

# CONSERVATION EASEMENTS 101

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## CONSERVATION EASEMENTS

### What is a Conservation Easement?

- The conveyance of a non-possessory interest in real property to a qualified holder, imposing limitations or affirmative obligations, for a conservation purpose.
- The agreement is entirely voluntary.
- The agreement is legally binding.
- The agreement is permanent and irrevocable.
- The agreement restricts development and uses of the land.
- A non-regulatory means of permanently conserving natural resources on privately owned lands.
- A conservation tool promoted by many federal, state and local public policies, including policies creating substantial tax incentives to willing private landowners who use them.

### What is a Valid Conservation Purpose?

Defined by the Uniform Conservation Act:

- Retaining or protecting natural, scenic, or open-space values of real property;
- Assuring its availability for agricultural, forest, recreational or open space use;
- Protecting historic resources;
- Maintaining or enhancing air or water quality; or
- Preserving historical, architectural, archeological or cultural aspects of real property.

Definition used by I.R.S. in IRC Sec. 170(h)(4):

- Preservation of land for outdoor recreation by, or education of, the general public;
- Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
- Preservation of open space (including farmland and forest land) where such preservation is
  - for the scenic enjoyment of the general public; or
  - pursuant to a clearly delineated governmental conservation policy; and will yield significant public benefits;
- Preservation of a historically important land area or a certified historic structure.

### What Kind of Property Can be Protected by a Conservation Easement?

Any property with significant conservation or historic preservation values:

- Forests
- Wetlands
- Riparian (river or stream) Corridors
- Tidelands, Feeder Bluffs and Nearshore Habitat
- Upland Wildlife Corridors
- Farms
- Endangered species habitat
- Archeological Sites
- Scenic areas
- And more

### Why Grant a Conservation Easement?

Conservation easements offer several advantages to the grantor:

- They leave the property in the ownership of the landowner, who may continue to live on it, sell it or pass it on to heirs.
- They are flexible, and can be written to meet the particular needs of the landowner while protecting the property's resources.
- They are permanent, remaining in force when the land changes hands.
- They can significantly lower estate taxes—sometimes making the difference between heirs being able to keep land in the family and needing to sell it.
- Donating an easement may result in a federal income tax deduction (in some circumstances a very substantial one) for the charitable donation of a qualified real property interest.
- Encumbrance by an easement alone, and especially in combination with enrollment of the encumbered property in the Current Use (aka Open Space) Program, may result in significant reduction in property taxes.

### Who Can Grant an Easement?

- Any owner of property with conservation or historic resources, including:
  - private individuals
  - corporate owners
  - public agencies and
  - land trusts or other nonprofitscan grant conservation easements.
- An easement can be donated or sold.

### To Whom Can They Grant It?

- Public agency
  - Federal resource agency – US Forest Service, US Fish & Wildlife Service, Natural Resources Conservation Service
  - State resource agency– WA Dept. of Fish & Wildlife
  - Local municipality
  - Other political subdivision – Conservation District, Metropolitan Park District
- Private nonprofit land trust
  - National – The Nature Conservancy, the Trust for Public Land, American Farmland Trust
  - State – Montana Land Reliance
  - Regional – Cascade Land Conservancy, Inland Northwest Land Trust, Rock Mountain Elk Foundation
  - Local – Bainbridge Island Land Trust

### Are All Grantees Created Equal?

No. Here's why:

#### ***Land Trusts***

- There are currently about 1,700 land trusts in the United States, most of which have been formed some time within the last 40 years. Most land trusts start out as grassroots, all volunteer organizations with community support and high ideals but not a lot of practical experience. Over time they progress through a series of stages, gradually gaining a full understanding of our industry's professional standards & practices; developing a set of their own well-thought-out policies, procedures and forms to guide project selection, stewardship monitoring and other work; and building the financial capacity to maintain an experienced, well-trained professional staff.
- We have a very strong trade organization, the Land Trust Alliance, which has established stringent Standards & Practices, and does a great deal of work to provide the land trust community with a breadth and depth of educational, reference and networking resources. See [www.landtrustalliance.org](http://www.landtrustalliance.org)
- There are always a few bad apples in any barrel, and so even our industry has a few unscrupulous players who do not even try to live up to the ethical standards the rest of us have agreed to, but it is rare.

#### ***Agency Holders***

Some government or quasi-government agencies have decades of experience creating, monitoring and enforcing conservation easements. Others not so much. And if conservation easements are held by an entity whose primary responsibilities are not conservation-oriented (such as a county or municipality), the monitoring and enforcement of those easements may be a very low priority for an under-resourced agency. Moreover, the staff training necessary to develop and maintain a quality land protection and stewardship program may be lacking. Sometimes, this sort of lack can be offset by the

holder contracting with a more experienced entity, like a local or regional land trust, to monitor and steward their conservation easements.

### Are All Conservation Easements Created Equal?

Absolutely not. The content, form and quality of each conservation easement is:

- Tailored to fit the needs of the particular grantor, property and conservation purpose(s).
- Influenced by the time period in which it was created;
- Influenced by state law and local or regional practices where it was created;
- Based on the mission, drafting philosophy, and model easement form currently in use by its grantee;
- Influenced in part by whether the easement is donated or purchased, and if donated, whether the landowner intends to seek a federal charitable contribution income tax deduction;
- Determined in part by what the landowners and their counsel will agree to; and
- Heavily dependent on the stage of development and relative sophistication of the grantee entity at the time of the easement's drafting;

In addition to the easement document itself, the overall quality of a conservation project's selection, design and execution are all dependent on the grantee's relative sophistication. However, if good landowner relations are maintained, there may be periodic opportunities to improve the clarity and relative level of protection afforded by the easement through well-crafted amendments.

### How Restrictive is an Easement?

Each conservation easement is tailored to fit the needs of the particular grantor, property and conservation purposes. There are also several different drafting philosophies: Some permit all activities not expressly prohibited under the easement's terms; Some prohibit all activities not expressly permitted under the easement's terms; easements state on their A conservation easement will usually prohibit or significantly restrict:

- Industrial and commercial activities.
- Subdivision.
- Construction of additional structures or improvements.
- Removal, filling or other disturbance of soil surface.
- Disturbance of wetlands or water courses.
- Outdoor advertising structures.
- Mining.
- Dumping.
- Commercial recreation.

Other restrictions will be tailored to fit with the specific conservation purposes of the easement. For instance:

- Natural habitat easements may restrict cutting trees or other vegetation; may limit road building or the use of off-road motor vehicles; and may limit or entirely prohibit livestock.

- Easements that have both conservation and public recreational purposes may allow trail building in some areas but limit or prohibit access to other areas that are particularly environmentally sensitive.
- Working forest or working farm easements may include a requirement to comply with a separately agreed to forest or farm management plan; or may specify in the easement itself certain management practices aimed at protecting forest health, soil stability, water quality and the wellbeing of wildlife.
- Historic preservation easements will obviously be tailored to protection of the particular historic structures or archeological resources being protected.

#### What Uses Are Permitted?

Again, depending on the conservation purpose(s) of the particular easement, permitted activities may include:

- Agriculture.
- Forestry.
- Noncommercial outdoor recreation.
- Residential use of a portion of the property.
- Other rights specifically reserved.

(Includes structures, improvements and land alteration related to the above.)

#### What Happens to Unused Development Rights?

There are several different drafting approaches concerning unused development rights that are not expressly reserved in a conservation easement. The easement may:

- Transfer and extinguish all currently available unused development rights;
- Transfer and extinguish all current and future unused development rights; or
- Transfer all unused development rights to the grantee without expressly extinguishing them (i.e., the development rights would become assets of the grantee that could, if local law permitted, be sold to a developer who wished to increase the permitted density on another parcel in a less environmentally sensitive area)

#### How Long Does an Easement Last?

- Most easements are written so that they last forever. (To qualify as a charitable donation for federal income tax purposes, the easement must be perpetual.)
- An easement runs with the land – i.e., the original owner and all subsequent owners are bound by the restrictions of the easement.

#### What Are the Grantee's Responsibilities?

- The holder of the easement is responsible for enforcing the restrictions that the easement document spells out in perpetuity.
- To do this, the grantee monitors the property on a regular basis, typically once a year.

To accomplish these tasks effectively, the holder must also:

- Maintain good records; and

- Maintain relationships with all of the owners (including successive new owners) of their conservation easement properties;
- Maintain a stewardship program that provides those landowners with information, referrals and other resources to help them maintain or improve their properties' conservation values; and
- Maintain sufficient capacity (both financial and human) to meet its stewardship and legal defense obligations.

Should the grantee ever become incapable of meeting its stewardship and legal defense obligations, it (or a court with appropriate jurisdiction) must transfer its conservation easements to another qualified easement holder.

#### Must an Easement Allow Public Access?

- Public agencies often require public access as a condition of funding if an easement is purchased.
- Landowners who donate conservation easements for habitat protection, protection of scenic views, or working farm or forest purposes, may or may not choose to open their property to the public.
- If an income tax deduction is to be claimed for an easement whose purpose(s) include outdoor recreation or education, some public access would be required.

#### What Does a Conservation Easement Consist of:

- Preamble
- Recitals
- Conveyance
- Purpose (often stated very generally with greater detail contained in the Baseline Resource Report)
- Land Use Restrictions
- Reserved Rights
- General Provisions (including enforcement provisions)
- Signatures
- Attachments – Often include some or all of the Baseline Resource Report which should consist of important maps, lists, descriptions and photographs that together represent the condition of the property at the time of the easement, the location of improvements and/or specially defined building envelopes or no-build or no-cut zones. If the Baseline Resource Report is not attached (or not all attached) to the recorded easement, it should be signed off on by both parties, a copy provided to the landowner and any other interested parties, and a copy held by and available for review at the offices of the land trust or public agency.
- Amendment(s) – Be sure to check the public records for subsequently filed amendments.

## How Does a Land Trust Evaluate a Potential Conservation Easement Project?

### ***The Land***

#### The land's qualities:

- What is it about the land that is important? What are its special natural or historical features?
- Does the entire parcel need to be protected to maintain the property's natural or scenic values?

#### Factors Favoring Fee Ownership:

- The property contains highly sensitive resources.
- Public use is a significant conservation objective.
- The resources require intensive management.
- Surrounding lands are owned in fee by a land trust or other conservation organization or agency.

#### Factors Favoring Conservation Easements:

- Conservation objectives include productive use.
- Private ownership is compatible with the conservation objectives.
- The grantee has the capability and finances to monitor and enforce the easement.
- Restrictions that protect the resources can be negotiated and can be reasonably monitored and enforced.

### ***The Landowner***

#### The landowner's objectives for the land:

- Is the landowner interested in donating the land?
- Does the landowner want to continue living on the land?
- Does the landowner want to continue owning the land and passing it on to someone in their family?

#### The landowner's financial situation:

- Does the landowner need to sell the land?
- Does the landowner need to reserve the right to build additional houses on the property, or to sell building lots?
- Does the landowner have genuine conservation intent?
- Does the landowner have a genuine donative intent, or is there a quid pro quo (e.g., is easement required in order to obtain approval for a residential subdivision development)?
- Is the landowner's primary motive related to income tax, estate tax or property tax concerns?

### ***The Grantee – Importance of Project Selection Criteria***

- Every grantee should develop and apply its own stringent Project Selection Criteria.
- Project Selection Criteria help ensure the land trust or public entity focuses on important projects, promoting wise use of its limited time and money.
- Criteria flag potential problems and issues that otherwise might be overlooked.
- Criteria communicate to landowners and to land trust/public entity personnel about policies and priorities.

- Criteria focus the evaluation of a project on its merits rather than personalities.
- Criteria provide the land trust or public entity with a justification for saying “no”.

#### How Does a Grantee Monitor and Enforce its Easements?

- A representative of the grantee generally visits the property at least once a year, walking it with the landowner to talk about changes, plans for the future, problems or concerns the landowner has, followed by the preparation of a written report with maps and photos, as needed, to document findings.
- A savvy grantee will also check the public record every year before their site visit to learn of any changes in ownership or other encumbrances that may have been recorded against the property.
- If the property is especially large (as in many working forest easements), monitoring or all or a portion of the property may sometimes be done by air or via the examination of recent satellite imagery in some years, with physical visits to the property occurring in alternate years.
- If there are minor compliance problems, the land trust works with the landowners to better educate them on the easement’s terms and what that means for them in practical day-to-day activities and decisions.
- If the landowner simply refuses to work with the land trust and willfully violates the easement to the substantial detriment of the land’s conservation values, the land trust has an obligation to use all the legal means at its disposal to get the landowner to cease his destructive activities and to remediate any damage. In some cases, this could mean the demolition of disallowed new structures and habitat restoration plantings.