]\_\_\_ of the banks of the watercourse sometimes known as \_\_\_\_\_ Creek running through the Property and depicted approximately in the Baseline Documentation.

**OR**

A one-hundred (100) foot vegetative buffer strip along each side of the \_\_\_\_\_ River [Creek] [measured from the middle of the River [Creek]] is required. Owner shall maintain the buffer strip that currently exists and/or allow it to naturally revegetate

and/or plant the buffer strip with native species. Once established, Owner shall not disturb the buffer, except as reasonably required for (1) erosion control; (2) Passive Recreational uses that require water access and associated Structures permitted herein; (3) access to water for irrigation of the Property; (4) control of non-native and invasive species or removal of dead, diseased, or infected trees as permitted herein; (5) access to portions of the Property that are accessible only by crossing that waterway; (6) livestock stream crossings in accordance with an approved Soil and Water Conservation Plan prepared by the Soil Conservation District; (7) enhancement of Wetlands, wildlife habitat or water quality; (8) maintenance and use of the existing \_\_\_\_\_ [Structure(s) located within the buffer]\_\_\_\_\_. Owner shall not store manure or compost nor use or deposit pesticides, insecticides, herbicides or fertilizers (except for revegetation or planting of native species, or control of invasive or diseased species) within the buffer strip.

**Commentary.** Delete provisions that are inapplicable and check that terms are defined and issues addressed as needed.

**OR**

“Wetlands” means portions of the Property defined by state or federal law as wetlands at the time of the proposed activity. Other than the creation and maintenance of man-made ponds with all necessary and appropriate permits, and the maintenance of Agricultural drainage ditches, the diking, draining, filling, dredging or removal of Wetlands is prohibited.

**AND/OR**

(5) **Soil Disturbance.** Any use or activity that causes or is likely to cause [significant] soil degradation or erosion, soil compaction, or the pollution, degradation, or depletion of any surface or subsurface waters, or the degradation of native vegetation communities or any other native habitats on the Property is prohibited. Any use or activity, including the use of heavy machinery or tractors, that is likely to cause significant compaction, erosion, or disturbance of the soil in the Property or degradation of water is prohibited, including but not limited to grading, discing, dragging, harrowing, plowing, ripping, floating, leveling, clearing, and any other activity that exposes bare soil. No geothermal exploration or development is permitted. Mining, drilling, exploration for, or development and/extraction of minerals, hydrocarbons, steam, soils, gravel, rock, or other materials on or below the surface of the Property are all prohibited, [using any method that disturbs the surface of the land,] except

**[the following are various options one could select, not all intended to be used]**

as necessary for the permitted drilling of water wells pursuant to Paragraph \_\_\_\_.

**Commentary.** Consider whether to limit the permitted drilling locations both because of the undesirability of drilling in specific locations and because of the disruption to be caused by installation of pipelines, roads, tanks and the like.



**AND/OR**

that Owner may disturb soil and land surface on the Property if (a) limited and localized in impact, affecting no more than \_\_\_ square feet/acres of the Property in the aggregate at any time; (b) not irretrievably destructive of significant conservation interests; and (c) reasonably necessary for, and incidental to, carrying out the improvements and agricultural production uses expressly permitted on the Property by this Easement. Owner shall use all practical means to mitigate any adverse effect on the Conservation Values of the Property [and adjacent land] in carrying out any permitted activities, and upon completion, Owner shall promptly restore any portion of the Property affected thereby as nearly as possible to its condition existing prior to commencement thereof.

**AND/OR**

that Owner undertake conservation practices that promote native flora and fauna, enhance soil stabilization, or reduce erosion in accordance with sound and generally accepted best management practices, including restoration work. Approval of Land Trust is required when conservation practices involve significant surface alteration, soil compaction or include using material such as rock or concrete in amounts over \_\_[e.g., 10]\_\_ cubic yards in volume in any calendar year.

(5) **Removal, Mining and Extraction.** The mining or extraction of soil, sand, gravel, rock, oil, natural gas, fuel, or any other mineral substance, using any method that disturbs the surface of the land, is prohibited.

**OR**

(5) **Removal, Mining and Extraction.** No person has retained a qualified mineral interest in the Property of a nature that would disqualify this Easement for purposes of §1.170A-14(g)(4) of the Treasury Regulations. From and after the Easement Date, the grant of any such interest is prohibited and Land Trust has the right and obligation to prohibit the exercise of any such right or interest if granted in violation of this provision.

**OR**

(5) **Removal, Mining and Extraction.** The removal and extraction of soil, sand, gravel, rock, oil, natural gas, fuel or any other mineral substance through a surface removal and extraction method, is prohibited. Well drilling and underground piping for and the production of subsurface mineral substances does not constitute a surface removal and extraction method, but rather constitutes a subsurface removal and extraction method, and such subsurface removal or extraction as permitted herein does not impair the purpose of this Easement and the significant conservation interests being protected by this Easement. Owner shall notify Land Trust in writing prior to conducting any subsurface exploration or extraction. Any surface disturbance resulting from permitted subsurface removal or extraction activities, such as the extraction of oil, natural gas, or other hydrocarbon products, shall be temporary and limited to an area not exceeding two (2) acres and shall be in accordance with applicable law. There shall

be no more than one (1) removal or extraction site within the Property at any time. Owner shall be entitled to install, repair, replace and remove an underground pipeline on the Property from any extraction site to the boundary of the Property. After any temporary subsurface removal and/or extraction, Owner shall restore all disturbed areas to a condition similar or equivalent to its topographical state prior to the disturbance by restoring soils and replanting suitable adapted vegetation. Whenever possible, access to removal and/or extraction sites shall be by existing roads. Any temporary disturbance of the surface of the Property resulting from a subsurface removal and extraction method shall not irretrievably or significantly impair or interfere with the Purpose of this Easement and the significant conservation interests being protected by this Easement. [At Owner's election,] [At Land Trust's direction,] any subsurface removal or extraction activities may be concealed or conducted such that the production facilities are compatible with existing topography and landscape. Granting Owner and Land Trust intend that the provisions in this paragraph satisfy the requirements of Treasury Regulation § 1.170A-14(g)(4)(i) with respect to Owner's retention of a qualified mineral interest, as that term is defined in the Internal Revenue Code and related Treasury Regulations.

**Commentary.** Notice to Land Trust is mandatory. Treasury Regulations §1.170A-14(g)(5)(ii). Consider requiring approval in addition to notice.

**AND/OR**

(6) Paving, Road Construction and Trails. No building of roads, grading or other changes in the normal topography of the land are permitted, except to continue the normal management of the land as expressly permitted herein or documented in the Baseline Documentation and the existing road and related alterations documented in the Baseline Documentation. No portion of the Property presently unpaved shall be paved or otherwise be covered with concrete, asphalt, or any other paving material, nor shall any paved or unpaved road for access or other purposes be constructed without the advance written approval of Land Trust. [Any residual roads may be used as single-track trails only and must be reasonably maintained in a manner that will prevent erosion of the topsoil and leaf mold layers of the soil.]

**OR**

(6) Paving, Road Construction and Trails. The maintenance, repair, and use of existing access and agricultural roads on the Property in substantially their present location and condition are permitted. No extension or expansion of roads into forever wild or open space land is permitted without prior approval of Land Trust as set forth below.

**OR**

(6) Paving, Road Construction and Trails. The [construction,] maintenance, [relocation,] repair, and use of roads on the Property are permitted.

**Commentary.** Avoid the very broad provision created by deletion of the brackets if at all possible. It may be so broad as to invalidate many easements, excepting perhaps some

agricultural easements. Construction of new roads outside an agricultural road context should be permitted only after consideration of the location and impact on conservation values, so the location should be designated on maps or should require land trust permission or some other control should be imposed.

**OR**

(6) Paving, Road Construction and Trails. No portion of the Property presently unpaved shall be paved or otherwise be covered with concrete, asphalt, or any other [impervious] material, nor shall any road for access or other purposes be constructed without the advance written approval of Land Trust as provided herein. Existing unpaved farm roads as required by agricultural operations documented in the Baseline Documentation are permitted to remain without further Land Trust approval. Owner shall not oil unpaved roads without prior Trust consent, which may be given for oiling with vegetable oils in accordance with best practices. Owner shall notify Land Trust of any relocation of or addition to unpaved roads within the Agricultural Area.

(a) Existing Road—The maintenance, repair, and use of the existing road currently existing as of the date of this Easement in substantially their present location, width, length, and unpaved condition are permitted. [The existing access road to \_\_\_\_\_ may be paved in its present location, and Owner may install an access gate on the existing access road. In addition, Owner may widen the existing access road so long as the width does not exceed \_\_\_\_\_ feet.]

**OR**

(a) Existing Road—The existing access road may be extended or otherwise altered to enable access to \_\_\_\_\_, so long as any new road construction (i) occurs below \_\_\_ feet of altitude and (ii) does not encroach upon the \_\_\_\_\_ to any greater extent than the access road existing as of the date of this Easement documented in the Baseline Documentation.

**OR**

(a) Existing and New Roads—The maintenance, repair, relocation, improvement, and use of the existing road on the Property, and the construction, maintenance, repair, relocation and use of \_\_\_\_\_ new roads for access to the Property and to access the Development Zone are permitted. These roads shall be unimproved, unpaved, and no greater than \_\_\_\_\_ feet in width, except that the primary road used to access the Development Zone may be paved and up to \_\_\_\_\_ feet in width or improved to the minimum extent necessary to accommodate legal requirements existing at the time of construction. Owner shall not permit any road or driveway access through any portion of the Property to any adjoining parcel, whether or not under the same ownership.

**Commentary.** Reference to “legal requirements existing at the time of construction” gives up some control to an unknown future. If appropriate, include some limitations on the character of road permitted (single/two lane road or more).

(b) **Foot Trails**—The construction, relocation, maintenance and use of [unpaved] foot trails on the Property in substantially their present location and condition is permitted. Foot trails may be realigned so long as such realignment has been approved in advance by Land Trust as provided herein, and so long as realignment does not degrade the ecological and scenic Conservation Values of the Property. Land Trust may approve limited extensions of and construction of new foot trails as appropriate to the circumstances, with consideration given to the risk of increasing trespassing, the risk of erosion, and similar concerns, and so long as that construction does not degrade the ecological and scenic Conservation Values of the Property. Use of foot trails shall be nonmechanical [nonmotorized] and limited to noncommercial Recreational Activities as described herein. Owner may utilize small quantities of decomposed granite or similar crushed material for trail surfacing.

**Commentary.** Require that trails be covered (if at all) by wood chips, gravel, or other highly porous surface? Be sure there is a definition of Recreational Activities, included below.

**AND?**

This paragraph expressly permits Owner to enter into a trail easement with a public or non-profit agency for noncommercial recreational purposes.

**Commentary.** Define the terms? Include any restrictions? Require Land Trust approval? Consider whether the trail will have to comply with the ADA and the requirements for width, surface and the like that the ADA will impose.

**AND?**

(c) **Impervious Surface**—No more than \_\_ percent of the surface [square feet] of the Property may be covered with impervious material of any kind made or added by humans, including concrete, asphalt, packed earth, structures, tents, or other material.

**Commentary.** Consider adding: Owner must notify Land Trust of any construction or activity that increases impervious coverage by \_\_\_\_\_ square feet or more, whether or not approval is required for that construction or activity.

(7) **Vehicles.** The operation of any motorized or non-motorized vehicle off permitted roads [outside the Development Zone] is prohibited except for urgent emergency uses.

**Commentary.** Consider any possible ADA issues.

**OR**

(7) **Vehicles.** The operation of any motorized or non-motorized vehicle off permitted roads is prohibited except (i) in conjunction with permitted Agricultural Uses, (ii) for urgent emergency uses, (iii) for maintenance [and restoration] of the Property and its water supply, (iv) addressing trespassing, and (v) monitoring this Easement.

**Commentary.** Use only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here.

**OR**

(7) **Vehicles.** Use of bicycles, motorcycles, all-terrain vehicles, or any other type of motorized or non-motorized vehicles on or off roadways on the Property is prohibited except that Owner or others under Owner’s control may make limited use of vehicles when reasonably necessary for permitted conservation management activities, permitted residential or recreational uses, or urgent emergency uses, or as permitted by existing easements of record as shown in the Baseline Documentation.

(8) **Water.** The Property includes all water and water rights, ditches and ditch rights, springs and spring rights, reservoir and storage rights, wells and groundwater rights, creeks and riparian rights and other rights in and to the use of water historically used on or otherwise appurtenant to the Property. Owner reserves and shall retain all right, title, and interest in and to all tributary and non-tributary water, all appropriative, prescriptive, contractual or other water rights, and related interests in, on, under, or appurtenant to the Property for use on or for the benefit of the Property in a manner consistent with this Easement and in accordance with applicable federal, state, and local laws, regulations and requirements. Activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters, are prohibited. Alteration or manipulation of any existing water courses, creeks, wetlands and drainages located on the Property, and the creation or development of any new water source or water impoundment on the Property, including, but not limited to, wells, springs, creeks, dikes, dams, ponds, tanks, and cisterns, by any means is prohibited, except that

(a) **Existing Well**—Owner may maintain and deepen the existing well located at \_\_\_\_\_.

**OR**

(a) **Existing Water System**—Maintenance, repair, replacement, expansion and use in its present location of the existing agricultural reservoir and other irrigation improvements, including the existing pump and pump house, on the Property are permitted in accordance with all then-applicable federal, state, and local laws, regulations and requirements.

(b) **Replacement Water Supply**—Owner may replace or rebuild existing water supply systems and wells, and construct new water supply systems and wells, as necessary to maintain adequate water supply to the Property (with the term “adequate” to be judged based on the levels of water use consistent with the Conservation Values of the Property).

**Commentary.** Consider whether to restrict the location of any replacement system.

**OR**

(a&b) **Water Systems**—Maintenance, repair, improvement[, enhancement]and

replacement of existing water supply systems [existing wells and other irrigation improvements] on the Property, and the construction of new water supply systems including, but not limited to, springs, wells, holding tanks, pipes and fire hydrants [including the drilling of additional wells and constructing or siting of water storage improvements, fixtures and pipelines for water], are permitted to the extent necessary for noncommercial residential use by Owner exclusively on the Property [and any lawful use on other property (i) owned or controlled by Owner or \_\_\_\_ [relatives/affiliates] \_\_\_\_ and (ii) \_\_\_\_\_ County Assessor Parcel Nos. \_\_\_\_\_, and \_\_\_\_\_] and for fire protection, in accordance with all applicable federal, state, and local laws, regulations, and requirements.

**OR**

(b) **Water Resource Development**—Owner may maintain, modify and relocate existing water resources on the Property and develop and maintain a pond for wildlife on the Property not to exceed \_\_\_\_ in size. The principal existing water resources on the Property are \_\_\_\_\_. Any water-resource development or use shall be principally designed to enhance wildlife habitat or other permitted uses of the Property and shall be developed in a manner consistent with its Conservation Values. No water-resource development shall be for residential, agricultural, commercial, or industrial use of the Property.

**AND/OR**

(b) **Irrigation Improvements**—New irrigation improvements for permitted Agricultural Uses, including ponds, pumping stations, above ground storage tanks over \_\_\_\_ gallons, and \_\_\_\_\_ [footprint over x feet, over x feet in height, visible from road??] \_\_\_\_\_, \_\_\_\_\_, require the prior approval of Land Trust as set forth below.

**Commentary.** Use only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here. Add some definition of size or nature of improvements subject to this requirement.

(c) **Watershed Enhancement, Creek Restoration and Aquifer Enhancement**—Owner may undertake activities to enhance watersheds, restore creeks or enhance natural aquifer recharge so long as (i) the activities have been approved by a qualified native vegetation restoration expert and a qualified hydrologist, (ii) the activities are consistent with the Conservation Values of the Property and the purposes of this Easement, and (iii) the activities have been approved in advance by Land Trust as provided herein.

(d) **No Transfer of Water Rights**—Owner shall not separately [permanently] transfer, encumber, sell, lease or otherwise separate any water rights associated with the Property, nor any permits, licenses or contracts related to the water rights on the Property, or change the authorized or historic use of the water rights without the consent of Land Trust. Owner shall not abandon or allow the

abandonment of, by action or inaction, any of the water rights or such permits, licenses or contracts without the consent of Land Trust.

**OR**

(d) **Limited Transfer of Water Rights**— All water shall be retained in \_\_\_\_\_ County for agricultural production only. Water may be distributed to a contiguous property or other property owned or leased by Owner on an annual basis for agricultural production only. Any temporary distribution of water shall not impair the long-term agricultural productive capacity or open space character of the Property.

(e) **Pollution Prohibited**— Any disturbance of the soil or pasturing of animals is prohibited within \_\_\_ feet of \_\_\_\_\_ is prohibited.

**Commentary.** Identify specific bodies of water, wetlands or watercourses by name and/or by reference to an attached map. Water rights vary significantly from State to State and especially from Coast to Coast.

(9) **Trees and Other Vegetation.**

(a) **General Rule**— The pruning, felling, or other destruction or removal of living [standing] [native] trees, shrubs, and other vegetation on the [Forever Wild Zone/Natural Area] Property is prohibited, except (i) to control, prevent or treat [immediate/impending/direct] hazards, disease or damage to humans, domestic animals, or permitted Property improvements, (ii) to prevent fire or create necessary fire breaks or fire trails, (iii) to maintain existing and permitted roads and trails, (iv) to develop reserved Agricultural Uses or other expressly permitted uses, or (v) to maintain the ecological health of vegetation communities present on the Property, all subject to prior Land Trust approval as provided below and pursuant to consultation with a qualified vegetation ecologist or other qualified specialist in the vegetation communities present on the Property. [All forestry operations shall be conducted in accordance with applicable federal, state, and local laws, regulations and requirements.]

**Commentary.** Depending on the circumstances, it may or may not be appropriate to limit the prohibition to native trees. The distinction with standing trees arises if trees may fall on roads or trails; a fallen tree may retain sufficient roots to remain living so that the ability to cut the tree to clear the road may be important. A donor may wish to protect a particular species. Consider whether all of the exceptions require land trust approval; maintaining existing and permitted roads and trails might easily be allowed without prior approval on some properties. Use (iv) only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here.

**OR**

The pruning, felling, or other destruction or removal of living standing native trees, shrubs, and other vegetation in the Natural/Forever Wild Area is

prohibited, except (i) to control, prevent or treat hazards, disease or damage to humans, domestic animals, or permitted Property improvements, (ii) to control fire or create necessary fire breaks or fire trails, (iii) to maintain existing and permitted roads and trails, (iv) to develop reserved Agricultural Uses or other expressly permitted uses, or (v) to maintain the ecological health of vegetation communities present on the Property, all subject to prior written notice of \_\_\_ business days to Land Trust and pursuant to consultation with a qualified vegetation ecologist, forester or other qualified specialist in the vegetation communities present on the Property. Tree clearing activities involving the removal of living native trees on greater than 1 square acre of the Property shall only be done with prior Trust approval as provided below, except clearing for reserved Agricultural Uses as provided herein.

**Commentary.** This less protective alternative uses notice rather than approval. Use only if the term “Agricultural Uses” is defined elsewhere in the easement or if a definition is added here. Be sure the Natural or Forever Wild Area is defined. Consider whether to use a prior notice requirement as set out or a prior approval requirement—the choice may depend on the character of the land and the fragility of its plants and animals, the potential harm, the desires of the donor, and all the other pertinent circumstances.

#### **AND/OR**

Land Trust approval is not required for tree removal for emergency fire control.

**Commentary.** Owner is unlikely to have much ability to control what firefighters do in an emergency in any event even if present.

(b) **Timber Harvest Plan**—In the event of a fire, salvageable trees may be harvested and sold in accordance with any existing or new timber harvest plan. Any trees removed to accommodate permitted development may be sold in accordance with the timber harvest plan consistent with generally accepted “Best Management Practices,” as those practices may be identified from time to time by appropriate governmental or educational institutions, and in a manner not wasteful of soil resources or detrimental to water quality or conservation. Any modifications to the existing timber harvest plan and any new plan must be approved in advance by Land Trust and shall not harm the Conservation Values of the Property [or adjacent parcels].

(b) **Forest Management**—Owner reserves the right to manage forested areas on the Property including the right to remove exotic or invasive species and the right to practice pre-commercial thinning, weeding, cleaning, sanitation, pruning and other such measures to achieve silvicultural objectives, provided that all such forest management, cutting or harvesting shall be conducted in accordance with state certified best forest management and husbandry practices then current and by using uneven age selection silviculture methods designed to retain the natural character of the area; and provided that all such activities shall be



conducted in a manner to (a) maintain and/or foster vertical diversity (b) minimize disturbance to naturally occurring seedlings and saplings as necessary to assure adequate regeneration of native species (c) preserve intact riparian areas and wetlands; (d) foster species native to the area and soils; (e) protect the hydrological systems of the Property; (f) avoid disturbance to known threatened, rare or endangered plant or animal species and their habitat and (g) minimize disturbance to organic and mineral soils on the Property. "Selection silviculture" methods shall mean methods of harvesting in which individual trees or small groups of trees are removed to regenerate new seedlings and to foster and/or maintain an uneven aged-forest composed of at least three distinct age classes of trees. Other methods of harvesting are permissible following a natural disaster only with the prior written consent of Land Trust.

**Commentary. Limit to a portion of the Property?**

(b) Forest Management Plan – The Forest Management Plan must be prepared by a qualified forester engaged by Owner. A qualified forester is a professional forester with a minimum of three years experience managing woodlands in and around \_\_\_\_\_ County who has furnished Land Trust satisfactory credentials including, at a minimum, evidence of a Bachelor of Science degree in forestry from an educational institution with a forestry curriculum accredited by the Society of American Foresters or other comparable educational standards and two letters of recommendation from similarly qualified professionals. The plan shall conform to (1) this Easement, (2) the requirements for certification as a "Well-Managed Forest" by the Forest Stewardship Council or similar body accredited worldwide to offer landowners independent, third-party certification of sustainable forest management practices, and (3) the following requirements and such other terms and conditions as Land Trust may require as conditions of approval after Review:

(i) A description of and an appropriately scaled and accurate map identifying the natural and physical features of the Property to include property boundary lines; forest type, stocking, age and stand history; wetlands and water bodies, including rivers, streams, ponds, and lakes both intermittent and year-round; roads, trails or other non-forested areas; special plant and wildlife habitats, including rare or endangered plant or wildlife species or communities identified by \_\_\_\_\_.

(ii) An access plan indicating principal routes of ingress and egress for all areas in which forest management is to be conducted including roads, trails and log landing areas. This access plan must minimize new forest openings. Access roads must not exceed \_\_\_\_\_ [twenty (20)] feet in width.

(iii) Management of forest stands for long (i.e. \_\_\_\_\_ [twenty

(20)]\_\_\_\_ years or more) rotations.

(iv) Implementation of Best Management Practices for the conduct of forest management and harvesting activities including establishment, maintenance and reclamation of log landings and skid roads.

(v) Creation of a balance of forest age classes and diversity of native species composition within the Property; i.e., no plantation forestry (a forest stand raised artificially, either by sowing or planting, except planting or replanting with a diversity of native species) nor any liquidation or clear cutting (except to remove diseased or damaged trees for replanting with a diversity of native species).

(vi) Measures to minimize erosion and conserve productive soils for sustainable uses including erosion control measures to be employed during, and at the completion, of each forest management activity to ensure soil stabilization and to prevent erosion and sediment run off adjacent to wetlands and water bodies.

(vii) Measures to maintain and enhance the quality of forest and timber resources on the Property.

(viii) Measures to protect the quantity and quality of water resources including the type, amount and location of herbicides, pesticides, fungicides, insecticides, rodenticides and fertilizers to be used, if any.

(ix) Measures to preserve canopy where identified as contributing to scenic or wildlife habitat resources described in this Easement.

(x) Measures to minimize adverse effects upon, and to protect and enhance, habitats for native species of plants and wildlife.

(xi) Prohibition of forestry activities except in accordance with the plan.

(xii) Requirement for on-site, active supervision of all harvesting activities by qualified forester with reporting requirements to Land Trust of any non-conformity with the plan.

(xiii) Requirement of completion of harvesting activities within one-year following date of plan or such longer period as is approved by Land Trust after review.

(b) **Forest Management Plan** – Any Forest Management Plan must include the following information: the location of boundary lines and their marking status, existing conditions including maps and documentation depicting stands, soils and stand history; location of planned harvests; plans and locations for access ways and access improvements needed; and clear demonstration of methods

designed to assure compliance with the standards for vegetation management and conservation protection set forth in \_\_\_\_\_. Land Trust may also require written notice \_\_\_ days before harvest is to begin after marking of all trees to be cut.

**Commentary.** Consider the local forestry practices and likely future practices in determining how strict controls need to be. Limitations on the area that may be cut in any year or decade and other forms of limitation and control may be appropriate. Consider whether to use a prior notice requirement as set out or a prior approval requirement—the choice may depend on the character of the land and the fragility of its plants and animals, the potential harm, the desires of the donor, and all the other pertinent circumstances.

(c) **Use of Wood**—Wood derived from any permitted removal, including, but not limited to, wood derived from the cutting of fallen, dead or diseased trees, may be used by Owner as firewood for personal use on or off the Property [or other persons residing on the Property as firewood for use principally on the Property]. Up to \_\_\_ cords of wood per year may be used or bartered in exchange for tree-removal or other property maintenance services. Under no circumstances shall healthy native trees be cut solely for firewood, bartering, or any commercial purpose.

**OR**

(c) **Use of Wood**—Owner may gather and use of dead wood or diseased tree for personal noncommercial residential use [on the Property].

(d) **Additional Cutting**—Owner may (i) keep the access road/permitted roads clear and Owner may clear underbrush, branches, and woody and non-woody vegetation having a basal diameter of no more than \_\_\_\_\_ inches anywhere on the Property; and (ii) within or outside the Development Zone maintain or enhance the view from the Residence and Second Unit; except that Owner may clear no more than \_\_\_ mature trees of greater than \_\_\_ inches basal diameter within a \_\_\_\_\_ year period for said purpose provided that prior Trust approval is obtained as provided below.

**Commentary.** One person's enhanced view is another person's wanton destruction, so define and limit (ii) as much as possible. Consider the extent to which the owner will need to clear back encroaching forest from any open areas, meadows or orchards. Any of these provisions need to be carefully written in the easement and the conditions documented with care in the baseline.

**AND/OR**

(e) **Non-Native Exotics**—The planting, cultivating, or other intentional introduction or dispersal by Owner of non-native plant or non-native wildlife species outside of the Development Zone is prohibited.

**Commentary.** If the paragraph is expanded to include the Development Zone, consider exceptions for garden plants, landscaping and the like.

**AND/OR**

Owner is entitled to maintain and restore native plant communities on any portion of the /Property and to control or eliminate non-native plant species using any methods approved by local, state or federal natural resource management agencies, including prescribed burning or mowing to remove native or non-native vegetation that is encroaching upon the native vegetation, and use of herbicides. [All prescribed burning operations shall be conducted in accordance with applicable federal, state, and local laws, regulations and requirements[and shall be conducted only with prior Land Trust approval as set forth herein].]

**AND/OR**

Maintenance and restoration activities involving the removal of any living standing native trees or occurring on greater than \_\_\_\_\_ acre[s] of the Property in any \_\_ year period shall only be done with prior Land Trust approval as provided below.

**AND/OR**

Owner may engage in control or elimination of [native or] exotic plant and animal species anywhere on the Property that pose a threat to human health, safety or welfare, or the safety of domestic animals, in conformance with all federal, state, and local laws, regulations and requirements.

(f) Protection of Existing Vegetation—Except as expressly provided above, Owner shall not cut, remove, harvest, or destroy any live or dead native trees, native shrubs, or other native plant, except as necessary to control or prevent hazard or disease and to maintain healthy, diverse, native vegetation and habitat, in accordance with current ecologically-based practices.

**Commentary.** Note inconsistency with earlier provision on firewood and adjust as needed. If there is a residence, be sure to except mowing, planting and maintenance of lawn, garden and landscaped areas and maintenance of any fire protection zones around the residence.

**AND/OR**

Any clearing of vegetation greater than \_\_\_\_\_ inches in basal diameter, grazing, or prescribed burning shall be pursuant to consultation with a qualified vegetation ecologist or other specialist in the vegetation communities present on the Property, proof of which shall be submitted to Land Trust in the form of a letter from that specialist, and shall be with prior Land Trust approval as provided below.

**AND?**

Owner may protect and culture native trees by any means, including thinning, pruning, or brush clearance. For purposes of this Easement, “native trees” shall include \_\_\_\_\_

(g) Harm to Vegetation—Unseasonal watering; use of fertilizers, pesticides,

biocides, herbicides or other agricultural chemicals [outside the Development Zone], weed abatement activities, incompatible fire protection activities, and all other activities and uses affecting vegetation that may adversely affect the purposes of this Easement are prohibited unless necessary to control or eradicate exotic plants, or to treat or prevent disease to native plants or animals.

(h) Existing Meadow – The maintenance of the existing Meadow using any means including, but not limited to, mowing and grazing is permitted. Encroaching trees overhanging into the meadow may be cut to retain the meadow’s size and shape as described in the Baseline Documentation. [However, nothing in this paragraph shall be read to permit any fencing in or around the Meadow other than as currently used inside the Development Zone and described in the Baseline Documentation.]

**Commentary.** This provision can be adapted easily to existing orchards and other open spaces that are to be retained as open land. Absent permission to cut encroaching trees, the open areas will be lost over time, potentially reducing biodiversity.

(i) New Open Areas – Owner reserves the right, with the prior approval of Land Trust as set forth below, to cut and remove forest vegetation and natural regeneration on [up to \_\_\_\_\_ acres/square feet on] the Property [in the area depicted on Exhibit \_\_] to establish and maintain additional open areas for permitted agricultural use, habitat improvement, noncommercial recreational use or \_\_\_\_\_. Owner shall comply with applicable federal, state, and local laws, regulations and requirements.

(j) Fire – Owner may undertake wildfire management activities and control excess vegetation to lower the risk of wildfire with the approval of Land Trust. Such methods may include, but are not limited to brush removal, tree pruning, prescribed burning or mowing of the Property. Mowing may be accomplished with the use of a tractor or similar vehicle.

**Commentary.** Earlier provisions also address prescribed burning and can be combined with this provision.

(10) Trash and Debris, Storage and the Like. The dumping, burial, burning, or other disposal or accumulation of wastes, ashes, refuse, debris, dredge spoils, hazardous or toxic materials, inoperative vehicles, or other unsightly or offensive material on the Property is prohibited, except that reasonably generated by activities permitted herein and disposed of in a lawful manner that does not cause, and is not likely to cause, soil degradation or erosion, harm to native plant communities, pollution of any surface or subsurface waters, or any other degradation of Conservation Values. No more than one unregistered [passenger] vehicle shall be kept on the Property.

**Commentary.** Farm vehicles are often unregistered.

**AND?**

Agricultural products, agricultural chemicals (including herbicides, pesticides, fungicides, fertilizers, and other materials commonly used in farming operations), oil, fuels, and petroleum products for use in agricultural operations on the Property, agricultural byproducts, and agricultural equipment used on the Property may be stored on the Property in accordance with applicable federal, state, and local laws, regulations and requirements.

**AND?**

The application, storage and placement on the Property of domestic septic effluent and municipal, commercial or industrial sewage sludge or liquid generated from such sources for agricultural purposes may be undertaken only if in accordance with applicable federal, state, and local laws, regulations and requirements and only with the prior approval of Land Trust and only if a qualified professional environmental consultant certifies in writing that the application of any of these materials will not substantially diminish the viability and productivity of the agricultural soils on the Property.

**OR**

(10) **Dumping.** Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery, hazardous or toxic substances, dredge spoils, industrial and commercial byproducts, effluent and other materials on the Property is prohibited, whether by Owner or third parties. Soil, rock, other earth materials, vegetative matter, or compost may not be placed on the Property except when reasonably required for (1) Agriculture or other permitted uses on the Property; or (2) construction and/or maintenance activities permitted under this Easement.

(11) **Agricultural Use Prohibited.** Any [grazing or other] agricultural use of, or activity on, the Property is prohibited, except as expressly permitted herein in the Development Zone. Among those uses and activities specifically prohibited are the construction or operation of a winery and the planting of grapes or any other agricultural commodity for sale or trade, the operation of a winery or any other processing facilities, and the breeding or raising of livestock for commercial purposes on the Property.

**AND?**

The use, storage, or disposal on the Property of any pesticides, fungicides, and herbicides, or other toxic or polluting material, is forbidden except for use or storage in the Development Zone in relation to non-commercial agricultural production and for home and landscaping maintenance in the Development Zone.

**OR**

(11) **Agricultural Use Permitted.** Owner retains the right to use the Property [Agricultural Zone and Development Zone] for commercial agricultural purposes, including the Agricultural Uses described below, or to permit others to use the Property [Agricultural Zone and Development Zone] for commercial agricultural purposes, in

accordance with applicable federal, state, and local laws, regulations and requirements as long as the agricultural productive capacity and open space character of the Property are not thereby significantly impaired.

(a) **Definition**—“**Agricultural Uses**” shall mean the commercial production, processing, storage or retail marketing of crops, livestock, and livestock products. For purposes hereof, crops, livestock and livestock products include, but are not limited to (i) crops commonly found in the community surrounding the Property; (ii) field crops, including corn, wheat, oats, rye, barley, hay, potatoes, cotton, tobacco, herbs and dry beans; (iii) fruits, including apples, peaches, grapes, cherries, nuts and berries; (iv) vegetables, including lettuce, tomatoes, snap beans, cabbage, carrots, beets, onions, mushrooms, and soybeans; (v) horticultural specialties, including sod, seeds, nursery stock, ornamental shrubs, ornamental trees, Christmas trees and flowers; (vi) livestock and livestock products, including dairy cattle, beef cattle, sheep, swine, goats, horses, poultry, fur bearing animals, milk and other dairy products, eggs and furs; (vii) timber, wood, and other wood products derived from trees; (viii) aquatic plants and animals and their byproducts, and (ix) breeding and raising of bees.

[additional possible permitted agricultural activities to consider]

breeding, raising, pasturing, and grazing livestock of every nature and description so long as no more than \_\_\_\_\_ livestock (including, but not limited to, cows, emus, sheep, \_\_\_\_\_ and horses) and their immature offspring exist on the Property at any time; breeding and raising poultry; planting, raising, harvesting, and producing agricultural and horticultural crops of every nature and description [including non-commercial wine grapes provided, however, that under no circumstances shall more than a total of \_\_\_\_\_ vines for wine grapes be planted on the Property], boarding, stabling, raising, feeding, grazing, exercising, riding and training horses and instructing riders

**Commentary.** Consider crops that require extensive greenhouses or other facilities and whether they should be permitted at all or restricted to portions of the Property that are not visible to the public. Consider agricultural activities that are unsightly or smelly and should be restricted in location or size. Some activities normally thought of as agricultural may not be appropriate such as sod farms.

(b) **Prohibitions**—Certain Agricultural Uses are prohibited, namely, (i) pig farms with over \_\_\_\_ pigs, (ii) raising over \_\_\_\_ chickens for eggs or meat, (iii) feed lots for cattle or other meat animals, (iv) mechanized farming, (v) aquaculture, (vi) intensive animal and fish farming, (vii) unnatural concentrations of animals, (viii) dumping of grape waste, (ix) use of \_\_\_\_\_[chemicals]\_\_\_\_\_ and (x) greenhouses in excess of \_\_\_\_ square feet. All other Agricultural Uses are prohibited if the agricultural productive capacity and open space character and the Conservation Values of the Property would be significantly impaired as a result.

**Commentary.** The lists of permitted and prohibited uses are internally inconsistent—both are overinclusive to promote discussion with Owner as to intended easement terms. If numbers of animals are too difficult to negotiate, consider using AUMs (animal unit month defined by NRCS – see <http://www.thecattlesite.com/articles/1129/using-the-animal-unit-month-aum-effectively>).

(c) **Standards and Practices**—All agricultural [and winery] activities shall be in accordance with the then-current scientifically-based practices recommended by the U.S. Cooperative Extension Service, U.S. Natural Resources Conservation Service, or other government or private natural resource conservation and management agencies then active.

**OR**

All agricultural operations on the Property shall be conducted in a manner consistent with a conservation plan prepared by a qualified conservation professional approved by Land Trust.

**AND**

This plan shall be updated periodically and any time the basic type of agricultural operation on the Property changes or ownership of the Property changes. This plan shall provide for management of the Property in a manner consistent with generally accepted “Best Management Practices,” as those practices may be identified from time to time by appropriate governmental or educational institutions, and in a manner not wasteful of soil resources or detrimental to water quality or conservation. All agricultural operations shall be conducted in accordance with applicable federal, state, and local laws, regulations and requirements.

**Commentary.** If possible, define the Best Management Practices more clearly or better define the organization(s) that prescribe the Best Management Practices.

**AND**

Agricultural activities for the production of fruits, vegetables, livestock and other items for commercial sale must also conform to generally accepted requirements for organic certification. Such conformity is to be evidenced by delivery to Land Trust, not less than once per year, of a certificate issued by an agent approved for such purpose by the United States Department of Agriculture or other responsible authority reasonably acceptable to Land Trust.

**Commentary.** Restriction to organic only practices may make the easement more likely to be challenged as uneconomic as circumstances change. Consider whether to include in easement with an organic only provision a fall back provision to govern if organic farming becomes impracticable in the future. This provision could define impracticality or leave the issue for the court to determine. Either way, the land would remain in farming even if organic farming could not continue.

(d) **Processing of Agricultural Residues**—Owner may engage in the burning,



chipping, grinding, mixing or composting of agricultural residues of plant or animal origin that result from the production of farm, ranch, horticultural, floricultural or agricultural products, processed for the purpose of returning a similar amount of processed material to the Property. Such residues may include manures, orchard or vineyard prunings or other crop residues derived from the Property. The addition of amendments to stabilize or cure the processed residues to improve attributes such as bulk, nutrient value, pH, moisture or texture shall be permitted, so long as such addition does not cause the resulting volume of processed material to exceed substantially the amount of agricultural residues initially added. All processing of agricultural residues shall be conducted in accordance with applicable federal, state, and local laws, regulations and requirements.

(12) **Commercial or Industrial Use.** Any commercial or industrial use of, or activity on, the Property, except as expressly permitted herein, is prohibited.

(a) **Definition** – Among those uses and activities specifically prohibited are the construction or operation of a winery or any other processing facilities, the breeding or raising of livestock for commercial purposes, or the operation of an inn, hotel, bed and breakfast or any similar lodging entity. As used in this Easement, the term “**commercial**” shall mean any use or activity that involves the exchange of cash, goods or services, barter, forgiveness of indebtedness, or any other remuneration in exchange for goods, services, lodging, meals, entertainment in any form, or the right to occupy space over a period of time.

**Commentary.** If none of the (b) paragraphs are used, this paragraph should be merged with the opening sentence. An alternative definition of “commercial” would read: ““Commercial” means any use or activity conducted by Owner or a third party for the purpose of realizing a profit or other benefit to Owner, a designee, or a third party from the exchange of goods or services by sale, barter, or trade. In instances in which the Owner is a nonprofit corporation, Owner may conduct only those Commercial uses or activities that are directly related to Owner’s mission. Commercial activities and uses that are permitted shall be limited in scale to those appropriate to the size and location of the Property and shall not harm the Conservation Values.”

(b) **Ecosystem Functions** – Nothing in this paragraph shall prevent Granting Owner/Owner from developing ecosystem functions on the Property, consistent with the provisions governing land use set forth in this Easement, including, but not limited to, carbon sinks, stream bank restoration, biodiversity mitigation, carbon sequestration and wetland and stream mitigation (other than creation of wetlands from historically upland property, such as hillsides or sites with no more than one of the following: current or historical evidence of hydric soils, hydrophytic vegetation, or wetland hydrology), provided that such developments are not in conflict or inconsistent with the conservation purpose of or the restrictions set forth in this Easement and that prior written approval for

same is obtained from Land Trust. Land Trust is not responsible for monitoring any such activities for compliance with permit(s) therefor, and Land Trust has no obligation to enforce the permits.

**Commentary.** This and the following (b) paragraphs use both Granting Owner/Owner to encourage consideration whether the Granting Owner wishes to reserve these rights personally or wishes them to be available for exercise by future owners. Consider whether to address limitations on surface activities as carbon sequestration could involve piping and wells. Alternatively, cut the opening words and begin with “Granting Owner/Owner may develop ....” Consider whether to limit these activities to a portion of the Property. Also, consider whether to retain the rights in Land Trust, or split them between Owner and Land Trust, or retain them in the Granting Owner (and family) but provide for them to belong to Land Trust when the land is transferred to a new owner or out of the family. Each transfer option has risks and potential enforcement problems. The most difficult may be stripping the rights on transfer to a successor owner. If rights remain with the family until transfer to a non-family member, the easement will need to define who is a family member (perhaps by reference to probate and inheritance laws). If the transfer is not automatic, then issues may arise in completing the transfer if the rights have become valuable.

PS: “therefor” is correctly spelled in this paragraph.

**OR**

(b) Ecosystem Services Credits—Granting Owner/Owner reserves the right to enter into agreements whereby (1) the Granting Owner/Owner agrees to manage the natural resources associated with the Property in a specific manner consistent with this Easement or (2) permits a third party to manage such natural resources in a specific manner consistent with this Easement. In addition, Granting Owner/Owner reserves the right to sell, trade, or exchange quantifiable ecosystem services credits associated with the Property, provided that such sales, trades, or exchanges are exercised in a manner that is consistent with this Easement. All such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to this Easement, and Granting Owner/Owner shall at all times remain responsible for compliance with this Easement. [One example of such agreement, sale, trade, or exchange is one under which Granting Owner/Owner receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program. Another example would be agreeing to restore, enhance or manage a wetland as part of a wetland banking or credit program, provided that such activities do not reduce existing areas of productive timberlands on the Property and further provided that Granting Owner/Owner may not benefit from any compensation or credits available through such programs or agreements in the event that such restoration is required as a result of Granting Owner/Owner’s violation of this Easement.] Granting Owner/Owner and Land Trust acknowledge that, because the conservation interests protected by this Easement shall not be adversely affected

by any agreements, exchanges or trades, and the only interest affected shall be Granting Owner/Owner's interest, any compensation received by Granting Owner/Owner for such agreements, exchanges or trades shall be payable in its entirety to Granting Owner/Owner. Granting Owner/Owner and Land Trust acknowledge and agree that this reserved right does not include the right to exchange, trade, extract, license, lease, transfer, or sell topsoil, minerals, or water located on the Property.

**Commentary.** Including examples in the paragraph aids in its later interpretation if there is a dispute as to the nature of the permitted activities. Consider whether to limit to a particular portion of the Property.

**OR**

(b) **Property Resources Values** – “Property Resources Values” shall mean value obtained through enhancement of the ecosystems or environments on the Property and/or value obtained through Granting Owner/Owner's refraining from exercising, in whole or in part, any Reserved Right. Property Resources Values include, but are not limited to mitigation or restoration credits for wetlands, forests, prairies, habitats, streams, cultural significance, energy, emissions, carbon sequestration, aquifer recharge, water quality, nutrients, and endangered species habitat or any other similar currency or credit asset for which a market may now or later come to exist. Owner reserves the right to manage or enhance the Conservation Values and/or to refrain, in whole or in part, from exercising Reserved Rights [(including rights to conduct Forest Management Activities),] and to sell any Property Resources Values based upon and associated therewith, provided any such sale shall not physically harm the Property's Conservation Values and shall not be inconsistent with the Purpose of this Easement. For example, Granting Owner/Owner may create a mitigation bank or participate with others to create a mitigation bank based upon the Reserved Rights in a portion of the Property's carbon sequestration value or watershed value and receive compensation for the sale of credits from such bank.

**Commentary.** If included, “Forest Management Activities” must be defined in another paragraph. Consider for all of these whether Land Trust or Owner should receive the compensation and revise as appropriate and/or move to the section on land trust rights. Consider whether to limit to a particular portion of the Property.

**OR**

(b) **Mitigation Programs** – Subject to Land Trust's prior written consent, not to be unreasonably withheld, conditioned or delayed, the right to participate in, and retain any income received therefrom, any current or future programs with state or federal agencies or private entities intended to provide incentive or compensation for the restoration or relocation of rare, imperiled, threatened, or endangered species or communities on the Property in a manner designed to restore historic natural systems, or for other environmental preservation or enhancement efforts (including, for example, wetland mitigation, carbon credit,

and similar programs), provided such program is consistent with the Purpose of this Easement and enhances the Conservation Values.

**Commentary.** Consider who should receive the compensation and revise as appropriate and/or move to the Land Trust rights paragraph. Consider whether to state specific factors to be considered in granting or denying consent and/or to grant Land Trust more discretion.

**OR**

(b) **Natural Resource Benefits**—Granting Owner/Owner reserves the right to sell, trade, or exchange quantifiable natural resource benefits associated with the Property, provided that such sales, trades, or exchanges are exercised in a manner that is consistent with this Easement. Such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to this Easement, and Granting Owner/Owner shall at all times remain responsible for compliance with this Easement. [One example of such agreement, sale, trade or exchange is one under which Granting Owner/Owner receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program. Another example would be agreeing to restore, enhance or manage endangered species habitat as part of a conservation banking or credit program, provided Granting Owner/Owner may not benefit from any compensation or credits available through such programs or agreements in the event that such restoration is required as a result of Granting Owner/Owner’s violation of this Easement.] The Parties acknowledge that, because the conservation interests protected by this Easement shall not be adversely affected by such agreements, exchanges or trades, and the only interest affected shall be Granting Owner/Owner’s interest, any compensation for such agreements, exchanges or trades shall be payable in its entirety to Granting Owner/Owner.

(13) **Recreational Uses.** Owner retains the right to use and to permit others to use the Property for otherwise lawful noncommercial [and nonmotorized] recreational uses, including, but not limited to, hiking, cross-country skiing, birdwatching, meditating, observing and photographing nature, walking, picnicking, resting, education and \_\_\_\_\_ that are consistent with the purposes of this Easement. Owner retains the right to use and to permit others to use the Property for passive, non-intrusive, and non-commercial recreational or educational purposes that require no significant surface alteration or other development of the land. Such uses may include, but are not limited to hiking, horseback riding and nature study. All commercial recreational uses of, or commercial recreational activities on, the Property are prohibited. The terms “**commercial recreational uses**” and “**commercial recreational activities**” shall mean uses or activities that are typically recreational in nature for which users are charged a fee in excess of the property owner’s costs for the privilege of engaging in the uses or activities.

**Commentary.** Consider defining passive recreation: ““Passive Recreation,” or “Passive Recreational” as the context may require, means low-impact activities conducted outdoors, including nature study, bird watching, orienteering, hunting, fishing, hiking, boating, horseback riding, camping, and cross country skiing.” Some may debate whether hunting, horseback riding and cross country skiing should be included. Perhaps set out activities that are not passive recreation to aid those applying the definition in the future.

**AND?**

All commercial [non-passive] uses are prohibited.

**OR**

To the extent required to qualify for exemption from federal estate tax under §2031(c) of the Internal Revenue Code, Owner agrees that commercial recreational uses are not permitted within the Property.

**AND?**

Resort structures, golf courses, non-residential swimming pools, public or commercial airstrips, commercial equestrian facilities, public or commercial helicopter pads, athletic fields, and any other nonagricultural recreational structures or facilities are prohibited on the Property.

**OR**

Under no circumstances shall athletic fields, golf courses or ranges, airstrips or helicopter pads be constructed on the Property.

**AND?**

Owner may place various removable, non-permanent, non-residential items on the Property, including wooden picnic tables or benches, [a wood sleeping platform no larger than \_\_\_ feet by \_\_\_ feet in dimension, shade structures], sculpture or environmental artworks, and other items of a similar nature. Placement or removal of materials that requires crossing the wet meadow with a vehicle is permitted only during the dry season (typically late summer and fall) when the ground is hard enough that no ruts or enduring tracks are created. During such crossings, natural vernal pools shall be strictly avoided.

**AND?**

Other buildings and facilities for any other private recreational use may not be built on the Property without the advance written approval of Land Trust as provided herein.

(14) Hunting, Trapping and Guns. Hunting or trapping is prohibited, except with the prior written consent of Land Trust, such consent to be given only to the extent necessary to control non-native species or disease on the Property, to maintain the ecological balance of native wildlife on the Property, or for ecological research as permitted herein. [Owner reserves the right to conduct limited, noncommercial hunting, trapping and target shooting activities on the Property.] All other use of guns and any other weapons, target shooting with guns or any other weapons, use of explosives and fireworks are prohibited.

**Commentary.** Consider whether monitoring difficulty outweighs the benefit of this provision. Reasonable deer hunting may be desirable to keep deer population at a level consistent with Conservation Values. It may be necessary to hunt a mountain lion that has developed a taste for humans. Consider whether to address bows and arrows or to deem them included in “other weapons.” Consider whether to permit hunting for food.

(15) Amplified Sound and Outdoor Lighting. The use of amplified sound systems audible outside Development Zone that may harass or harm wildlife is prohibited. Outdoor lighting shall not result in any light visible off of the Property that is inconsistent with the rural character of the Property and the surrounding landscape.

**Commentary.** Consider whether monitoring difficulty outweighs the benefit of this provision.

(16) Other Activities. \_\_\_\_\_

**Commentary.** Think about all the possibilities and try to address any that are plausible or possible. Some examples are set out below. Consider whether monitoring difficulty outweighs the benefit of these provisions. Consider night lighting, access by large mowing equipment, emergency vehicle access, the size of any parking area, need for public bathrooms, rubbish cans, supporting facilities.

(a) Ecological/Scientific Research—Owner may engage in and permit others to engage in ecological research on the Property that is consistent with the intent of this Easement provided that Land Trust’s approval is obtained as provided herein if the research is more than merely observational.

(b) Educational Activities—Owner may carry out educational activities related to the agricultural use of the Property, including but not limited to educational activities addressing the subjects of sustainable agriculture, food production and nutrition, environmental conservation, and ecology.

**Commentary.** Consider whether to make it clearer that this permission is limited to Owner or extends to others. If the latter, consider whether Land Trust may need oversight options through prior notice, approval, contract review or other means.

(c) Weddings and Events—Weddings, parties, picnics, hikes and other gatherings with over \_\_\_\_\_ attendance are prohibited. [No more than \_\_\_\_\_ persons may use the Property on any single day.]

**Commentary.** Consider whether monitoring difficulty outweighs the benefit of this provision. Is Owner to be entitled to make money on these activities? If so, the money may encourage more frequent and larger activities than the land can carry and may require more significant controls. If not, Owner is unlikely to permit the activities for strangers. Uses of the land for profit can be discovered with Internet searches because the advertisements are easily found. Annoyed neighbors are likely to report frequent events, and their impact will be visible at time of monitoring.

(d) Optional Management Plans—In addition to any management plans required by this Easement for the exercise of specifically reserved rights, Owner

and Land Trust may mutually agree on a management plan for the Property intended to implement the provisions of this Easement, including but not limited to the initiation or continuation of activities requiring Land Trust's prior approval, for a specified period not to exceed \_\_\_\_\_ years. Neither this provision nor any management plan agreed to by the Parties shall be construed to modify this Easement.

**Commentary.** Depending on the nature of the land, level of anticipated use, and likelihood of change over time, Owner and Land Trust may be better served by an easement that sets clear boundaries of permitted and prohibited activities, defines a framework for addressing other activities to determine the extent to which they may be appropriate and then leaves the details to a management plan that can be revised over time to fit the changing needs and circumstances.

(e) **Use of Pesticides and Herbicides**—Spraying or other application of herbicides, pesticides, rodenticides or other chemicals or materials designed or intended to kill, eradicate, and/or eliminate plants, animals, or insects or that have that effect is permitted on the Property only as specified in this subparagraph and in strict compliance with the requirements noted:

(i) Spraying or other application of materials that are generally available for non-commercial household uses and in accordance with the manufacturer's recommendations and applicable laws and regulations is permitted in the Development Zone.

(ii) Spraying or other application of materials that are generally available for non-commercial household uses, in accordance with the manufacturer's recommendations and applicable laws and regulations, and in the minimum fashion required to kill, eradicate or eliminate invasive plants, is permitted with the prior written permission of Land Trust.

(iii) Spraying or application is otherwise permitted only with the prior written permission of Land Trust, upon its determination, in its sole and exclusive discretion, that such spraying or application is necessary to avoid greater harm to important conservation values protected by this Easement.

(f) **Invasive Plant Removal**—Owner may remove plants recognized as invasive by \_\_\_\_\_ or by Land Trust so long as \_\_\_\_\_.

**Commentary.** Consider whether to require prior approval, to limit the size or location of the area affected or the methods used, to limit the types or size of plants removed, to address the impact on native species. In some circumstances (e.g., high value agricultural land), Owner's interests and concerns are likely to be aligned with those of Land Trust, so there is less need for specificity and control. In other cases, as when protected riparian areas grow tall enough to obscure Owner's view, Owner may use a liberal provision to harm valued habitat and cause erosion.

(g) **Future Technology** – No use shall be made of the Property, and no activity thereon shall be permitted that is or is likely to become inconsistent with the Purposes of this Easement. Owner and Land Trust acknowledge that, in view of the perpetual nature of this Easement, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Easement. Land Trust therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Easement or (b) alterations in existing uses or structures, are consistent with the Purposes of this Easement.

**Commentary.** If you are unable to negotiate the sole discretion standard, then consider a mutual agreement standard. At minimum articulate a review standard that does not bind Land Trust to be objectively reasonable. Reasonableness is highly circumstantial and subjective. In this instance, Land Trust need the ability to determine what is consistent with the conservation purposes and values without reference to economic or contractual reasonableness.

(17) **Right to Privacy/Prevention of Trespass.** Owner retains the right to privacy and the right to exclude any member of the public from trespassing on the Property. [Owner shall undertake all reasonable actions to prevent the unlawful entry and trespass by persons whose activities may degrade or harm the Conservation Values of the Property.]

**Commentary.** Imposing affirmative obligations on an owner, especially subsequent owners, presents potential problems and may not be enforceable. Some owners may seek to shift the burden of addressing trespassers to the land trust.

(18) **Acts of God.** Owner may undertake the [clearing and] restoration of land, watercourses, roads, and other structures that have been damaged by fire, flood, earthquake, wind or other natural or human-induced forces. Where possible, forest, shrub, and herbaceous cover damaged by such forces shall be restored with native species appropriate to the site. Under no circumstances shall non-native plants be intentionally introduced outside of the Development Zone. [Unless otherwise specified, nothing in this Easement shall require Owner to take any action to restore the condition of the Property after any act of God[ or other [unforeseeable] event over which Owner had no control].]

**Commentary.** An owner needs to be able to act following a natural disaster, but some owners may use the disaster as an excuse to engage in activities prohibited by the easement and harmful to Conservation Values. Note a provision under the enforcement paragraphs captioned “Natural Events Beyond Owner’s Control.”

(19) **Home Occupations.** So long as otherwise consistent with the Conservation Values, persons lawfully residing on the Property may engage in “**home occupations**,” that occur exclusively inside the home as that term is defined in and subject to all conditions provided in the then current local, state and federal law. Any physical



change required outside the home to accommodate the home occupation is subject to prior written approval of Land Trust.

**Commentary.** Do not include if there are no residential uses permitted. Consider whether to fix the home occupations to those permitted to current law or to permit this provision to float with changes in the law. If the law existing at the time of the easement is to govern, provide copies of the relevant provisions attached as an exhibit; alternatively, provide for the law to apply together with any amendments or recodifications applicable thereafter.

(20) Wind, Solar, and Hydropower Energy. To the extent permitted by, and in accordance with, all then-applicable laws, regulations, and requirements, Owner may place or construct facilities for development and utilization of wind, solar, and hydropower energy resources for [residential] use principally on the Property; provided, however, that there shall be no more than \_\_\_\_\_ structures

**Commentary.** The opening clause is often used but is essentially redundant as the Owner must comply with law in any event.

that may be located within the “Energy Zone” depicted on Exhibit \_\_\_\_

that may be located anywhere on the Property except in the \_\_\_\_\_

that may not be located in any location where visible from \_\_\_\_\_ Road

that may be no more than \_\_\_\_\_ feet in height.

Installation of wind, hydropower, and solar energy structures shall be with prior Land Trust approval as provided herein, , and Land Trust shall take into consideration the impact on scenic and ecological Conservation Values. All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity. . Owner and Land Trust hereby agree this paragraph is a reasonable restriction under state and federal law.

**Commentary.** Omit one or more of wind, solar, and hydropower as appropriate. Consider the risks and benefits of relying in part on “then applicable” laws when their content is unknown when drafting the Easement. Impose any necessary restrictions or limitations in the Easement without assuming laws in the future will do so. The reference to use “principally on the Property” arises from the fact that connection to the electric grid means that excess electricity at any point will flow off the Property while insufficient electricity will be drawn from the grid. The requirement that the facilities be designed to produce electricity for use principally on the Property imposes a limit on size and scope of the facilities. Some States limit restrictions on solar power facilities, see California Civil Code §714, and this wording attempts to ensure some Land Trust control over placement and size despite those limitations. Any of these facilities can have significant impacts on conservation values, so the permission should be drafted to minimize the impact to the extent possible.

**OR**

(20) Wind, Solar, and Hydropower Energy. Small-scale facilities for the generation and transmission of electrical power may be built on the Property only with

the approval of Land Trust. Owner and Land Trust hereby agree this paragraph is a reasonable restriction under state and federal law.

**OR**

(20) Renewable Energy Generation. The construction, use, maintenance, repair and replacement of \_\_\_\_\_ turbine(s) for the generation of wind energy shall be permitted exclusively, but only upon receipt of Land Trust's prior written approval (to be granted, conditioned or withheld in its sole discretion). When considering whether to issue such approval, Land Trust shall weigh and evaluate, among other relevant factors, the overall aesthetic impacts of the proposed turbine(s) in the context of the surrounding landscape, the environmental impacts, and the scope of its anticipated energy benefits, and, upon Land Trust's request, Owner shall be required to provide Land Trust with written documentation addressing these and other matters deemed relevant by Land Trust.

**Commentary.** Depending on the circumstances, include height, footprint and other limitations and consider whether to limit the location to a portion of the Property.

**OR**

(20) Renewable Energy Generation.

[(a) Commercial Energy Production—Subject to subparagraph (b) below, Granting Owner/Owner retains the right to construct geothermal, wind, and solar generation facilities for commercial transmission, distribution or sale ("**alternative energy production**"). Any alternative energy production and distribution facilities, including transmission lines, permitted hereunder must be consistent with protection and preservation of the Conservation Values. If Granting Owner/Owner proposes to engage in alternative energy production, Granting Owner/Owner must prepare for Land Trust's review and written approval as provided herein, an alternative energy production plan that explains, at a minimum, siting, size, height, generation capacity, location of distribution lines, and other relevant information required by Land Trust to ensure compatibility of the alternative energy production plan with protection of the Conservation Values. All energy production plans and distribution contracts and agreements approved by Land Trust must be made expressly subordinate to the rights of Land Trust in this Easement to protect the Conservation Values in perpetuity.

(b) Possible Future Commercial Energy Production—As of the date of this Easement, Granting Owner/Owner and Land Trust mutually agree that current technology for commercial wind and solar energy generation, using tall and visually intrusive wind turbines and large arrays of solar panels, is incompatible with protection of the Conservation Values, and, therefore, commercial alternative energy production using such technology is prohibited. If alternative energy production technology changes in the future so that alternative energy production on a commercial scale is compatible with protection of the

Conservation Values, Owner may seek Land Trust's approval of an alternative energy production plan in accordance with subparagraph (a).

(c) Noncommercial Energy Production for Use on the Property—Owner retains the right to construct geothermal, wind, and solar generation facilities for noncommercial uses solely on the Property, except that any incidental surplus electricity may be sold commercially or credited to Owner's utility service (net metering). Because of the potential impact on riparian areas and other protected Conservation Values, Owner may only generate hydroelectricity for use on the Property with the prior approval of Land Trust as provided herein.

**OR**

(20) Renewable Energy/Ancillary Improvements—Without permission from Land Trust, other improvements, including, but not limited to, facilities for the generation and transmission of electrical power, such as windmills and/or [detached] solar arrays may be built exclusively within the Building Envelope. Generation of any electrical power shall be principally for use on the Property. Ancillary improvements constructed within the Building Envelope count toward the impervious surfaces limitation as set forth herein. Construction of telecommunications towers is prohibited. All energy production plans, construction and distribution contracts and other agreements must be made expressly subordinate to this Easement and to the rights of Land Trust in this Easement to protect the Conservation Values in perpetuity.

**Commentary.** Limit to particular types of improvements if appropriate. Consider whether to identify the location of these improvements even within the Building Envelope, if large or visible to the public or likely to impact wildlife to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations on the improvements and consider including a Land Trust approval requirement or a pre-construction notice requirement. Consider whether to permit telecommunications towers that are built as part of the other structures.

**OR**

(20) Ancillary Improvements—Other improvements, including, but not limited to, facilities for the generation and transmission of electrical power, such as a windmill and/or methane digesters may be built on the Property only for the use on the Property and only with the approval of Land Trust, as provided herein.

**Commentary.** Identify the location of these improvements if possible to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations. Consider whether the limit to use strictly on the Property is appropriate or should be extended to adjacent properties under common ownership or another extension.

**OR**

(20) Alternative Energy/Communications Structures and Improvements—Structures and improvements necessary to undertake alternative energy activities such as wind, solar, methane and other similar energy generation activities as well as

communications facilities such as cell towers or 911 communications towers are permitted as further described below, so long as they are compatible with the Purposes of this Easement, subordinate to the \_\_\_\_\_[conservation]\_\_\_\_\_ use of the Property and located in a manner that minimizes the impact to \_\_\_\_\_[primary conservation attributes, prime or statewide important soils, scenic, riparian, habitat, etc.]\_\_\_\_\_.

(a) Building Envelope: Within the Building Envelope, Owner may construct structures and improvements limited to flat rooftop panels [and \_\_\_\_\_] without permission of Land Trust. Other structures and improvements require prior Land Trust approval as set out herein.

**Commentary.** Structures that can be concealed inside on immediately adjacent to existing structures, such as a communications tower that can be inside a silo, may also be permitted without Land Trust approval.

(b) \_\_\_\_\_ Area: Subject to the impervious surface coverage limitations set forth herein and the requirement that they affect no more than \_\_ percent of the \_\_\_\_\_ Area, such structures and improvements may be built in the \_\_\_\_\_ Area with the prior approval of Land Trust as set out herein. Land Trust may condition approval upon the posting of a bond providing \_\_\_\_\_.

**Commentary.** The size, nature and duration of the bond would depend on the structure. A bond may be appropriate for the construction period but less necessary thereafter. Consider also the need for any ongoing insurance obligation for Owner, for example, to address land restoration after a devastating storm. The size and character of the structure dictate the importance of a bond or ongoing insurance obligation.

(c) Location: Before selecting the location of any site for these structures and improvements, Owner shall give Land Trust an opportunity to participate in an onsite meeting to review proposed locations and any required roads by giving notice as provided herein. Owner shall comply with the \_\_\_\_\_ State Department of \_\_\_\_\_ [Agriculture and Markets or Environment as appropriate]\_\_\_\_\_ guidelines for mitigation for impacts causes by construction and operation of such structures.

**Commentary.** This subparagraph is usually fine if the structure and road are confined to the Building Envelope. If not, or if the envelope is large, then selection of the location should be subject to Land Trust approval. If the Granting Owner has plans to build in the immediate future, then the plans should be defined more specifically in the Easement.

(d) Easement Governs: All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

**OR**

(20) Community Commercial Wind Generation – The \_\_\_\_\_[insert general

location, e.g., “ridge line at the northeast corner” or more specific designation, identify on map exhibit]\_\_\_\_\_ on the Property may have a sufficient wind resource to be suitable for the generation of electric power. Owner and Land Trust may elect to explore wind energy production collaboratively employing \_\_\_[one/ up to \_\_\_\_\_/no more than \_\_\_\_\_] wind turbines in partnership with \_\_\_\_\_ community with the objective of providing energy to that community and not principally for economic gain. Any such wind energy project, including the scale, location and all other conditions, shall require the prior written approval of both Owner and Land Trust, and either party may in its sole discretion withhold or condition said approval.

**Commentary.** Provide for allocation of any economic benefit. Consider any limits on the size or footprint of the turbines.

**OR**

(20) Possible Future Commercial Energy Production—As of the date of this Easement, Granting Owner and Land Trust mutually agree that current technology for commercial wind and solar energy generation, using tall and visually intrusive wind turbines and large arrays of solar panels, is incompatible with protection of the Conservation Values, and, therefore, commercial alternative energy production using such technology is prohibited. If alternative energy production technology changes in the future so that alternative energy production on a commercial scale is compatible with protection of the Conservation Values, Owner may seek Land Trust’s approval of an alternative energy production plan in accordance with \_\_\_\_\_ and taking into consideration the impact on scenic and ecological Conservation Values. All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

**Commentary.** Set out the limitations and conditions suit the land and circumstances.

(21) Domestic and Wild Animals. To the extent permitted above, Owner retains the right to graze livestock or any other domesticated or farm animals on the Property. [Owner retains the right to graze any livestock on the Property, subject to such restrictions as may be necessary to maintain the health of native vegetation.] Owner retains the right to remove or control specific feral animals [or feral animal species] that threaten human health, safety or welfare or Conservation Values, using techniques that minimize harm to native wildlife including methods approved by local, state or federal natural resource management agencies, shooting or trapping non-native animals.

**Commentary.** Restrict numbers or kinds of domestic animals? Limit domestic animals to a portion of the Property, to the Development Zone? Review the provisions on fencing to be sure they are consistent with the limitations on animals. Be consistent with earlier provisions on livestock. If numbers of animals are difficult, consider using AUMs (animal unit month defined by NRCS – see <http://www.thecattlesite.com/articles/1129/using-the->

[animal-unit-month-aum-effectively](#)). On the wild animals, limit the permission to remove or control to non-native animals? What about bear, lion, rabid skunks or rabid bats? What about insects such as Africanized bees or fire ants? What about even native animals and insects that may pose dangers or problems in the immediate residential areas? Be sure to be consistent with (14) if that paragraph is also used. Consider whether to have a notice or approval requirement for some or all of the activities here. Are small animal kennel operations prohibited or permitted?

(21) **Grazing.** Granting Owner does not graze or pasture domestic animals or livestock on the Property for commercial purposes at the time of granting this Easement. Owner may graze and pasture domestic animals and livestock in existing fields and pastures for recreational purposes, for fire protection, or to qualify the Property for the most favorable property tax treatment under \_\_\_\_\_ [applicable law]\_\_\_\_\_ so long as consistent with this Easement. Owner will notify Land Trust in writing \_\_\_\_ days before starting any commercial grazing activity and provide Land Trust a pre-approved USDA Natural Resource Conservation Service (“NRCS”) or similar grazing management plan prescribing recommended stocking densities for approval by Land Trust. Upon \_\_\_\_ days written notice by Land Trust that the approved grazing plan interferes with the Conservation Values, Owner must reduce the number of domestic animals and/or livestock on the Property to a level deemed satisfactory by Land Trust. An existing approved grazing plan shall continue in effect until a new plan is approved. If there is any conflict between the grazing plan and this Easement, this Easement shall control.

**Commentary.** Restrict numbers or kinds of domestic animals? Limit domestic animals to a portion of the Property, to the Development Zone? Review the provisions on fencing to be sure they are consistent with the limitations on animals. If numbers of animals are difficult, consider using AUMs (animal unit month defined by NRCS – see <http://www.thecattlesite.com/articles/1129/using-the-animal-unit-month-aum-effectively>). Be sure to be consistent with (14) if that paragraph is also used. Consider whether to use a prior notice requirement as set out or a prior approval requirement—the choice may depend on the character of the land and the fragility of its plants and animals, the potential harm, the desires of the donor, and all the other pertinent circumstances.

(22) **Boundaries.** Owner is obligated to identify the boundaries of the Easement, any Development Zone and any other area specially recognized in this Easement before undertaking any actions that are restricted by this Easement within or without the boundaries in question. If Owner fails to do so, Land Trust has the right to require a survey of the relevant lands, at Owner’s cost, if necessary to determine whether Owner’s land use activity is in compliance with this Easement.

**Commentary.** See Land Trust *Standards and Practices* 9D.

(23) **Reserved Rights Exercised to Minimize Damage.** All rights reserved by Owner or activities not prohibited by this Easement shall be exercised so as to prevent or to minimize damage to the Conservation Values identified above and water quality, air quality, land/soil stability and productivity, wildlife habitat, scenic and cultural

values, and the natural topographic and open space character of the Property.

5. **Notice and Approval Processes.**

(1) **Notice of Intent to Undertake Activities or Uses.** In addition to notice and[/or approval requirements] set forth in paragraphs \_\_\_\_\_, Owner must notify Land Trust and obtain approval before undertaking activities or uses (1) not documented in the Baseline, (2) not affirmatively permitted herein or (3) inconsistent with Conservation Values this Easement is intended to protect [about which Owner is uncertain as to their adverse impact on Conservation Values].

**Commentary.** See Land Trust *Standards and Practices* 11F. This requirement can be very onerous if the Baseline is poorly prepared so that many activities and uses are not documented adequately, if the permissions are cryptically worded so that there can be debate as to what is actually permitted, and if the Conservation Values are inadequately identified. Owners acting in good faith can be wrongly accused of violation, and land trusts can be subject to criticism from third parties for failure to enforce easements.

(a) **Purpose**—Notice affords Land Trust an opportunity to determine whether the proposed activities or uses are permitted under this Easement and, if so, to ensure that they are designed and carried out in a manner that is consistent with this Easement, as well as to enable Owner to engage in permitted activities confident that they create no unintended violations.

(b) **Application**—Owner shall submit a written description of the proposed activity or use (an “**Application**”) explaining its nature, scope, design, location, timetable, and other material aspects in sufficient detail to permit Land Trust to make an informed judgment.

(c) **Initial Response**—Within \_\_\_ days after receipt of the Application, Land Trust shall inform Owner in writing whether the Application is complete or whether additional, specified information is required for a complete Application.

(d) **Costs**—If Land Trust reasonably determines that (i) the advice of a consultant such as an engineer, ecologist, attorney or surveyor is necessary to determine whether an Application is complete and/or to assist Land Trust in reviewing the Application, or (ii) more than 10 person-hours of Land Trust’s personnel will be or have been spent annually responding to Application(s) submitted by Owner, a fee based upon Land Trust’s estimate of costs of consultants and/or Land Trust personnel (collectively “**Land Trust’s Costs**”), Owner shall pay Land Trust’s Costs upon notification of the amount or withdraw the Application. If payment is made, Land Trust’s time to determine that the Application is complete shall be extended until the consultant’s work, if any, is done. If payment is not made, the Application is deemed denied. After Land Trust completes its response to the Application, Land Trust shall submit a final statement of the aggregate amount of Land Trust’s Costs, and appropriate adjustments shall be made at that time.

(2) **Land Trust’s Approval.** When Land Trust’s approval is required or

sought as set forth herein, Land Trust shall grant or deny approval in writing within \_\_\_ days after receipt of Owner's complete Application. Criteria that Land Trust may consider include, without limitation, compliance with the provisions of this Easement, the capability of the proposed activity or use to preserve and enhance Conservation Values, the manner in which the proposed activity or use is to be carried out, and its likely effect upon Conservation Values. Land Trust's approval may be withheld upon a good-faith determination by Land Trust that there is a significant risk that the activity or use as proposed would be inconsistent with the purposes of this Easement. Approval or disapproval is within the sole discretion of Land Trust, and approval may only be granted upon conditions that tend to further [will not harm] the Conservation Purpose of this Easement. Failure of Land Trust to respond to a notice of intention within \_\_\_ days of receipt of that notice shall constitute a denial [unless Owner promptly sends a second notice of intention by certified mail, postage prepaid, return receipt requested, and an additional \_\_\_ days have expired without a response, in which case the request is deemed approved].

**AND?**

Land Trust shall grant permission or approval to Owner only where Land Trust, acting in Land Trust's sole [reasonable] discretion and in good faith, determines that the proposed action will not significantly diminish or impair the agricultural productive capacity and open space character of the Property and would not cause significant soil degradation or erosion.

(3) **Inspection and Certification.** Upon completion of any use or activity of limited duration, or upon commencement of any use or activity of unlimited duration, as the case may be, Land Trust shall, at the request of Owner, inspect the Property and, if the action was performed in accordance with this Easement and Land Trust's approvals or consents issued hereunder, issue a certificate to that effect, dated as of the time of inspection. Land Trust shall be fully reimbursed by Owner for all costs, including reasonable professional fees of surveyors, attorneys, consultants, Land Trust staff, and accountants, incurred in servicing Owner's request.

(4) **Discretionary Approval.** In limited circumstances, Land Trust may give written permission to Granting Owner/Owner to engage in activities that have impacts on the Conservation Values but that do not conflict with the conservation purposes of this Easement. Land Trust may give its permission only if it determines, in its sole discretion, that such activities (1) do not violate or are not in conflict with the general and specific purposes of this Easement AND (2) either enhance or do not significantly impair any Conservation Value protected by this Easement. Any discretionary consent given by Land Trust under this Paragraph must be delivered by Land Trust to Granting Owner/Owner in writing before Granting Owner/Owner may engage in the proposed activity, and such consent shall be (a) revocable at Land Trust's discretion, (b) limited in duration; and (c) specific to the individuals or entities who have requested permission to engage in the activity. Notwithstanding the foregoing, Land Trust will not agree to



any activities that would result in the amendment or termination of this Easement under state or federal law. Granting Owner/Owner understands and agrees that Land Trust may not be compelled by legal action or otherwise to give consent to any request made under this Paragraph. Nothing in this section shall require Land Trust to consent to any activity otherwise restricted in this Easement, or compel Land Trust to consult or negotiate regarding the withholding or provision of such consent.

**Commentary.** Use this provision, if at all, only with caution. In many circumstances, it would increase the danger of violations under an owner's "easier to ask for forgiveness than permission" approach to life, and it is likely to increase the number of requests and the expense of stewardship. If used, consider limiting its availability to the Granting Owner.

(5) **Notice of Land Trust's Obligations.** If Land Trust by action or inaction does not perform or fulfill any affirmative, non-discretionary obligation required of Land Trust pursuant to this Easement, then Owner may give written notice of that obligation to Land Trust as provided herein, and the Parties shall cooperate and act in good faith to reach a resolution with respect to the obligation.

**OR, A DIFFERENT SET OF PROVISIONS ON APPROVAL:**

5. **Land Trust's Approval or Withholding of Approval.**

(1) **General.** When Land Trust's approval is required, Land Trust shall grant or withhold its approval in writing within sixty (60) days of receipt of Owner's written request therefor. In the case of withholding of approval, Land Trust shall notify Owner in writing with reasonable specificity of the reasons for withholding of approval, and the conditions, if any, on which approval might otherwise be given. Failure of Land Trust to respond in writing within sixty (60) days shall be deemed to constitute written approval by Land Trust of any request submitted for approval that is not contrary to the express restrictions hereof.

(2) **Land Trust Approval of Certain Uses or Activities.** Any use or activity permitted under paragraph \_\_, or any \_\_\_[Agricultural/Forest/Other]\_\_\_ Management Plan required under paragraph \_\_, shall be subject to the prior approval of Land Trust. Owner shall request such approval in writing and shall include therewith information identifying the proposed activity and the reasons for the proposed activity with reasonable specificity. Land Trust's evaluation of the request shall generally take into account the criteria included at paragraphs \_\_\_\_\_ as they relate to the activity itself as well as to the site for the proposed activity, and Land Trust's approval or permission, as the case may be, shall not be unreasonably withheld.

(3) **Land Trust Approval of Sites.** The exercise of any right to \_\_\_\_\_ shall be subject to the prior approval by Land Trust of the site for that proposed activity. Owner shall request approval in writing and shall include therewith information identifying the proposed site with reasonable specificity, evidencing conformity with the requirements of the applicable paragraphs under which the right is reserved hereunder, and, when

applicable, evidencing conformity with existing land use regulations. Land Trust's approval, which shall not be unreasonably withheld, shall take into account the following criteria:

- (a) the extent to which use of the site for the proposed activity would impair the scenic qualities of the Property that are visible from public roads;
- (b) the extent to which use of the site for the proposed activity would destroy an important habitat or would have a material adverse effect on the movement of wildlife;
- (c) the extent to which use of the site for the proposed activity would impair water quality;
- (d) in the case of any proposal to build new structures, the extent to which new road construction would be necessary to provide access to the site;
- (e) in the case of any proposal to build new structures or roads, the extent to which the scenic quality of the Property may be adversely impacted;
- (f) the extent to which the proposed activity or use of the site for the proposed activity would otherwise significantly impair the conservation values of the Property.

Owner and Land Trust shall cooperate and shall act in good faith to arrive at agreement on suitable sites in connection with any determinations that are necessary to be made by them (either separately or jointly) under this paragraph. Notwithstanding the foregoing, Land Trust's approval of a proposed site or activity shall be withheld if the site for the proposed activity would interfere with the essential scenic quality of the Property.

(4) **Notice to Land Trust.** Following the receipt of Land Trust's approval when required under paragraph (2) or paragraph (3), and not less than thirty (30) days prior to the commencement of any use or activity approved under paragraph (2) or (3), Owner agrees to notify Land Trust in writing of the intention to exercise such right. The notice shall describe the nature, scope, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Land Trust to monitor such activity. If not provided to Land Trust under paragraph (3), the notice shall also include information evidencing the conformity with the requirements of the applicable paragraphs under which the right is reserved hereunder, and, when applicable, evidencing conformity with existing land use regulations. At Land Trust's sole discretion, Land Trust may permit commencement of the activity less than thirty (30) days after receiving Owner's written notice. See also paragraph \_\_, with respect to Owner's written notice to Land Trust concerning a transfer of any interest in all or a portion of the Property.

6. **Land Trust's Remedies.** Land Trust may take all actions that it deems necessary to ensure compliance with this Easement. Land Trust shall have the right to

prevent and correct violations of this Easement. If Land Trust finds what it believes is a violation, it may at its discretion take appropriate legal action to ensure compliance with this Easement and shall have the right to correct violations and prevent the threat of violations.

**Commentary.** Note that this section 6 is specifically devoted to remedies available to Land Trust. An alternative approach would be to expand and revise this section to cover all remedies, for Land Trust and Owner, and to include the arbitration or mediation paragraphs that appear in the general provisions at the end of the databank.

(1) **Notice of Violation; Corrective Action.** If Land Trust determines that a violation or potential violation of this Easement has occurred or is threatened, Land Trust may give written notice to Owner of such violation and demand corrective action sufficient to cure the violation within a specified time appropriate to the circumstances and, when the violation involves injury to the Property resulting from any use or activity inconsistent with the purposes of this Easement, to restore the portion of the Property so injured to its prior condition in accordance with a plan approved by Land Trust.

**AND?**

Upon receipt of such notice, Owner shall have \_\_\_ days in which to respond to Land Trust and to commence such corrective action as may be necessary to cure the violation or restore the Property. Should Owner fail to respond or to commence corrective action within the \_\_\_-day period and thereafter diligently pursue the corrective action, Land Trust may exercise any other remedies provided herein, or at law or in equity. This period to cure shall only apply if the actions constituting the alleged violation have been suspended.

(2) **Injunctive Relief.** If a court with jurisdiction determines that a violation may exist or has occurred, Land Trust may obtain an injunction, specific performance, or any other appropriate equitable or legal remedy. A court may also issue an injunction requiring Owner to restore the Property to its condition prior to the violation. In any case where a court finds that a violation has occurred, Owner shall reimburse Land Trust for all its expenses incurred in stopping and correcting the violation, including but not limited to reasonable attorney fees. Failure of Land Trust to discover a violation or to take immediate legal action shall not bar it from doing so at a later time. Land Trust's remedies under this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity or otherwise. Land Trust may seek preliminary injunctive relief even though the dispute is to be arbitrated.

**Commentary.** Seeking the suspension of a building permit or other administrative action may be best way to stop construction. An additional sentence may be added: "Except when an ongoing or imminent violation could irreversibly diminish or impair the agricultural productive capacity and open space character of the Property, Land Trust shall give Owner written notice of the violation or potential violation, and \_\_\_ days to correct it, before filing any legal action."

(3) **Damages.** Land Trust shall be entitled to recover damages for violation of this Easement or injury to any of the Conservation Values protected by this Easement, including, without limitation, damages for the loss of scenic, aesthetic, or environmental values. [Without limiting Owner's liability therefor, Land Trust shall apply any damages recovered in such manner as Land Trust shall determine in its sole discretion to the costs of monitoring and enforcing this Easement and undertaking any corrective action on the Property.]

(4) **Emergency Enforcement.** If Land Trust, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to Conservation Values, Land Trust may pursue its remedies under this paragraph and state law without prior notice to Owner or without waiting for the period provided for cure to expire.

(5) **Scope of Relief.** Land Trust's rights under this paragraph apply equally in the event of either actual or threatened violations of this Easement. Owner agrees that Land Trust's remedies at law for any violation of this Easement are inadequate and that Land Trust shall be entitled to the injunctive relief described herein, both prohibitive and mandatory, in addition to such other relief to which Land Trust may be entitled, including specific performance of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Land Trust's remedies described in this paragraph shall be cumulative and in addition to all remedies now or hereafter existing at law or in equity. Land Trust's remedies are not intended to displace any other remedy available under this Easement, \_\_\_\_\_[state enabling act]\_\_\_\_\_, or any other applicable law. Land Trust may take such other action as it reasonably deems necessary to insure compliance with this Easement.

(6) **Costs of Enforcement.** All reasonable costs incurred by Land Trust in enforcing this Easement against Owner, including, without limitation, costs of suit and reasonable attorney fees, experts' fees and any costs of restoration necessitated by Owner's violation of this Easement shall be borne by Owner[; provided, however, that, if Owner ultimately prevails in a judicial enforcement action, Owner shall be entitled to reimbursement for costs of suit and reasonable attorney fees].

**Commentary.** Some States, including California, mandate that a one-sided attorney fee clause is reciprocal. Cal. Civ. Code §1717.

(7) **Forbearance.** Land Trust, in the [reasonable] exercise of its sole discretion, may forbear to exercise rights under this Easement. Forbearance by Land Trust to exercise its rights under this Easement in the event of any breach of any term of this Easement by Owner shall not be deemed or construed to be a waiver, estoppel or laches by Land Trust of such term or of any subsequent breach of the same or any other term of this Easement. No delay in or omission of the exercise of any right or remedy upon any breach by Owner shall impair such right or remedy or be construed as a waiver, estoppel or laches.

**OR**

(7) Forbearance. If Land Trust does not exercise any or all of its enforcement rights upon the occurrence of an event constituting a violation of this Easement, that forbearance shall not to be interpreted as an agreement to postpone or to forbear the exercise its enforcement rights with respect to that occurrence or a future occurrence.

(8) Waiver of Certain Defenses. Owner hereby waives any defense of laches, waiver, estoppel, or prescription. In making this grant of Easement and in acquiring this Property, Granting Owner and subsequent Owners have considered the possibility that uses prohibited by this Easement may become more economically valuable than permitted uses and that neighboring parcels may be put to prohibited uses. All Parties intend that any such changes shall not be deemed circumstances justifying amendment or termination of this Easement.

(9) Change of Conditions. The fact that any use of the Property that is expressly prohibited by this Easement, or any other use as determined to be inconsistent with the purpose of this Easement, may become greatly more economically valuable than permitted uses, or that neighboring properties may in the future be put entirely to uses that are not permitted thereunder, has been considered by Granting Owner in granting this Easement and by Owners in acquiring this Property. It is their belief that any such changes will increase the benefit to the public of the continuation of this Easement, and it is the intent of Granting Owner, subsequent Owners and Land Trust that any changes should not be assumed to be circumstances justifying the termination or extinguishment of this Easement pursuant to this paragraph. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment pursuant to this paragraph.

**Commentary.** This provision or the much simpler one that follows can be tailored to the special situation of a particular easement when particular changes are foreseeable.

**OR**

(9) Change of Conditions. If one or more of the purposes of this Easement may no longer be accomplished, such failure of purpose shall not be deemed sufficient cause to terminate the entire Easement as long as any other purpose of the Easement may be accomplished.

**OR**

(9) Natural Events Beyond Owner's Control—Nothing contained in this Easement shall be construed to entitle Land Trust to bring any action against Owner for any injury to or change in the Property resulting from natural causes beyond Owner's control, including fire, flood, storm, and natural earth movement, or other natural events, or from any prudent action taken by Owner in an emergency to prevent, abate, or mitigate significant injury to the Property resulting from such natural causes.

**Commentary.** Consider whether to omit unless the donor asks for this provision. Act of God and emergency would be defenses to a claimed violation in many or all States, but there are likely variations in the scope and nature of the defenses.

**OR**

(9) **Economic Hardship**—In making this grant and in accepting ownership, Granting Owner and Owner have considered the possibility that uses prohibited by this Easement may become more economically valuable than permitted uses and that neighboring properties may in the future be put entirely to such prohibited uses. Both Owner and Land Trust intend that any such changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Easement. In addition, the inability of any Owner to conduct or implement any or all of the uses permitted under this Easement, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment. Owner and Land Trust agree that global warming and climate change-caused effects shall not be a basis for termination of this Easement.

**Commentary.** This provision could be included in the recitals.

(10) **Cumulative Remedies.** This description of Land Trust's remedies does not preclude Land Trust from exercising any other right or remedy that may at any time be available to Land Trust under this Easement or applicable law. If Land Trust chooses to exercise one remedy, Land Trust may nevertheless choose to exercise any one or more of the other rights or remedies available to Land Trust at the same time or at any other time.

7. **Public Access.** No right of access by the general public to any portion of the Property is conveyed by this Easement.

8. **Responsibilities of Owner and Land Trust Not Affected.** Other than as specified herein, this Easement is not intended to impose any legal or other responsibility on Land Trust, or in any way to affect any existing obligations of Owner as owner of the Property. Among other things, this principle shall apply to the following.

(1) **Costs, Legal Requirements, and Liabilities.** Owner retains and agrees to bear all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, and operation of the Property. [Owner does hereby indemnify and hold Land Trust harmless therefrom.] Owner remains solely responsible for obtaining any applicable government permits and approvals for any construction or other activity or use permitted by this Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state, and local laws, regulations, and requirements. Owner shall keep the Property free of any liens arising out of any work performed for or materials furnished to Owner that might impair the effectiveness of this Easement in any way.

**Commentary.** Note that the agreement to indemnify may not be enforceable against subsequent owners.

(2) **Subsequent Liens on Property.** No provisions of this Easement shall be construed as impairing the ability of Owner to use this Property as collateral for future indebtedness.

(3) **Subsequent Encumbrances.** The grant of any easements or use restrictions that might diminish or impair the agricultural viability or productivity of the Property or otherwise diminish or impair the Conservation Values protected by this Easement is prohibited, except with the approval of Land Trust.

**Commentary.** Coordinate this provision with Paragraph 11(4) so one is omitted or both are consistent.

(4) **Taxes.** Owner shall be solely responsible for payment of all taxes and assessments levied against the Property. Owner shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively “**taxes**”), including, without limitation, any taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Land Trust with satisfactory evidence of payment upon request. If Land Trust ever pays any taxes or assessments on the Property, or if Land Trust pays levies on Owner’s interest in order to protect Land Trust’s interests in the Property, Owner will reimburse Land Trust for the same.

**Commentary.** Some land trusts add a requirement for Owner to give notice of payment of taxes. This type of requirement is particularly appropriate in States that treat unpaid property taxes as a superpriority lien so that nonpayment can trigger a sale free and clear of the easement. Notice under the Easement enables Land Trust to learn the status of the payment with minimum effort. In most circumstances, Land Trust would receive notice of a sale pursuant to the foreclosure or judicial sale rules, but there will be significant costs in addition to the unpaid taxes at that late date.

(5) **Upkeep and Maintenance.** Owner shall be solely responsible for the upkeep and maintenance of the Property, to the extent it may be required by federal, state, and local laws, regulations and requirements. Land Trust shall have no obligation for the upkeep or maintenance of the Property. If Land Trust acts to maintain the Property in order to protect Land Trust’s interest in the Property, Owner will reimburse Land Trust for any such costs.

(6) **Liability for Operations and Conditions.** Land Trust shall have no responsibility for operation of the Property, monitoring of hazardous conditions on it, or protection of Owner, the public or any third parties from risks relating to conditions on the Property. Without limiting the foregoing, Land Trust shall not be liable to Owner or other person or entity in connection with consents given or withheld, or in connection with any entry upon the Property occurring pursuant to this Easement, or on account of any claim, liability, damage or expense suffered or incurred by or

threatened against Owner or any other person or entity, except as the claim, liability, damage, or expense is the result of [negligence,] gross negligence, or intentional misconduct of Land Trust or its officers, directors, members, employees, or agents.

(7) Indemnification by Owner. In view of Land Trust's negative rights, limited access to the land, and lack of active involvement in the day-to-day management activities on the Property, Owner hereby releases and shall indemnify, protect, defend and hold harmless Land Trust, its officers, directors, members, employees, contractors, legal representatives, agents, successors and assigns from and against all liabilities, costs, losses, orders, liens, penalties, claims, demands, damages, expenses, or causes of action or cases, liability, damage or expense suffered or incurred by or threatened against Owner or any other person or entity, to the Property or the Easement. Owner shall be solely liable for injury or the death of any person, or physical damage to any property, or any other costs or liabilities resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, unless due to the negligence or willful misconduct of Land Trust. Owner agrees to take out, and keep in force, public liability and other insurance to protect Owner against any liability to the public, whether to persons or property, incident to the use of or resulting from an occurrence in or about the Property. Such insurance shall be in the amount maintained by comparable properties for comparable uses and in no case less than One Million Dollars (\$1,000,000) per occurrence, or such greater amount as Land Trust may require commensurate with inflation. Land Trust shall be named additional insured on Owner's general liability insurance policy.

**Commentary.** Some insurers will not allow additional named insureds.

(8) Indemnification by Land Trust. Land Trust shall indemnify, defend with counsel of Owner's choice, and hold Owner harmless from, all expense, loss, liability, damages and claims, including Owner's attorney fees, if necessary, arising out of Land Trust's entry on the Property, unless caused by a violation of this Easement by Owner or by Owner's negligence or willful misconduct.

**Commentary.** Some land trusts omit this provision unless the donor requests it.

**AND?**

Land Trust agrees to take out, and keep in force, general liability insurance to protect Land Trust against any liability, whether to persons or property, incident to its right to enter upon the Property to monitor compliance with and otherwise enforce this Easement. Such insurance shall be in the amount maintained for comparable monitoring purposes, in no event shall be less than One Million Dollars (\$1,000,000) per occurrence, and shall name Owner as an additional insured. Upon request of Owner, Land Trust shall provide a copy of the insurance policy evidencing such coverage. Land Trust shall indemnify, defend and hold Owner harmless from all liabilities, costs (including reasonable attorney fees and cost), damages, claims and losses arising out of any damage to property or injury or death of any person occurring in, on, above or



about the Property resulting from any act or omission of Land Trust and its members, officers, trustees, employees, agents and contractors, unless due solely to the negligence of Owner, its partners, officers, trustees, employees, agents, and contractors, and the heirs, personal representatives, successors and assigns of Owner.

**Commentary.** Most land trusts omit this provision unless a donor demands a reciprocal insurance provision. This sort of provision presents increasing problems when there are multiple owners.

9. **Representations and Warranties.** Owner agrees and Granting Owner represents and warrants that, after reasonable investigation and to the best of their knowledge:

(1) **No Hazardous Materials Liability.** [Other than agricultural and/or household chemicals that have been applied, used, and disposed of in accordance with all then-applicable laws, n] [N]o substance defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement including, without limitation, The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”) (the “**Environmental Compliance Laws**”) as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or in any other way harmful or threatening to human health or the environment, exists on or has been released, generated, treated, stored, used, disposed of, deposited, abandoned, or transported in, on, under, from, or across the Property. Owner represents, warrants and covenants to Land Trust that Owner’s activities upon and use of the Property are in compliance with all Environmental Compliance Laws. Without limiting the obligations of Owner under this Easement, Owner agrees to indemnify, protect and hold Land Trust harmless against any and all claims arising from or connected with any hazardous materials present, alleged to be present, or otherwise associated with the Property at any time, except any hazardous materials placed, disposed or released by Land Trust, its employees or agents. If any action or proceeding is brought against Land Trust by reason of any such claim, Owner shall, at the election of and upon written notice from Land Trust, defend such action or proceeding by counsel reasonably acceptable to Land Trust or reimburse Land Trust for all charges it incurs for legal services in defending the action or proceeding. If, at any time, there occurs, or has occurred, a release in, on, from, under, or about the Property of any substance now or hereafter defined, listed, or otherwise classified pursuant to any Environmental Compliance Laws as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or in any other way harmful or threatening to human health or the environment, Owner shall perform containment, remediation, and any cleanup actions which such Environmental Compliance Laws require Owner to perform.

**Commentary.** Note that Land Trust has an independent obligation to investigate and do environmental due diligence for hazardous materials. Land Trust *Standards and Practices* 9C.

OR

(1)(a) No Hazardous Materials Liability. Owner agrees and Granting Owner represents and warrants that they have no actual knowledge of a release or threatened release of any Hazardous Materials on, at, beneath or from the Property. Owner hereby promises to defend and indemnify Land Trust against all litigation, claims, demands, penalties and damages, including reasonable attorney fees, arising from or connected with the release or threatened release of any Hazardous Materials on, at, beneath or from the Property, or arising from or connected with a violation of any Environmental Laws. Owner's indemnification obligation shall not be affected by any authorizations provided by Land Trust to the Owner with respect to the Property or any restoration activities carried out by Land Trust at the Property[; provided, however, that Land Trust shall be responsible for any Hazardous Materials contributed after this date to the Property by Land Trust].

(b) Owner agrees to remain in compliance with, all applicable Environmental Laws. Owner agrees and Granting Owner represents and warrants that there are no notices by any governmental authority of any violation or alleged violation of, non-compliance or alleged noncompliance with or any liability under any Environmental Law relating to the operations or conditions of the Property.

(c) "**Environmental Law**" or "**Environmental Laws**" means any and all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, Hazardous Materials, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect.

(d) "Hazardous Materials" means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment or any other material defined and regulated by Environmental Laws.

(e) If at any time after the effective date of this Easement there occurs a release, discharge or other incident in, on, or about the Property of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or in any way harmful or threatening to human health or the environment, Owner agrees to take any steps that are required of the Owner with respect thereto under federal, state, or local law necessary to ensure its

containment and remediation, including any cleanup.

**Commentary.** Consider adding a requirement for notice to Land Trust.

(2) **Limited Status of Land Trust.** Despite any arguably contrary provision in this Easement, the Parties do not intend this Easement to be, and this Easement shall not be, construed such that it creates in or gives to Land Trust any of the following:

- (a) The obligations or liabilities of an “owner” or “operator,” as those terms are defined and used in Environmental Compliance Laws;
- (b) The obligations or liabilities of a person described in 42 U.S.C. section 9607(a)(3) or (4);
- (c) The obligations of a responsible person under any applicable Environmental Laws;
- (d) Any right to investigate, control, monitor or remediate any Hazardous Materials associated with the Property;
- (e) Any right to exercise physical or management control over the day-to-day operations of the Property or any of Owner’s activities on the Property;
- (f) Any authority to specify the chemicals or Hazardous Substances that may be used on the Property, or
- (g) Any control over Owner’s ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the Property.

Nothing in this Easement shall be construed as giving rise, in the absence of judicial decree, to any right or ability in Land Trust to exercise physical or managerial control over the day-to-day operations of the Property, or any of Owner’s activities on the Property, or otherwise to become an operator with respect to the Property within the meaning of the Environmental Compliance Laws. The term “hazardous materials” includes, without limitation, (a) material that is flammable, explosive or radioactive; (b) petroleum products, including by-products and fractions thereof; and (c) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA, the Hazardous Materials Transportation Act (49 U.S.C. section 6901 et seq.); the Hazardous Waste Control Law (California Health & Safety Code section 25100 et seq.); the Hazardous Substance Account Act (California Health & Safety Code section 25300 et seq.), and in the regulations adopted and publications promulgated pursuant to them, or any other applicable federal, state or local laws, ordinances, rules, regulations or orders now in effect or enacted after the date of this Easement.

(3) **Storage Tanks.** There are not now any underground storage tanks located on the Property, whether presently in service or closed, abandoned, or decommissioned, and no underground storage tanks have been removed from the Property in a manner not in compliance with applicable Environmental Compliance Laws.

(4) Compliance with Law. Granting Owner and the Property are in compliance with all federal, state, and local laws, regulations, and requirements applicable to the Property and its use.

(5) Litigation, Proceedings and Investigations. There is no pending or threatened litigation in any way affecting, involving, or relating to the Property. No civil or criminal proceedings or investigations have been instigated at any time known to Granting Owner, none is now pending, and no notices, claims, demands, or orders have been received, arising out of any violation or alleged violation of, or failure to comply with, any federal, state, or local law, regulation, or requirement applicable to the Property or its use, nor do there exist any facts or circumstances that the Granting Owner might reasonably expect to form the basis for any such proceedings, investigations, notices, claims, demands, or orders.

**Commentary.** Optional addition in some factual circumstances: Granting Owner has made full written disclosure to Land Trust of a past incident on the Property that might have but did not give rise to an investigation.

(6) Acts Beyond Owner's Control. Nothing contained in this Easement shall be construed to entitle Land Trust to bring any action against Owner for any injury to or change in the Property resulting from causes beyond Owner's control, including, without limitation, fire, flood, storm, and natural earth movement, or other natural events, or from any prudent action taken by Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

**Commentary.** Consider whether to omit unless the donor asks for this provision.

(7) Granting Owner's Title Warranty. Granting Owner owns the entire fee simple interest in the Property, including the entire mineral estate, free from all encumbrances except those described in Exhibit \_\_, and hereby promises to defend the same against all claims that may be made against the Easement.

**OR**

(7) Granting Owner's Title Warranty. Granting Owner represents and warrants that Granting Owner owns the entire fee simple interest in the Property, including the entire mineral estate, and hereby promises to defend this Easement against all claims that may be made against it. Any and all financial liens or financial encumbrances existing as of the date of the execution of this Easement have been subordinated. Exhibit \_\_ (Prior Encumbrances) sets forth all the non-financial encumbrances.

**OR**

(7) Granting Owner's Title Warranty. Granting Owner owns the entire fee simple interest in the Property, including the entire mineral estate, free from all encumbrances except those described in Exhibit \_\_, attached hereto and incorporated herein by this reference. Granting Owner agrees to take all steps necessary to cause the title insurance company to defend the Property against all claims that may be made

against title that are covered by Granting Owner's title insurance policy. Except as may be reflected in Exhibit \_\_, Granting Owner warrants that no change affecting title has occurred since Granting Owner acquired the Property.

**Commentary.** This last paragraph is a much less desirable option for Land Trust. Land Trust may protect itself by obtaining its own title insurance. Land Trust is required to perform its own title investigation under Standards and Practices.

(8) **Subordination.** Any and all financial liens or financial encumbrances existing as of the date of the execution of this Easement have been subordinated, as indicated in Exhibit \_\_. Any financing lien or encumbrance at any time shall be subordinate to this Easement, and the Parties agree to execute such documents as may be reasonably required by Owner's lender(s) to accomplish such subordination.

(9) **No Representation of Tax Benefits.** Owner represents and warrants that (i) Owner has not relied upon any information or analyses furnished by Land Trust with respect to the availability, amount or effect of any tax deduction, credit or other benefit to Owner or to the value of this Easement or the Property; (ii) Owner has relied solely upon personal judgment and/or professional advice furnished by the appraiser and legal, financial and accounting professionals engaged by Owner. [If any person providing services in connection with this Easement or the Property was recommended by Land Trust, Owner acknowledges that Land Trust is not responsible in any way for the performance of services by these persons; and (iii) donation of this Easement is not conditioned upon the availability or amount of any deduction, credit or other tax benefit.]

**Commentary.** A land trust may cover these points adequately in other communications so that inclusion of this paragraph may be unnecessary.

(10) **Consideration.** Granting Owner acknowledges receipt of \$1.00 in consideration of the grant of this Easement to Land Trust. The consideration has been paid in full to Granting Owner.

**Commentary.** A few States may require payment of consideration. If unnecessary, omit.

10. **Condemnation and Extinguishment.** This Easement may be terminated only due to extraordinary circumstances and only by way of condemnation, as described below, or judicial extinguishment if a court with jurisdiction, at the joint request of Owner and Land Trust, determines that conditions on or surrounding the Property have changed to such a degree that it has become impossible or impractical to fulfill the Conservation Purpose[s]. If all or any part of the Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation by any public, corporate, or other entity with eminent domain powers or authority, so as to terminate this Easement in whole or in part, Owner and Land Trust shall act jointly to recover the full value of the interests in the Property subject to the taking or in-lieu purchase and all direct and incidental damages resulting therefrom. All expenses reasonably incurred by Owner and Land Trust in connection with the taking or in-lieu

purchase shall be paid out of the amount recovered. Land Trust's share of the balance of the amount recovered shall be determined by multiplying that balance by the ratio set forth immediately below. If this Easement is taken, in whole or in part, by exercise of the power of eminent domain, Land Trust shall be entitled to compensation in accordance with applicable law.

**Commentary.** See *Land Trust Standards and Practices 11J*.

(1) **Valuation.** This Easement constitutes a real property interest immediately vested in Land Trust that, for purposes of condemnation, the Parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) the ratio of the value of the Easement at the time of this grant to the fair market value of the Property, without deduction for the value of the Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to section 170(h) of the Internal Revenue Code of 1986, as amended. For the purposes of this subparagraph, the ratio of the value of the Easement to the value of the Property unencumbered by the Easement shall remain constant.

**Commentary.** Consider whether Land Trust should share in the appreciation of the value of the land proportionately. Alternate language might read: "If this Easement is terminated in whole or in part, whether by judicial extinguishment or condemnation, Land Trust shall be entitled to a percentage of the gross sale proceeds or condemnation award equal to the greater of (i) the percentage required pursuant to Treasury Regulation §1.170A-14(g)(6); or (ii) the proportion that the value of this Easement at the time of extinguishment or condemnation bears to the then value of the Property as a whole."

(2) **Application of Proceeds.** Land Trust shall use all proceeds received under the circumstances described in this paragraph to pay the costs to monitor, enforce and preserve any portions of the Property that remain subject to this Easement, or, if no remaining portion of the Property is subject to this Easement, to monitor and enforce other easements held by Land Trust that are comparable to this Easement and to conserve properties subject to such other easements in a manner consistent with Land Trust's conservation purposes under this Easement.

(3) **Highest and Best Use.** The purposes of this Easement are presumed to be the best and most necessary public use as defined in section \_\_\_\_ of \_\_\_\_ [state law] \_\_\_\_.

(4) **Extinguishment.** If circumstances arise in the future that render the purpose of this Easement impossible or impractical to accomplish, this Easement can only be terminated or extinguished by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Land Trust shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to termination or extinguishment, shall be the stipulated fair market value of this Easement or proportionate part thereof, as

determined in accordance with Paragraph 10.1.

**Commentary.** See *Land Trust Standards and Practices 11K*.

11. **Transfers and Amendments.**

(1) **Transfer of Easement by Land Trust.** This Easement may only be assigned or transferred to a private nonprofit organization that, at the time of transfer, is a “qualified organization” under section 170(h) of the Internal Revenue Code, authorized to acquire and hold easements pursuant to section \_\_\_\_ of \_\_\_\_ [state law]\_\_\_\_, that has similar purposes to preserve agricultural lands and open space. If no such private nonprofit organization exists or is willing to assume the responsibilities imposed by this Easement, then this Easement may be transferred to any public agency authorized to hold interests in real property as provided in section \_\_\_\_ of \_\_\_\_ [state law]\_\_\_\_. Such an assignment or transfer may proceed only if the organization or agency expressly agrees to assume the responsibility imposed on Land Trust by this Easement and is expressly willing and able to hold this Easement for the purpose for which it was created. All transfers shall be duly recorded. If Land Trust is no longer authorized to hold easements under section \_\_\_\_ of \_\_\_\_ [state law]\_\_\_\_ (or any successor provision then applicable), it shall transfer or assign its rights and obligations under this Easement in accordance with this paragraph. All consideration received by Land Trust for any transfer or assignment shall be applied first to the costs incurred by Land Trust for such transfer or assignment and to monitor and enforce this Easement during its ownership thereof, and any remaining consideration shall be used by Land Trust for its costs of monitoring and enforcing comparable easements upon other properties and for conservation of those other properties in a manner consistent with Land Trust’s conservation purposes under this Easement.

(2) **Subsequent Transfers by Owner.** Owner agrees to disclose this Easement to all prospective buyers of the Property and to inform Land Trust of a prospective sale. Owner agrees that this Easement shall be incorporated by reference in any deed or other legal instrument by which Owner transfers any interest in all or a portion of the Property or by which Owner grants to a third party a right or privilege to use the Property, including, without limitation, any easement, leasehold interest, or license agreement. Owner further agrees to give written notice to Land Trust of the transfer of any such interest, or the grant of any such right or privilege, at least \_\_\_ days prior to the date of such transfer or grant. The failure of Owner to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way. If Property subject to this Easement is transferred while a violation remains uncured, Owner who transfers remains liable for the violation jointly and severally with Owner to whom the Property is transferred.

**OR**

(2) **Subsequent Transfers by Owner.** Any time the Property itself, or any interest in it, is transferred by Owner to any third party, Owner shall notify Land Trust

in writing at least \_\_\_ days prior to the transfer of the Property or interest, and the document of conveyance shall expressly incorporate by reference this Easement. Any document conveying a lease of the Property shall expressly incorporate by reference this Easement. Failure of Owner to do so shall not impair the validity of this Easement or limit its enforceability in any way.

**OR**

(2) Subsequent Transfers by Owner and Transfer Fee. Any time the Property itself, or any interest in it, is transferred by Owner to any third party, Owner shall notify Land Trust in writing at least \_\_\_ days prior to the transfer of the Property or interest, and the document of conveyance shall expressly incorporate by reference this Easement. Any document conveying a lease of the Property shall expressly incorporate by reference this Easement. Failure of Owner to do so shall not impair the validity of this Easement or limit its enforceability in any way. At the time of any transfer of a fee interest [or lease in excess of \_\_ years], Owner shall pay to Land Trust a transfer fee of \$\_\_\_\_\_ [or \_\_ percent of the sale price/fair market value]. For purposes of this transfer fee, any testamentary conveyance or conveyance by gift by Owner to a member of Owner's family [within the third degree of consanguinity] shall not be considered a transfer.

(3) Estoppel Certificates. Upon receipt of a written request by Owner, Land Trust shall, within \_\_\_ days thereafter, execute and deliver to Owner, or any person designated by Owner, any document, including an estoppel certificate, that certifies, to the best of Land Trust's knowledge, Owner's compliance with any obligation of Owner contained in this Easement and otherwise evidences the status of this Easement. Such certification shall be limited to the condition of the Property as of Land Trust's most recent inspection. If Owner requests more current documentation, Land Trust shall conduct an inspection, at Owner's expense, within \_\_\_ days of receipt of Owner's written request therefor. Prior to any transfer of title, Owner shall request such certification.

**OR**

(3) Estoppel Certificates. Land Trust will provide certificates to Owner or third parties indicating the extent to which, to Land Trust's knowledge after due inquiry, the Property is in compliance with this Easement, after an inspection by Land Trust made at Owner's cost within \_\_\_ days after Owner's written request.

**Commentary.** Another option is to omit all estoppel certificate provisions unless the Grantor requests them.

(4) Additional Easements. Owner shall not grant any additional easements, rights of way or other interests in the Property (other than a security interest that is subordinate to this Easement), or grant or otherwise abandon or relinquish any water right or mineral right or agreement relating to the Property, without first obtaining the written consent of Land Trust. Land Trust may withhold such consent if it determines that the proposed interest or transfer is inconsistent with the purposes of this Easement



or will impair or interfere with Conservation Values. This provision shall not prohibit transfer of a fee or leasehold interest in the Property that is subject to this Easement and complies with its provisions.

**OR**

(4) **Additional Easements.** The grant of any subsequent easements, interests in land, or use restrictions that might diminish or impair the agricultural productive capacity or open space character of the Property is prohibited. Owner may grant subsequent easements, including conservation easements, interests in land, or use restrictions on the Property, provided that they do not restrict agricultural practices conducted or maintained for commercial purposes in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, or interfere with any term of this Easement, as determined by Land Trust. Land Trust's written approval shall be obtained at least \_\_\_ days in advance of Owner's execution of any proposed subsequent easement, interests in land, or use restriction on the Property, and such subsequent easements, interests in land, and use restrictions shall make reference to and be subordinate to this Easement. Land Trust shall deny any proposed subsequent easement, interest in land, or use restriction that appears to restrict agricultural husbandry practices, or diminishes or impairs the agricultural productive capacity or open space character of the Property.

(5) **Permitted Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Owner and Land Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of Land Trust under any applicable laws, including sections \_\_\_ et seq. of \_\_\_ [state law]\_\_\_ or section 170(h) of the Internal Revenue Code of 1986, as amended, and (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration. Any amendment or modification shall be recorded in the Official Records of \_\_\_\_\_ County, \_\_\_\_\_. This Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Easement, nor the status or rights of Land Trust under this Easement.

**Commentary.** See Land Trust *Standards and Practices* 11I; Amending Conservation Easements: Evolving Practices and Legal Principles (Land Trust Alliance 2007). Consider adding any specific express provisions, for example, that no amendment "can permit additional residences on the Property beyond the number of residences permitted on the effective date"—if that is true and important, or that no amendment can permit whatever other absolute prohibition might be appropriate. Not only does this addition further achievement of donor intent but it also reinforces the perpetual nature of the restrictions for the IRS. Additional policies are available at [http://learningcenter.lta.org/objects/view.acs?object\\_id=15164](http://learningcenter.lta.org/objects/view.acs?object_id=15164).

**OR**

(5) **Amendments.** It is the Parties' expectation that this Easement will not be amended or modified. Upon request by the Granting Owner/Owner, Land Trust may in its sole discretion agree to amend or modify this Easement, but in no event shall such amendment be made without compliance with both Land Trust's internal procedures and standards for such modification and state and local laws regarding the creation and amendment of easements and in conformity with federal laws (including tax laws) associated with easement creation. No amendment shall be allowed that would adversely affect the qualifications of this Easement as a charitable gift or the status of Land Trust under any applicable laws, including section 170(h) of the Internal Revenue Code or the laws of the State of \_\_\_\_\_, serves to weaken the Easement in terms of protection of the Conservation Values or affects its perpetual duration. Any such amendment shall be recorded in the official records of the county in which the Property is located.

**AND**

Any party requesting an amendment shall pay all Land Trust costs including staff time and direct costs for reviewing the request, whether the amendment is granted or denied, and for negotiating and completing the amendment, if approved.

**OR**

(5) **Permitted Amendment Agreed to by Original Granting Owner Only.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the original Granting Owner and Land Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of Land Trust under any applicable laws, including sections \_\_\_\_ et seq. of \_\_\_[state law]\_\_\_ or section 170(h) of the Internal Revenue Code of 1986, as amended, (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration, (iii) the original Granting Owner must consent to the amendment if sought by a subsequent Owner, whether or not that original Granting Owner continues to own the Property, and (iv) no amendment is permitted once the original Granting Owner is deceased. Any amendment or modification shall be recorded in the Official Records of \_\_\_\_\_ County, \_\_\_\_\_. This Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Easement, nor the status or rights of Land Trust under this Easement.

**OR**

(5) **No Amendment Permitted.** No amendment or modification of this Easement shall be allowed under any circumstance absent order of a court of competent jurisdiction.

12. **Perpetuation of Easement.** This Easement shall be of perpetual duration, it being the express intent of the Parties that this Easement not be extinguished by, or

merged into, any other interest or estate in the Property now or hereafter held by Land Trust or any other Party.

**OR**

12. **Perpetual Duration.** Pursuant to \_\_\_\_ [state/federal law]\_\_\_\_\_, this Easement shall run with the land in perpetuity. Every provision of this Easement that applies to Owner or Land Trust shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests may appear.

**Commentary.** The second sentence is also covered in the “Successors” paragraph below.

**OR**

12. **Perpetual Duration—No Merger.** No merger of title, estate or interest shall be deemed effected by any previous, contemporaneous, or subsequent deed, grant, or assignment of an interest or estate in the Property, or any portion thereof, to Land Trust, or its successors or assigns. It is the express intent of the Parties that this Easement not be extinguished by, merged into, modified, or otherwise deemed affected by any other interest or estate in the Property now or hereafter held by Land Trust or its successors or assigns.

**Commentary.** Consider whether there is any likelihood that Land Trust will ever own this property in fee. If so, is it appropriate to maintain the restrictions or should the easement merge? State laws vary as to the circumstances in which merger will occur, whether contracting parties can prevent merger by a provision such as this, and related subjects.

**OR**

12. **Perpetual Duration—No Merger.** Granting Owner and Land Trust explicitly agree that it is their express intent, forming a part of the consideration of this Easement, that the provisions of this Easement are to last in perpetuity. To accomplish that intent and in view of the public interest in its enforcement of this Easement, the Parties specifically agree that (1) no purchase or transfer of the underlying fee interest in the Property by or to Land Trust shall be deemed to eliminate this Easement, or any portion thereof, under the doctrine of “merger” or other legal doctrine; and (2) should Land Trust come to own all or a portion of the fee interest in the Property, Land Trust as successor in title to Owner shall observe and be bound by all obligations of the Owner under and all restrictions imposed upon the Property by this Easement.

The Parties further agree that, if it becomes necessary to avoid the application of the doctrine of “merger” or similar legal doctrine that would result in extinguishment of this Easement, Land Trust, as promptly as practicable, shall either (1) transfer its fee simple interest in the Property subject to this Easement, or (2) assign Land Trust’s interests in this Easement of record to another holder in conformity with the requirements of this paragraph. Any instrument of assignment of this Easement or the rights conveyed herein shall refer to the provisions of this paragraph and shall contain language necessary to continue it in force.

OR

12. **No Merger.** Unless the Parties expressly state that they intend a merger of estates or interests to occur, then no merger shall be deemed to have occurred hereunder or under any document executed in the future affecting this Easement.

13. **Notices.** Any notice, demand, request, consent, approval, or communication that a Party desires or is required to give to the other Parties shall be in writing and either served personally or sent by first class mail, postage prepaid, return receipt requested, or delivered by a nationally recognized overnight delivery service such as Federal Express or United Parcel Service, charges prepaid or charged to the sender's account. Addresses for purpose of giving notice are as follows:

To the Granting Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To Land Trust:

Executive Director  
\_\_\_\_\_ Land Trust  
\_\_\_\_\_  
\_\_\_\_\_

or to such other address as a Party from time to time shall designate by written notice to the other Parties. When personally delivered, notice is effective upon delivery. When mailed, certified mail, postage prepaid, return receipt requested, notice is effective on receipt, if delivery is confirmed by a return receipt. When delivered by an overnight delivery service, notice is effective on delivery, if delivery is confirmed by the delivery service. A recipient cannot defeat delivery by refusing to accept the notice, and notice is deemed delivered if refused.

14. **Recordation.** Land Trust shall record this instrument in timely fashion in the Official Records of \_\_\_\_\_ County, \_\_\_\_\_, and may re-record it at any time appropriate in Land Trust's discretion as may be required to preserve Land Trust's rights in this Easement.

OR

14. **Recordation and Effective Date.** Owner and Land Trust intend that the restrictions arising hereunder take effect on the day and year this Deed of Conservation Easement is recorded in the Official Records of \_\_\_\_\_ County, \_\_\_\_\_, after all required signatures have been affixed hereto. This Easement shall be timely recorded. Land Trust may re-record this instrument or record any other instrument at any time as may be required to preserve its rights in this Easement.

15. **General Provisions.**

(1) **Controlling Law.** The interpretation and performance of this Easement shall be governed by the laws of the State of California. [Unless otherwise stated, r] [R]eferences to authorities in this Easement shall be to the statute, rule, regulation, ordinance, or other legal provision that is in effect at the time this Easement becomes

effective], disregarding the conflicts of law principles of that State].

**Commentary.** In some States, a nearby neighbor can also sue. Add the final words if Grantor lives outside the State or has strong connections to another State.

(2) **Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to achieve the conservation purposes of this Easement and the policy and purpose of section \_\_\_ et seq. of \_\_\_[state law]\_\_\_. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the conservation purposes of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. This Easement has been fully negotiated between the Parties so that the rule that documents may be construed against the drafter does not apply.

(2) **Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purpose of \_\_\_[state law conservation easement organic act/state and federal law governing easements]\_\_.

(a) **Construction Favoring Validity**—If any provision in this instrument is found to be ambiguous, an interpretation consistent with this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. The Parties acknowledge that each Party and its counsel have reviewed and revised this easement and that no rule of construction that ambiguities are to be resolved against drafting party shall be employed in the interpretation of this Easement.

(b) **Conflict in Conservation Values**—If a conflict arises between protection of one or more of the identified Conservation Values that may have an actual impact, or may have a potential impact, on one or more of the other identified Conservation Values, Land Trust intends to enforce this Easement, in its sole discretion, by giving the greatest level of protection to the Conservation Values in the hierarchy and order as listed in the Recitals, Paragraph \_\_. Land Trust reserves the right to review this hierarchy of Conservation Values from time to time as the public benefits that are provided by this Easement may change over time. Owner acknowledges that Land Trust has the right in its discretion and after consultation with Owner [and Granting Owner if alive and no longer owner of the Property], to modify and to revise this hierarchy by filing a Notice in the public records of \_\_\_\_\_ County, \_\_[State]\_\_. [Land Trust and Owner may mutually agree to modify and to revise this hierarchy by filing a Notice in the public records of \_\_\_\_\_ County, \_\_[State]\_\_.] The hierarchy set forth in Paragraph \_\_ is intended to apply only to resolve actual or potential conflicts between protected Conservation Values, and therefore, this Paragraph \_\_ may not be interpreted or construed by Owner, Land Trust, or any other person to justify a disregard of, or to discount, Land Trust’s and Owner’s obligations hereunder to protect and preserve all Conservation Values if such actual or potential conflict between protected Conservation

Values does not exist.

**Commentary.** One option is offered if Land Trust has the unilateral right to revise hierarchy of Conservation Values. An alternative in brackets is offered if Land Trust and Owner must mutually approve of revision of hierarchy of conservation values. A Granting Owner may want to retain the right to participate in the consultation or decision, so that option is also available. This provision requires a detailed recital that precisely identifies the "Conservation Values" and the initial hierarchy.

**OR**

(1/2) Controlling Law and Liberal Construction. This Easement shall be interpreted under the laws of the State of \_\_\_\_\_, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes. [Any decisions resolving such ambiguities shall be documented in writing.]

(3) Significance of Recitals and Terms. The Recitals to this Easement are integral and operative provisions of this Easement. In all matters of interpretation, whenever necessary to give effect to any clause of this Easement, the neuter or gender-specific pronouns include the masculine and feminine, the singular includes the plural, and the plural includes the singular.

(4) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby. To the extent permitted by law, the Parties waive any provision of law that renders any provision of this Easement invalid, illegal or unenforceable in any respect.

**OR**

(4) Severability. If any term, provision, covenant, condition, or restriction of this Easement is held by a court of competent jurisdiction to be unlawful, invalid, void, unenforceable, or not effective the remainder of the agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

(5) Entire Agreement. This Easement sets forth the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous discussions, negotiations, understandings, or agreements of the Parties relating to the subject matter of this Easement, all of which are merged herein.

**OR**

(5) Entire Agreement. This Easement is the final and complete expression of the agreement between the Parties with respect to this subject matter. Any and all prior or contemporaneous agreements with respect to this subject matter, written or oral, are merged into and superseded by this written instrument.

(6) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Owner's title in any respect.

(7) Joint Obligation. The obligations imposed by this Easement upon multiple concurrent Owners shall be joint and several.

(8) Successors and Assigns. All covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the Parties hereto and their respective personal representatives, heirs, lessees, successors, and assigns and shall continue as a restrictive covenant and equitable servitude running in perpetuity with the Property. The terms "Owner" and "Land Trust," wherever used herein, and any pronouns used in place thereof, shall include, respectively, the Granting Owner and all of the Granting Owner's heirs, successors and assigns, and the above-named Land Trust and its successors and assigns.

(9) Termination of Rights and Obligations and Standing to Enforce. A Party's rights and obligations under this Easement terminate upon transfer of the Party's interest in the Easement or transfer of the Property, except all representations and warranties made by and liabilities incurred by Granting Owner shall survive. Only Land Trust and Owner [and Granting Owner and/or the state Attorney General] may bring an action to enforce this Easement, and nothing herein shall be construed to grant any other individual or entity standing to bring an action to enforce this Easement if standing is not otherwise authorized under applicable law, nor to grant any rights in the Property by adverse possession or otherwise.

**Commentary.** In some States, a nearby neighbor can also sue. If Granting Owner retains the right to approve amendment of the Easement, that needs to be added. Many donors are concerned that an easement will enable neighbors or strangers to sue, and the second sentence is intended to assure such owners that the Easement does not create rights to sue that do not otherwise exist.

(10) No Oral Approval. [Owner understands that any] Any oral approval or oral representation made by a Land Trust officer, employee or agent does not meet the requirements of this Easement, does not otherwise bind or commit Land Trust, and may not be relied on by Owner. [Owner agrees that n] No oral approval or oral representation made by Land Trust's officers, employees or agents, or understood by Owner to have been made by Land Trust, its officers, employees or agents, shall be used by Owner to assert that Land Trust is, in any way, estopped or has made an election or has waived any provision of this Easement.

(11) Reasonableness Standard. Owner and Land Trust shall follow a reasonableness standard, shall use their best efforts to make any determinations that are necessary or are contemplated to be made by them (either separately or jointly) under this Easement in a timely manner, shall cooperate with one another, and shall take all other reasonable action suitable to these ends.

(11) Mediation. If a dispute arises between Owner and Land Trust concerning the consistency of any proposed use or activity with this Easement, and Owner agrees not to proceed with the use or activity pending resolution of the dispute, either Party

may propose mediation by written request delivered to the other. If both Parties agree, then, within \_\_\_ days after receipt of the request, the Parties shall select a single impartial mediator. If the Parties are unable to agree on selection of a single mediator, then the Parties shall, within \_\_\_ days of receipt of the initial request, jointly apply to the \_\_\_[arbitration body]\_\_\_\_\_ or to a court for appointment of an impartial mediator with relevant experience in real estate and conservation easements. Mediation shall then proceed in accordance with the following guidelines:

**Commentary.** Consider whether to set a time for the mediation request to be made. Consider whether to provide that mediation does not affect the land trust's right to interim injunctive relief. State law may be clear on that issue, so the easement should not muddy the water. These mediation provisions appear in the general provisions, reflecting that they are possible remedies available to both Land Trust and Owner. The earlier databank section on remedies is specific to remedies available to Land Trust. Think about whether to broaden the scope of the remedies section to include mediation there as an alternative to including it here.

(a) **Purpose**—The purpose of the mediation is to (i) promote discussion between the Parties; (ii) assist the Parties to develop and exchange pertinent information concerning issues in the dispute; and (iii) assist the Parties to develop proposals that will enable them to arrive at a mutually acceptable resolution of the controversy. The mediation is not intended to result in any express or de facto modification or amendment of this Easement.

**Commentary.** This mediation provision is applicable to disputes between Owner and Land Trust concerning the consistency of any proposed use or activity with the Easement. Consider whether to expand or contract the application of the mediation remedy, but the decision can also be made when the dispute arises. No purpose is served by having the ability to force an adversary into mediation, and the parties can always agree to mediate even if the Easement is silent.

(b) **Participation**—The mediator may meet with the Parties and their counsel jointly or ex parte. The Parties agree that they will participate in the mediation process in good faith and expeditiously, attending all sessions scheduled by the mediator. Party representatives with settlement authority will attend mediation sessions as requested by the mediator.

(c) **Confidentiality**—All information presented to the mediator shall be deemed confidential and shall be disclosed by the mediator only with the consent of the Parties or their respective counsel. The mediator shall not be subject to subpoena by any Party. No statements made in or documents prepared for mediation sessions shall be disclosed in any subsequent proceeding or construed as an admission of a Party. The sole exception from this prohibition shall be the settlement agreement or similar document to which the Parties agree in the context of the mediation.

(d) **Time Period**—Neither Party shall be obligated to continue the mediation



beyond \_\_\_ days from the date of selection or appointment of a mediator nor if the mediator finds no reasonable likelihood that continuing mediation will result in mutually agreeable resolution of the dispute.

(e) **Costs** – Unless otherwise agreed at the time, the cost of the mediator shall be borne equally by Owner and Land Trust; the Parties shall bear their own expenses, including attorney fees, individually.

**Commentary.** A land trust may elect to omit either mediation or arbitration provisions or may opt for one but not the other. Mediation is rarely successful if the parties are adamant in their views and unwilling to consider compromise, so mandatory mediation may be a pointless expense. A strong mediator can sometimes move mountains, however, so it may be valuable to have the ability to require a mediation before litigation begins. Mediation may cost \$5,000 to \$8,000 a day just for the mediator. The local legal culture and availability of strong mediators, the nature of the easement, and many other factors will affect the decision. One further “baseball arbitration” provision might be included, borrowed from the Pennsylvania model [http://www.conserveland.org/model\\_documents/Commentary08sep11.doc](http://www.conserveland.org/model_documents/Commentary08sep11.doc), with appropriate adaptation:

If the mediation under the preceding subsection is unsuccessful, Owner and Land Trust agree to submit their respective final written proposals to a conservation or resource management professional, unaffiliated with either Owner or Land Trust, who has the expertise, training or qualifications to review their respective proposals (the “Reviewer”) and to select one, and only one, that best meets the standard of reasonableness set forth above. If Owner and Land Trust are unable to identify a mutually agreeable Reviewer, the Reviewer is to be appointed by \_\_\_\_\_. Owner and Land Trust must each submit one, and only one, written proposal to the Reviewer within ten (10) days following appointment of the Reviewer. Within thirty (30) days following receipt of such proposals, the Reviewer must select, by notice to Owner and Land Trust, either Owner’s proposal or Land Trust’s proposal as submitted, without compromise or modification. Neither Owner nor Land Trust are permitted to communicate with the Reviewer during the Review period. The decision of the Reviewer is final and is conclusively deemed to meet the standards of reasonableness set forth above. Owner and Land Trust accept this procedure in full satisfaction of any and all rights that they may have under applicable law or otherwise to appeal or otherwise litigate disputes arising with respect to Review under this Easement. Cost of the Reviewer are to be borne equally by Owner and Land Trust.

(12) **Binding Arbitration.** If a dispute arises between Owner and Land Trust concerning the consistency of any proposed use or activity with this Easement, either Party may refer the dispute to binding arbitration by a request made in writing upon the other, provided that Owner agrees not to proceed with the use or activity pending resolution of the dispute.

**Commentary.** The arbitration provisions appear in the general provisions, reflecting that they are possible remedies available to both Land Trust and Owner. The earlier databank section on remedies is specific to remedies available to Land Trust. Think about whether to broaden the scope of the remedies section to include arbitration there as an alternative to including it here. Also, consider whether to expand the arbitration provision to encompass all disputes or to narrow it.

(a) **Timing and Selection of Arbitrator**—Within \_\_\_ days of the receipt of the request, the Parties shall select a single arbitrator to hear the matter. If the Parties are unable to agree on selection of a single arbitrator, then each Party shall name one arbitrator and the two arbitrators thus selected shall select a third neutral arbitrator; provided, however, if either Party fails to select an arbitrator within \_\_\_ days after appointment of the first arbitrator, or if the two arbitrators fail to select a third arbitrator within \_\_\_ days after appointment of the second arbitrator, then a proper court, on petition of a Party, shall appoint the second or third arbitrator or both, as the case may be, in accordance with section \_\_\_\_\_ et seq. of \_\_\_\_\_ state law \_\_\_\_\_, or any successor statute then in effect. Any arbitrator chosen shall be experienced in both real estate law and conservation easement law.

**Commentary.** Use of three arbitrators results in a very expensive process as the parties will be paying for all three plus at least one attorney on each side. Many States have laws under which the court will appoint a single arbitrator if the parties cannot agree, and that may be a more desirable default than a three-arbitrator panel.

(b) **Law Governing and Entry of Judgment**—The matter shall be settled in accordance with that statute or other body of rules then in effect, and a judgment of arbitration award may be entered in any court having jurisdiction thereof.

(c) **Injunctive and Other Relief**—The arbitrator shall have the same powers as a \_\_\_\_\_ [superior] \_\_\_\_\_ judge to order in the award all injunctive, declaratory or other relief or remedies that could be awarded in any action filed in \_\_\_\_\_ County Court upon the same causes of action, and the arbitrator may retain continuing jurisdiction when appropriate to make further determinations or to enforce the award.

**Commentary.** Ability to include this provision depends on state law.

(d) **Costs**—The prevailing Party shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for all its costs and expenses related to the arbitration, including, without limitation, fees and expenses of arbitrator(s) and attorney fees, as determined by the arbitrators and any court of competent jurisdiction that may be called upon to enforce or review the award.

\_\_\_\_\_  
**Granting Owner's initials**

\_\_\_\_\_  
**Land Trust Representative's initials**

**Commentary.** Initials may be required under the laws of some States. In some States, the Easement can be drafted so that the Owner pays Land Trust fees and costs if Land Trust prevails but the parties each bear their own fees and costs if Owner prevails. Other States mandate reciprocal provisions if there is provision for shifting fees and costs.

(13) **Captions.** The captions in this instrument have been inserted solely for convenience of reference and shall have no effect upon construction or interpretation.

**Commentary.** Consider whether to omit this paragraph. Although it commonly appears, its value may be limited at best.

(14) **Counterparts.** The Parties may execute this instrument in two or more counterparts that shall, in the aggregate, be signed by all Parties; each counterpart shall be deemed an original instrument as against any Party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall control.

**Commentary.** Omit the paragraph if all signatures will be done at once or if an escrow is used and the parties will each sign the same document through the escrow.

(15) **Representation of Authority of Signatories.** Each individual executing this Easement on behalf of the Granting Owner or Land Trust represents and warrants to the other Party that the execution and delivery of this Easement and all related documents have been duly authorized by the Party for which the individual is signing and that the individual has the legal capacity to execute and deliver this Easement and thereby to bind the Party for which the individual is signing.

**Commentary.** Consider omitting the paragraph if Granting Owner is a natural person.

(16) **Representation by Counsel.** The Granting Owner retained and has been represented by \_\_\_\_\_ in the negotiation and preparation of this Easement. Land Trust has been represented by its staff attorney \_\_\_\_\_ and assisted by pro bono counsel in this transaction.

**Commentary.** Omit the paragraph if Granting Owner was not represented by counsel and vary the second sentence as appropriate.

(17) **Appraisal; Tax Forms.** If Granting Owner claims a federal and/or state income or other tax deduction for the donation of this Easement, Granting Owner shall provide Land Trust with a copy of the "qualified appraisal" (as defined by the Treasury Regulations applicable to the valuation of donated property for federal income tax purposes) of the fair market value of the Property before this Easement was recorded, the fair market value of the Property subject to the restrictions of this Easement, and the fair market value of the Easement. Within a reasonable time after Land Trust receives the qualified appraisal of the Easement and a properly and accurately completed IRS Form 8283 (or its successor form or state equivalent), Land Trust will complete and execute those portions of that form that require information from Land Trust as the donee and return it to Granting Owner. Land Trust will not knowingly sign a Form

8283 if it has significant concerns about the appraiser, appraisal and/or claimed tax deduction. Land Trust makes no assurance as to whether a deduction may be available or, if so, what the tax benefits may be.

**Commentary.** See Land Trust *Standards and Practices* 10. Much or all of this information should be given to the donor much earlier in the process, preferably in written form, to ensure that the donor is informed of these and related important points. Guidance Document <http://www.landtrustaccreditation.org/pdf/10A-10BGuidanceDocument.pdf>. This paragraph should be used, if at all, as a secondary communication because it will be seen by the donor too late in the usual donation timeline to convey information needed earlier in the process.

TO HAVE AND TO HOLD unto Land Trust, its successors, and assigns,  
WITNESS the following signatures.

**Commentary.** The foregoing two lines may be archaic in some States.

**GRANTING OWNER:**

\_\_\_\_\_

**By:** \_\_\_\_\_

**Dated:** \_\_\_\_\_, 2009

\_\_\_\_\_

**By:**

**Its:** President and CEO

\_\_\_\_\_ **LAND TRUST:**

\_\_\_\_\_ LAND TRUST

A \_\_\_\_\_ Nonprofit Corporation

**Dated:** \_\_\_\_\_, 2009

\_\_\_\_\_

**By:**

**Its:** President

Exhibits to include or consider

Property Description(s)

Maps

Depiction of Zones or Areas

Maps of Structures, Improvements, Other Features

Baseline Documents

List of Title Exceptions, Encumbrances