Changes to the Model Grant of Conservation Easement and Declaration of Covenants

9/16/2025

The changes to the model described below were finalized following the release for public comment of draft changes on 3/19, 4/17, 6/1, and 7/15/2025 and review of the subsequent submissions. The review process also included an online forum on 6/10 and an in-person review at the 8/15/2025 Land Protection and Stewardship Gathering.

Article 1. Background; Grant to Holder

The Change: 1.04(b)(2) Standard Protection Area

The Conservation Objective read as follows:

> To promote good stewardship of the land so that it will always be able to support open space activities including Sustainable[1] Agriculture or Sustainable Forestry.

The change modified it to read as follows:

> To promote good stewardship of the land, the Sustainable production of Forestry or Agricultural goods, and other Sustainable open space activities.

Why the Change?

The resource-specific Conservation Objectives explicitly include the protection and improvement of water quality and natural habitat. These objectives and the Highest Protection Area objective "to protect and enhance the richness of biodiversity and natural habitat" work strongly and mutually in support of one another.

In contrast, some tension exists between these same resource-specific objectives and the possible conduct of Sustainable Agriculture or Sustainable Forestry referenced in the SPA objective. Commercial timber production and farming—even when following exceptionally good practices—will have detrimental impacts on the quality of natural habitat and water resources. Well-chosen practices may minimize or negate these impacts over time, or even lead to net conservation gains, but near-term harm is inescapable.

How should the easement holder, in its role as the interpreter of the easement document, reconcile this tension between the resource-specific objectives and the activities that the SPA references? To what if any extent are detrimental impacts on wildlife and water acceptable under the easement? Could a holder use its latitude as interpreter to block most or all commercial production in the SPA due to impacts on wildlife and water? One could argue that such an action is supported or even mandated by the present text. One can also argue against that proposition.

The revision provides clarity and explicit support for Sustainable timber harvests or farming in the SPA just as the easement explicitly supports wildlife habitat and water quality.

Article 2. Transfer; Subdivision

The Change: 2.02(a) Lots Within Property

The following edit was made to this permitted action:

> If the Property contains more than one Lot, ~~Subdivision to~~(1) ~~merge~~consolidation of two or more Lots into one; or (2) subject to Review, ~~reconfigure~~reconfiguration of one or more of the boundaries of such Lots except a boundary of the Property as described in exhibit A.

Why the Change?

This edit does not change the meaning of the provision. It simply serves to improve clarity given that people are sometimes confused by the model's referencing merger of lots as a Subdivision.

Article 3. Highest Protection Area

The Change: 3.02(b) Resource Management and Disturbance

This section, which itemizes 10 permitted activities and uses in the Highest Protection Area, was reworked as follows:

(1)*This permission to cut trees, etc. to address risk of harm is unchanged.*

[1] "Sustainable is a defined term in the model. It "means land management practices that provide goods and services from an ecosystem without degrading soil or water resources and without a decline in the yield of those goods and services over time.""

(2) *This item—permitting small scale tree cutting, e.g., for heating a home with firewood—is moved from its former #6 position.*

~~(2)~~(3) Planting, ~~re~~transplanting, and maintaining Native Species ~~or, subject to Review, planting, replanting, and maintaining other vegetation~~.

(4) In addition to the activities listed above but subject to Review, management of plants, animals, and fungi for the purpose of enriching biodiversity and improving ecosystem health, conducted in accordance with a Resource Management Plan or other plan satisfactory to Holder. ~~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.~~

(5) and (6), originally (4) and (5), are unchanged.

(7), (8), and (9) are unchanged.

(10) ~~O~~Subject to Review, other activities that Holder, without any obligation to do so, determines are consistent with maintenance or attainment of Conservation Objectives and are conducted in accordance with the Resource Management Plan or other plan ~~approved for that activity after Review~~satisfactory to Holder.

Why the Change?

Item 10 provides holders discretion to approve any number of management activities in the HPA, which would include measures to improve biodiversity and ecosystem health. Such measures are arguably needed on many if not most properties if biodiversity and ecosystem health are to be improved and not diminished over time due to invasive species, harmful past forest practices, deer overbrowse, etc. This flexibility provided by item 10 has been known to be missed by some readers.

The edit is intended to make clearer that active management to advance conservation is permissible, subject to Review depending on the nature of the activities. By reordering items, the edit is further intended to improve the reader's comprehension.

- Actions involving tree cutting and vegetation management that *don't require Review* are offered first as items (1), (2), and (3).
- The modified item (4) permits a wide range of additional actions (including, although not explicitly listed, Invasive Species control) *subject to appropriate Review*.
- Items (10) is revised to improve clarity with no substantive change in meaning.

Article 4. Standard Protection Area

The Change: 4.01(c) Impervious Coverage Limitations

The parenthetical content in 4.01(c)(3), which reads as follows, was deleted:

> Subject to Review, Holder may adjust Impervious Coverage limits to account for the lesser impact of specific Improvements designed to reduce environmental harm caused by Impervious Coverage ~~(for example, green roofs and permeable surfacing materials)~~.

Why the Change?

The parenthetical content is unnecessary, and its deletion does not affect the operation of the grant. The parenthetical content might however be construed as a quasi-endorsement of the noted practices. Both green roofs and permeable surfacing materials require substantial ongoing maintenance to remain effective, and a holder will want to be careful in potentially creating a major monitoring responsibility if such practices are proposed to be used to adjust Impervious Coverage limits. As such, it makes sense to remove any suggestion that these particular practices (or any others) are endorsed as a means to address Impervious Coverage.

Article 5. Minimal Protection Area

The Change: 5.02(d) Residential and Other Uses

5.02(d)(1) read:

> Residential use is permitted but limited to not more than one Dwelling Unit.

The provision was revised to read as follows:

> Residential use is permitted but limited to not more than __________ **(two if not noted otherwise)** Dwelling Unit(s).

Why the Change?

Would the inclusion of an in-law suite in a residential structure permitted in the Minimal Protection Area—whether used by family or for Airbnb hosting or the like—be to the detriment of conservation? Would a multi-family apartment building within the MPA—a structure that could lessen the demand for sprawling development in the vicinity of the property—be detrimental? Perhaps yes, perhaps no. The model's present default of one Dwelling Unit might discourage users from deliberating the optimal Dwelling Unit count for a particular project.

If the Minimal Protection Area were to be made sufficiently small, it could make sense to remove the Dwelling Unit limitation altogether from the model as being unnecessary to achieve the Conservation Objectives. However, the MPA is often made larger than optimal from a conservation perspective to provide the landowner with sufficient flexibility to make reasonable use of the land. In these instances, deliberation over an appropriate and optimal Dwelling Unit count is sensible.

The Change: 5.01(c) Limitations on Improvements

5.01(c)(1) read:

> Not more than one Improvement (whether an Existing Improvement or Additional Improvement) may contain Dwelling Units (if any) permitted under this article.

The provision was changed to read as follows:

> Not more than __________ **(two if not noted otherwise)** Improvement(s) (whether an Existing Improvement or Additional Improvement) may contain Dwelling Units (if any) permitted under this article.

Why the Change?

See the discussion for 5.02(d).

The use of detached structures for additional dwelling units, whether accomplished through renovating a garage or constructing entirely new structures, is becoming more common. Providing a blank to be completed by users encourages consideration of what would be optimal for a particular project.

Article 8. Miscellaneous

The Change: 8.03 Transfer

8.03(c) read:

> **Ending Continuing Liability.** If Holder is not notified per this section's requirement, it is not the obligation of Holder to determine whether a violation first occurred before or after the date of the transfer. The pre-transfer Owners continue to be liable on a joint and several basis with the post-transfer Owners for the correction of violations under this Grant until such time as Holder is given the opportunity to inspect and all violations noted in Holder's resulting inspection report are cured.

The provision was revised to read as follows:

> **After Transfer.** Owners continue to be liable for the correction of violations under this Grant that occurred or continued during their period of ownership, without regard to when the violation is discovered, except to the extent specifically limited by Holder in writing.

Why the Change?

The former Ending Continuing Liability provision was designed to incentivize Owners to provide notice of transfer as required under 8.03. It operates by extending the pre-transfer Owner's liability to violations occurring *after transfer*, while offering relief from this risk to notice-compliant Owners. This approach was discarded because (1) informal polling of users indicated that the provision has not been effective as a compliance incentive, and (2) the provision may be misunderstood to affect the pre-transfer Owner's liability for violations that predate transfer.

If neither the former nor revised provision were included in the model, Pennsylvania common law supports the right of Holder to assert the liability of a pre-transfer Owner for pre-transfer violations discovered after transfer. By extension of this principle, Holders may assert joint-and-several or alternative liability of pre-and post-transfer Owners where Holder was not notified of a transfer and cannot independently determine who is actually at fault for a violation. The new language retains the present version's affirmation of this principle, heading off any risk that the common law could be successfully challenged in a scenario where a violation is discovered post-transfer for which a previous Owner was responsible.

The new version also ensures Holder flexibility regarding whether and how to provide assurances to pre-transfer Owners about surviving or continuing liability. A recommended approach is to provide a tailored set of assurances to buying and selling Owners, such as the approach advanced in the Model Compliance Statement. For additional guidance on this subject, see the guide Estoppel Certificates, Compliance Statements, and Conservation Easements.

The Change: 8.08 Indemnity

The paragraph read as follows:

> Owners must indemnify and defend the Indemnified Parties against all Losses and Litigation Expenses arising out of or relating to: (a) a breach or violation of this Grant or Applicable Law; and (b) personal injury (including death) and damage to personal belongings occurring on or about the Property if and to the extent not caused by the negligent or wrongful acts or omissions of an Indemnified Party.

The provision was modified to append the following item (c) to the list of circumstances requiring Owner indemnity:

> . . . and (c) the presence, release, or threatened release of hazardous substances on, under, or from the Property.

Why the Change?

Federal and state laws (the federal Comprehensive Environmental Response, Compensation, and Liability Act and Pennsylvania's Hazardous Sites Cleanup Act) impose liability for the costs to remediate or prevent releases of hazardous substances. This liability can occur by virtue of a party's ownership or management of land, even where no specific violation of law is alleged.

The risk to conservation easement holders under these laws is remote. Holders of conservation easements have not, to date, been held liable under these laws, and such a finding is unlikely, as conservation easements rarely convey affirmative land management rights such that a holder might be reasonably characterized as an "operator" with potential responsibility for the release of hazardous substances. However, absent further clarification from legislature or courts, the theoretical possibility exists that a government agency or private party could, in casting a wide net, include a conservation easement holder in such an action. This addition of a few more words to the model guards against this remote possibility.