

2023 Changes to the Model

Grant of Conservation Easement and Declaration of Covenants

Updating the 11/8/2021 through 10/4/2023



FEDERAL TAX ITEMS

Change to 1.07(a)

The words “without consideration except as set forth in this article” were deleted from 1.07(a) as shown here:

Qualified Conservation Contribution. The undersigned Owner or Owners intend this grant of Conservation Easement, a transfer of a partial interest in real estate ~~without consideration except as set forth in this article~~, to qualify as a qualified conservation contribution (as defined under §170(h)(1) of the Code). If the Conservation Easement is transferred to any Person, that Person must commit to hold it exclusively for conservation purposes as defined in the Regulations.

Why the Change?

The phrase is superfluous. Note that subsection 1.07(f) states that: “Except for such monetary consideration (if any) as is set forth in this article, Holder acknowledges that no goods or services were delivered to the undersigned Owner or Owners in consideration of this Grant.”

SUBDIVISION FOR PARK OR PRESERVE

Change to 2.02(b)

Article 2 as of 2021 contained the following permission:

Subject to Review, creation and transfer of a Lot to a Qualified Organization for park, nature preserve, public trail, or other conservation purposes approved by Holder after Review.

The Review standard was changed as follows:

Subject to Review and approval by Holder without any obligation to do so, creation and transfer of a Lot to a Qualified Organization for park, nature preserve, public trail, or other conservation purposes.

Why the Change?

An Owner could seek to create a tightly held land trust to receive subdivided land for a nature preserve as a way of circumventing the subdivision and transfer restriction. Under the present model, such a transfer would be subject to Review. However, if the Holder denied the proposal without cause other than the feeling that the Owner is doing an end-run around the subdivision limitations, the courts, if petitioned, might find that the Holder acted unreasonably in discharging its Review responsibilities. By changing the model to remove the reasonableness standard for Review for this item, the possibility of the Owner circumventing the subdivision restriction will be reduced.

CARBON

Changes to 2.02

Subsection 2.02’s title, “Permitted Changes,” was shortened to “Permitted” and its opening statement was changed from “The following *changes* are permitted” to “The following *actions* are permitted.” To the present list of three actions, a fourth was added:

(d) Commitments Regarding Resource Management Practices. Commitments to implement resource management practices consistent with Conservation Objectives and otherwise permitted under this Grant together with the transfer of rights, credits, or offsets (for example, carbon or nutrient credits) arising from or related to such commitments.

Addition to the Commentary

The commentary accompanying this new provision would suggest the option of making such commitments and transfers subject to Review if the parties wish to empower the Holder to guard against potential conflicts between the operation of the easement and what might be included in a carbon deal before that deal is struck. The model does not include the Review requirement because of the additional burden it would place on the Holder.

Why the Change?

The prohibitions contained in section 2.01 include: “Transfer of development rights or other rights granted or allocated to the Property in support of land development outside the Property.”

Is a carbon credit one such prohibited right? Can a carbon credit be construed as supporting land development outside the Property? Or is a carbon credit an interest in real property that would be addressed by the first prohibition of section 2.01? (The law is in flux as to the nature of carbon credits: are they a real or personal property interest?) Does it make a difference whether carbon credits are created for the voluntary market or regulatory market?

The reality is that the model was developed without attention to carbon credits.

This change is intended to make clear that easements created using the model in no way prevent carbon transactions—assuming those transactions don’t require resource management practices contrary to the Conservation Objectives and restrictive covenants of the grant.

This change does not wade into debates about the pros and cons of carbon transactions on already conserved lands. It simply provides certainty that such transactions are possible under the easement if they are otherwise feasible.

Deleted are “including removal of Invasive Species” and “or health of Native Species on or about the Property.”

Item (3) of 3.02(b) as of 2021 had read:

Subject to Review, removal of vegetation to accommodate replanting as permitted in this article.

This was expanded to read:

Subject to Review, removal of vegetation to accommodate replanting as permitted in this article; subject to Review, eliminating Invasive Species to benefit natural habitat and the ecosystem.

Why the Change?

Earthworms, honeybees, and Kentucky blue grass, for example, may be viewed as Invasive Species and thus, at least on first consideration, reasonably be identified for removal. This might suggest to someone with ulterior motives a backdoor way to substantially rearrange the landscape without need for Holder approval. While item (1) does require Owners to take reasonable steps to consult with Holder before removing Invasive Species, some have suggested that this provision leaves too much room for trouble.

The change would place the sole focus of item (1) on reducing the risk of harming humans and their belongings rather than mixing in other concerns.

REMOVAL OF INVASIVE SPECIES

Proposed Change to 3.02(b)

For the Highest Protection Area, the model as of 2021 had read:

(b) The following activities and uses are permitted:

(1) Cutting trees, Construction, or other disturbance of resources, **including removal of Invasive Species**, to the extent reasonably prudent to remove, mitigate, or warn against an unreasonable risk of harm to Persons, their belongings, **or health of Native Species on or about the Property**. Owners must take such steps as are reasonable under the circumstances to consult with Holder prior to taking actions that, but for this provision, would not be permitted or would be permitted only after Review.



v. 10/4/2023