



Guidelines for Amending a GOCO-funded Conservation Easement

Note: GOCO’s approval of an easement amendment means only that the amendment has met GOCO’s requirements and should not be interpreted as a representation that the amendment meets standards imposed by any other organization (including, but not limited to, a government agency or other third-party funder) or complies with applicable federal, state, or local laws (including, but not limited to, laws related to tax benefits, the easement holder’s charitable status, and granting of impermissible private benefit and/or private inurement).

Amendments to conservation easements (or other GOCO-approved use restrictions) should be rare and must be approached with caution. GOCO recognizes, however, that amendments are sometimes unavoidable (such as when correcting errors or clarifying ambiguities) or desirable (such as adding new acreage to an existing easement to avoid multiple easements on a single property).

Unless an easement explicitly states otherwise, GOCO must provide written approval of any amendment before it is recorded. When considering an amendment, it is important to involve GOCO early in the process.

GOCO will consider amendments to conservation easements when the easement holder can demonstrate the following:

1. The amendment is consistent with the conservation values the easement seeks to protect and the statement of intent/purpose of the easement. See the “Effect on Conservation Values” section below for further discussion on an amendment’s relationship to the property’s conservation values.
2. The amendment does not result in more than incidental financial benefit to the landowner.¹
3. The amendment does not affect the easement’s perpetual duration.
4. The proposed amendment complies with the amendment language of the easement.

Please note the following as they apply to all requests for amendment:

Effect on Conservation Values:

Generally, amendments should have a beneficial impact on the property’s conservation values. GOCO recognizes, however, that some amendments are intended to improve the quality of the easement document, eliminate ambiguities, clarify the intent or modify the operation of the easement, without necessarily benefitting the conservation values; such amendment proposals shall not have a negative effect on conservation values, and should demonstrate a rational need (including, for example, correction of an error, amendment in lieu of condemnation, changes necessary for the property owner to exercise reserved rights compatible with the original purpose of the easement, or an amendment that is called for in the original easement). In situations where there is no such rational need, GOCO will approve only those amendments that result in a demonstrated net benefit to the conservation values.

¹ This applies when GOCO has helped fund the conservation easement interest. In situations where GOCO helped a local government purchase the fee title to a property, GOCO may waive this requirement at its discretion.

Correction Deeds or Other Instruments:

GOCO considers an amendment to be any change to any provision of or exhibit to an easement, however seemingly minor.² Therefore, any “correction deed” or any other instrument that purports to alter in any way an existing easement is considered by GOCO to be an amendment and is subject to GOCO review and approval.

Appraisals of Amendments:

GOCO may, in its sole discretion, require that an appraisal be performed or an appraiser’s opinion letter be issued to determine whether the proposed amendment results in more than incidental financial benefit to the landowner. GOCO may require that an appraisal commissioned as part of the amendment due diligence comply with any or all aspects of GOCO’s appraisal policy for land acquisitions.

Subordination of Amendments:

Any mortgage or other encumbrance that post-dates the original easement must be subordinated to the amendment. Depending on the circumstances of a particular amendment, GOCO may require that an already-subordinated mortgage be subordinated to the amendment as well.

Contents of Amendment:

All amendments must include, at a minimum, recitals identifying the original easement and laying out the reasoning behind the amendment, the specific revisions to the easement, a statement that the unaltered terms of the easement remain in full force and effect, a statement that the perpetual nature of the easement is uninterrupted by the amendment, the legal description of the entire easement property, and any relevant maps, drawings, or other attachments.

GOCO may consider amended and restated deeds for more complicated amendments as may be necessary or desirable. Use of an amended and restated deed should not be viewed as an opportunity to re-write the entire original easement. In the event that GOCO approves the use of an amended and restated deed, the applicant must address each substantive change so that the proposed change may be approved or denied on its own merits.

Third-Party Opinions:

GOCO reserves the right to consult with outside experts (biologists, foresters, appraisers, geologists, etc.) regarding the proposed amendment. Upon request and when possible, GOCO will maintain the landowner’s, easement holder’s, and property’s identification confidentiality.

Baseline:

Depending on the nature of the amendment, it may be necessary to update the Baseline report.

Amendment Process:

Amendment requests must include the items on GOCO’s “Easement Amendment Checklist”. If GOCO agrees to the amendment, GOCO will provide a written approval letter along with the final agreed-upon draft of the amendment. The parties will then sign and record the amendment in the exact form approved by GOCO and will provide GOCO with a copy of the recorded amendment.

The following relate to certain types of amendments:

Amendments in Lieu of Condemnation:

² GOCO’s definition of “amendment” is its own and should not be interpreted as the easement holder’s or any other party’s definition of “amendment”.

When an amendment is necessary:

When an entity with power of eminent domain threatens to take fee title to a portion of a property that is protected by conservation easement, GOCO will accommodate an amendment to the easement to remove the condemned portion so long as (a) a determination is made that the proposed use is incompatible with the conservation values and the terms of the easement, (b) the easement holder is compensated by the condemning authority, and (c) the easement holder agrees to refund to GOCO its proportionate share of the proceeds, as established in the easement. (If the area of the proposed use would have been excluded from the easement had it existed at the time of the easement, then it will likely be necessary to remove the affected property by amendment. Examples include expansion of road right-of-way onto an easement property, construction of an intrusive public utility such as a water treatment plant, or construction of some other public use, such as a school.)

When an amendment may not be necessary:

When an entity with power of eminent domain threatens to take an easement over a portion of a property that is protected by conservation easement, GOCO will determine, in consultation with the easement holder, whether an amendment is necessary. In any event, GOCO will require that (a) the proposed use is compatible with the conservation values the easement seeks to protect, (b) the condemning authority agrees to restore the affected portions of the property to their pre-condemnation state, (c) the easement holder is compensated by the condemning authority, and (d) the easement holder agrees to refund to GOCO its proportionate share of the proceeds, as established in the easement. (If the proposed use would have been acceptable as a condition to title at the time of the easement – such as placement of a utility line – it is possible that an amendment won't be necessary.)

Addition of New Acreage to an Existing Easement: If adding acreage to an existing GOCO-funded easement for which no additional GOCO grant has been awarded, GOCO may conduct a full due diligence review of any additional acreage added to an existing easement acquired with GOCO funds, whether the addition of acreage is the sole purpose for the amendment or part of a more complicated proposal. Specific items GOCO will need to review are included in the “Due Diligence Checklist”. Alternatively, GOCO will not need to conduct a due diligence review on added acreage if the amendment contains specific language stating that GOCO provisions do not apply to the added acreage.

If adding acreage to an existing GOCO-funded conservation easement for which GOCO has awarded a separate grant, GOCO's requirements will be met by meeting the due diligence requirements of the new grant. GOCO will work with the grantee to determine whether an amendment of the original easement, an amendment and restatement of the original easement, or a separate easement document is appropriate.