

CHAPTER 9—COMMENTARY ON MODEL AGRICULTURAL CONSERVATION EASEMENT WITH OPTION TO PURCHASE

Legal Designation

The term “Conservation Easement” is used in most jurisdictions, but in some states such an agreement may be designated an agricultural, open space, or scenic easement, restriction, or servitude. You should check the law of your state regarding the proper legal designation for the easement and any legally established terminology or requirements that may affect the way your document should be drafted.

Introductory Summary

In this model, the language preceding the “Recital” section establishes the identity of the parties and the terms that will be used throughout the document to designate each party (“Grantor” and “Grantee”) and the agreement between them. Note that the term “this Easement” here refers to all aspects of the agreement, including the provisions for the purchase option. You may prefer to use the term “Easement and Option” to emphasize the fact that this is not a *typical* conservation easement and that the Option is not a separate document but an integral part of the Easement.

When there is more than one individual grantor (as is often the case), you can establish in this section that they will be designated collectively by the singular term “Grantor,” or you can use the plural “Grantors,” as in the Model (which will allow you to use the pronouns, *they*, *them*, *their* and avoid the awkwardness of gender-specific singular pronouns).

Recitals

The recitals or “whereas” clauses set forth background information that helps to frame the

legal and factual basis for the Easement. The level of detail presented in easement recitals varies greatly. Some easements include more detailed recitals than the Model does, especially with regard to paragraphs C and F. In so far as the recitals establish the purposes of the parties in entering into the agreement, the function of this portion of the agreement will overlap the function of Section II (Statement of Purpose). Generally, however, the recitals tend to be more concerned with the motivation of the parties than with an exact legal definition of the purpose of the agreement.

Use of the term “whereas” to introduce the recitals is a traditional but not obligatory convention.

Paragraph B. If Grantor is granting the easement immediately after acquiring the Property and has not yet begun using the Property, you may change this clause to read, “The Property has been acquired by Grantor with the intent of using it actively for...”

Paragraph C. When the Grantee is an organization that is tax-exempt under section 501(c)(3) of the Code, the recitals should so specify and should identify the “charitable” purposes of the organization (as recognized by the IRS) that relate to the purposes of the Easement. Establishing that the Grantee has 501(c)(3) status and is accepting the Easement for charitable purposes is important when the Easement is being donated by Grantors who will claim a tax deduction for the donated value. These factors are also important when the Grantee accepts charitable donations from others for the restricted purpose of purchasing the Easement. In any case, it is crucial for a 501(c)(3) organization that purchases an easement, whether with restricted or unrestricted funds, to be able to show that the funds were spent for a charitable purpose. However, it should

be emphasized that, in the event of an IRS review of the Easement's purposes, the outcome will hinge not on whether certain portions of the Tax Code are cited in the document but on the IRS's own determination of how the Easement's purposes relate to those or other sections of the Code.

Paragraphs D and E. You may find other language appropriate for your purposes, but it is important to identify public or community benefits deriving from the Easement. (Assistance to farmers, in itself, is not recognized by the IRS as a charitable activity.)

Paragraph F. It can be useful to cite any federal, state or local laws or government policies that authorize conservation easements or that authorize or support other activities intended to achieve the stated purposes of the Easement. Citation of such laws or policies can strengthen the enforceability of the terms of the Easement. (See the final section of this chapter, "Possible Additional Detailed Provisions," re: potentially relevant laws and policies.) Again, it should be emphasized that, in the event of an IRS review of whether the purpose of the Easement qualifies as charitable, the outcome will hinge not on whether certain public policies are cited in the document but on whether the IRS considers these (or other) policies to be truly applicable.

Other possible recital clauses. Other purposes or activities should be cited when they apply, especially when they may help to establish the charitable nature of the transaction. Such purposes or activities may include protection of habitat for specific species, preservation of open space for "the scenic enjoyment of the general public," the preservation of "historically important" land or structures, and scientific activities.

I. Grant of Easement and Option

In the Model the basic nature of the transaction is stated in this section more fully than in the introductory summary that precedes the recitals (in differently structured easements the two may be combined). Grantors grant the Easement to Grantee.

In return, Grantee pays a certain price to the Grantors. When Grantee is purchasing the Easement, the price usually (as in the Model) equals the Easement's market value, which is the difference between the appraised unrestricted market value of the Property and the appraised "as-restricted" market value of the Property. If the Easement is being donated, this section must be modified to indicate this fact, but the market value of the Easement being donated should still be established at some point in the document. (For more on the process of appraising the as-restricted value of property, see commentary on Section IV of this document, as well as Chapter 10: Resale Formula Design). Notwithstanding the approach taken in the Model, the conventions for stating the price paid for the Easement do vary from state to state. In some states a nominal charge (for example, \$10.00) is customarily stated to have changed hands, whether a market price was paid or the Easement was donated.

Throughout this section, care should be taken to use language that complies with the conveyancing conventions and requirements of the jurisdiction in which the subject property is located, which may sometimes mean strict adherence to a seemingly arbitrary formula.

In some cases the Easement will be granted immediately upon Grantor's purchase of the property from another party. In such cases, if the actual price for the Easement is to be stated in this section of the Easement and if that price is derived from an unrestricted market value that is determined at least in part from the price paid by Grantors for the Property immediately prior to the granting of the Easement, then the third sentence of the section should be modified to indicate this fact.

The final section of this chapter, "Possible Additional Detailed Provisions," offers language for a number of "representations and warranties" that may be added to this section (or included elsewhere in the document) if they are deemed necessary.

The final section of this chapter also offers language dealing explicitly with the possible assignment of the Easement by the original Grantee. The cited sections of the Tax Code and specified state laws regarding permitted “donees” would of course govern any assignment even if they were not cited in the document.

II. Statement of Purpose

The language used in stating the purpose of an easement is generally a product of two sets of factors: (1) the specific actual purposes for which the Grantee accepts the Easement, and (2) the specific language of applicable laws, codes, regulations and other statements of government policy. The second of these considerations has a significant bearing on the legal status and enforceability of the Easement, but should not be allowed to blur the interpretation of the document that is intended by the Parties.

To date, most agricultural conservation easements have not addressed the issues of continued agricultural use and affordable access for future farmers. Such easements sometimes state their purpose simply as the preservation of productive agricultural land, or as the preservation of agricultural land as open space for specified purposes recognized as charitable by the IRS or otherwise recognized as serving the public interest. Some such easements also state the purposes of encouraging sound soil management and preserving natural resources. The Model Easement, however, states the additional purposes of maintaining active agricultural use and maintaining the economic viability of such use. Any easement that involves an option to purchase for a restricted price should include language which, like this section of the Model, establishes the purpose of the Option as well as the Easement’s other provisions.

Some conservation easements prioritize their various stated purposes—e.g., by identifying the preservation of agricultural land as open space as

the primary purpose, with the encouragement of sound soil management and preservation of natural resources as secondary purposes to be implemented in so far as they do not interfere with the primary purpose.

Some conservation easements do not contain the kind of detailed definition of agricultural use found in the second paragraph of this section of the Model, and some of those that do contain such definitions do so with specific reference to definitions established by state statutes or the policies of state departments of agriculture. Most of these definitions, like that in the Model, are very broad and inclusive, and may therefore include certain land uses that you want your Easement to prohibit or restrict. The Model, though it includes a broad definition, makes it clear that certain agricultural uses are nonetheless prohibited or restricted by certain specific terms of the Easement.

The Vermont easements discussed in Chapter 5 define the primary purpose in terms of the goals set forth in the Vermont statute authorizing the purchase of such easements. When these Vermont easements contain an Option to Purchase at Agricultural Value, they also state that, “The objective of ensuring that working and productive agricultural lands remain available for production agriculture, affordable and owned by individuals actively engaged in farming will be further advanced by the Option to Purchase at Agricultural Value, as incorporated below.”

III. Terms and Conditions

This obviously important segment of the Easement must be carefully tailored to the circumstances of the particular case. The Model suggests typical terms and conditions, but you should be prepared to adapt, modify, supplement, add, or omit provisions as your goals and the circumstances of your particular case dictate.

This segment of the Model is organized by collecting in Section A those provisions that deal with rights

retained absolutely by the Grantor, then collecting in Section B those provisions that deal with absolutely prohibited activities or uses, and finally collecting in Section C those provisions that deal with activities or uses that are permitted only with the prior written approval of the Grantor. Other ways of organizing this material are possible. For instance, some easements group together (1) all provisions relating to agricultural land-use practices, (2) all provisions relating to the construction and use of agricultural improvements, (3) all provisions relating to the construction and occupancy of residential improvements, etc.

It should also be noted that an additional category of terms and conditions is contained in the “Exhibit: Requirements and Restrictions,” which also contains provisions for amending its provisions from time to time by mutual consent of the Parties. This Exhibit should be carefully tailored to your own goals and circumstances. (In Appendix 5 you will find a “Restrictions Menu,” containing a number of *possible* provisions from which you may choose and adapt those that are relevant for your purposes.) In general, it is best to place in this Exhibit any provisions that you may have reason to adjust as circumstances change over time, whereas the basic principles of which these adjustable provisions are the practical application should be stated in this Part III of the body of the Easement.

III(A) Retained Rights

Note the important broad provision in the introduction to this section regarding “the customary rights and privileges of ownership not inconsistent with the stated purposes of this Easement.” The specific rights that are then enumerated do not constitute an exhaustive list of the “customary rights and privileges” that are thus retained. The Model lists a limited number of specific retained rights that might otherwise be questioned or compromised by an over-zealous, or insufficiently discriminating Grantee. Other rights that might be added to the list in certain circumstances include the following.

- The right to harvest fuel wood (and perhaps timber) for Grantor’s own use.
- The right to operate specified non-agricultural home businesses on the Property.
- The right to carry out educational activities other than or different from those described in the Model, perhaps including internship programs for prospective farmers.
- The right to allow certain individuals or groups other than the Grantors’ own family to occupy housing on the Property, or to allow market-rate rental of certain housing.

There are also some types of “activities, structures and uses” that the Model includes in Section C as requiring prior written approval but that you may want to include, instead, in Section A as something that Grantor has an unqualified right to do—or has a right to do provided certain requirements are met (e.g., construction of permanent agricultural improvements within a specified building envelope or within certain limitations on the size of the structures).

It should be noted that, if your easement includes any sort of land use plan or farm plan as a referenced exhibit or calls for the preparation of such a plan by the Natural Resources Conservation Service or other agency, then a number of the otherwise unqualified rights stated in this section may be qualified with the phrase “provided that the activity is consistent with the terms of the Plan” (or language to this effect).

III(B) Prohibited Uses

You will want to give careful consideration to the question of what activities should be included in this section as categorically prohibited and what activities should be included in the next section as prohibited unless specifically approved by the Grantee. It should be noted that the status of potential land uses prohibited by an easement differs significantly from land uses prohibited by a ground lease. In the case of a ground lease, the lessor can always agree to permit uses that are

not permitted by the terms of the lease. In the case of an Easement, however, prohibited land uses represent rights that the (charitable) Grantee has purchased or accepted as a tax-deductible donation. If the Grantee then agrees to permit such uses in a particular instance, it is returning some of those rights to the Grantor in a way that could alter the tax consequences—or tax-exemption consequences—of the easement. For this reason, the difference between “Prohibited” and “Prohibited without prior written approval” has more significant consequences in the case of the easement than in the case of the ground lease.

B(1) Use inconsistent with intent. Since it is impossible to enumerate and precisely describe every specific use or activity that you would wish to see prohibited, it is important to include a broadly framed statement, such as the one in this subsection, prohibiting all activities that are inconsistent with the intent of the Easement.

B(2) Extraction of soil and minerals. As presented, this section prohibits mining or extraction only so far as it “disturbs the surface of the land or degrades its agricultural productivity.” You may wish to prohibit these activities absolutely, regardless of their effect, or you may wish to permit them only with Grantee’s prior written approval, thus allowing Grantee to judge the effect on a case-by-case basis.

B(3) Structures not for permitted use. This section deals with another topic that you may prefer to address in the next section, which allows Grantee to make case-by-case judgments on all structures serving purposes other than the agricultural or educational. It is assumed here that *residential* structures that will be occupied by the Grantors or by others actively involved in farming the Property *are* “appropriate for and intended to support” permitted agricultural use. Note that the first clause of the section applies to both permanent and temporary structures, the second only to permanent structures.

The second clause of this section is intended to establish a principle that is crucial to the preservation

of affordability. The principle is most likely to be applicable in connection with residential structures and is addressed in this context in subsection C(4); however, other types of structures could have the same effect, so it is important that the application of the principle not be limited to residential structures.

B(4) Exhibit: “Requirements and Restrictions.”

This subsection explicitly establishes (and calls the reader’s attention to) the fact that, under the terms of this Easement, a number of specific activities may be prohibited by the terms of the “Requirements and Restrictions” exhibit even though they are not mentioned here in the body of the Easement. It also makes it clear that the prohibitions stated in the exhibit may be modified or supplemented over time and that, at any given time, such prohibitions are to be applied in their then current form.

B(5) Failure to achieve “Qualified Owner” status.

The principle stated here as a prohibition is stated as an “affirmative covenant” in section F below. You may choose to state it only in the latter form, but its importance and unusual nature are such that there is good reason to establish it explicitly in the body of the Easement although the details appear only in the “Restrictions and Requirements” exhibit.

B(6) Prohibition of conveyances not subject to Easement. The principle that is stated here as a prohibition emphasizes the affirmative requirement, stated in Section V(G), that any conveyance by Grantors of any ownership interest in the Property be fully and explicitly subject to the terms of the Easement. You may choose to eliminate one or the other version of the principle, or to retain both for emphasis. In any case it is useful to make it explicitly clear that the principle applies to the leasing of any part of the Property as well as to sales.

III(C) Prior written approval required.

The “activities, structures and uses” addressed in this section stand between those to which Section A gives the Grantors an absolute right and those to which Section B. absolutely removes Grantors’ right. These are activities, structures or uses that

may be consistent with the stated purposes of the Easement in some circumstances but not in others. Grantee is given the responsibility of deciding when and where they are consistent. Many types of activities will inevitably fall into this middle category; nonetheless, there is reason to place reasonable limits on the number of activities to be treated this way. The approval process entails time and effort for both parties. The more you are able to categorize activities one way or the other—as simply permitted or simply prohibited—the less burden there will be for both.

C(1) Development of permanent structures. Some easements allow Grantors to retain the right to develop permanent structures without prior written permission provided the structures are located within a specified “farmstead area” or “building envelope.” Other easements allow Grantors to retain this right provided that the total land area covered by all such improvements does not exceed a specified percentage of the Property. You may choose to use either of these approaches, or you may deal with the matter as the Model does based on the assumption that the Grantee should consider both the immediate impact of any construction and its effect on the long-term use and affordability of the Property.

C(2) Residential use. Since, in many market situations, high-end residential use is likely to be the “highest and best use” of land (the use commanding the highest prices), it is obviously important for the Grantee to assure that residential use isn’t allowed to separate from and compete with agricultural use.

C(3) Subdivision. In some situations you may want to prohibit subdivision absolutely rather than permitting it with prior written approval.

C(4) Leasing. It is obviously important to make sure that not only the Grantors but also any parties renting any part of the Property will comply with the terms of the Easement.

C(5) Exhibit: “Requirements and Restrictions.”

This clause serves as a reminder to the reader that other conditions requiring prior approval may be found in the attached exhibit.

C(6) Other uses inconsistent with purpose.

This clause makes explicit the Grantee’s power to interpret and apply the intent of the Easement regarding activities and uses that are neither explicitly permitted nor explicitly prohibited.

III(D) Approval Process

You can modify the process and timeframe specified in this section as you see fit, but it is important that some such explicit process and timeframe be prescribed so that there will be no question as to the compliance of either party—either during the approval process or years hence when it may be necessary to consult the written record to determine whether a given activity has been duly approved at some point.

III(E) Affirmative Covenant Regarding Continued Agricultural Use. [See also Section III(B)(5)]

This “affirmative covenant” is modeled in part on similar language found in the “Agricultural Preservation Restriction” used by the state of Massachusetts, but is otherwise a provision not commonly found in conservation easements, which generally entail the *giving up* of certain rights by the Grantors rather than the *taking on* of new affirmative obligations. However, there is no question as to whether a conservation easement can legally impose an “affirmative obligation” as well as a “negative burden.” Section 4 of the federal 1981 Uniform Conservation Easement Act states that, “A conservation easement is valid even though: . . . (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder.”

III(F) Enforcement of Terms and Conditions

These are relatively conventional provisions for the enforcement of a conservation easement,

stated broadly enough to be applicable in most jurisdictions. For samples of more detailed provisions see the final section of this chapter.

IV. Option to Purchase Property

The Purchase Option is here defined as “an integral part” of the Easement, which, like the rest of the Easement, “runs with the land” and is thus intended to be perpetual. There is no question that conservation easements can be (and for tax purposes must be) perpetual, and, as noted above, the federal Uniform Conservation Easement Act explicitly permits such an easement to impose “affirmative obligations” on the Grantors. Both the Vermont easement with purchase option discussed in Chapter 5 and the Massachusetts Agricultural Preservation Restriction explicitly state that the purchase option is an “integral” part of the easement and “runs with the land.” Nonetheless, in some jurisdictions, a perpetual purchase option may be viewed as a violation of the common law “rule against perpetuities,” or statutes based on this rule, even if it is embedded in an agreement that is otherwise permitted to run perpetually with the land. You are therefore advised to consult a qualified attorney on the question of whether to define the duration of the Option as perpetual or to define it as limited to a specified number of years. (Another approach that may be discussed with your attorney is the possible inclusion of a “back-up provision” like that used in the Model Agricultural Ground Lease (Section 14.4) stating that in the event the Option is “construed to be subject to any rule of law limiting the duration of such option,” the period for exercising the option shall then be construed as limited to a specified term.)

IV(A) Triggering of Option

Of the two types of “triggering Events” for which the Model provides, the first (giving Grantee an option to purchase if Grantors intend to sell) is the more common and more readily and agreeably enforceable. The second type (allowing Grantee to intervene and purchase the Property in certain circumstances even though Grantors do not want to

sell) clearly involves more onerous consequences for the Grantors and a potentially difficult and disagreeable task for the Grantee that seeks to exercise the Option in such circumstances. Your easement may not provide for this second type of triggering event, either because the owner of the Property is unwilling to grant an easement with an option that can be triggered in this way or because the potential Grantee finds that such an option would entail potential difficulties that outweigh the potential gain. We have included it in the Model, however, for those potential Grantors and Grantees who are prepared to go the extra mile to achieve the goal of maintaining active agricultural use of the Property. The purchase option in the Live Power Farm easement described in Chapter 2 does provide for this kind of triggering event.

Note that in Section IV(A)(2) the Model defines the second triggering event not simply as a failure to maintain active agricultural use but as a failure to cure a violation of the obligation to maintain “Qualified Owner Status” in accordance with the provisions of Exhibit B: Requirements and Restrictions. As noted in the commentary on Section A of Exhibit B, these provisions include several important protections for the Grantors. Furthermore, because the terms of the Exhibit can be amended by mutual agreement of the parties, it is possible to adapt or supplement these protections as circumstances change over time.

IV(B) Determination of Option Price

At various points in this section, the language will need to be adjusted if the only triggering event is to be Grantors’ intent to sell (e.g., in the first sentence of B(1) you would omit the parenthetical “if Grantors have proposed to sell...”).

B(1)(a). The requirement that the appraiser have experience with agricultural real estate in the local area is important. Most appraisers in most localities deal primarily with residential and commercial real estate, but not with real estate that is purchased or leased specifically for agricultural purposes. Such appraisers may be qualified to determine

the unrestricted market value of property that is valued as a country estate, but they are normally not qualified to determine the “as-restricted value” of property whose owners can use it only for agricultural purposes.

It is clearly fair to allow the party who did not select the first appraiser to commission a second appraisal by an appraiser of their own choosing, but the provision for as many as three appraisals may seem unnecessarily elaborate. This provision is intended, however, to deal with the possibility that one of the first two appraisers has inadequate experience with agricultural real estate, with the result that his or her appraisal (and the average of the two appraisals) is skewed by experience with residential rather than agricultural property—or is perceived by one of the parties to be thus skewed. In providing for a third appraiser selected by the other two, the intention is to put this final selection in the hands of disinterested professionals in position to identify another professional they would both trust to make a reasonable determination of the as-restricted value of agricultural property.

The Vermont option to purchase at agricultural value discussed in Chapter 5 calls for only one appraisal, “by a mutually approved disinterested appraiser selected by Grantor and Grantee, with the expense of such appraisal divided equally between Grantor and Grantee” (and even the one appraisal is not required if the parties are able to agree on a price without an appraisal).

B(1)(b). The opportunity for Grantors to choose this alternative method of determining the Option Price gives them some protection against a possible depreciating market for agricultural property. Of course, the price determined in this way—as the appraised as-restricted value at the time the Easement was granted, adjusted for inflation since that time—will not take into account (as the method described in B(1)(a) will) the value of any improvements that the Grantors have made since granting the Easement.

Note: The manner of determining the as-restricted value presented in the Model can be modified.

You may choose to define the as-restricted value simply as the appraised as-restricted value at the time of resale (alternative “a”), or simply as the appraised as-restricted value when the easement was executed adjusted for inflation (alternative “b”), rather than allowing the Grantor to choose between these alternatives. You may also define the purchase option price as the *greater* of alternative “a” or alternative “b,” which is the approach used with the Vermont option. Other variations are also possible. See Chapter 10: Resale Formula Design.

IV(C) Procedures for Exercising Option

This section will be considerably simplified if the Option can be triggered only by Grantors’ intent to sell—with all of Section C(2) thus omitted. The procedure for exercising an option triggered by a violation of the “Qualified Owner requirement” in Section C(2) is particularly sensitive and should be thought through carefully. In any case, you may choose to modify the time periods allowed for the various steps in Section C(1) and/or Section C(2).

IV(D) Completion of Purchase

You may choose to modify the time period allowed for completion and/or to describe a required process in greater detail.

IV(E) If Option Is Not Exercised

Note that there is no provision here for what will happen if Grantee does not exercise an option triggered by a violation of the “Qualified Owner requirement.” Grantee can still try to enforce the requirement, however, through the provisions of Section III(E) and III(F).

IV(F) Transfers Exempt from Option

These provisions make it clear that the option will not be triggered by transfers within a family or to someone already engaged in operating the farm as a partner of the owner. As noted in Chapter 5, the easement used in Vermont also provides an exemption for transfers to someone meeting the federal definition of “qualified farmer” (farm income constituting at least 50% of gross income).

V. Miscellaneous Provisions

Sections V(A–F)

Sections (A) through (F) are common provisions for this and other types of agreement. Note, however, that Section B (re: Severability) would result in the Purchase Option being eliminated from the Easement if it were found to be unenforceable on the grounds that, in its present (perpetual) form it violated the rule against perpetuities or law based on this rule. You may therefore want to insert, following Section B, a provision such as this:

C. Duration: *It is the intention of the Parties that the purchase option described in part IV hereof (the “Option”) shall continue in effect perpetually as an integral part of this perpetual Easement. In the event that the Option shall be construed to be subject to any rule of law limiting the duration of such Option, the time period for the exercising of the Option shall be construed to expire twenty (20) years after the death of the last survivor of the following persons:*

_____.

You should complete such a provision by specifying an identifiable group of young children, such as “all of the children born during the year immediately prior to the date hereof in _____.” [Identify a specific hospital in the region where the Property is located].

V(G) Subsequent Transfers by Grantors

This is a more detailed version of the principle that is also stated in Section III(B)(6) as a prohibition of transfers that are *not* subject to the Easement. See commentary on Section III(B)(6).

V(H) Assignment by Grantee

The requirement that any assignee be an eligible donee under the IRS Code is particularly important if the Easement has in fact been donated and if the Grantors/donors have taken a tax deduction as a result of the donation. If the Easement was sold rather than donated by the Grantors and if the Grantee paid for it with funds provided by a government program, then any law or regulation

having a bearing on the qualifications of entities holding easements purchased with such funds is particularly important.

V(I) Amendment

You may choose not to provide for amendment of the “body” of the Easement without the participation of a court of law as provided in Section J below. (However, you will probably still want to allow the updating and modification of Exhibit B: Requirements and Restrictions by the mutual consent of the Parties.)

It should be emphasized that any provisions for amendments that you do include must be limited by the stated purposes of the Easement, by applicable laws, and by IRS regulations. When the Grantors sell or donate valuable rights to the Grantee *in perpetuity*, it should generally be assumed that these rights—and the value attached to them—cannot be given back to the Grantors. If the Grantors have received benefits as a result of the donation of a conservation easement, any amendment of the Easement that affected the value of what had been granted would potentially affect those benefits. (Section 170(h) of the IRS Code defines a “qualified conservation contribution” as the “contribution (A) of a qualified property interest, (B) to a qualified organization, (C) exclusively for conservation purposes.” The Section further states that “a contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.”)

V(J & K) Extinguishment & Proceeds

These provisions recognize that the Easement represents an ownership interest with a monetary value that is transferred by the Grantors—either as a donation or in return for payment from Grantee. Under normal circumstances, Grantee cannot legally liquidate the monetary value of the rights that were granted to it. However, if circumstances affecting the Property should change so much that the Easement can no longer accomplish its purpose and if, for this reason, a court should “extinguish”

some or all of the Easement's terms and conditions, the Grantee does then have a claim on the value that had been granted to it and that would now otherwise flow back to the Grantors upon the extinguishment of the restrictions. These sections spell out the process whereby the Grantee can liquidate that claim when the Property is subsequently sold by Grantors.

Exhibit B: Requirements and Restrictions

This exhibit should be seen as a sample rather than as a model, since it is intended to serve as a vehicle for provisions that are adapted to the particular property and the particular circumstances that affect that property at a given time but that may be subject to change. In general, you should place in this exhibit any provisions that there may be reason to modify in order to carry out the basic purpose of the Easement through changing circumstances.

Part A. Active Agricultural Use and Qualified Owner Requirement

This is an important part of any conservation easement that includes a purchase option that can be triggered by a failure of the Grantors to maintain active agricultural use of the Property or otherwise maintain Qualified Owner status. Because of its important relationship to the purchase option, you might consider including some or all of it in Part IV of the Easement. We have chosen to include it in the Exhibit, however, because the sensitive nature of the requirement may call for adjustment of the details over time if its purpose is to be achieved with fairness to the Grantors. In particular, you will want to be able to adjust the dollar amount that is established as the minimum required average gross agricultural income. (If you choose to move this portion of the Exhibit to Part IV of the Easement, you will want to provide in Part IV for the periodic adjustment of the required minimum dollar amount.)

A(1). Potential grantors of a conservation easement containing this type of requirement will understandably want the minimum income

requirement to be set at a reasonably low level, and we assume that potential grantees will generally want to accommodate the legitimate concerns of such potential grantors. The goal is not to heighten the already difficult economic challenge facing most farmers; it is to assure, in so far as possible, that the Property will continue to be used by people who face the basic economic challenge of farming rather than by people for whom farming is a hobby.

An alternative approach to the income requirement is to require that at least a specified *percentage* of the Grantors' total income must be derived from agricultural use of the Property rather than requiring a minimum dollar amount of agricultural income. This approach is used in the Live Power Farm easement described in Chapter 2. It is also used in the "Vermont program" in defining "qualified farmers" who are exempt from the purchase option. This type of income requirement is an effective way to screen out the "hobby farmer" or "gentleman farmer" whose agricultural use of the property might generate a certain gross income but whose livelihood does not depend on that income. However, a significant difficulty with this approach is that, depending on the percentage that is required, it may also screen out farmers who must take outside jobs *so that they can afford to continue active agricultural use of the Property.*

Regardless of which approach is used, it is appropriate to establish the minimum requirement not on a year-by-year basis but in terms of the average for several years, so that a single year's bad luck with crops and/or markets cannot, by itself, result in a violation of the Easement. In any case, a violation of a requirement relating to annual income cannot be cured in less than a year, unless the violation is simply a failure to submit the necessary documentation. The Model therefore allows a full year to cure a failure to meet the minimum requirement. Section A(3), however, allows only 60 days to cure a failure to submit the necessary documentation.

A(2). This section assures the Grantors that they can continue to own and occupy the Property in

their retirement and in the event that illness or disability prevents them from actively farming the Property. You may wish to modify the specific terms regarding age and years of prior use stated in Section A(2)(a). Section A(2)(b) is very broadly stated. You may or may not want to try to establish more specific criteria.

Part B. (Sample) Land Use Restrictions

We have included a sampling of the kinds of detailed restrictions that may be included in such an Exhibit. But what is included in any one actual set of specific restrictions will of course depend on the nature of the specific property as well as on the views of Grantors and Grantee as to what kinds of restrictions are appropriate. See Appendix 5 for examples of other possible restrictions.

Part C. Amendment of Requirements and Restrictions

As suggested above, it is an essential feature of this type of exhibit that it be possible to amend it as circumstances change. The process of amendment must of course involve mutual consent of the Parties, but you may modify the procedures for seeking such an agreement. It is important to note the requirement that, "Any amendment adopted by the parties shall be consistent with the Statement of Purpose of the Easement and shall comply with Section 170(h) of the Internal Revenue Code and any regulations promulgated in accordance with that section." In other words, amendments to this exhibit should not undermine the basic conservation purposes of the Easement or restore to the Grantor basic rights that the Grantor has granted to the Grantee. (See commentary on Section V(I) above.)

Possible Additional Detailed Provisions

In practice, conservation easements vary as to the amount of detail with which basic provisions are fleshed out. Some include highly detailed provisions designed to ensure that the document's basic intent is clear and legally enforceable in a variety of possible circumstances. Others rely on more

generally stated provisions. In drafting the Model, we have tended to follow the latter course—in part because we have not wanted to obscure the basic logic of the document beneath a layer of "legalistic" language. However, such language can serve practical purposes and you may want to develop certain sections of your own document in greater detail. In that event, the sample provisions included below may be helpful.

Explicit Reference to Section 170(h) "Conservation Purposes"

Section 170(h) of the Internal Revenue Code identifies the circumstances under which the granting of a conservation easement will be treated as a tax-deductible charitable donation. To be treated in this way, the easement must be a "qualified conservation contribution," which "means a contribution (A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes." The section makes it explicitly clear that a perpetual "restriction on the use which may be made of the real property" is a "qualified real property interest," and that an organization that is recognized as tax-exempt under section 501(c)(3) is a "qualified organization." The section's definition of "conservation purposes," however, is more general and more various. It can be important, especially in the case of a donated conservation easement, to establish that the purposes of the easement do in fact qualify under this definition. In the sample language below, the bulleted provisions relate directly to the section 170(h) definition. Such language may be included in either the Recitals or the Statement of Purpose.

The grant of this Easement will serve the following "conservation purposes," as such term is defined in Section 170(h)(4)(A) of the Code: [select applicable purposes only]

- The preservation of open space, including farmland, pursuant to the following clearly delineated governmental conservation policies:

The Farmland Protection Policy Act, P.L. 97-98, 7 U.S.C. Section 4201, et seq.,

whose purpose is “to minimize the extent to which Federal programs and policies contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government and private programs and policies to protect farmland;”

[State] Right to Farm Law [citation];

[State] Conservation Easement Law [citation];

[State] Preferential Tax Law for Agricultural Land [citation];

[Other State laws, Executive Orders, and/or state and local conservation/growth management policies.]

- The preservation of open space for the scenic enjoyment of the general public from [describe highway/other public location].
- The protection of a relatively natural habitat for [describe fish, wildlife, or plants].
- The preservation of a land area for the education of the general public [specify educational activities such as farm visits for school children].
- The preservation of a land area of historic importance due to [describe historic importance].

Representation and Warranty Provisions

Some or all of the following “boiler plate” provisions may be included in Part I: Grant of Easement and Option. Most of these involve warranties by the Grantors that there are no legal issues, title deficiencies, or other problems that could affect the sufficiency of what is granted to the Grantee.

Authority To Execute Conservation Easement.

The person executing this Easement on behalf

of Grantee represents that the execution of this Easement has been duly authorized by Grantee. The persons executing this Easement on behalf of the Grantors represent that the execution of this Easement has been duly authorized by the Grantors.

No Litigation. *Grantors warrant that there is no action, suit or proceeding which is pending or threatened against the Property or any portion thereof relating to or arising out of the ownership or use of the Property, or any portion thereof, in any court or before or by any federal, state, county or municipal department, commission, board, bureau, agency or other governmental instrumentality.*

State of Title. *Subject to the matters of record as disclosed in the Title Report, Grantors warrant that they have good and sufficient title to the Property and that all mortgages are subordinated to this Easement and Option.*

Compliance with Laws. *Grantors have not received notice of and have no knowledge of any material violation of any federal, state, county or other governmental or quasi-governmental statute, ordinance, regulation, law or administrative or judicial order with respect to the Property.*

Hazardous Materials. *Grantors represent and warrant that the Property (including, without limitation, any associated air, soil, groundwater, and surface water) is free of any conditions that individually or in the aggregate (1) pose a significant risk to human health or the environment; (2) violate any environmental law; or (3) could reasonably be expected to cause any person to incur environmental investigation, removal, remediation, or other cleanup costs. Grantors warrant that there are no underground tanks located on the Property. Grantors further warrant that they shall comply with all environmental laws in using the Property and that they shall keep the Property free of any material environmental defect, including, without limitation, contamination from hazardous materials.*

Provisions Relating to Violations, Corrective Action, Enforcement

The following provisions may be used to replace, clarify, elaborate, and/or strengthen the provisions of section III(F).

Notice of Violation: Corrective Action. *If Grantee becomes aware that a violation of the terms of this Easement and Option has occurred or is threatened to occur, Grantee shall give written notice to Grantors of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantors fail to cure the violation within thirty (30) days after receipt of notice from Grantee, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing such violation within the thirty (30) day period or fail to continue diligently to cure such violation until finally cured, Grantee shall have all remedies available at law or in equity to enforce the terms of this Easement, including without limitation the right to seek a temporary or permanent injunction with respect to such activity, to cause the restoration of that portion of the Property affected by such activity to the condition that existed prior to the undertaking of such prohibited activity, and/or to recover any damages arising from the violation. The Remedies described in this paragraph shall be cumulative and shall be in addition to all remedies hereafter existing at law or in equity.*

Costs of Enforcement. *In any action, suit or other proceeding undertaken to enforce the provisions of this Easement and Option, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses including attorneys' fees, and if such prevailing party shall recover judgment in any action or proceeding, such costs and expenses shall be included as part of the judgment. In addition, any costs of restoration shall be borne by Grantor.*

Emergency Enforcement. *If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the protected values of the Property, Grantee may pursue its remedies under this paragraph without prior notice to Grantors and without waiting for the period to cure to expire.*

Grantee's Discretion. *Enforcement of the terms and provisions of this Easement shall be at the discretion of Grantee, and the failure of Grantee to discover a violation or to take action under this paragraph shall not be deemed or construed to be a waiver of Grantee's rights hereunder with respect to such violation in the event of any subsequent breach.*

Waiver of Certain Defenses. *Grantors hereby waive any defense of laches, estoppel, or prescription.*

Acts Beyond Grantors' Control. *Nothing contained in this Easement and Option shall be construed to entitle Grantee to bring any action against Grantors for any injury to or change in the Property resulting from causes beyond Grantor's control, including fire, flood, storm, and earth movement.*