

Drafting an Amendment and Restatement of a Grant of Conservation Easement



The *Model Grant of Conservation Easement and Declaration of Covenants* may be modified to amend and restate a grant of conservation easement by following the instructions below.

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Different Changes Demand Different Approaches

Depending on the particular facts and circumstances, changes to a conservation easement may be best accomplished through a simple amendment or by an amendment and restatement in full of the easement document. The guide [Amend OR Amend and Re-state](#) describes the situations that best lend themselves to each approach.

If a simple amendment is judged most appropriate, the [Model Amendment of Grant of Conservation Easement and Declaration of Covenants with Commentary](#) may be used to accomplish the changes.

The guide [Adding to Land Under Conservation Easement](#) describes three alternatives for adding to eased land and includes a model document to help implement one of the alternatives.

The [Model Grant of Conservation Easement and Declaration of Covenants](#) may be modified to amend and restate a grant of conservation easement by following the instructions below. A key objective for the Holder in accomplishing any amendment and restatement is to make it clear that the restatement supersedes but does not release the old document. The instructions here help ensure that the restated grant retains the same priority and enforceability as the original grant.

Title of Document

Entitle the restated grant “Amended and Restated Grant of Conservation Easement and Declaration of Covenants” to indicate that it is not an entirely new grant of easement.

In the opening recital, replace “THIS GRANT OF CONSERVATION EASEMENT AND DECLARATION OF COVENANTS” with:

THIS AMENDED AND RESTATED GRANT OF CONSERVATION EASEMENT AND DECLARATION OF COVENANTS.

Easement Date; Restatement Date

In the opening recital, change the term “Easement Date” to “Restatement Date.” Generally, that substitution may be made throughout the restated grant; however, in a few instances (noted below), reference to the date of the original grant is more appropriate.

Connect to Original Grant

Change the caption of §1.01 from “Property” to “Original Grant; Property” and substitute the following for the first sentence of §1.01:

On _____ (the “Easement Date”), [insert name or names of the original grantors of the easement or, if the ownership has not changed, the “undersigned Owner or Owners”] granted and conveyed to Holder a [insert name of document; for example, “Deed of Grant of Conservation Easement and Declaration of Restrictive Covenants”] (the “Original Grant”) on the Property described below and more fully in exhibit A (the “Property”). The Original Grant was recorded on _____ in the Public Records in Book ____ Page _____. The

undersigned Owner or Owners and Holder desire by the execution and recordation of this Grant to amend and restate the Original Grant in its entirety commencing as of the Restatement Date set forth above.

(Follow this text with the Property identification table set forth in §1.01.)

Easement; Covenants

Easement: If Property Description Has Changed or Conservation Objectives Expanded

If the restated grant incorporates a new description of the Property or an expanded set of Conservation Objectives, replace the first sentence of §1.02(a) with the following text:

The Owners have granted and conveyed or, by this Grant, do grant and convey to Holder an unconditional and perpetual easement upon the entire Property including any land not described as within the bounds of the Property under the Original Grant for the purpose of advancing the Conservation Objectives described below (that easement, the “Conservation Easement”).

This text assures that the conservation easement has been granted with respect to the entirety of the Property described in the restated grant regardless of any possible inaccuracies in the description incorporated into the original grant. If there is absolutely no change in the Property description, then delete from the provision the words “including any land not described as within the bounds of the Property under the Original Grant.”

Easement: If Property Description and Conservation Objectives Remain the Same

If the Property description is not changing, then replace the first sentence of §1.02(a) with the following text:

The undersigned Owner or Owners and Holder agree and confirm that, as of the Restatement Date and at all times thereafter, the easement granted and conveyed under the Original Grant and affirmed with this Grant (that easement, the “Conservation Easement”) (1) remains valid, binding and enforceable with respect to the Property prior in right to all other Liens or other matters affecting title to the Property but for Existing Servitudes and (2) includes within its scope all of the purposes identified as the Conservation Objectives whether or not mentioned in the Original Grant.

This text reconfirms the continued validity, enforceability, and priority of the conservation easement established by the original grant.

Owner Covenants

In §1.02(b) replace “establish” with “amend and restate the.”

Holder Covenants

If the Holder Covenants are being modified, in §1.02(c) replace “accepts” with “affirms its acceptance of” and replace “establishes” with “amends and restates the.”

If the Holder covenants are not being modified, shorten §1.02(c) to “By this Grant, Holder affirms its acceptance of the Conservation Easement.”

New Easement Plan

Different Protections for Different Areas

A restated Grant based on the model is likely to need a new Easement Plan attached as exhibit B and incorporated into §1.03 to show the location of one or more areas, each with a different set of protections—Highest Protection Area, Standard Protection Area, and Minimal Protection Area. Older easement documents tended to identify differing levels of protection, if at all, by identifying a building area.

Addressing Building Areas

You should not simply rename an older grant’s “building area” as a “Minimal Protection Area” in the restatement. The building area and the model’s Minimal Protection Area are similar in that they both usually identify an area where a substantial structure is permitted; however, beyond that, they are likely quite different in concept and implementation. (The philosophy behind the Minimal Protection Area is to sharply limit its size but to be quite permissive regarding what is permitted and to minimize the need for monitoring in the area.)

Conservation Objectives

Section 1.04 of the model sets forth the Conservation Objectives of the easement. To complete this section for a restatement, you will have to closely study the text of the original grant and likely the baseline documentation to glean the easement’s intended purposes. You should take care to be as accurate as possible in reflecting the original intended purpose of the easement in the Conservation Objectives. (See the guide [Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#).)

Many easement documents drafted before the model’s debut defined the purposes of the easement rather generally—often reciting verbatim the definition of conservation purposes contained in the charitable gift provisions of the federal internal revenue code (IRC 170(h)) with little elaboration. Rather than shoe-horning conservation goals into a tax code-driven provision, the model’s philosophy is to be conservation-driven and tax law-compliant, which tends to deliver a more comprehensive set of conservation purposes and a more detailed description of each purpose. Grants that used the tax code formulation or a similarly generic approach to conservation purposes can be amended and restated to expand the purposes and improve upon the ultimate conservation results delivered by the easement. For example, older grants seldom included water resource protection goals; a restatement is a perfect opportunity to include this valuable conservation purpose.

Baseline Documentation

Restatement affords Holder the opportunity to check the adequacy of existing baseline documentation and supplement it to reflect existing conditions as of the Restatement Date and current standards for such documentation. To assure clarity as to the definition of “Baseline Documentation,” substitute the following for the definition of Baseline Documentation in §1.05:

As of the Restatement Date, the undersigned Owner or Owners and Holder have signed an acknowledgment of the accuracy of a report that incorporates both the baseline

documentation referred to in the Original Grant as well as additional photographs and information that reflect existing conditions as of the Restatement Date (that report, the “Baseline Documentation”).

Federal Tax Items

With respect to the amended and restated grant, no charitable gift is allowed unless the Owners make an additional donation either by giving up valuable rights reserved in the original grant or by conveying the easement over land not included in the original grant.

No Past or Present Qualified Contribution

Section 1.07 may be deleted if the original grant was not used and the amended and restated grant will not be used as a qualified conservation contribution for purposes of the charitable gift provisions of the Code.

Past Contribution—No; Present Contribution—Yes

If the original grant was not used as a qualified conservation contribution but the greater conservation value created by the amended and restated grant will be used as a qualified contribution, keep §1.07 in place and unchanged.

Past Contribution—Yes; Present Contribution—No

If the original grant was used as a qualified conservation contribution but the amended and restated grant will not be used as an additional contribution, replace the first sentence of §1.07(a) “Qualified Conservation Contribution” with the following text:

The Original Grant, a transfer of a partial interest in real estate, was intended to qualify as a qualified conservation contribution (as defined under §170(h)(1) of the Code).

In the first sentence of §1.07(b) “Public Benefit,” change “The undersigned Owner or Owners have granted the Conservation Easement to provide...” to “The Conservation Easement has been granted to provide...”

Past Contribution—Yes; Present Contribution—Yes

If the original grant was used as a qualified conservation contribution and the amended and restated grant is intended to result in an additional qualified conservation contribution, replace the first sentence of §1.07(a) “Qualified Conservation Contribution” with the following text:

This Grant and the Original Grant, each transfers of a partial interest in real estate, are intended to qualify as qualified conservation contributions (as defined under §170(h)(1) of the Code).

In the first sentence of §1.07(b) “Public Benefit,” change “The undersigned Owner or Owners have granted the Conservation Easement to provide...” to “The Conservation Easement has been granted to provide...”

Existing Improvements

You must choose whether to define “Existing Improvements” (article 9) as of the Restatement Date or the original Easement Date. Holders desiring to make a fresh start with the easement

documentation will prefer the definition to refer to the Restatement Date. Others will find it clearer to define Existing Improvements as of the Easement Date.

If the Restatement Date is selected, you must take into account that Improvements constructed before the Restatement Date are grandfathered as Existing Improvements under the restatement and the reference point for determining Additional Improvements likewise moves forward to the Restatement Date. As a result, limitations included in the original grant must be checked and revised in the restated grant to reflect the change.

If the Easement Date is selected, you must take into account that the revised Baseline Documentation updated to the Restatement Date will show Improvements constructed after the Easement Date. To clarify, the definition of Additional Improvements in the Glossary may be supplemented as follows:

Improvements shown on the Baseline Documentation as of the Restatement Date but not included as Existing Improvements as of the Easement Date are considered to be Additional Improvements for purposes of interpreting and applying the provisions of this Grant.

Legal and Policy Considerations

A brief summary of the rationale for Holder’s decision to change the terms of the original Grant guards against misinterpretation and supports the conclusion that Holder has acted in accordance with all legal and ethical standards. You may want to consider adding a section, such as the following, to the end of article 1 to present background material relevant to the Holder’s decision to amend and restate:

1.1_ Consistency of Amendment and Restatement with Applicable Law and Policy

Holder has entered into this Grant because it has concluded that the amendment and restatement of the Original Grant strengthens the conservation easement held by it with respect to the Property, furthers the conservation purposes of the Original Grant, and otherwise complies with Applicable Law and Holder’s policy on amendment of easements.

The provision may stop here or additional support may be added, for example:

This Grant does not diminish in any material way the protections on natural and scenic resources set forth in the Original Grant.

This Grant strengthens the Conservation Easement by defining as the Conservation Objectives the protection of the specific resource values within the Property intended to be protected by the Conservation Easement.

This Grant enhances enforceability and easement administration by clearly stating the limitations on future use and development agreed to by Owners and Holder.

This Grant brings easement administration practices into conformity with Holder’s current practices, which more effectively and efficiently serve to uphold the Conservation Objectives than the Holder’s older practices.

The Holder has made all requisite inquiry and is satisfied that, first, this Grant significantly advances Holder's charitable purpose of protecting natural resources, and, second, that any benefit to the Owners or other private interests that may accrue from the amendment and restatement does not constitute a private benefit under the Code or, if it does, the benefit is incidental.



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Patricia L. Pregmon, attorney at law, and Andrew M. Loza are the authors.

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