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**TITLE 3 AGRICULTURE**  
**DELAWARE ADMINISTRATIVE CODE**

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**DEPARTMENT OF AGRICULTURE**  
**DELAWARE AGRICULTURAL LANDS PRESERVATION FOUNDATION**  
**700 Planning, Farmland Preservation**

**702 Regulations Governing the Delaware Agricultural Forestlands Preservation Program**

The Foundation is granted authority to establish criteria for Forestland Preservation Areas (hereinafter referred to as "Forestland Preservation Area") and the purchase of forestland preservation easements. [3 Del.C. §933]

**1.0 Criteria for Forestland Preservation Area Eligibility**

- 1.1 In order to qualify for the Agricultural Forestland Preservation Program, the lands proposed as a Forestland Preservation Area in the application must meet the following criteria:
- 1.1.1 The owner or owners shall hold fee simple title to all land to be placed in the Forestland Preservation Area;
  - 1.1.2 The land must constitute a contiguous area of trees or forest and cover at least 10 acres in size and be capable of being timbered and reforested, as determined by the State Forester;
  - 1.1.3 The land shall be zoned to allow for agricultural or open space uses and shall not be subject to any major subdivision plan;
  - 1.1.4 The applicant or applicants, including all fee simple title holders, must sign a written agreement committing to the Forestland Preservation Area restrictions set forth in this Section and 3 Del.C. §934 and other adopted requirements;
  - 1.1.5 The land must be viable and potentially productive forestlands;
  - 1.1.6 The land must be located outside a designated Growth Zone, as that term is defined in 3 Del.C. §902(11);
  - 1.1.7 The land must not be subject to an existing conservation or preservation easement or other restriction which prohibits development;
  - 1.1.8 The land proposed for inclusion shall include all of the eligible forestlands located in the tax parcels subject to the application, and no eligible real property shall be carved out or otherwise excluded. One (1) location containing no more than one (1) acre of land may be designated for seasonal recreational dwelling usage provided that the property proposed for inclusion contains at least 30 acres and the use of the designated area does not adversely affect the forestlands of the property. The owner may designate up to three residential locations as permitted under 3 Del.C. §933(8)(b), provided that any seasonal recreational dwelling shall be counted against the total allowable dwelling units;
  - 1.1.9 No more than one (1) acre of land for each 20 acres of usable forestlands, up to a maximum of 10 acres, can be used for permanent dwelling housing;
  - 1.1.10 The land shall have a forest management plan prepared by a professional forester that addresses the landowner's forest management goals for the land. The plan shall contain, at a minimum, aerial and soil maps of the land, a description and analysis of the forest by management unit, silvicultural prescriptions for each management unit, shall be revised and updated at least once every five years, and shall be available for inspection by the State Forester's office.
- 1.2 For the purposes stated in this chapter, the phrase "viable and potentially productive forestlands" is defined as land that is capable of being timbered and reforested as determined by the State Forester.

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**2.0 Application Procedures**

- 2.1 The Foundation will provide application forms on which applicants who volunteer to place their lands into a Forestland Preservation Area agree to provide the requested information.
- 2.2 The Foundation shall provide assistance to potential applicants in completing application forms when requested.
- 2.3 Foundation staff may conduct on-site inspections and phone interviews with the applicants to acquire data necessary to review the application and write a staff report.

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#### 3.0 Application Review Procedures

- 3.1 The Foundation, subject to the review and approval of the State Forester, has the authority to approve applications establishing Forestland Preservation Areas and to purchase forestland preservation easements. [3 Del.C. §931]
- 3.2 The Foundation staff and the State Forester will review applications and determine whether or not the minimum eligibility requirements under subsection 1.1 have been met.
- 3.3 If the minimum eligibility requirements have not been met, the applicant will be notified by letter from the Foundation indicating that the application does not qualify for further review, and the reasons for ineligibility.
- 3.4 If an applicant excludes a portion of property otherwise includable in a proposed Forestland Preservation Area, the Foundation shall deny the application; provided however that the applicant shall have the right to designate a location for seasonal recreation dwelling usage and residential usage, as allowed by law.
- 3.5 Subject to subsection 3.3 of this regulation, if the lands proposed as a Forestland Preservation Area in the application meet minimum eligibility criteria, then the Foundation staff will submit to the Foundation and the State Forester applications and criteria checklists describing and summarizing the criteria as established in this chapter.
- 3.6 If the applicant disagrees with the staff evaluation of the proposed Forestland Preservation Area, then the applicant may contact the Foundation staff to discuss the application review. The Foundation staff will meet with the landowner to discuss the review within thirty (30) days from receiving such telephone call or letter.
- 3.7 If the issue is not resolved to the applicant's satisfaction, the applicant may request an administrative review with the Foundation by submitting a letter to the Foundation within fourteen days (14) of the applicant's last meeting with Foundation staff. This letter must include reasons and documentation to justify the applicant's claim or claims.
- 3.8 Within seven (7) working days from the receipt of the landowner's letter, the Foundation will schedule a meeting and notify the applicant by certified letter of the date, time, and place of the meeting, at least seven (7) days in advance.
- 3.9 At the administrative review meeting, the applicant or applicants shall present information or documentation as to how the proposed Forestland Preservation Area satisfies the eligibility criteria.
- 3.10 The Foundation will render a decision within thirty (30) days from the administrative review meeting and notify the applicant in writing of its decision.

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#### 4.0 Creation of a Forestland Preservation Area

- 4.1 To establish a Forestland Preservation Area, the application must be approved by the Foundation and the State Forester. [3 Del.C. §932 (a)]
- 4.2 After review by the Foundation and State Forester, the application is subject to a review period of thirty (30) days in which the Secretary of Agriculture may approve or reject the application. The application shall be deemed officially approved at the end of the review period if it is not approved or rejected by the Secretary of Agriculture. [3 Del.C. §919 and 938]
- 4.3 The property legally becomes a Forestland Preservation Area when the applicant and Foundation Chairperson (or designee) have signed the Forestland Preservation Area Agreement and no rejection has been exercised by the Secretary of Agriculture, or the Secretary of Agriculture has specifically approved the application.
- 4.4 Copies of the Forestland Preservation Area Agreement shall be filed with the County Planning and Zoning and Tax Assessor's Offices and recorded in the Office of the Recorder of Deeds. The Foundation shall require from these Offices proof of recording, receipt of the Forestland Preservation Area Agreement, or both.
- 4.5 The Foundation shall endeavor to provide written notification of the date of establishment of the Forestland Preservation Area and provide a copy of the Forestland Preservation Area Agreement to the applicant, however, the failure of the Foundation to satisfy any formality following execution of a Forestland Preservation Area Agreement shall not affect the validity of the Forestland Preservation Area Agreement.

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#### 5.0 Forestland Preservation Area Restrictions

- 5.1 Any rezoning or major subdivision of real property included in a Forestland Preservation Area is prohibited. [3 Del.C. §934 (a)(1)]

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- 5.2 The submission of applications for preliminary rezoning or approval of subdivision plans for any property within a Forestland Preservation Area to a county or municipality shall be considered evidence of the intent to rezone or subdivide and no action shall be taken by any county or municipality on any such application until the expiration of the Forestland Preservation Area Agreement.
- 5.3 During the term of the Forestland Preservation Area Agreement, activities on the property shall be limited to forestry production, forestry operations, forestry management and control, wildlife habitat management, and activities related to the foregoing. [3 **Del.C.** §934(a)(2)]
- 5.4 Forestry management, control and related activities allowed on Forestland Preservation Areas are as follows:
  - 5.4.1 Hunting, trapping and fishing, provided such activities are limited to private non-commercial activities that do not adversely affect the forestland use of the property, and provided further that leasing of the property for such non-commercial activities shall be allowed.
  - 5.4.2 Easements, licenses and other property interests for utility, telecommunications, and access uses are allowed subject to the requirements set forth in 3 **Del.C.** §909(a)(5)(f).
  - 5.4.3 The use of portable non-permanent forest planting, harvesting and processing equipment.
  - 5.4.4 Conservation, educational and research activities related to forestlands.
  - 5.4.5 Ditching for drainage necessary to enhance or preserve forestlands.
  - 5.4.6 The grazing of livestock, excluding housing or shelters, subject to prior approval by the State Forester.
  - 5.4.7 Timbering and reforestation.
  - 5.4.8 Noncommercial private recreational uses such as hiking, horseback riding, and primitive camping, provided such activities do not adversely affect the forestland use of the property.
  - 5.4.9 Activities involving best forestland management practices.
- 5.5 No more than 1 acre of land for each 20 acres of usable land in a Forestland Preservation Area, subject to a maximum of 10 acres, shall be allowed for permanent dwelling housing. The seasonal recreational dwelling usage designated pursuant to 3 **Del.C.** §933(7) shall be counted against the total allowable permanent dwelling housing acreage. With respect to acreage allowed for dwelling housing there shall be a limit of 3 dwelling houses for residential use placed on the allowable acreage at 3 locations designated by the owner. This limit shall include any pre-existing dwelling housing or the seasonal dwelling usage designated pursuant to 3 **Del.C.** §933(7). If however there exists 3 dwelling houses on the real property at the time of approval of the new Forestland Preservation Area, the allowable total number of dwelling housing and the allowable acreage shall be allocated to the existing dwelling houses and no additional dwelling houses, including seasonal dwelling usage, shall be allowed. The aforesaid dwelling housing allowances are subject to any applicable zoning laws and regulations, and the approval of said allowances by the Foundation shall not be considered a representation by the Foundation that said allowances comply with any applicable zoning laws and regulations.
- 5.6 Excavation or filling, borrow pits, extraction, processing and removal of sand, gravel, loam, rock or other minerals is prohibited unless such action is currently required by or ancillary to forestry management, control and related activities allowed on forestland preservation areas.
- 5.7 Activities that would be detrimental to drainage, flood control, water conservation, erosion control or soil conservation are prohibited.
- 5.8 Any other activity that might negatively affect the continued use of the land as forestlands is prohibited.
- 5.9 No conversion of forestland to cropland, pasture-land, open space or other types of land use shall be allowed.
- 5.10 No permanent commercial or industrial structures shall be located on the property.
- 5.11 No disposal, burial, storage, or stock piling of junk, vehicles, equipment, liquid or solid waste or other liquid or solid materials shall be allowed, except that wastewater spray irrigation shall be allowed utilizing best available treatment technology with storage and treatment facilities located on lands outside the Forestland Preservation Area.
- 5.12 The Forestland Preservation Area Agreement and Forestland Preservation Area requirements and benefits shall be binding on the heirs, successors and assigns of property owners within a Forestland Preservation Area. A property owner intending to transfer all or a portion of the property in a Forestland Preservation Area shall provide written notice to the Foundation at least (10) days in advance of the date of transfer of the property, and shall notify the purchaser or transferee that the property is subject to Forestland Preservation Area restrictions. Any transfer of real property in a Forestland Preservation Area shall be preceded by the execution by the transferor and the transferee of an Acknowledgment in the form designated by the

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Foundation and in recordable form acknowledging the restrictions applicable to the property and the agreement by the transferee to be bound by said restrictions.

- 5.13 Pursuant to 3 **Del.C.** §934 (d), all restrictions shall be covenants which run with and bind the lands in the Forestland Preservation Area for a minimum of ten (10) years, beginning when the Forestland Preservation Area Agreement takes effect as specified in the Forestland Preservation Area Agreement.

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#### **6.0 Continuation of a Forestland Preservation Area**

- 6.1 All properties are to remain in a Forestland Preservation Area for at least ten (10) years.
- 6.2 If a landowner wishes to withdraw from, or terminate a Forestland Preservation Area, then the Foundation must receive a written notice of intent to withdraw no less than six (6) months prior to the ten (10) year anniversary date of initial establishment of the Forestland Preservation Area. [3 **Del.C.** §934 (d)]
- 6.3 If the Foundation does not receive a written notification of the landowner's intent to withdraw from the Forestland Preservation Area at least six (6) months prior to the ten (10) year anniversary date of that Forestland Preservation Area, then the land shall remain in the Forestland Preservation Area for an additional five-year period unless and until written notice of intent to withdraw shall be given at least six months prior to the end of each additional five-year period.

#### **7.0 Inspection of Forestland Preservation Area**

- 7.1 The Foundation and State Forester shall have the authority to enter upon lands located within a Forestland Preservation Area as may be necessary to perform surveys, appraisals, and investigations to accomplish its mission; consistent with applicable statutes and these regulations. [3 **Del.C.** §939]
- 7.2 The Foundation or its designee, including the State Forester, reserves the right to inspect restricted land and enforce agreements.
- 7.3 If any violations of the terms and the conditions of the Forestland Preservation Area Agreement occur, the Foundation may institute proceedings in the appropriate court to enforce the terms and seek appropriate relief. [3 **Del.C.** §939]

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#### **8.0 Purchase of Forestlands Preservation Easements [3 Del.C. §936]**

- 8.1 The intent of this section is to provide a framework for the acquisition of Forestland Preservation Easements (hereinafter referred to as "Forestland Preservation Easements") to protect in perpetuity those lands of the state most suitable for long-term utilization of forestland resources while preserving invaluable wildlife and habitat protections and open space benefits to the citizens of the State of Delaware.
- 8.2 The Foundation will give priority to on acquiring Forestland Preservation Easements in areas where significant forestlands can be maintained for long-term forestry production.
- 8.3 Based on the long-range goal set forth in Section 8.2, the Foundation will only consider properties outside of designated growth areas in the acquisition of Forestland Preservation Easements.
- 8.4 In the criteria established for the prioritization of Forestland Preservation Easements, the Foundation will also give weight to the Forest Land Evaluation (LE) score for the subject parcel and the location of the subject parcel in relation to approved Delaware Forest Legacy Areas and state-designated Natural Areas.

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#### **9.0 Schedule for Acquisition of Forestland Preservation Easements**

- 9.1 Recognizing that voluntary applications by Forestland Preservation Area landowners may exceed available funds for the procurement of Forestland Preservation Easements, it is necessary to establish a procedure for pooling, reviewing, prioritizing, and funding applications for permanent Forestland Preservation Easements.
- 9.2 Application and funding cycles will take place on schedules established by the Foundation.
- 9.3 Applications for the purchase of Forestland Preservation Easements in Rounds of Purchases shall be subject to deadlines established by the Foundation.
- 9.4 For each Round of Forestland Preservation Easement Purchases the Foundation shall rank the applications in the Round in accordance with the criteria set forth herein.

- 9.5 Upon completion, the appraisals shall be provided to the landowners, and the procedures set forth herein involving offers for the sale of preservation easements shall be initiated.
- 9.6 After receipt and the completion of review of offers for the sale of preservation easements, the Foundation shall review the offers and announce the selections.
- 9.7 Following the selection of properties for acquisition of Forestland Preservation Easements, the Foundation shall arrange for surveys of the properties to be conducted, and proceed to settlement under the terms of option agreements, subject to the availability of funding and satisfaction of regulatory, financial or other restrictions or limitations.
- 9.8 The Foundation is under no obligation to purchase a Forestland Preservation Easement which is offered for sale.

**10.0 Matching Contributions To The Program**

The Foundation may establish a reserve of available funds for the matching of federal, county, state, local, or private funds for the preservation of forestlands.

**11.0 Eligibility Criteria For Forestland Preservation Easements**

The criteria for eligibility of acquisition of a Forestland Preservation Easement shall be the same as the criteria for Forestland Preservation Area eligibility. In addition, offered preservation easement lands shall be in an established Forestland Preservation Area and in compliance with Forestland Preservation Area requirements to be eligible; provided however that the Foundation shall have the authority to acquire Forestland Preservation Easements located within an existing Agricultural Preservation District heretofore approved by the Foundation. The Foundation shall have the right, in its sole discretion, to acquire a Forestland Preservation Easement on only a part of the property included within the Forestland Preservation Area Agreement or Agricultural Preservation District, as the case may be.

**12.0 Application Procedures**

- 12.1 A separate application shall be required for each forestland tract offered for Forestland Preservation Easement purchase. The Foundation shall not be obligated to process any incomplete application.
- 12.2 The Foundation shall develop and make the application form available to landowners or other interested parties.

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**13.0 Review and Evaluation of Forestlands Preservation Easement Application**

- 13.1 The Foundation shall review the application to determine if it is complete and meets the minimum criteria set forth herein.
- 13.2 If the application is complete and the minimum criteria are met, a representative of the Foundation shall view the forestlands.
- 13.3 The Foundation shall for each Round of Preservation Easement Purchases evaluate applications which meet the minimum criteria and rank the applications in accordance with the criteria of Section 14.0. Notwithstanding the ranking procedure set forth in Section 14.0, the Foundation shall be entitled to have all eligible properties appraised and considered for purchase of Forestland Preservation Easements.

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**14.0 Ranking Criteria for Forestland Preservation Easement Applications**

- 14.1 A system for ranking Preservation Easement applications is established to assist the Foundation in reaching a final decision.
- 14.2 Four categories will be utilized to rank the Preservation Easement applications during the Foundation's review period with a maximum score of 220 points. The four categories, each of which is discussed below, are forest productivity, size of discount, proximity to an approved Delaware Forest Legacy Area, and proximity to a state designated Natural Areas. In the event of a tie score, the property with the higher Forest Land Evaluation (LE) will receive the higher ranking. If the tie score is not resolved by the Forest LE scores, then the parcel with the greater acreage will receive the higher ranking.
- 14.3 Forest Productivity - Forest Land Evaluation Score - 100 Points.

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- 14.3.1 In order to follow a rational, statewide plan for the acquisition of development rights on forestlands, the Foundation will give weight to applications for sale of Preservation Easements based on the land's capacity to produce timber. A property's Forest LE score will be used to reflect this capacity. Forest LE scores range from 0 to 100 with 100 reflecting the best soils for timber production.
- 14.3.2 Land with multiple soil types with differing LE scores will be categorized based on a weighted area average of the various LE scores.
- 14.4 Forestland Preservation Easement Discount - 100 Points.
  - 14.4.1 The Foundation will also consider applications for sale of Forest Preservation Easements based on the ability to purchase easements at a discounted cost or donation.
  - 14.4.2 Weight will be given to the owner's willingness to receive a discounted payment from the appraised value of the Forestland Preservation Easement. One point will be awarded for each percentage of discount provided by the owner from the appraised value of the Forestland Preservation Easement.
- 14.5 Other factors - 20 Points.
  - 14.5.1 Other criteria the Foundation will consider in the ranking of applications for sale of Forest Preservation easements will include the property's natural resource values, in addition to timber, and its location relative to lands designated as high priority for protection by the State.
  - 14.5.2 Ten (10) points will be awarded if the property is located within an approved Delaware Forest Legacy Area (FLA). A property shall be considered within a FLA if at least half of the property's area is located within the FLA.
  - 14.5.3 Ten (10) points will be awarded if the property is located within a state-designated Natural Area as defined in 7 Del.C. Ch. 73. A property shall be considered within a Natural Area if at least half of the property's area is located within the Natural Area.

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**15.0 Appraisals [3 Del.C. §916]**

- 15.1 An offer to purchase a Forestland Preservation Easement shall be based upon one or more appraisal reports which estimate the full market value of the forestlands under its agricultural zoning designation and the forest-only value of the forestlands tract. Any appraisal obtained by the Foundation shall remain the property of the Foundation and may not be used by the property owner for tax purposes.
- 15.2 Subject to subsection 15.7 of this regulation, an appraisal to the extent possible shall be based primarily on an analysis of comparable sales.
- 15.3 The value of buildings or other improvements on the forestlands shall be excluded in determining the Forestland Preservation Easement value. Excluded from the value of the Forestland Preservation Easement shall be the acreage designated for residential use or reasonable dwelling use.
- 15.4 The appraiser shall be:
  - 15.4.1 An independent, licensed real estate appraiser who is qualified to appraise a property for easement purchase. An appraiser shall be selected on the basis of experience, expertise and professional designation, and
  - 15.4.2 A member of an organization which subscribes to the "Uniform Standards of Professional Appraisal Practice" published by the Appraisal Standards Board of the Appraisal Foundation, and shall follow their ethical and professional standards.
- 15.5 The appraiser shall supply a narrative report which contains information specified by the Foundation.
- 15.6 The appraiser shall provide the Foundation with paper and electronic copies of each appraisal report as determined by the Foundation.
- 15.7 The forest-only valuation shall be based on the property's capacity to produce timber through each soil type located on the property. The State Forester shall calculate annual timber production rates for each soil type and determine a five-year, rolling average of timber sale prices for the state. These values will produce an average annual income per acre for the property. This income value will then be capitalized to produce the forest-only valuation using a five-year, rolling average rate of return.
- 15.8 The Forestland Preservation Easement value is then calculated using the full market valuation appraisal and the forest-only valuation.

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**16.0 Comparable Sales Data**

The appraiser shall supply information concerning comparable sales.

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**17.0 Forestland Preservation Easement Value and Purchase Price**

- 17.1 The value of a Forestland Preservation Easement in perpetuity shall be the difference between the full market value and the forest-only value contained in the appraisal report.
- 17.2 The price paid by the Foundation for the purchase of a Forestland Preservation Easement may not exceed, but may be less than, the value of the Forestland Preservation Easement. [3 **Del.C.** §916(a)]
- 17.3 If an applicant is not satisfied with the appraisal provided by the Foundation, the applicant shall be entitled to have an independent appraisal performed at the applicant's expense by a qualified appraiser as specified in subsection 15.4. The alternative appraisal shall be prepared in the same format as the Foundation's appraisal and shall be submitted to the Foundation within forty-five (45) days of the applicant's date of receipt of the appraisal provided by the Foundation. The forty-five (45) day period may be extended by the Foundation, provided the time extension does not delay the time frame established by the Foundation for making selection and acquisition decisions.
- 17.4 The review of the alternative appraisals by the Foundation shall be based on written submissions under such procedures as specified by the Foundation.
- 17.5 The maximum adjusted Preservation Easement value which the Foundation may accept is the difference between the adjusted forest-only value and the adjusted full market value, determined as follows:
  - 17.5.1 The adjusted forest-only value shall equal the sum of:
    - 17.5.1.1 The forest-only value determined by the applicant's appraiser, and
    - 17.5.1.2 Up to one-half of the positive difference between the forest-only value determined by the Foundation's appraiser and that appraiser's values which exceed those determined by the applicant's appraiser.
  - 17.5.2 The adjusted full market value shall equal the sum of:
    - 17.5.2.1 The full market value determined by the Foundation's appraiser, and
    - 17.5.2.2 Up to one-half of the positive difference between the full market value determined by the applicant's appraiser and that appraiser's values which exceed those determined by the Foundation's appraiser.

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**18.0 Offer of Purchase by the Foundation**

- 18.1 The priority for making purchases of Forestland Preservation Easements shall be those properties with the highest score as described in Section 14.0.
- 18.2 Notwithstanding the priority and non-priority requirements set forth in this Section, the Foundation shall be entitled to:
  - 18.2.1 Accept donations of preservation easements under such terms and conditions that may be imposed in the donations, provided the preservation easements contain the restrictions imposed under 3 **Del.C.** Ch. 9; and
  - 18.2.2 Participate in programs which make monies available for the purchase of preservation easements, subject to the requirements of such programs, provided the preservation easements contain the restrictions imposed under 3 **Del.C.** Ch. 9.

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**19.0 The Forestlands Preservation Easement**

- 19.1 The owners of the subject forestlands shall execute a document conveying the Forestland Preservation Easement which document shall be in the form specified by the Foundation or such other form which contains conditions contained in Option Agreements executed by landowners.
- 19.2 The document shall be in recordable form and contain:

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- 19.2.1 A legal description setting forth the metes and bounds of the forestlands subject to the Forestland Preservation Easement and the seasonal dwelling or residential acreage, if any, designated by the owner pursuant to 3 **Del.C.** §933(8)(b).
- 19.2.2 At least one course and distance referencing a fixed marker or monument of a type commonly placed in the field by a surveyor.
- 19.2.3 The legal description shall not contain a closure error greater than one foot per 200 linear feet in the survey.
- 19.2.4 The forestlands on which a Forestland Preservation Easement is to be purchased must be surveyed and the survey shall show any residential acreage designated by the owner pursuant to 3 **Del.C.** §933(8)(b).

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**20.0 Title Quality**

The Forestland Preservation Easement conveyed to the Foundation shall be unencumbered except for standard exceptions and be capable of being insured as such by an established and recognized title insurance company doing business in the State of Delaware. Any title defects, liens, survey discrepancies, boundary line disputes, or similar title issues shall be resolved by the property owner, at his or her sole expense. If subsequent to the purchase of a Preservation Easement it is determined that the amount of acreage is less than as reflected on the survey used by the Foundation for purposes of calculating the purchase price for the Preservation Easement, the property owner shall be required to refund to the Foundation any excess funds paid in reliance upon the inaccurate survey.

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