

MODEL

Grant of Purchase Option

with Commentary



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Commentary updated 9/16/2022

Acknowledgements

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Colcom Foundation



Nothing contained in the model and commentary is intended to be relied upon as legal advice or to create an attorney-client relationship. The material presented is generally provided in the context of Pennsylvania law and, depending on the subject, may have more or less applicability elsewhere. There is no guarantee that it is up to date or error free.

Preface

A Right Without Obligation

A purchase option assures the option holder of the right to purchase property at a certain price within a certain time period but without an obligation to do so. It expands the opportunities for and limits the risks of real estate investment. The guide [Purchase Options](#), published by WeConservePA, explains common and creative uses of purchase options to facilitate conservation projects. The [Model Grant of Purchase Option](#) provides a flexible platform to implement the strategies and address the various circumstances described in [Purchase Options](#).

The commentary to the model is intended as a resource, available to both land trusts and landowners, to explain the purpose of each provision in the model; refer the user to pertinent portions of [Purchase Options](#) for deeper or more expansive analysis of issues; and provide alternative and optional provisions.

Related Tools

The [Model Grant of Purchase Option](#) may be used to acquire rights to purchase any real estate interest: land ownership, conservation easement, trail easement, leasehold, and others. The purchase may be for full value or part donation (bargain-sale). Notwithstanding its broad application, other tools may be appropriate in certain situations:

- *Seeking commitments and assurances.* A purchase and sale agreement, like a grant of purchase option, involves a commitment by the landowner to convey property interests; unlike a purchase option, a purchase and sale agreement creates an obligation for the prospective buyer (or donee) to acquire the interests. A purchase and sale agreement also provides legal protections to the prospective owner by incorporating representations, warranties, and covenants on the part of the seller. See the guide [Purchase and Sale Agreements for Conservation Projects](#) for sample provisions that you can add to standard Pennsylvania Association of Realtors purchase agreement forms to address conservation issues.
- *Getting a chance.* When a landowner is not presently interested in selling, a right of first purchase guarantees its holder the opportunity to make an offer to purchase should circumstances change. The guide [Right of First Offer and Right of First Refusal](#) explains the uses of the rights of first offer and first refusal. See also the [Model Grant of Right of First Offer](#) and the [Model Grant of Right of First Refusal](#).
- *Wholly donated easements.* The [Model Conservation Easement Donation Agreement](#) sets forth the steps for establishing an easement and the expectations and obligations of the prospective easement donor and easement holder during the process.

WeConservePA publishes these and other model legal documents and guides regarding conservation real estate transactions at the WeConservePA.org library.

Improve the Guidance

WeConservePA welcomes suggestions for improving its guidance. Please email your comments to info@WeConservePA.org.

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The Model

Prepared by:

Name:

Address:

Phone:

Return to:

Name:

Address:

Tax parcel(s):

Model Grant of Purchase Option

WeConservePA publishes this model at
WeConservePA.org. Please refer to the commentary
for explanations of the model's content and for
alternative and optional provisions.

Grant of Purchase Option

Date of Grant:

Owners:

Option Holder:

Option Exercise Date:

INTENDING TO BE LEGALLY BOUND, the Owners identified above ("Owners") grant to the Option Holder identified above ("Option Holder") the option to purchase (the "Purchase Option") described below affecting all or a portion of the property (the "Property") described in the attached "Property Description".

1. Property Interests

The following real estate interests are the subject of the Purchase Option (the "Property Interests"): **[DELETE, MODIFY, OR ADD ITEMS AS APPLICABLE]**

Ownership. Good and marketable title to the Property by delivery of special warranty deed. If the Purchase Option is exercised, the transaction is to be governed by the terms of the then-current form of purchase and sale agreement made available by the Pennsylvania Association of Realtors.

Access Easement. An easement over the area identified as _____ on the attached Easement Plan for the following purposes: _____. The form of the grant of access easement is to be the most recent version of the *Model* _____ published by WeConservePA.

Conservation Easement. A conservation easement on the land shown on the attached Easement Plan. If an "Excluded Area" is identified on the Easement Plan, only the remainder of the Property (other than the Excluded Area) is subject to the conservation easement. The document granting the conservation easement is to be the most recent version of the *Model Grant of Conservation Easement and Declaration of Covenants* published by WeConservePA. The protection areas shown on the Easement Plan are to be given their

respective meanings as set forth in the *Model Grant of Conservation Easement and Declaration of Covenants*.

Leasehold. A leasehold estate with respect to the area identified as _____ on the attached Lease Plan for a term of not less than ____ years.

2. Exercise of Option

The Purchase Option must be exercised, if at all, by written notice to the Owners delivered to their address set forth next to their signatures below on or before the Option Exercise Date identified above. If the Option Holder exercises the Purchase Option, closing of the acquisition of the Property Interests ("Closing") will be held at a mutually agreeable location in the county in which the Property is located on a mutually agreeable date not later than ninety (90) days following the Option Exercise Date.

3. Purchase Price for Property Interests

The consideration to be paid for the Property Interests at Closing (the "Purchase Price") is **[DELETE THE ITEM THAT DOES NOT APPLY]**

- the sum of \$_____.
- ____% of the fair market value established by one or more appraisals performed in accordance with Uniform Standards of Professional Appraisal Practice. Option Holder is responsible for providing and paying for all appraisals required to establish the Purchase Price to the satisfaction of those contributing funding for the acquisition.

4. Option Consideration

In consideration of the grant of this Purchase Option, Owners acknowledge receipt of the sum of \$1.00.

5. Extension of Purchase Option

The Option Exercise Date, Closing date, or both may be extended by mutual agreement of Owners and Option Holder.

6. Transactional Costs and Expenses

- 6.1 **Owners' Obligations.** At Closing, Owners must pay (or otherwise remove as a prior encumbrance on the Property Interests) all mortgages, liens and encumbrances securing the payment of money and any real estate taxes that remain unpaid as of the Closing or relate to preferential tax treatment prior to Closing. Whether or not Closing occurs, Owners are responsible for the costs and expenses of any attorney or other advisors engaged by Owners.
- 6.2 **Option Holder's Obligations.** Whether or not Closing occurs, Option Holder is responsible for the costs of title, survey, environmental and other inspections, applications for funding, any subdivision or other governmental approvals required as a condition of Closing, and preparation of Closing documents to transfer the Property Interests.

7. Transfer of Purchase Option

This Purchase Option is freely assignable. Option Holder must notify Owners of the name and address of the transferee for notices.

8. Condition of Property

Owners must maintain the Property in its natural, scenic, open and, if applicable, wooded condition through the Closing or earlier expiration of the Purchase Option.

9. Attachments

The following attachments referred to in this Grant of Purchase Option are incorporated into the document by this reference:

- Property Description
- **[DELETE, MODIFY, OR ADD ITEMS AS RELEVANT]** Easement Plan

10. Recording

This Purchase Option may, at the option of the Option Holder, be recorded in the Office for the Recording of Deeds (the "Public Records") in the county in which the Property is located. If Option Holder fails to exercise the Purchase Option, or fails to complete Closing once the Purchase Option is exercised, Option Holder must execute, at the request of Owners, a release of this Grant of Purchase Option for recording in the Public Records.

INTENDING TO BE LEGALLY BOUND, Owners have signed and delivered this Grant of Purchase Option as of the Date of Grant identified above.

Street Address for Notices:

Signatures of Owners:

_____(Seal)

_____(Seal)



This document is based on the Model Grant of Purchase Option
(v. 2022.09.16) provided by WeConservePA.

Nothing contained in the model, which was prepared in the context of Pennsylvania law, is intended to be relied upon as legal advice or to create an attorney-client relationship. There is no guarantee that it is up to date or error free. It should be revised under the guidance of legal counsel to reflect the specific situation.

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF _____ :

ON THIS DAY _____, before me, the undersigned officer, personally appeared
_____, known to me (or satisfactorily proven)
to be the person(s) whose name(s) is/are subscribed to this Grant of Purchase Option, and
acknowledged that he/she/they executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Print Name: _____, Notary Public

Commentary to the Model Grant of Purchase Option

General Instructions

Read the Commentary. The purpose of each provision is explained and, often, alternative approaches are described and optional provisions provided.

Guides and Models. Unless otherwise noted, all guides and model legal documents referenced in the commentary are published by WeConservePA and, thanks to WeConservePA's donors, made available free-of-charge at the [WeConservePA.org](https://www.WeConservePA.org) library.

Structure Tracks Model. The model follows a simple outline structure, and the commentary follows the same pattern to make cross-referencing easy.

Get Legal Counsel. The model and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The models must be revised to reflect the specific circumstances of the particular project. Any document drafted with assistance of these models should be completed with the guidance of legal counsel to ensure that the document accomplishes what is intended without unintended consequences.

Disclaimer. Once a document based on the model has been prepared or reviewed by an attorney licensed to practice law in the applicable state, delete the disclaimer near the end of the model that reads "Nothing contained in the model ..."

Other States. Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.

Updates. Check the [WeConservePA.org](https://www.WeConservePA.org) library periodically for updates to the model.

Format and Identifying Information

Recording? See section 10 of the commentary, which addresses the recording (or non-recording) of the document and alternatives.

Space for Recording Information. The top of the model's first page provides space for information required by some county recording offices: the name and address of the preparer, the person to whom the document is to be returned, and the tax parcels of the real estate to which the document pertains. If the information is unneeded or undesirable

in a particular county, delete the text but keep the lines in order to preserve a 3-inch margin at the top of the first page.

Margins. Minimum margin requirements vary among counties; however, a typical requirement is a 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right, and bottom margins. (Page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5-inch by 11-inch paper. The model is formatted to conform to these specifications.

Preparer Information. Pennsylvania law does not require that a licensed attorney or law firm prepare or be identified as the preparer of the document; however, non-lawyers preparing easement documents must take care to comply with applicable legal and ethical standards.

Staff. A non-lawyer employed as staff by the Holder or Owners (i.e., a party to the transaction) may prepare the easement document and be named as the preparer.

Non-staff. Non-lawyers who are not staff of one of the parties with an interest in the transaction may not provide legal documents for transactions. Producing such documents for others constitutes the unauthorized practice of law.

Basic Document Information

Title of Document

Purpose. The title “Grant of Purchase Option” differentiates the granting document (referred to in this commentary as the “Grant”) from the real estate interest (the “Purchase Option”) granted by execution and delivery of the granting document.

Date of Grant

Purpose. This identifies the date of the Grant, which is also the earliest date upon which the Option Holder may exercise the Purchase Option.

Owners

Purpose. This identifies the full legal names of the persons who own the land that is the subject of the Purchase Option.

Names Don’t Match Deed. If the full legal names of the Owners do not match those on the last deed of record (for example, there has been a death), it is good practice to recite the off-record facts to clear up the apparent gap in title. These facts typically are recited either with the names of the Owners at the beginning of the granting document or at the end of the attached Property Description.

Handling Multiple Owners

Options to Purchase Land. As discussed in the guide [Purchase Options](#), a purchase option is an excellent tool to sort through, and gain control over, messy ownership situations. There is no need to get all of the owners on board at the same time with the same transaction. The Option Holder can deal with each owner of a percentage interest in the Property separately. The Option Holder is not obliged to purchase *any* of the interests unless its ready, willing and able to purchase *all* of the interests in the Property.

Options to Purchase Easements. An easement (whether for access or conservation) must be granted by all the persons holding title to the Property in order to be valid and legally binding. As such, all the titleholders must commit to sell their interests in order for the option to purchase an easement to be effective.

Owner Relationships. The relationship of multiple Owners to each other may be included but is not necessary for recording or other purposes. Examples: X and Y, husband and wife, or X and Y, as joint tenants with rights of survivorship.

Type of Entity. If a person other than an individual is granting the Purchase Option, a phrase identifying the nature of the person is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania limited partnership.

Option Holder

Purpose. This identifies the proper legal name of the Option Holder and contact information for the Option Holder's project representative.

Type of Entity. A phrase identifying the nature of the Option Holder is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania nonprofit corporation.

Option Exercise Date

Purpose. This identifies the date on or before which the Option Holder must exercise the Purchase Option, if at all.

Strict Observance. The Option Exercise Date is a critical date. To avoid a potential dispute about whether or not the Purchase Option was timely exercised, the selected date should not fall on a weekend or holiday. Option Holder must exercise the option, if at all, strictly in accordance with its terms. Unlike many other types of contracts, this is an area of the law in which a good faith effort or substantial compliance is not enough.

Opening Recital

Purpose. The opening recital sets forth who is conveying the purchase option to whom regarding which particular real property.

Intending to be Legally Bound. Purchase options must be supported by consideration, or a legally sufficient substitute for consideration, to be enforceable against the Owners. Under Pennsylvania law, the phrase “intending to be legally bound” is a valid substitute for consideration if the Owners were not compensated for the Grant.

Main Body of the Grant

1. Property Interests

Purpose. This section identifies the real estate interest (or interests) that the Option Holder will acquire if the Purchase Option is exercised.

Possible Property Interests. The model notes four property interests common to conservation transactions: fee simple ownership, trail or other public access easement, conservation easement, or leasehold. (These particular options are discussed in more detail below.) Other possible interests abound, for example: a right of entry for resource management purposes; an easement for vehicular access to adjoining land; or the right to hunt deer to control damage to forest resources.

Tailor the Model. Users may tailor the model to acquire the right to purchase any real estate interest. Delete the Property Interests listed in the model that do not apply to the circumstance. If none apply, add the relevant interest. Further customize the specifics as appropriate to the situation.

Owners’ Deliverables. To avoid potential disputes and litigation, the Grant must precisely identify what the Owners are required to do, or deliver, upon exercise of the Purchase Option. To resolve any doubt, the documents to be delivered by the Owners at Closing may be attached to, and incorporated into, the Grant.

Ownership Property Interest

Minimizing Risks. The guide [Purchase Options](#) explains some of the risks to the Option Holder if a purchase option requires only the delivery of a deed with no other specifics upon the exercise of the option. To lessen these risks, the model provides that if the Purchase Option is exercised, the transaction will be governed by a well-established form of [purchase and sale agreement](#).

Alternative. If users of the model prefer a form of agreement other than the Pennsylvania Association of Realtors form, they may incorporate their selected form into the Grant by, for example, substituting the following:

If Option Holder exercises the Purchase Option, the transaction is to be governed by the terms of the purchase and sale agreement attached to, and incorporated into, this Grant of Purchase Option.

No Purchase Agreement. The sentence beginning, “If the Purchase Option is exercised...” may be deleted if the Owners and Option Holder are comfortable that the exchange of a deed against delivery of the purchase price is all that is involved with the transaction. The Option Holder needs to evaluate, with advice of counsel, whether it is comfortable with relying solely on its title and other investigations because, without a purchase and sale agreement, it will have no assurances from the Owners to rely upon.

Future Purchase Agreement. The following may be substituted for the sentence beginning “If the Purchase Option is exercised...”:

Owners agree to negotiate in good faith with Option Holder the terms of a purchase and sale agreement for the Property for the same Purchase Price and with the same Closing date set forth in this Grant and on such other terms and conditions as are mutually agreeable to the parties.

Due diligence investigations may, and often do, disclose problematic title or physical conditions of the Property. These issues can be raised, and specifically addressed, in a purchase and sale agreement negotiated when due diligence is underway and, perhaps, close to completion.

Access Easement

If the Property Interest is a public access easement for recreational purposes, one of several models available in the Model Documents area of the WeConservePA.org library (accompanied by a plan identifying the easement area) will, in many cases, be sufficient to set the material terms of the grant of access easement. For other access easements, the document to be delivered at Closing may be attached to the Grant and the Property Interest could be described, for example, as follows:

Access Easement. An easement for [briefly describe the nature of the access] as set forth in the attached document entitled “Grant of Access Easement”.

Be sure to add the name of the attached document to the list of attachments incorporated into the Grant in section 9 “Attachments.”

Conservation Easement

If the Property Interest is a conservation easement, the material terms of the grant of conservation easement and declaration of covenants to be delivered at Closing are set by stipulating that the Model Grant of Conservation Easement and Declaration of Covenants published by WeConservePA will be used and that the Property will be conserved as Highest Protection Area, Standard Protection Area, and Minimal Protection Area as these areas are shown on an Easement Plan incorporated into the Grant.

Leasehold

The default provision leaves a number of material terms to be determined. There are several approaches to resolve potential issues:

- Incorporate the form of lease agreement as an attachment. To accomplish this, attach the document and append the following to the default provision:

The document entitled “Lease Agreement” attached to, and incorporated into, this Grant is to be executed and delivered at Closing.

- Incorporate a schedule setting the material terms to be included in the Lease Agreement to be delivered at Closing. To accomplish this, attach the schedule and append the following to the default provision:

The form of lease to be executed and delivered at Closing (the “Lease Agreement”) will include the terms set forth in the schedule entitled “Lease Terms” attached to, and incorporated into, this Grant. The Lease Agreement will be prepared by Option Holder and submitted to Owners for review and approval, not to be unreasonably withheld or delayed.

2. Exercise of Option

Purpose. This section sets the procedure by which the Purchase Option must be exercised, if at all, and sets the terms under which Closing of the transaction must occur.

Address for Notices. Notice of exercise must be given strictly in accordance with the terms of the Grant. Users need to check that the address furnished on the signature lines allows speedy delivery: a street address where notice can be hand-delivered or served by an overnight delivery courier.

Additional Detail. The default provision may be expanded to specify in detail the requirements for proper exercise of the Purchase Option; for example, setting the precise time of day (and time zone) that is the deadline for notice delivery; specifying acceptable modes of delivery; and setting corresponding time frames for delivery applicable to each. The advantage of specificity is forming a safe harbor where the Owners cannot dispute that notice was timely given. The disadvantage is that any deviation from the stipulated requirements may invalidate the notice even if it was, in fact, delivered before expiration of the deadline. Users should seek advice of counsel when incorporating additional detail into the notice provision.

Closing. The default provision (closing 90 days after exercise) is a mere placeholder. Any number of days or months may be substituted.

3. Purchase Price for Property Interests

Purpose. This section sets the compensation that, upon exercise of the Purchase Option, the Option Holder is obligated to pay at Closing for the Property Interests.

Two Choices. The model provides two alternatives for setting the Purchase Price for the Property Interests: (1) fixed price as of the Date of Grant or (2) determined by appraisal at a later date.

Appraisal Standard. The appraisal alternative requires the use of the Uniform Standards of Professional Appraisal Practice, which are generally accepted standards for professional appraisal practice.

Requirements of Funding Sources. Conservation projects are often funded by grants from public or charitable sources, who want and need assurance that they are not paying more than fair value. Many public funding sources also require more than one appraisal. To give the needed assurance and prevent any dispute over which appraisal sets the Purchase Price, the model provision provides that the appraisal establishing the Purchase Price must be satisfactory to these funding sources.

Clarification. If desired, the following clarification may be added:

The appraisal is to be delivered to Owners not later than ninety (90) days prior to the Option Exercise Date. If applicable, the appraisal may be delivered conditioned upon subsequent acceptance by Funding Sources.

The number of days may be changed; however, the timing needs to coordinate with the requirements of the Funding Sources (if applicable) and the possibility that the Owners may obtain a Second Appraisal (see below) or that a Review Appraisal (see below) may be required. It is imperative that the Option Holder know the Purchase Price before the Option Exercise Date.

Floor on Purchase Price. When the Purchase Price is to be determined by appraisal, some Owners may not be willing to risk receiving payment of less than a certain amount, no matter the results of the appraisal. Among other reasons, they may not be able to clear the title of mortgage liens if a minimum Purchase Price is not available at Closing. The solution is to create a floor Purchase Price by adding the following to the end of the appraisal alternative: “but not less than \$___ unless approved by Owners.”

Ceiling on Purchase Price. There is no need to set a maximum Purchase Price because, if the appraised value is higher than budgeted by the Option Holder, the Purchase Option will not be exercised (unless the Owners agree to the lower Purchase Price). If the Owners have targeted a Purchase Price they expect for the Property interest, the Option Holder (if a charitable organization) may propose a donation of the appraised value in excess of the targeted Purchase Price. If that is acceptable to the Owners, the following may be added to the section to implement that agreement:

Owners have voluntarily limited the Purchase Price to a maximum of \$____. Any value in excess of that amount is considered a donation to Option Holder.

Multiple Appraisals. If the Owners are not satisfied that they can rely upon a single appraisal to establish a fair Purchase Price, the following may be added to §3:

Owners may elect to obtain their own appraisal for purposes of establishing the Purchase Price (the "Second Appraisal"). The Second Appraisal must conform to the requirements of Uniform Standards of Professional Appraisal Practice and be paid for by Owners. The Second Appraisal must be delivered, if at all, to Option Holder not later than thirty (30) days after delivery to Owners of the appraisal obtained by Option Holder (the "First Appraisal"). If the Purchase Price set by the Second Appraisal is within five (5%) percent of that set by the First Appraisal, the Purchase Price is to be set at the midpoint between the two, subject to acceptance by Funding Sources, if applicable.

If the Purchase Price set by the Second Appraisal exceeds the First Appraisal by more than five (5%) percent, Option Holder may elect, by notice to Owners within thirty (30) days following delivery of the Second Appraisal, to commence the following procedure (the "Review Appraisal"): The first two appraisers shall select a third appraiser to perform a review of the First Appraisal and the Second Appraisal for the purpose of setting a Purchase Price not greater than that set by the Second Appraisal and not lower than that set by the First Appraisal. The cost of the Review Appraisal is to be borne in equal shares by Owners and Option Holder whether or not the Purchase Option is exercised. If the Review Appraisal is delivered within ten (10) days of the Option Exercise Date, the Option Exercise Date shall be extended to ten (10) days following delivery of the Review Appraisal. If Option Holder fails to elect the Review Appraisal procedure, the Purchase Price to be paid at Closing (if the Purchase Option is exercised) shall be as set forth in the Second Appraisal unless otherwise agreed in writing by Owners and Option Holder.

The phrase "five (5) percent" in the above text may be changed to conform to the agreement of the parties but typically the range will not exceed ten (10) percent. The number of days for notice and delivery may also change but the entire appraisal process must be concluded, and the Purchase Price definitively set, before the Option Exercise Date.

4. Option Consideration

Purpose. This section sets the value received by the Owners in consideration for the Grant of Purchase Option.

Should the Option Holder Pay for the Option? The guide [Purchase Options](#) explains why it is not unusual for Owners to receive little or no cash in exchange for granting a purchase option. The nominal payment provided by the model's default provision reflects this situation.

Cash Consideration. If the Owners require cash compensation for the Grant beyond the nominal payment provided for in the model, replace the model's default text with a provision such as the following:

In consideration of the Grant of this Purchase Option, Owners acknowledge receipt of the sum of \$___ (the "Option Payment") paid by Option Holder on or before the Date of the Grant. The Option Payment is non-refundable whether or not the Purchase Option is exercised; however, if the Purchase Option is exercised, the Option Payment is credited against the balance of the Purchase Price otherwise due at Closing.

If No Credit. In the alternative set forth above, the Option Payment is applied to the Purchase Price at Closing just as a deposit under an agreement of sale would be. If this is not to be the case, delete the remainder of the sentence starting with the semicolon.

Option Holder's Efforts as Additional Consideration.

The Option Holder will have to make a substantial investment of time, energy, and money to complete the purchase if the owners grant the purchase option. The default provision of the model may be expanded to include the following provision that expresses the Owners' understanding that the Option Holder's willingness to make that investment is an inducement to the Owners to take the property off the market and allow the Option Holder the opportunity to proceed:

As additional consideration for the grant of this Purchase Option, Option Holder agrees to apply for, and use reasonable good faith efforts to obtain, funding of the Purchase Price from one or more funding sources.

Funding Plan. To further communicate the complexity and effort that the Option Holder will take on to complete the project and, if appropriate, indicate that a contribution in support of the project is expected from the Owners, the above provision may be further expanded by adding the following:

These sources include the following:

____% Commonwealth of Pennsylvania
 ____% County in which the Property is located
 ____% Municipality in which the Property is located
 ____% Other Funding Sources
 ____% Bargain-sale contribution by Owners
 100%

Fixed Instead of Percentage. The funding plan may alternatively be expressed in dollar amounts, for example:

\$_____ [Identify Funding Source]
 Balance of Purchase Price: Bargain-sale donation by Owners

5. Extension of Purchase Option

Purpose. This section provides a mechanism for the Option Holder to gain more time to exercise the Purchase Option or close on the purchase following exercise of the Purchase Option.

Default Provision is Placeholder. The Owners and Option Holder may agree to extend the dates with or without the existence of this provision. The provision's purpose is to serve as a placeholder to be replaced if the parties agree to provide for extension of the Option Exercise Date, the Closing date as described below.

Extensions. Extension periods are necessary when the time frame for exercising the Purchase Option or closing the transaction is not sufficient for the Option Holder to achieve a high degree of certainty as to project completion. Extension periods are also desirable to allow time for the Option Holder to handle unanticipated setbacks in the course of project completion. The Owners may find an extension period to be preferable to a longer initial term because they can set conditions that must be met for the Option Holder to merit additional time.

Extensions in Response to Progress. The Owners may be willing to extend the option period if they are comfortable that progress is being made towards project completion. If so, the Option Holder may want to consider offering benchmarks to evidence that progress; for example, the following may be substituted for the model's default provision:

The Option Exercise Date is automatically extended an additional _____ (____) days upon delivery to Owners, before the then-scheduled Option Exercise Date, of written evidence that Option Holder has obtained commitments from funding sources identified in §4 in an amount not less than ____% of the Purchase Price.

The Closing Date is automatically extended an additional _____ (____) days upon delivery to Owners, before the then-scheduled Closing Date,

of copies of grant contracts issued by funding sources in an aggregate amount not less than ____% of the Purchase Price.

Extensions in Response to Payment. The Owners may be willing to extend if they are relieved of the burden of carrying costs generated by the Property. If so, the Option Holder may want to offer periodic payments calculated to offset the Owners' obligations to pay taxes, insurance and maintenance during the extension period. The Closing Date may be substituted for the Option Exercise Date in the following example:

The Option Exercise Date is automatically extended an additional _____ (____) days upon payment to Owners, not later than the then-scheduled Option Exercise Date, of the sum of \$_____ (each, an "Extension Payment"). Extension Payments are non-refundable, whether or not the Purchase Option is exercised; however, if the Purchase Option is exercised, Extension Payments are credited against the balance of the Purchase Price otherwise due at Closing.

If the Owners are unwilling to allow unlimited extensions, add the following to the end of the above provision: "Owners have no obligation to extend the Option Exercise Date past _____."

6. Transactional Costs and Expenses

Purpose. This section allocates between the Owners and Option Holder the costs and expenses of Closing and other transactional expenses.

Clear Title. The Owners are required to clear title to the Property interests by removing liens for taxes and other items that can be removed by the payment of money. This section may be deleted if a purchase and sale agreement was incorporated into the Grant. (See the commentary to §1 above.)

Transactional Costs. The Option Holder is responsible for all transactional costs and expenses except for Owners' obligations under §5.1.

Realty Transfer Tax. Transfer of real estate to a conservancy (that is tax exempt pursuant to §501(c)(3) of the Internal Revenue Code and has a primary purpose of preserving land for historic, recreational, scenic, agricultural, or open space opportunities) is excluded from realty transfer tax; so too are a number of other conservation-related real estate transactions. See the WeConservePA guide [Realty Transfer Tax Exclusions for Conservation-Related Transactions in Pennsylvania](#) for more information. (In most of Pennsylvania, 2% in realty transfer taxes are assessed on most transfers of real property. By custom, the seller and buyer split the tax.)

Credit Option Holder for Tax Savings. Absent an agreement to the contrary, the Owners will receive a windfall (1% tax savings) arising solely from the Option Holder's status as a conservancy. To allow the Option Holder the benefit of that savings, add the following subsection to the end of the section:

- 6.3 **Realty Transfer Tax.** Option Holder is entitled to a credit against the Purchase Price payable at Closing for the realty transfer tax otherwise due from Owners on the transfer of the Property interests but for the status of Option Holder as a tax-exempt conservancy.

7. Transfer of Purchase Option

Purpose. The section provides the Option Holder the flexibility to assign the Purchase Option to another party. The rationale underlying the right to assign freely is that the Owners' interest is to receive payment in full of the Purchase Price at the time of transfer. The identity of the transferee is irrelevant.

Limit to Qualified Organization. The Owners may want to restrict assignment of the Purchase Option to a qualified organization as defined in §170(h) of the Internal Revenue Code, if, for example, they are agreeing to a Purchase Price below fair value because it is for a conservation cause or if they are seeking tax benefits for a bargain sale of the Property Interests. In such cases, substitute the following for the default provision:

Option Holder may not assign this Purchase Option except to a qualified organization as defined in §170(h) of the Internal Revenue Code.

8. Condition of Property

Purpose. This section assures that conservation values within the Property will not be degraded during the term of the Purchase Option.

Portion of the Property. If the condition of only a portion of the Property has bearing on the Property Interest, replace "Owners must maintain the Property..." with "Owners must maintain the portion of the Property subject to the Property Interests..."

9. Attachments

Purpose. This section incorporates the attachments referred to in the Grant into the document.

Other Attachments. The Property Description is always attached. The Easement Plan is needed to locate an easement or other area that is the subject of a Property interest. Other documents to be delivered at Closing may be attached as discussed in §1.

10. Recording

Purpose. This section assures the Option Holder of the opportunity to exercise the Purchase Option whether or not the identified Owners continue to own the Property.

Release. If the Purchase Option is not exercised by the Option Exercise Date, the model requires the Option Holder to sign a release in recordable form to clear the Grant from the Public Records. If the Owners are concerned about the Option Holder's compliance with this requirement, the release can be signed at the same time as the Grant and held by a mutually agreeable escrow agent until the Option Exercise Date passes without exercise of the Purchase Option.

Privacy Concerns. The Owners or Option Holder may want to keep the terms or the very existence of the Purchase Option entirely private.

- One alternative to recording the Grant is to **record a redacted version** of the Grant that eliminates sensitive information. For example, the text of §3 (Purchase Price) may be deleted and the following substituted: "Intentionally omitted in recorded document."
- A second alternative is to **record a short summary** of the essential information needed to furnish public notice of the existence (but not the terms) of the Purchase Option. The document would need to include only the following items:
 - A title, for example, "Memorandum of Grant of Purchase Option";
 - County recording office requirements for recording above the title of the document, for example, parcel identification number;
 - Date of Grant, Owners, Option Holder and Option Exercise Date;
 - Description of the property subject to the option;
 - A closing recital, for example, "Intending to be legally bound, Owners have signed delivered this Memorandum of Grant of Purchase Option as of the Date of Grant identified above"; and
 - Signature lines and acknowledgments.
- A third alternative is to **record nothing at all** and to **replace §10** of the model with a provision captioned "Confidentiality" as furnished below.

10. Confidentiality [Alternative for §10. Recording]

Owners agree to keep the existence this Grant and the terms of the Purchase Option completely confidential through the Option Exercise Date. Owners must not disclose or discuss with anyone the terms of this Purchase Option, the prospective sale to Option Holder, or the reasons why Option Holder may be interested in the Property.

Purpose. This alternative guards against the Option Holder's interest in acquiring the Property from becoming public knowledge. Control of public information may serve a number of purposes:

- The Option Holder may want to delay public disclosure until it is certain that the project will be a success.

- The Option Holder may want to delay announcement of the project until it has had a chance to gather public support and minimize adverse opinion.
- Disclosure of the Option Holder's interest before other parcels key to the project are under the Holder's control may result in the owners of those parcels escalating their demands regarding the sale of their parcels.

Closing Matters

Closing. When a person making a promise gets nothing of value in return—receives no *consideration*—the law may not require the promise to be kept. Rather than risk that the mutual promises contained in the agreement won't be seen as consideration under the law, the model includes a legally sufficient substitute for consideration. The phrase *intending to be legally bound* is a valid substitute for consideration in the Commonwealth of Pennsylvania (but not necessarily other states).

Signature Lines. Space has been provided for signature by two individual Owners. The Option Holder may, but need not, sign the Grant. If an Owner is a corporation, partnership or other entity, substitute a corporate signature line. Likewise, a form of acknowledgment appropriate for a corporation should be substituted for the form provided in the model, which is appropriate only for individual Owners.

Address for Notices. This is critical information to give proper notice of the exercise of the Purchase Option.

Witness/Attest. It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.

Acknowledgment. The date of the acknowledgment should not be earlier than the Date of Grant.