

MODEL

Grant of Right of First Offer

with Commentary



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Commentary updated 8/19/2022

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 Foot in the Door

Your organization wants to buy a particular parcel of land important to its conservation goals. Unfortunately, the owners have no interest in selling to your organization or to anyone. They may offer it to you some day but, then again, they may have forgotten your conversations, think it's not worth the trouble of reaching out, or leave matters to their heirs.

What can your organization do? One possibility is to seek a right of first offer and a right of first refusal. The WeConservePA guide [*Right of First Offer and Right of First Refusal*](#) describes these rights and how they may help you.

This publication provides a model legal document that may be used to obtain a right of first offer (as well as a right to negotiate if the initial offer is not acceptable). This right gives an organization a crucial foot in the door—a guaranteed opportunity to someday deal with the owners or their heirs *before* the property goes on the market.

The holder of a right of first offer has the opportunity to purchase land before any other prospective purchasers. When the owners wish to sell their land, they must first make an offer (determined at their discretion) to the holder of the right; the holder may then take or leave the offer. Alternatively, the right can be structured so that the holder, rather than the owners, makes the initial offer, and the owners then accept or reject it.

If the offer is rejected and the holder of a right of first offer also holds a right of first negotiation, then the owners must refrain from marketing their property and engage in good faith negotiation with the holder for a period of time. However, neither the owners nor the holder are obligated to reach agreement.

A Tool to Obtain Rights of First Offer and Negotiation

The [*Model Grant of Right of First Offer*](#) provides a tool for documenting a commitment by landowners to turn first to a conservation organization before looking elsewhere for a purchaser. It includes both a right of first offer and a right of first negotiation.

The commentary to the model explains the purpose of each provision in the model, refers the user to pertinent portions of the guide [*Right of First Offer and Right of First Refusal*](#) for deeper examination of issues, and provides alternative provisions to address various circumstances and needs.

The *Model Grant of Right of First Offer* contemplates a purchase of *land*. If you instead wish to obtain *an easement*, an attorney experienced in real estate law could adapt the model to serve the need.

Other Tools for Facilitating Acquisitions

The [*Model Grant of Right of First Offer*](#) applies to a time period before the landowners put their property up for sale on the real estate market. In contrast, the [*Model Grant of Right of First Refusal*](#) is used to assure that, after a property's exposure to the market, your organization has an opportunity to match a competing bid the landowners are ready to accept. You may use the model on its own or in conjunction with the *Model Grant of Right of First Offer*

The [*Model Grant of Purchase Option*](#) may be useful when the landowners are willing to (1) sell their land or an easement to your organization within a certain time frame or upon the occurrence of a specific triggering event and (2) commit to a specific purchase price or a well-defined method for establishing the price.

When land is to be acquired, whether by purchase or acceptance of a donation, a well-drafted agreement for sale helps protect the conservation organization's interests. The guide [*Purchase and Sale Agreements for Conservation Projects*](#) provides guidance for preparing a sales agreement that appropriately addresses matters specific to conservation projects.

A prospective easement donor and conservation organization can use the [*Model Conservation Easement Donation Agreement*](#) to establish the process they will follow in exploring, planning, and completing an easement donation.

Available at WeConservePA.org

WeConservePA has published many guides and model legal documents addressing conservation real estate transactions. Find them 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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Prepared by:

Name:

Address:

Phone:

Return to:

Name:

Address:

Tax parcel(s):

Model Grant of Right of First Offer

WeConservePA also publishes a
Model Grant of Right of First
Refusal and other model legal
documents at WeConservePA.org

Grant of Right of First Offer

Date of Grant:

Owners:

Grantee:

INTENDING TO BE LEGALLY BOUND and in consideration of the sum of \$1.00, the above identified Owners grant to the above identified Grantee the rights described below affecting the Property described in the attached Property Description.

Certain initially capitalized terms used in this document are defined in §6.

1 Intent to Transfer to Third Party

- 1.1 **Notice.** If the Owners want to Transfer the Property to a Third Party, they must notify the Grantee of their intent to Transfer and, until the Grantee has had the opportunities to purchase described in this Grant, the Owners must not (a) list the Property for sale with a broker or other agent or otherwise offer it for sale or other Transfer to a Third Party or (b) discuss or negotiate the terms of a Transfer with a Third Party.
- 1.2 **Less than whole.** If the Owners' notice applies to only a portion of the Property, then the Grantee's opportunity to offer and the Grantee's rights ending as described in §§1-4 pertain only to that portion of the Property. The Grantee's rights as to the remainder of the Property continue unchanged.

2 Opportunity of First Offer

- 2.1 **Offer.** The Owners' notice of intent to Transfer must include the purchase price and other terms of sale that the Owners are willing to accept in consideration of the Transfer of the Property (the "**Owners' Offer**").
- 2.2 **Response.** Within thirty days after receiving the notice of intent to Transfer (the "**Acceptance Period**"), the Grantee may, by notice to the Owners, accept the Owners' Offer

or make a counteroffer setting forth the purchase price that Grantee is willing to pay and other terms the Grantee is willing to accept in consideration of the Property.

3 Opportunity to Negotiate in Good Faith

- 3.1 **Negotiation.** If the Grantee responds to the Owners' Offer with the Grantee's counteroffer, then during the time remaining of the Acceptance Period and the thirty days following (together, the "**Negotiation Period**"), the Owners and the Grantee must make good faith attempts to find mutually acceptable terms for the sale of the Property.
- 3.2 **Open offers.** The initial offer and counteroffer remain open and available for acceptance for the entire Negotiation Period.

4 End of Grantee's Rights

- 4.1 **Conditions that end rights.** The Grantee's rights under this Grant are ended and the Owners are free to offer the Property for sale to Third Parties if:
- (a) at the end of the Acceptance Period, the Owners have not received notice that the Grantee has either (1) accepted the Owners' Offer or (2) elected to negotiate during the Negotiation Period by submitting the Grantee's counteroffer; or
 - (b) at the end of the Negotiation Period, (1) no offer has been accepted and (2) the Owners and the Grantee fail to reach agreement on mutually acceptable terms for the Transfer of the Property.
- 4.2 **Reinstatement of rights.** The Grantee's rights under this Grant are reinstated if the Owners have not completed a Transfer of the Property to a Third Party within one year following the end of the Acceptance Period.

5 Requirements for Giving Notice

Notices under this Grant, including notice of change of address, must be in writing and delivered to the Owners or the Grantee, as the case may be, at their respective addresses set forth next to their signatures below by any of the following means: certified mail (return receipt requested), commercial courier guaranteeing next day delivery, or hand delivery.

6 Defined Terms

"**Grant**" means this granting document.

"**Grantee**" means the Person or Persons identified at the beginning of the Grant and its successors and assigns.

"**Owners**" mean the Person or Persons identified as the Owners above and all Persons who own the Property after them.

"**Person**" means an individual or entity including a trust, corporation, partnership, limited liability company, or other organization.

“Property” means the entirety of land described in the Property Description attached to and incorporated into this Grant or, as applied to a notice of intent to Transfer some but not all of the Property, then such lesser portion as is the subject of the notice.

“Public Records” mean the office for the recording of deeds in the county in which the Property is located.

“Third Party” means a Person other than the Owners, the Grantee, a lineal descendant of the Owners (including adopted children and stepchildren) or a trust established for the benefit of the Owners or such Persons, or a Person controlled by the Owners.

“Transfer” means a change of ownership or control of the Property and includes any of the following whether in a single transaction or a series of transactions and whether the transfer is voluntary, involuntary, by operation of law, or otherwise: (a) the direct or indirect sale, agreement to sell, assignment, or conveyance of the Property; and (b) the transfer of stock, partnership or other ownership interests in an Owner (if an Owner is at any time an entity rather than one or more individuals).

7 Recording

This Grant may, at the option of the Grantee, be recorded in the Public Records. Once the Grantee’s opportunities to purchase under this Grant have ended without possibility of reinstatement, the Grantee must execute, at the request of the Owners, a release of this Grant for recording in the Public Records.

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

Street Address for Notices:

Signatures of the Owners:

_____(Seal)

_____(Seal)

The Grantee signs below to evidence its acceptance of the terms of this Grant:

Street address for notices to the Grantee:

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 Agreement, 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.

_____, Notary Public
Print Name:

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF _____ :

ON THIS DAY _____ before me, the undersigned officer, personally appeared _____, who acknowledged him/herself to be the _____ of _____, a Pennsylvania non-profit corporation, and that he/she as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by her/himself as such officer.

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

_____, Notary Public
Print Name:



This document is based on the Model Grant of Right of First Offer
(v. 2022.08.19) 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.

Commentary to the Model Grant of Right of First Offer

General Instructions

Read the Commentary. The purpose of each provision is explained and, sometimes, alternative approaches are described and optional provisions provided to address various situations.

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 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 library periodically for updates to the model.

Format and Identifying Information

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. The title “Grant of Right of First Offer” differentiates the granting document (the “Grant”) from the real estate interest (the right of first offer) granted by execution and delivery of the document.

Date of Grant. Identify the date the right of first offer becomes effective by delivery of the Grant signed by the Owners.

Owners. Identify the full legal names of the persons who own the land that is the subject of the right of first offer and who are granting the right of first offer to the Grantee.

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.

Grantee. Identify the proper legal name of the Grantee.

Opening Recital

Purpose. The opening recital sets forth who is conveying the right of first offer to whom, the property that is subject to the right of first offer, and the consideration provided.

Intending to be legally bound. The grant of a right of first offer must be supported by consideration, or a legally sufficient substitute for consideration, to be enforceable against the Owners (defined in §6 to include all Owners of the land). 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.

Generally, no or nominal cash consideration is paid. Granting a right of first offer results in little disadvantage to the Owners; it is a cause of only minor inconvenience, if that, sometime in the future. Consequently, Owners who have any interest at all in the possibility of conserving their land generally grant the right of first offer to a conservation organization for no or nominal (e.g., one or ten dollars) consideration.

Nominal consideration is unnecessary. The inclusion of nominal consideration is unnecessary under Pennsylvania law if the phrase “intending to be legally bound” is used; however, many attorneys feel more comfortable with its inclusion.

If Owners need financial inducement. If payment is necessary to induce the Owners to grant the right, change “the sum of \$1.00” to the agreed upon amount.

Initially capitalized terms. The opening recital ends with a cross-reference to §6, which defines certain initially capitalized terms.

Main Body of the Grant

1 Intent to Transfer to Third Party

1.1 Notice

Timing. The right of first offer process does not begin until the Owners decide to sell or otherwise Transfer the Property to a Third Party. And then, until they notify the Grantee of their intent and the Grantee has the opportunities to purchase described in the Grant, they must not engage with anyone else regarding a Transfer.

Opportunity to share information. As discussed in the guide [Right of First Offer and Right of First Refusal](#), the fundamental value of a right of first offer is informational. The Owners’ notice of intent informs the Grantee that the

Property soon will be put on the market. It provides the Grantee the opportunity to reach out to the Owners and present them with information that otherwise wouldn't have been considered (for example, the Grantee's sincere interest in purchasing, the Grantee's financial capacity to purchase, the avoidance of a real estate commission if dealing directly with the Grantee, or the possibility of tax advantages in working with a charitable organization).

Key terms. The obligation to furnish notice of intent is triggered by an intent to *Transfer the Property to a Third Party*:

- The Owners must intend to "Transfer," which is defined in §6 to encompass a wide variety of events in which control of the property will pass from the current Owners to subsequent Owners.
- The Transfer must be to a "Third Party," which is defined in §6 to exclude Transfers to family members, to trusts for the benefit of family members, and to controlled companies. Those exclusions may be narrowed, for example, by elimination of controlled companies, or widened, for example, by excluding Transfers to spouses of lineal descendants.
- The "Property" transferred may be the entirety of the Property described in the legal description attached to the Grant or, as described in §6, it may be a portion of that Property.

1.2 Less than whole

Purpose. The notice of intent may apply to less than the whole of the Property. In this case, no matter the outcome in regards to the proposed Transfer of the portion, the Grantee's right of first offer remains in effect as to the remainder of the Property.

2 Opportunity of First Offer

Purpose. This section describes what must be included in the notice of intent to Transfer and the process that will afford the Grantee the opportunity to purchase the Property when the Owners decide to sell their Property but before they expose it to the market or entertain bids from others.

2.1 Offer

Purpose. The notice of intent is not simply informational but constitutes a firm offer by the Owners to sell at the price and terms set forth in the notice.

2.2 Response

Purpose. This subsection specifies the number of days the Owners' offer remains open for acceptance by the Grantee. (Assuming users retain the model's §3 and a counteroffer is made, the number of days will be extended per §3.)

Number of days. The default text of the model and alternative provisions provide the recipient of the offer thirty days to accept it (if at all). This number of days is merely a placeholder. Any number of days or months may be substituted.

Additional provision: Incorporate full terms of sale into acceptance of offer

Avoid uncertainty and potential disputes. Offers to sell or purchase at a certain price (but which fail to address other terms of sale) leave the other terms to be determined later by mutual agreement or, failing that, by implication based upon what a court determines would be reasonable and customary under the circumstances. Incorporating specific terms in an offer affords both the Owners and the Grantee the opportunity to avoid future disputes and litigation. One way to avoid uncertainty is to incorporate other terms by reference in the offer or by attaching to the offer the agreement of sale to be signed upon acceptance of the offer.

Example of incorporation *by reference* (add to §2.2):

Grantee's acceptance must take the form of Grantee's execution and delivery to Owners of the current form agreement for the sale of real estate published by the Pennsylvania Association of Realtors completed to reflect the terms set forth in this offer.

Example of incorporation *by attachment* (add to §2.2):

Grantee's acceptance must take the form of Grantees' execution and delivery to Owners of the Agreement of Sale attached to this offer.

Alternative provision: Grantee offers first

Instead of Owners, Grantee offers first. If the Owners are uncomfortable with putting a firm offer on the table first (as in the default provision), the order of offer and acceptance can be reversed by replacing the content of §2.1, §2.2, §3.1, §3.2 and §4.1 as follows:

- 2.1 **Offer.** The Owners' notice of intent to Transfer constitutes a request for an offer to purchase from the Grantee. The Grantee must respond to the Owners' request for offer (if at all) by notifying the Owners of its proposal within thirty days after receipt of the Owners' notice of intent to Transfer (the "Response Period"). The Response Period is extended to sixty days if the Grantee notifies the Owners within fifteen days after receiving the Owners' notice that the Grantee intends to obtain, at the Grantee's expense, an appraisal of the Property. The Grantee's proposal constitutes a firm offer to purchase at the purchase price and other terms set forth in the Grantee's notice to Owners of the terms of its offer.
- 2.2 **Response.** The Owners must notify the Grantee of their acceptance of the Grantee's proposal (if at all) not more than thirty days after receiving the Grantee's notice (the "Acceptance Period"). The

Acceptance Period is extended to sixty days if the Owners notify the Grantee within fifteen days after receiving the Grantee's proposal that the Owners intend to obtain, at the Owners' expense, an appraisal of the Property.

- 2.3 **Appraisal.** If the Response Period per §2.1 or the Acceptance Period per §2.2 is extended, then the Grantee or the Owners, as the case may be, must commission a Pennsylvania certified general real estate appraiser to perform the appraisal and provide the appraisal report to the other party with the proposal or acceptance (if any) as the case may be. The Owners permit appraisers to access the Property for these purposes.
- 3.1 **Negotiation Period.** If the Grantee provides the Owners with a proposal under §2 and the Owners do not accept it, then during the time remaining of the Acceptance Period and the thirty days following (together, the "Negotiation Period"), the Owners and the Grantee must make good faith attempts to find mutually acceptable terms for the sale of the Property.
- 3.2 **Open offers.** The Grantee's and the Grantor's offers remain open and available for acceptance for the entire Negotiation Period.
- 4.1 **Conditions that end rights.** The Grantee's rights under this Grant are ended and the Owners are free to offer the Property for sale to Third Parties if:
- (a) at the end of the Response Period, the Grantee has not made an offer to the Owners; or
 - (b) at the end of the Negotiation Period, (1) no offer has been accepted and (2) the Owners and the Grantee fail to reach agreement on mutually acceptable terms for the Transfer of the Property.

Disadvantage of offering first. The default provision is more advantageous to the Grantee because the Owners' first offer establishes a ceiling on the purchase price for purposes of future negotiations. If the Owners are willing to compromise to reach agreement, the purchase price will almost always move down (not up). The alternative provision is more advantageous to the Owners because it establishes a floor on the purchase price for purposes of future negotiations. The Grantee may raise the purchase price from its initial offer but rarely lowers it unless justified by previously unknown information.

Additional provision: Resolution between market values

Average market value. The Owners or the Grantee may want to include a provision to end negotiation and set a purchase price if they both have obtained appraisals and the two values are within a certain range of each other. In that case, add the following after §2.3 "Appraisal" above:

2.4 Market value purchase price. If both the Grantee and the Owners have obtained appraisals, and the appraisal reports indicate that the higher of the two values does not exceed the lower by more than 10%, then the average of the two values is agreed to be the purchase price for the Property.

- The figure of 10% is merely a placeholder. Any figure may be substituted.
- If the purchase price is established by the two appraisals, the parties may still want to include in the Grant the opportunity for further negotiation as to other terms of sale.

Alternative provision: Appraisals precede offer

Valuation problem. Owners are seldom armed with comprehensive and impartial guidance as to their land's value before placing their property on the market. They often overestimate the land's value and recognize this only after many months of the property failing to attract the bids they expected. In the context of a right of first offer, the Owners unrealistic expectations may place the Grantee in a difficult if not impossible bargaining position.

Good information early. An alternative approach starts by providing the Owners with professional, third party opinions regarding their land's value. The chief challenge with this alternative is that the Owners may not be willing to commit to paying for an appraisal.

Adjustments needed to implement. To implement this alternative, (1) use the replacement text for §3.1, §3.2 and §4.1 (presented above) for when the Grantee offers first and (2) replace §2's subsections with the following:

- 2.1 Appraisals.** Within 45 days of the Owners' notice of intent to Transfer, the Owners and the Grantee must each hire a Pennsylvania certified general real estate appraiser to prepare an appraisal of the Property's fair market value. The Owners agree to allow the Grantee's appraiser full access to the Property. The Owners and the Grantee must each provide the other with a copy of their respective appraisal report.
- 2.2 Offer.** Within 45 days of the Grantee's receipt of both appraisal reports, the Grantee may submit to the Owners an offer to purchase the Property.
- 2.3 Response.** Within 30 days of receiving the Grantee's offer (the "Acceptance Period"), the Owners must respond by accepting, rejecting or countering it.

Additional provision: More time needed for counteroffer

Insufficient time or information. The Grantee may be concerned that it will not have, within the Acceptance Period, sufficient information to make a firm offer. In that case, if acceptable to the Owners, add a new subsection to §2 as follows:

- 2.3 **Additional time for counteroffer.** If the Grantee is unable or unwilling to accept the Owners' offer during the Acceptance Period, the Grantee, may, by notice to the Owners within the Acceptance Period, extend the Grantee's exclusive opportunities to purchase under this Grant for the Negotiation Period described in §3.1.

3 Opportunity to Negotiate in Good Faith

Purpose. The right of first offer provides the Grantee with useful information about what the Owners' asking price is likely to be when the Owners offer the property for sale to the general public. That initial asking price is also likely to be at the high end of market value. The Grant does not require the Owners to establish a price based on market information; thus, the price quoted by the Owners may reflect nothing more than their wishful thinking. To address the likelihood that the Owners' offer to sell will not be acceptable without adjustment, the Grant provides for an extension to the initial offer and Acceptance Period to allow for further negotiation of price and other terms of sale.

Right of first negotiation. The extension into the Negotiation Period of the Grantee's exclusive rights during the Acceptance Period is sometimes referred to as a right of first negotiation.

Right exercised by presenting counteroffer. The default provision requires the Grantee to deliver a counteroffer to trigger the extension of its exclusive opportunity to deal with the Owners into the Negotiation Period. The effort of preparing and the commitment demonstrated by delivering a counteroffer shows the Owners that the Grantee is serious about purchasing the Property; it justifies the extension.

3.1 Negotiation Period

Purpose. This section establishes a time window—the "Negotiation Period"—within which the Grantee has the exclusive right to negotiate with the Owners with respect to the purchase of the Property.

Default period. The Negotiation Period is an extension of the time afforded the Grantee to respond to the Owners' first offer. The thirty-day period specified is a placeholder. Any number of days or months may be chosen.

Extends Acceptance Period. The thirty days is tacked on to the end of the Acceptance Period. Thus, the Grantee is not disadvantaged if it earlier notifies the Owners of its desire for further negotiation.

Mutual obligation. Both the Owners and the Grantee are obliged to negotiate in good faith during the Negotiation Period. Good faith negotiation may be described as an honest desire to reach agreement on the differences which exist

through compromise and a realization that the agreement thus reached should be fair and reasonable for both sides.

3.2 Open offers

Purpose. This section serves to keep the initial offers made during the Acceptance Period available for acceptance during the Negotiation Period. The rule of contract law that would otherwise apply is that the Owners' offer is automatically rejected when the Grantee delivers its counteroffer. The provision in §3.2 assures that, if further negotiation is unsuccessful, the Grantee still has the opportunity to accept the Owners' initial offer.

Alternative provision: No duty to negotiate

If the Owners are willing to grant only a right of first offer and not a further opportunity to negotiate, then delete *the entirety* of §3 and substitute the following:

3 No duty to negotiate

During the Acceptance Period, the Owners may consider, respond to, or negotiate any counterproposal tendered by the Grantee; however, following the end of the Acceptance Period, they have no duty to do so and no duty to deal exclusively with the Grantee.

If this alternative §3 is used, modify §4.1 so that it reads as follows:

Conditions that end rights. The Grantee's rights under this Grant are ended and the Owners are free to offer the Property for sale to Third Parties if, at the end of the Acceptance Period, the Owners have not received notice that the Grantee has accepted the Owners' terms.

4 End of Grantee's Rights

4.1 Conditions that end rights

Purpose. This subsection sets the conditions for when the Owners are free to offer their property for sale to others.

Outside date. The Grantee's rights of first purchase terminate with the end of the Acceptance Period; however, there are exceptions to this general rule:

- The Grantee's rights continue to the end of the Negotiation Period (§3).
- The Grantee's rights may be reinstated (§4.2).

4.2 Reinstatement of rights

Purpose. This subsection assures the Grantee that the Owners cannot satisfy their obligations under the Grant simply by giving notice of intent and going through the motions of the required process. If the Owners do not move forward with the

intended Transfer, then the next time they intend to sell, the Grantee will again have its opportunities to purchase.

Time for Transfer. The one-year time frame in the default provision is a placeholder. The time established by the Owners and the Grantee should reflect the reasonable time anticipated for marketing and closing a sale of the Property.

5 Requirements for Giving Notice

Purpose. This section requires that notices are given by reliable means in a manner likely to be timely received and noted by the receiving party.

Additional means. Additional means of delivery, such as email, may be added. Sometimes provisions allowing email delivery of notices are conditioned upon the email being followed promptly by one of the other methods.

6 Defined Terms

Purpose. To provide and clarify the meaning of various terms used in the Grant.

Grant. The definition abbreviates “Grant of Right of First Offer.”

Grantee. The definition clarifies that the Grantee is not only the conservation organization identified at the beginning of the Grant but includes its successors (for example, after a merger) and any Person to whom the right of first offer is assigned. The freedom to assign to another maximizes flexibility. The Grantee may not be in a position to purchase when the opportunity arises but it may want another organization to be able to take advantage of the opportunity.

Limited to Qualified Organization. If the Owners are granting the right of first offer to incentivize acquisition for a conservation purpose, they may want to restrict assignment of the right of first offer to another conservation organization. In such cases, add the following sentence to the end of the provision:

The Grantee may not assign this right of first offer except to a qualified organization as defined in §170(h) of the Internal Revenue Code.

Owners. This definition clarifies that the term includes not only the Person or Persons identified at the beginning of the Grant but also all Persons who own the Property after them.

Person. The definition, by including both individuals and entities, simplifies drafting.

Property. The definition addresses a Transfer of less than all of the Property described in the Property Description attached to the Grant.

Public Records. Use of the defined term simplifies drafting.

Third Party. The definition provides the means to list Persons to whom the Property may be transferred without triggering the right of first offer. The list may be expanded or shortened to fit the needs and goals of the parties.

Transfer. The term is defined to establish the scope of changes in ownership and control of the Property that trigger the right of first offer.

7 Recording

Purpose. This section provides the Grantee the option to record the Grant in the Public Records. Recording the Grant gives assurance that the Grantee will have the opportunities afforded under this Grant whether or not the Owners who sign the Grant continue to own the Property and that the Grantee will have both legal and equitable remedies in the event the signing Owners sell without meeting their obligations under the Grant.

Release. If the Grantee's rights under the Grant are ended (without the possibility for reinstatement), the model requires the Grantee to sign a release in recordable form to clear the Grant from the Public Records if so requested by the Owners. If the Owners are concerned about the Grantee'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 Grantee's rights under the Grant are ended without possibility of reinstatement.

Closing Matters

Closing. The phrase "INTENDING TO BE LEGALLY BOUND" is especially important where there is no consideration being given for the Grant because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania. The term "consideration" means something of value given in return for a promise.

Signature lines. Space is provided for signatures by two individual Owners. Add or delete spaces as necessary. The Grantee signs the Grant to evidence its acceptance of the terms. 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.

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.