

11/8/2021 Changes to Subsections 1.07(a) and 1.04(b) of the Model Grant of Conservation Easement and Declaration of Covenants

CHANGE 1: Subsection (a) of 1.07 Federal Tax Items is changed as follows:

- (a) **Qualified Conservation Contribution.** ~~The Conservation Easement has been donated in whole or in part by the undersigned Owner or Owners. The donation of the Conservation Easement by this Grant is intended to qualify as a charitable donation of a partial interest in real estate (as defined under §170(f)(3)(B)(iii) of the Code) to a Qualified Organization. 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 ~~the Conservation Easement~~it exclusively for conservation purposes as defined in the Regulations.

The primary reason for the above edit is that Holders and Owners do not always know with certainty that the easement involved a donation at the time of the grant. The edit focuses on what can be represented with certainty: the Owners intend the grant to qualify as a qualified conservation contribution.

CHANGE 2: The Area-Specific Conservation Objective for the Highest Protection Area at subsection 1.04(b) is changed as follows:

- (1) **Highest Protection Area.** To protect and enhance the richness of biodiversity and natural habitat, ~~keeping the area wild or undisturbed in character.~~

This change is explained in an addition to the **Commentary**, which reads as follows:

Wild and Undisturbed. In 2021, the wording of the Highest Protection Area objective was shortened and now reads: “To protect and enhance the richness of biodiversity and natural habitat.” Prior to this, it went on to say “, keeping the area wild or undisturbed in character.” This deleted phrase caused some confusion. Some people interpreted the text such that they should heavily err on the side of avoiding or blocking activities—even if there might be significant potential to enhance biodiversity and habitat—in favor of not directly disturbing the land. Unwavering use of such an interpretation can be unfortunate because as invasive species, climate change, and other factors make it increasingly hard for land to naturally regenerate and serve as healthy ecosystem, the frequency of situations is increasing where human intervention on the land to boost biodiversity and habitat is desirable.

We should be on guard for hubris that tells us that we can fully control and improve natural systems; we should also guard against proposals that may not be authentic in seeking to protect and enhance the natural values of the land. In any case, we should avoid the fallacy that hands-off management is always (or perhaps even often) the best strategy for optimizing biodiversity and habitat.

Elaboration. You may choose to elaborate on how the objective affects human activities on the land. For example:

To protect and enhance the richness of biodiversity and natural habitats, only disturbing the land for this purpose or, with minimal disturbance of habitat, for nonintrusive enjoyment of the land.

October 27, 2020 Changes to the

Model Grant of Conservation Easement and Declaration of Covenants

WeConservePA added a new subsection under 8.09 “Guides to Interpretation”:

(f) **Interpret in Favor of Conservation Objectives.** If any provision of this Grant or any writing submitted to or issued by or on behalf of Holder in connection this Grant is vague, ambiguous or may be interpreted or construed to favor an interest other than Holder’s, such provision is to be given the interpretation or construction most favorable to Holder’s interest in the Conservation Easement.*

WeConservePA made a minor clarification to 7.06 “No Fault of Owners.” It reads as follows:

Holder will waive its right to reimbursement ~~under this article~~ in regard to a violation as to Owners (but not other Persons who may be responsible for the violation) if Holder is reasonably satisfied that the violation was not the fault of Owners and could not have been anticipated or prevented by Owners by reasonable means.

* The commentary to 8.09 (f) reads as follows:

Purpose. To resolve disputes concerning the interpretation of an easement or covenant, courts developed a rule favoring the landowners’ right to use their land free of burdensome restrictions. The Conservation and Preservation Easements Act reverses that preference for conservation and preservation easements in Pennsylvania, but many state statutes lack such a provision. The model provision both helps to address this gap outside of Pennsylvania and assures that that the Grant will continue to be interpreted as agreed in the Grant even if the Conservation and Preservation Easements Act were to be changed in the future.

**Changes to the Model
Grant of Conservation Easement and Declaration of Covenants
from 5/3/2019 to 4/22/2020
(four provisions altered in total)**

Article 1. Background; Grant to Holder

1.07 Federal Tax Items

(e) **Extinguishment.** In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that (1) the grant of the Conservation Easement gives rise to a real estate right, immediately vested in Holder, that entitles Holder to compensation upon extinguishment of the easement; and (2) extinguishment for unexpected changes that make impossible or impractical the continued use of the Property for conservation purposes (as defined in the Regulations) of this Grant can only be accomplished by judicial proceedings. The fair market value of the right is to be determined in accordance with the Regulations; i.e., it is at least equal to the proportionate value that the Conservation Easement as of the Easement Date bears to the value of the Property as a whole as of the Easement Date (the “Proportionate Value”). If the Proportionate Value exceeds the compensation otherwise payable to Holder under this Grant or Applicable Law, Holder is entitled to payment of the Proportionate Value. Holder must use funds received on account of the Proportionate Value for conservation purposes (as defined in the Regulations).

[This change more cleanly aligns with the Regulations.]

Article 2.	Transfer; Subdivision
Article 3.	Highest Protection Area
Article 4.	Standard Protection Area
Article 5.	Minimal Protection Area

Article 6. Rights and Duties of Holder and Beneficiaries

6.01 Holder Covenants

(c) **Proceeds Used for Conservation Purposes.** Holder must use any funds received on account of the release, termination, or extinguishment of the Conservation Easement in whole or in part in furtherance of ~~its charitable~~Holder’s conservation purposes.

[“Charitable” doesn’t work for governmental holders and there is no compelling need to qualify a charitable organization’s conservation purposes as such.]

Article 7.	Violation; Remedies
Article 8.	Miscellaneous

Article 9. Glossary

“Applicable Law” means federal, state, or local laws, statutes, codes, ordinances, standards, and regulations applicable to the Property, the Conservation Easement, or this Grant, as amended through the applicable date of reference. If this Grant is intended to meet the requirements of a qualified conservation contribution, then applicable provisions of the Code and the Regulations (including notices issued interpreting the Regulations) are also included in the defined term.

[The change is intended to clarify that the definition includes notices issued by the IRS.]

“Regulatory Signs” mean signs (not exceeding one square foot each or such greater dimensions as are the minimum required by Applicable Law) to control access to the Property or for informational, directional, or interpretive purposes.

[The change is intended to accommodate situations where the law may require larger signs.]

The 2019.05.03 version of the seventh edition of the *Model Grant of Conservation Easement and Declaration of Covenants* updates the 2017.05.18 version with changes to section 6.04 as indicated below.

6.04 Review

The following provisions are incorporated into any provision of this Grant that is subject to Review:

- (a) **Notice to Holder.** ~~Before~~ Owners begin or allow ~~a Subdivision~~, Improvement, activity, or use that is subject to Review, Owners must ~~(1)~~ notify Holder of the proposed change including with the notice such information as is reasonably sufficient to comply with Review Requirements and otherwise describe the proposal and its potential impact on the Conservation Objectives ~~and (2) receive Holder's approval.~~
- (b) **Notice to Owners.** ~~Upon~~ receipt of Owners' notice, Holder must ~~review the proposed change and~~ notify Owners of Holder's determination to (1) accept Owners' proposal in whole or in part; (2) reject Owners' proposal in whole or in part; (3) accept Owners' proposal conditioned upon compliance with conditions imposed by Holder; or (4) reject Owners' proposal for insufficiency of information on which to base a determination. If Holder gives conditional acceptance under clause (3), commencement of the proposed ~~Subdivision~~, Improvement, activity, or use constitutes acceptance by Owners of all conditions set forth in Holder's notice.
- (c) ~~Time for Review. If requested by Owners, Holder must furnish its estimate of the time required to review the proposed change and use its best efforts and due diligence to notify Owners of its determination within this time period. Otherwise, Holder must make its determination within a reasonable period of time following receipt of Owners' notice to Holder.~~
- (d) **Standard of Review**
- (1) The phrase "without any obligation to do so," in relation to an approval or determination by Holder, means that, in that particular case, Holder's approval is wholly discretionary and may be given or withheld for any reason or no reason.
- (2) In all other cases, Holder's approval is not to be unreasonably withheld. It is not unreasonable for Holder to disapprove a proposal that may adversely affect resources described in the Conservation Objectives or that is otherwise inconsistent with maintenance or attainment of Conservation Objectives.

Deleted: At least 30 days before

Deleted: intend to

Deleted: an

Deleted: Within 30 days after

Deleted: <#>Failure to Notify. If Holder fails to notify Owners as required in the preceding subsection, the proposal set forth in Owners' notice is deemed approved.¶

One subsection of the 7th edition of the *Model Grant of Conservation Easement and Declaration of Covenants* was modified for the 2017.015.18 version. Subsection 3.02(c) was changed as follows:

~~Other Activities. Activities~~ **Recreation and Education.** Recreational, educational, and scientific research activities are permitted that do not require Improvements other than trails and do not materially and adversely affect maintenance or attainment of Conservation Objectives such as the following: (1) walking, horseback riding on trails, cross-country skiing, bird watching, nature study, fishing, and hunting; and (2) ~~educational or scientific activities~~ wildlife research consistent with and in furtherance of the Conservation Objectives. Vehicular use is not permitted in connection with the activities permitted under this subsection unless Holder approves the use after Review.