

Amending and Restating Grants of Conservation Easement



Best Practices to Document Changes

If a land trust intends to amend a grant of conservation easement, implementation of the changes requires careful planning and drafting. The consequences of a poor execution range from missed opportunities to improve easement stewardship to inadvertent elimination of conservation protections.

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Introduction

The Pennsylvania Land Trust Association has published a number of guides discussing the legal and policy considerations pertaining to the amendment of easement documents.¹ The purpose of this guide is, first, to assist the land trust that has decided to amend a grant of conservation easement in choosing whether to simply amend the document or amend and restate it in full. Further, to assist with an amendment and

restatement, the guide furnishes suggestions on adapting the [Model Grant of Conservation Easement and Declaration of Covenants](#)² to serve as a restatement of a grant. These suggestions can help holders identify issues to address in the restatement whether or not they are using the model.

Amend or Amend and Restate?

An amendment sets forth specific changes to a grant but otherwise keeps all of its provisions intact. A restatement of a grant substitutes an entirely new document for the original grant.

Circumstances Pointing to Amendment and Restatement

The easement holder may prefer restatement in the following circumstances:

- If the easement was not created relatively recently, a restatement presents the opportunity to incorporate current best practices into the easement document. Individual land trusts and the land trust movement as a whole have gained a tremendous amount of knowledge and learned many lessons regarding easement drafting, resource protection and easement stewardship over the years. A restatement informed by this experience will more effectively conserve the land.

¹ See the [Conservation Easement guide category](#) at the website [ConservationTools.org](#).

² The 7th edition of the model is available at http://conservationtools.org/library_items/323.

- If the original grant did not include important provisions or contains internal contradictions or ambiguities, an amendment that corrects the deficiencies also highlights them. Because it is recorded in the public records, the amendment makes available to other owners of land conserved under the same easement form a list of the weaknesses that some might seek to exploit. A restatement will avoid the highlighting of vulnerabilities.
- If the original grant was previously amended, restatement will avoid the need to read multiple documents together to get their meaning. A patchwork of changed provisions also risks inadvertent contradictions or lack of clarity within and between the documents.
- Easement administration is simplified by having uniform and effective provisions in each grant administered by the holder. A practice of using amendment requests as an opportunity to update to the holder's current form can help with achieving that uniformity.

Circumstances Pointing to Simple Amendment

The easement holder may prefer a simple amendment in the following circumstances:

- The proposed change is simple and straightforward; for example, permission to build an additional residence is to be eliminated or the parties wish to allow an existing improvement to be moved to a previously prohibited location (now recognized to be appropriate).
- The original grant was made relatively recently and thus uses the holder's present form or is acceptably close to it in form.

Other Circumstances

If the owners wish simply to add additional land to the easement—keeping the same conservation objectives and imposing the same restrictions as under the original grant—a simple amendment would seem in order. However, neither an amendment nor an amendment and restatement is the preferred way to

achieve that end. The better method is to record a separate grant *then consolidate the two grants into one restated grant*.

Why? First, for clarity on the public records: a title examiner searching the public records is sure to find a conservation easement granted on Parcel B (and the consolidation document) but may not discover that an amendment of an existing grant on Parcel A creates an easement over Parcel B. Second, to guard against a disastrous error: a separate document is certain to include a clause granting and conveying the easement on the additional land; this crucial language may be inadvertently omitted in an amendment.

Drafting the Restatement

The *Model Grant of Conservation Easement and Declaration of Covenants* (the "model") may be modified to restate a grant by following the suggestions below. A key objective is to make it clear that the restatement supersedes but does not release the old document. The restated grant retains the same priority and enforceability as the original grant.

Title of Document

Title 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 pro-

vision 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

One 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.³

Conservation Objectives

Section 1.04 of the model sets forth the Conservation Objectives of the easement. To complete this section for a restatement, the drafter will have to closely study the text of the original grant and likely the baseline documentation to glean the easement's intended purposes. The drafter should take care to be as accurate as possible in reflecting the original intended purpose of the easement in the Conservation Objectives.⁴

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 code⁵ 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

³ 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.

⁴ The guide [Amending Grants of Conservation Easement](#) [Legal Considerations for Land Trusts](#) and the [Model Policy for Conservation Easement Amendments](#), both available at ConservationTools.org, address the matter of original intent.

⁵ IRC 170(h)

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 the 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, make the following changes to §1.07:

- In the second sentence of subsection (a), change “by this Grant is” to “by the Original Grant was.”
- In the first sentence of subsection (b), change “The undersigned Owner or Owners have granted” to “The Conservation Easement has been granted.”

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, make the following changes to §1.07:

- In the second sentence of subsection (a), change “by this Grant” to “by this Grant and the Original Grant.”
- In the first sentence of subsection (b), change “The undersigned Owner or Owners have granted” to “The Conservation Easement has been granted.”

Existing Improvements

The drafter of the restatement 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, the drafter 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, the drafter 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

Whether a simple amendment or an amendment and restatement, a brief summary of the rationale for the holder’s decision to change the terms of the original grant guards against misinterpretation and supports the conclusion that the holder has acted in accordance with all legal and ethical standards. The holder and owners may want to consider adding a section to article 1 to present background material relevant to the holder’s decision to amend and restate:

1.11 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, such as the examples below:

- 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.

Resources at ConservationTools.org

To find experts on the topics covered by this guide, see the right hand column of the on-line edition at <http://conservationtools.org/guides/143>. The on-line edition also contains the most up-to-date listing of related library items and guides.

Library Categories

[Conservation Easement Amendment, Modification and Termination](#)

Related Guides

[The Nature of the Conservation Easement and the Document Granting It](#)

[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#)

Submit Comments

Help improve the next edition of this guide. Email your suggestions to the Pennsylvania Land Trust Association at aloza@conserveland.org. Thank you.

Acknowledgements

[Patricia L. Pregmon](#), attorney at law, is the primary author, and [Andrew M. Loza](#), the contributing author and editor.

The Pennsylvania Land Trust Association published this guide with support from the Colcom Foundation, William Penn Foundation and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.



Colcom Foundation

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