

New York State Department of Agriculture and Markets

**GUIDANCE DOCUMENT SERIES  
FARMLAND PROTECTION IMPLEMENTATION GRANT PROGRAM**

**Drafting Conservation Easements**

**GD # 4**

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***Overview***

According to Section 49 of New York State Environmental Conservation Law, a conservation easement is a legal agreement between a landowner and public body or not-for-profit conservation organization that permanently limits uses of the Property in order to protect certain conservation values. For farmland protection projects, the primary conservation value of the Property is its productive agricultural capacity. A conservation easement runs with the deed to the land and is the anchor document in a farmland protection project as it is the one that defines the future uses of the property in perpetuity. The conservation easement and its easement map work in concert to define allowed uses on various portions of the Property.

***Introduction***

There are some differing perspectives involving the issue of conserving “working landscapes” – differences that underlie some tensions that surface as agricultural easements are drafted. These tensions include:

- a. Preservation vs. Conservation: In the case of working landscapes, land is conserved for future agricultural or compatible uses. Preservation implies that the landscape will never change, while protected working landscapes will be actively managed. It is important to draft conservation easements with the mindset of “conserving” the land’s agricultural value, as opposed to “preserving” the land as it looks today in perpetuity.
- b. Economic Viability vs. Environmental Resource Protection: Agricultural conservation easements must find a balance between protecting the agricultural and environmental resources of the Property and providing enough flexibility and understanding to allow farmers to make a living off the land.
- c. Flexibility vs. Certainty: Along those lines, a balance must be struck between an easement that provides both flexibility to meet changing and growing agricultural market demands and certainty and clarity for the easement holder to adequately interpret and enforce the conservation easement in perpetuity.

This document will follow the New York State Department of Agriculture & Markets (NYS DAM) Model Agricultural Conservation Easement (revised 6/4/08; hereinafter, “Model Easement”) to provide guidance on each clause, including when variation to the Model Easement is allowed.

***Background***

In 1971, the Agricultural Districts Law (Agriculture and Markets Law Article 25-AA) was enacted to help maintain a supportive operating environment for farm businesses in state-certified Agricultural Districts through several “right to farm” provisions. In 1992, the Agricultural Protection Act created Article 25-AAA to encourage further development of agricultural and farmland protection programs at the state and local level. The legislation is

intended to support local efforts to protect agricultural land and insure the continued economic viability of the state's agricultural industry. In 1996, 25-AAA was amended further to include implementation grants – the current statutory authority for the state Farmland Protection program.

Article 25-AA and Article 25-AAA guide New York's Farmland Protection Program as it seeks to protect the state's productive agricultural resources while supporting farmers' ability to manage profitable businesses. The critical right to farm protections of the Agricultural Districts Law (Article 25-AA including Sections 303, 305 and 308) provide further guidance for NYSDAM in Farmland Protection Program administration and review of proposed farmland protection projects. Consequently, NYSDAM will review proposed conservation easement language to insure that proposed projects are not *unreasonably restrictive* of Farm Operations in contravention of the Agricultural Districts Law.

Some factors that NYSDAM will consider relative to the reasonableness of proposed easement restrictions and/or land planning proposals include:

- Whether the provisions adversely affect the farm operator's ability to manage the Farm Operation effectively and efficiently;
- Whether the provisions would restrict production options which could affect the economic viability of the farm;
- Whether the provisions would cause a lengthy delay in the construction of a farm building or implementation of an agricultural practice;
- The availability of alternative means to achieve the objective
- How the provisions compare to relevant standards under state laws and regulations (e.g. Sound Agricultural Practices as defined by the Agricultural Districts Law).

Definitions of Commonly Used Easement Terms

- Grantor – landowner of property being placed under conservation easement
- Grantee – holder of the easement, either a land trust or a unit of government
- Property – the land to be placed under the conservation easement
- Subordinate to – “placed in or belonging to a lower order or rank” “of less importance; secondary”
- Compatible with – “Consistent” “congruous”

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**Whereas Clauses**

This section provides the background information for the conservation easement. It describes the Property being protected, including its physical location. It documents local, county, state and/or federal governmental support for protection of the Property. Lastly, this section identifies the conservation values being protected on the Property, including any non-agricultural values as may be later identified in the easement as “Resource Protection Areas”. This recitation of the conservation values is essential as it serves as the background for the easement and will be

referenced upon easement interpretation. As in the “Purpose” clause discussed below, the agricultural values of the Property must be the primary reason for the easement and all other values secondary to its agricultural use. Any non-agricultural values being protected with the easement must be identified and defined in the whereas clauses.

The total “amount of consideration” must be stipulated in each Conservation Easement.

### **1. Grant of Conservation Easement**

This introductory clause defines the granting and conveyance of the easement on the Property by the landowner in perpetuity. It requires the landowner to conform to the terms of the easement and gives the easement holder authorization to enforce the easement as described in the document. This clause may be modified according to individual easement drafting needs.

### **2. Purpose**

The purpose clause is the conservation easement’s touchstone that will be used as a reference in all future easement interpretation. The conservation easement is intended to protect agricultural viability and soil resources hence this is the primary purpose. No variation to this clause as it is written in the Model Easement is allowed.

Additional purposes are permitted to the extent that they are identified as secondary to the primary agricultural purpose and do not unreasonably restrict Farm Operations in contravention to the Agricultural Districts Law. In all cases, such secondary protection goals must be consistent with the New York State Constitution, Section 49-0301 of the Environmental Conservation Law and Article 25-AAA, Section 321 of Agriculture and Markets Law (found in the Model Easement, Whereas Clause E and F respectively).

### **3. Implementation**

This clause outlines how the easement will be implemented. This clause may be modified according to individual drafting needs, however it must indicate that the easement shall not unreasonably restrict or regulate Farm Operations in contravention of the purposes of Article 25-AA of the Agriculture and Markets Law.

### **4. Definitions**

This clause provides an opportunity to formally define terms to be used throughout the conservation easement. NYSDAM does not require inclusion of all the definitions contained in the Model Easement, but each of the use areas specified in the Conservation Easement must be defined in some manner (e.g., Farmstead Area, Resource Protection Area, Farm Area, and any others as applicable). Further, NYSDAM requires use of these definitions as they appear in the Model Easement: Farm Operation, Farm Labor Housing, Impervious Surfaces, and Sound Agricultural Practices.

Other terms used in the easement may be defined here, so long as the definitions provided do not unreasonably restrict agricultural practices allowed under the easement in contravention of Agricultural Districts Law. In addition, when defining agricultural terms, it is important to remember that farms change while the conservation easement does not. Linking easement

definitions to those defined in legal statute or as determined by agricultural institutions, such as the Natural Resource Conservation Service (NRCS), allows for flexibility as agriculture evolves.

### **5. Reserved Rights Retained by Grantor**

This section defines the rights retained by the landowner. Any limitations on reserved rights retained by the Grantor must be in accordance with the Purpose of the conservation easement and must not unreasonably restrict agricultural practices.

#### **5.(a). Right to Use Property for Agricultural Uses**

This clause outlines the right to use the property for agricultural uses. The Model Easement allows for the property to be used as a Farm Operation, as defined in Section 301 of New York State Agriculture and Markets Law, or such successor law. The definition of agricultural use must link to this statute in order to allow for flexibility in agricultural operations on the property over time. This clause must require agricultural practices to be carried out in accordance with Sound Agricultural Practices.

#### **5.(b). Right to Use the Property for Rural Enterprises**

This section allows for use of the property for rural enterprises. All allowed rural enterprises must be compatible with the Purpose of the Easement and subordinate to the agricultural use of the Property. In addition, all rural enterprise use must be subject to limitations in Section 8 of the Easement (“Construction of Buildings and Other Improvements”). Examples of rural enterprises include: farm machinery repair, professional offices in the home, bed and breakfasts, firewood distribution, automobile mechanic shops and other rural businesses compatible with a Farm Operation. Limitations on rural enterprises allowed must not unreasonably restrict opportunities to increase farm viability in contravention of Agricultural Districts Law.

#### **5.(c). Right to Use the Property for Recreational Purposes**

This clause outlines the landowner’s rights to use the Property for recreational purposes. The Model Easement allows for personal and commercial recreational uses such as hunting, fishing, cross-country skiing and snowmobiling, under some constraints, as long as the use is compatible with the Purposes of the Easement and subordinate to the agricultural use of the Property.

The easement can restrict specific recreational uses on the Property so long as such limitations are reasonable and consistent with the Purposes of the conservation easement.

### **6. Conservation Plan**

NYSDAM strongly recommends including an easement provision requiring that agricultural practices are consistent with a Conservation Plan of some description. NYSDAM does not outline the specific elements that must be included in the Conservation Plan; however, they will not allow arbitrary or unreasonably restrictive constraints on agricultural use of the property or a requirement to follow conservation plans not prepared by a local Soil and Water Conservation District or other qualified conservation professional. A qualified conservation professional may include a Cornell Cooperative Extension Educator, a private conservation consultant with documented experience in conservation planning for Farm Operations, or a Natural Resource Conservation Service representative. In all cases, the Conservation Plan must be prepared in

cooperation with the landowner. The easement may, as reasonable, identify how frequently the Conservation Plan is to be updated.

### **7. Access**

This clause defines the conditions, if any, under which the public may have access to the Property. Landowners participating in the Farmland Protection Program shall not be required to provide public access as such access may conflict with the agricultural purpose of the easement. Farms are private businesses that frequently operate large commercial equipment and it is for the safety of the public that access is not required. However, landowners retain the right to grant public access to the Property if deemed appropriate.

Public access rights existing prior to the conservation easement, such as public boat or fishing access, may be acceptable if such public access is determined to be compatible with the purpose of the conservation easement and the agricultural use of the property.

### **8. Construction of Buildings and Other Improvements**

Farms require structures to house animals, store equipment, and provide housing for their workforce. Construction of new buildings must be in accordance with the primary Purpose of the easement, but done in a manner that minimizes the impact to the Property's agricultural soils where practical.

In general, construction, maintenance, replacement and enlargement of all agricultural structures necessary to the Farm Operation, including Farm Labor Housing, are allowed in the Model Easement. Specific standards and variations for each case are outlined below. Two use areas depicted on the easement map<sup>1</sup> and described in the Conservation Easement are pertinent to this section: 1) the Farmstead Area and 2) the Farm Area. The identification of these areas is essential as the building rights can vary between the two, as is discussed below. In addition, construction of buildings and other improvements may be limited in Resource Protection Areas, as defined in the Land Plan and Whereas Clauses, so long as they do not unreasonably restrict the viability of the Farm Operation in contravention of Agriculture and Markets Law.

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#### **8.(a). Impervious Surfaces**

An Impervious Surface is defined for the purposes of the Model Easement as any structures or improvements that permanently cover soil resources. This includes barns, milking parlors, machine storage sheds, and other areas paved with asphalt or concrete. NYSDAM does not include structures whose principal purpose is to protect soil and water resources, like manure storage areas, in the definition of Impervious Surfaces, even if these structures permanently cover soil resources.

Similarly, structures without permanent foundations are not included in the definition of Impervious Surfaces, such as greenhouses with dirt floors. While the roof of the greenhouse could be classified as impervious, it does not permanently cover the soils below it. The greenhouse could be taken down and active cropping recommenced on that land.

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<sup>1</sup> The easement map is based on the land plan and must be recorded with the conservation easement.

In total, Impervious Surfaces in the Farm Area is limited to a cumulative cap of 10%. This cap gives landowners adequate flexibility to construct necessary farm buildings and structures to remain viable without excessive impact to soil resources. Within the Farmstead Area, Impervious Surfaces are not restricted in the Model Easement. The Farmstead Area is a targeted area defined specifically to be the center of operations for the farm.

Impervious Surface limitations in the Farm Area and Farmstead Area must match those of the Model Easement. Grantees may define stricter Impervious Surface limitations in narrowly defined Resource Protection Areas, provided that such limitations do not unreasonably restrict Farm Operations in contravention to Agriculture and Markets Law.

**8.(b). Fences**

The Model Easement allows construction, repairs, removal, or replacement of fences anywhere on the Property to manage livestock or wildlife or to prevent trespassing on the Property.

**8.(c). Agricultural Structures and Improvements**

The Model Easement allows landowners to repair, remove, enlarge and replace any existing agricultural structures on the Property, provided such construction does not exceed a total Impervious Surface coverage of 10% of the Farm Area.

In the Farmstead Area, the Model Easement allows landowners to construct new agricultural structures related to the Farm Operation and for other purposes related to the production, marketing and processing of farm products, storage of agricultural machinery and keeping of livestock without limitation and without permission of the easement holder. In the Farm Area, NYSDAM allows for construction of agricultural buildings related to the Farm Operation that cover up to 5% of that area, without permission of the easement holder and up to an additional 5% of that area with permission of the easement holder.

Limitations may be placed on new agricultural structures and improvements in designated Resource Protection Areas as depicted on the easement map and described in the Conservation Easement. Such limitations should be consistent with the conservation purposes of the easement and may not unreasonably restrict agricultural practices on the Property.

**8.(d). Residential Dwellings**

The Model Easement allows repairs, enlargement or replacement of existing residential dwellings, as defined in the Model Easement, at their existing location (shown on the easement map). NYSDAM requires that all existing residential dwellings either be included in an existing or reserved Farmstead Area on the easement map or excluded from the Conservation Easement at time of drafting. If excluded from the easement, NYSDAM recommends that these lots be subdivided from the Property and that such subdivision occur prior to the conveyance of the Conservation Easement.

In the Farmstead Area, residential dwellings as defined in the Model Easement and any accessory structures and improvements may be built without permission subject to any applicable local, state or federal laws and regulations.

In the Farm Area, the landowner may construct Farm Labor Housing, as defined in the Model Easement, on up to 1% of the Farm Area without permission of the easement holder. Additional Farm Labor Housing may be built in the Farm Area above this cap only with permission of the easement holder. Farm Labor Housing is subject to the Impervious Surface limitation in the Farm Area.

Current non-habitable structures can be adaptively reused for Farm Labor Housing subject to local laws. Limitations may be placed on Farm Labor Housing in designated Resource Protection Areas as depicted on the easement map and described in the Conservation Easement. Such limitations should be consistent with the Purpose of the easement and may not unreasonably restrict agricultural uses on the Property.

#### **8.(e). Rural Enterprises**

Non-agricultural commercial enterprises are allowed within the Farmstead Area provided the activities are compatible with the purpose of the Easement and subordinate to the agricultural uses occurring in the Farmstead Area. Such rural enterprises are often important sources of secondary income that support the viability of the Farm Operation. The sale of non-agricultural petroleum or chemical products is prohibited as a rural enterprise. NYSDAM will not allow limitations on allowable rural enterprises that unreasonable restrict farm viability.

#### **8.(f). Recreational Structures and Improvements**

Recreational structures provide recreational opportunities for farm owners, their families and their employees. The Model Easement allows for existing recreational improvements to be repaired, relocated, removed and enlarged, up to an aggregate 1,000 square feet in the Farm Area and unlimited in the Farmstead Area so long as the improvements are compatible with the Purpose of the Easement and subordinate to the agricultural use of the property.

In the Farmstead Area, the landowner may construct permanent recreational improvements without permission of the easement holder, so long as they are compatible with and subordinate to the agricultural use of the Property.

In the Farm Area, recreational improvements are allowed without permission up to an aggregate of 1,000 square feet. Improvements that exceed this limitation are allowed in the Farm Area only with permission of the easement holder. Recreational improvements are also subject to the Impervious Surface limitation in the Farm Area. Recreational improvements, while important to farm viability and family recreation in many instances, should be located in ways that minimize the impact to agricultural resources in the Farm Area. The cap of 1,000 square feet for recreational improvements in the Farm Area includes both expansion of existing structures and new construction. Easements may vary from the 1,000 square foot limitation in the Model Easement within reason and upon approval by the easement holder.

Golf courses and ranges are prohibited in the Farm Area as they would significantly impact the agricultural use of the Property. Permanent improvements include those with foundations that permanently cover soil resources. Examples of “temporary” improvements may include athletic fields without permanent stands or goal posts primarily for personal use or campers without permanent utilities or foundations.

**8.(g). Utility Services and Septic Services**

Existing and new utility services to or from the improvements permitted by the easement are allowed as long as the uses compatible with the Purpose of the Easement and are subordinate to the agricultural uses of the Property. Septic services may be installed to service the residential dwellings as allowed in the easement, including Farm Labor Housing.

**8.(h). Alternative Energy and Communications Structures and Improvements**

Alternative energy generation and communications structures represent growing opportunities for farms to diversify their income sources and increase farm viability while offering an important opportunity for rural economic development.

Within the Farmstead Area, NYSDAM allows for construction of facilities for the generation and transmission of electrical power or telecommunications, such as windmills, detached solar arrays, and cell towers, subject to local, state and federal laws and regulations.

Permission is required for construction of such facilities in the Farm Area and will be allowed provided construction of such improvements impacts no more than 2% of the Farm Area. No variation from this 2% cap will be allowed. These structures and improvements will also be restricted to the total Impervious Surface coverage limitation of the Farm Area. In all cases, such improvements must be compatible with the Purpose of the Easement, subordinate to the agricultural use of the Property and located in a manner that minimize their impact on prime or statewide important soils.

**9. Maintenance and Improvement of Water Sources**

Water resources are essential to Farm Operations. Farmers use streams to provide drinking water to their animals, construct ditches to capture rainwater to irrigate crops or place tile lines in fields to drain water from fields that are often too wet to work. Restricting the use of these resources limits the productivity and viability of the farm and thus unreasonably restricts Farm Operations.

The Model Easement allows the landowner to use water resources flowing on or over the Property for uses compatible with those permitted in the easement. It also allows landowners to modify or alter the natural course of water flow in order to improve soil drainage, reduce erosion or provide irrigation provided all alterations are consistent with the Conservation Plan, Sound Agricultural Practices and the Purpose of the easement. All uses must be in accordance with applicable state and federal laws and regulations. No prohibition of maintenance of water sources will be allowed.

**10. Water Rights**

Water resources are essential to Farm Operations and thus may be used under the terms of the Model Easement. However, severing of water rights limits the kinds of agriculture possible on the Property and contradicts the primary purpose of the easement, thus is prohibited. In all cases, exercise of water rights must be in accordance with all applicable state and federal laws and regulations.

**11. Subdivision**

While provisions that govern subdivision can vary, the primary rationale underlying the restriction to limit future subdivision focuses on reducing the potential for land fragmentation that would render agricultural land unusable or impractical for a commercial agricultural enterprise.

The need for flexibility here is critical because what is deemed a viable farming unit today may be very different in the future. Some operations may desire or require larger acreages while others may actually focus their production efforts on fewer acres and farm more intensively.

Subdivision is permitted subject to a performance standard that requires the subdivided parcel remains viable for agricultural production either individually, or as part of an established farming operation.

Farm Labor Housing generally cannot be subdivided as stand-alone residential properties unless those units are designated as “non-worker” house sites or excluded from the easement.

Limitations on subdivision will be allowed, so long as they are not unreasonably restrictive of current or future Farm Operations in contravention of the purposes of Article 25-AA of the Agriculture and Markets Law. Absolute prohibition will be allowed under very narrow conditions. In any case whenever subdivision is allowed, this clause must make reference to the allocation of building rights between all parcels now subject to the easement. For example, each parcel does not necessarily retain the right to construct Impervious Surfaces on up to 10% of each resulting parcel. The Impervious Surface coverage limitation must be divided in some equitable manner between the original parcel and each resulting subdivided parcel.

## **12. Forest Management**

Forests that surround farm fields often provide critical supplemental income to the primary Farm Operation, especially over the winter, making the farm more economically viable and commodity diverse.

Under the Model Easement, landowners are be able to manage forest lots on the Property as a part of their Farm Operation, without permission from the easement holder, so long as the management is done according to an approved forest management plan. Landowners are required to give notice at least forty-five (45) days prior to any commercial timber harvest to ensure appropriate communication and stewardship.

This clause may be omitted from the easement if the farm doesn't have significant forest resources on the property.

## **13. Mining and On-Site Extractive Activity**

Sand and gravel deposits on farms are often used by the Farm Operation to establish or maintain roadways, provide fill for construction projects or use as animal bedding. Such use is appropriate, provided it has minimal impact on the agricultural productivity of the surrounding soil. Any outright prohibition of on-site sand and gravel use is strongly discouraged. On the other hand, stripping and removal of topsoil is prohibited as it directly contradicts the purpose of the easement.

Other mining and on-site extractive activities are allowed in the Model Easement only under restrictive conditions. Subsurface mineral and hydrocarbon exploration, development and extraction activities are only allowed with permission of the easement holder and under strict mandate to mitigate any adverse effect on the agricultural viability of the Property. In addition, NYSDAM and the local Soil and Water Conservation District must be given the opportunity to provide input on proposed locations for subsurface mineral and hydrocarbon exploration, development and extraction activities, including method of access and containment of waste products from the process.

#### **14. Road Construction**

Roads on the farm are necessary to move equipment and animals, harvest crops and provide access for customers. Most farm roads are constructed of sand and gravel and as such are not Impervious Surfaces that permanently impact the soils beneath them. Construction of impervious roads should be limited to the extent possible to minimize impact to prime and statewide important soils and each shall be counted towards the Impervious Surface coverage limitation in the Farm Area.

Road construction may be limited in a narrowly defined Resource Protection Area so long as such restrictions are reasonable and consistent with the Purpose of the Easement.

#### **15. Dumping and Trash**

Disposal of refuse on the farm in any way will certainly impact its agricultural viability in the future as it poses an environmental and human health hazard. However, farms often store “useful” waste on the Property, such as manure, leaf and yard litter, and older equipment that serve as sources of parts for new equipment.

The Model Easement allows storage of agricultural products and byproducts, farm equipment used for parts, household waste in receptacles for periodic off-site disposal or biodegradable materials for composting or re-use, so long as they are used and stored in accordance with Sound Agricultural Practices and the Conservation Plan.

If a farm dump is pre-existing on the Property, NYSDAM may require Grantee to go through a Phase I environmental assessment to determine if remediation is necessary. Ultimately, it may make sense to exclude this area from the easement.

NYSDAM will not allow outright prohibitions on the storage or application of agricultural waste products as it would unreasonably impact farm viability.

#### **16. Permission of Grantee**

Permission requests will likely be made during the course of the easement and it is important that all parties understand the procedure required. This clause clearly outlines how permission can and should be granted so that the easement holder and landowner can be held accountable for their actions. The permission process in general should not be overly burdensome to either the landowner or easement holder.

Landowners must obtain the easement holder's written permission for a proposed action that requires it according to the terms of the Easement. The easement holder must grant permission unless it determines that such action is 1) incompatible with the Purpose of this Easement or 2) not subordinate to the agricultural use of the Property. The easement holder must respond to the permission request within 45 days of receipt of the request. This timeframe may be reasonably extended, if agreed upon by both the easement holder and the landowner. This clause may also include a reasonable default provision if a response is not received within the specified amount of time.

### **17. Ongoing Responsibilities of Grantor and Grantee**

Other than defined in this section, the easement does not impose any legal or other responsibility on easement holder or in any way affect any obligations of the landowner as owner of the Property. The Model Easement defines the following responsibilities:

#### **17.(a). Taxes**

The landowner remains responsible for payment of all taxes and assessments levied against the Property. The easement holder may, at its discretion, take action to protect its interest in the Property and to assure the enforceability of the Easement. If the easement holder makes any payment on behalf of the landowner, the landowner shall reimburse said costs.

#### **17.(b). Upkeep and Maintenance**

Grantor remains solely responsible for the upkeep and maintenance of the Property to the extent required by law and the Easement. Grantee shall have no obligation for the upkeep and maintenance of the Property.

#### **17.(c). Liability and Indemnification**

Grantor agrees to indemnify and hold Grantee and the State of New York, Department of Agriculture and Markets harmless from any and all costs, claims or liability relating to the Property. This section may also include an indemnification of any and all environmentally hazardous or toxic substances or materials on or under the Property.

### **18. Extinguishment of Development Rights**

Complete extinguishment of the development rights ensures that the primary purpose of the easement is met. Development rights from the Property must be extinguished.

Even in Transfer of Development Right (TDR) cases, the development rights must be terminated or permanently removed from the Property. This provision should specify how and where the development rights are then to be used elsewhere.

### **19. Baseline Documentation**

A Baseline Documentation Report, including maps and photographs, should be compiled and approved by all partners as an accurate representation of the current conditions of the Property and presented to all partners at the time of closing. The Baseline Documentation Report facilitates future monitoring and enforcement of the Easement. All Properties protected under easement must have a Baseline Documentation Report and the easement must reference it.

## **20. Right of Inspection**

This clause provides guidance for both the easement holder and the landowner on when and under what circumstances the easement holder is allowed on the Property. For simple annual monitoring, reasonable notice should be given to the landowner prior to entering the property and in many cases, the landowner's presence at the review is an important relationship building opportunity. However, if an irreparable violation is suspected, action should be taken as soon as possible to protect the resources defined in the easement and therefore notice is not required. Care should be executed here as the relationship between the landowner and the easement holder is perpetual and can easily be damaged with poor communication. NYSDAM must be afforded the same right of inspection as the easement holder.

The days and hours of notice and inspection may be varied in this provision within reason.

## **21. Enforcement**

It is the easement holder's responsibility to enforce and uphold the terms of the conservation easement and the landowner's responsibility to follow the terms of the conservation easement. Should a violation arise, the easement holder must take action to correct the violation through one or more legal remedies specified in this clause and described below.

*Injunctive relief* = a court order that requires a party to do or refrain from doing a certain act or acts, as opposed to a monetary judgment.

*Specific performance* = the actual accomplishment of a contract by the party bound to fulfill it. In this case, the actual accomplishment of the obligations stated in the easement. Under the doctrine of *specific performance*, where money damages would be inadequate compensation for the breach of an easement obligation, the Landowner would be compelled to perform what she agreed to do under the easement.

*Declaratory relief* = a court's remedy for the determination of a party's legal rights. Declaratory relief provides a binding decision by a judge on the rights and status of parties in a dispute even though no consequential relief is awarded. The decision is binding on the parties in any subsequent court action on the matter.

*Cumulative remedy* = a remedy imposed in addition to another that remains in force.

*Expedited relief, ex parte* = hastened relief through a judicial order granted at the request and for the benefit of one party without notice to or contestation by the other party.

The Model Easement indicates that the landowner shall have 30 days to cure a violation as determined by the easement holder. The easement holder may also bring an action to enjoin the violation through temporary or permanent injunction if necessary to stop an ongoing or threatened violation that could irreversibly diminish or impair the Purpose of the Easement. The easement holder may also seek money damages, including the damages for the loss of the resources protected under the Purpose of the Easement and restoration of the Property to its condition prior to the violation.

The time to cure the violation may be varied within reason.

## **22. Third Party Enforcement**

This clause gives NYSDAM the right to enforce a material violation of the easement. According to the language in the Model Easement, NYSDAM may only exercise this right if they have

given the easement holder and landowner sufficient time to cure the violation. If the easement holder is prosecuting an enforcement action, NYSDAM shall not have the right to enforce the same violation. This clause protects the state investment in the easement in perpetuity should the easement holder be unable to do so. This clause is not required. However, applicants must demonstrate that the proposed Grantee has the organizational and financial resources to enforce the terms of the easement, by litigation if necessary, as its justification to leave this clause out of its Conservation Easement. If included, the clause must be included verbatim from the Model Easement.

### **23. Dispute Resolution**

Conflicts may arise between landowners and easement holders that often have different skill sets and knowledge bases. A formal dispute resolution process gives both sides the opportunity to learn from the conflict and find common ground from which to work. This clause is not required by NYSDAM and the language may be reasonably changed from that included in the Model Easement.

### **24. Transfer of Easement**

On occasion, easement holders become unable to meet the responsibilities dictated to them by the perpetual Easement. This clause outlines how the easement may be transferred and to whom it may go.

According to the Model Easement, the easement holder may transfer the easement to any private non-governmental organization or public agency that at the time of transfer is a “public body or not-for-profit conservation organization as defined by Section 49 of New York State Environmental Conservation Law or “qualified organization” under Section 170(h) of the IRS Code, provided that the transferee agrees to assume the responsibility imposed on the Grantee by the Easement. If the Grantee ever ceases to exist or qualify under Section 49 of the ECL or Section 170(h) of the IRS Code, a court of competent jurisdiction shall transfer this Easement to another qualified organization having similar purposes that agrees to assume the responsibilities imposed by the Easement.

### **25. Transfer of Property**

The conservation easement is meant to be perpetual and run with the deed of the property, regardless of who owns it. This clause secures that goal. Notice is required to the easement holder and NYSDAM so that both may begin to develop a relationship with the new landowner, providing education and clarification regarding the rules of the easement. The notification time may be varied from thirty (30) days within reason.

The easement holder may impose a transfer fee when the Property is transferred to another landowner. If this is included in the easement, it must be referenced in the Subdivision provision as well as stipulating that a subdivision is another “transfer” of the Property.

### **26. Amendment of Easement**

As the original easement had to be approved by NYSDAM to ensure it met the agricultural standards of the farmland protection program, so does any amendment to the easement once

signed. This is to ensure that over time the easement continues to meet the Purposes defined therein. The second sentence of this clause in the Model Easement must be included as written.

### **27. Extinguishment of Easement**

Extinguishment of the easement should be very difficult to achieve, since the easement is meant to be perpetual in nature. According to NYSDAM, all parties must prove without a doubt that the purpose of the easement is impossible to be met. Cessation of farming does not meet this requirement as the Purpose of the easement is to keep land available for agriculture – not a positive requirement to farm it. This clause draws attention again to the importance of the Purpose clause as the key touchstone of the easement.

### **28. Proportionate Share**

This clause does several things. It sets forth the Proportionate Share of the Property or the percentage of the value of the Property contained in the easement. This value is calculated by dividing the appraised value of the Property with the easement on it by the appraised value of the Property unencumbered. This percentage will be used to determine a payment scale or apportionment of value should the easement ever be terminated or extinguished.

The difference between 100% and the proportionate share is the value of the Property apportioned to the landowner at the time of extinguishment of the Conservation Easement.

The second thing defined in this clause is how the Proceeds will be utilized should the easement ever be extinguished and the property is subsequently sold unrestricted and/or Grantee is paid the value of its Proportionate Share. . The Proceeds may be kept by the local partner and reused with notification to NYSDAM in a similar manner in which they were given. Alternatively, the Proceeds may be divided between all project partners as is described below.

In essence, each party that contributed money to the purchase of the conservation easement (including a landowner donation) is entitled to their proportion of that value back. Each financial contribution is divided by the Proportionate Share (the value of the easement). Percentages must equal 100%. The portion of the Proceeds due to NYSDAM may be retained by the Grantee so long as they use the funds in a manner consistent with the primary Purpose of this easement. The portion of the Proceeds that may have been contributed by a landowner donation (as a result of a bargain sale of the Conservation Easement) should be reflected as going to one or more of the local project partners as identified in the easement.

No administrative or transaction costs may be included as contributions to the Proceeds percentages as determined by this clause.

#### Example calculation:

Appraised value of unencumbered Property = \$2,300,000

Appraised value of conservation easement = \$1,350,000

Purchase price of conservation easement = \$1,000,000

Proportionate share =  $\$1,350,000/\$2,300,000 = 58.7\%$ . The cash equivalent of this amount will be distributed to all project partners based on their financial contribution to the project as below.

County cash contribution =  $\$150,000/\$1,350,000 = 11.11\%$  of the Proportionate share

Town cash contribution =  $\$25,000/\$1,350,000 = 1.85\%$  of the Proportionate share

Bargain sale contribution =  $(\$1,350,000 - \$1,000,000)/\$1,350,000 = 25.93\%$  of the Proportionate share

NYSDAM share =  $[\$1,350,000 - (\$150,000 \text{ county} + \$25,000 \text{ town} + \$350,000 \text{ bargain sale})]/\$1,350,000 = 61.11\%$  of the Proportionate share

### **29. Interpretation**

In any case where the Easement seems ambiguous, the interpretation shall refer back to the Purpose clause. If the action is found consistent with the Purpose, that interpretation of the Easement will be favored to one that is inconsistent with the Purpose.

### **30. Successors**

The Easement is meant to run in perpetuity with the Property. As such, any owners of the Property or holders of the easement must be obligated by the terms of the Easement; therefore every provision of the Easement will apply to any successor Grantor or Grantee.

### **31. Severability**

Each clause in the Easement in this case, stands alone. If one is found invalid, it does not implicate the validity of the entire Easement.

### **32. Notices**

This clause stipulates how written notices must be delivered and addressed and therefore eliminates question of what constitutes a legal written notice. This language may be amended to include other forms of communication used by the landowner and easement holder, such as electronic mail and facsimile.

### **33. Title**

This clause affirms that the title is clear to the Property. For more information on Title Commitments and Curatives, see Guidance Document #5.

### **34. Subsequent Liens on Property**

This clause defines if and how subsequent liens may be placed on the Property. This is an important clause as many landowners' worry about their lending ability after the easement is in place. All subsequent liens on the Property must be subordinate to the Easement.

### **35. Subsequent Encumbrances**

The easement holder has the responsibility to determine whether future easements or restrictions on the Property are consistent with and subordinate to the Purposes of the Easement. If so, they may not withhold permission for said encumbrance. In all cases, future encumbrances must be consistent with the primary Purpose of this Easement and shall not unreasonably restrict or regulate Farm Operations in contravention of the purposes of Article 25-AA of the Agriculture and Markets Law.

### **36. Grantor's Environmental Warranty**

This clause does several things to protect all parties involved in the easement transaction. First it provides the landowner with security that the easement holder and the State have no right to dictate the operations on the farm outside of the exceptions detailed in the easement. Second, it holds the easement holder and the State harmless for any activities on the farm that constitute an environmental hazard. Lastly, it places the responsibility on the landowner to remedy any such environmental hazard, again holding harmless the easement holder and the State.

**37. Duration of Easement**

The easement is perpetual in duration.

**38. Entire Agreement**

The easement as defined in this document constitutes the entire agreement. No alteration or variation of the easement shall be valid or binding unless contained in an amendment that complies with Section 26 (“Amendment”).

**39. Waiver**

No waiver by the easement holder of any breach or default of this agreement shall be deemed to extend to any prior or subsequent default or breach. No waiver is binding unless executed in writing by the easement holder.

**40. Binding Effect**

The provisions of the easement will run with the Property in perpetuity and will bind and be enforceable against the landowner and any future owners and any parties entitled to possess or use the Property.

**41. Captions**

The captions in the Easement are inserted solely for convenience and reference and are not a part of the Easement and have no effect upon interpretation.

**Additional issues that may be addressed in conservation easements:**

**Resource Protection Areas**

Additional limitations in narrowly defined Resource Protection Areas will be allowed provided that they are consistent with the Purpose of the Easement and do not unreasonably restrict Farm Operations in contravention of Agriculture and Markets Law (see Guidance Document #1 “Farm Operations and Agricultural Districts”). The resources being protected in an RPA must be identified and defined in a Whereas clause at the beginning of the easement in order to provide background for its existence. No outright prohibition of all agricultural uses in relation to a Farm Operation will be allowed. For guidance on how to define Resource Protection Areas and protect the resources therein, please see Guidance Document #3 “Developing a Land Plan for an Agricultural Conservation Easement”.

**Link to samples/model**

<to be inserted>

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