

Introduction to Conservation Easements for the Non-Lawyer James Wyse, Esq., Herold and Haines, P.A, 2007

Initial Thoughts .

If you are involved with land preservation or land use planning, you have probably heard of conservation easements. You may be associated with a land trust that holds conservation easements; you may know someone who has donated a conservation easement on his or her property; you may have sold development rights on your own land to a governmental agency; you may be a member of a planning or zoning board that has acquired conservation easements on stream corridors or steep slopes as part of a site plan or subdivision approval. But the chances are you have only limited familiarity with the kinds of provisions found in a well-drafted easement document. And unless you are a real estate attorney, you may not be acquainted with the procedural steps that have to be taken to successfully protect property using conservation and agricultural easements.

These materials have been prepared to help you better understand easement documents and the process involved in creating and transferring them. They include a brief description of the legal and practical steps that must be taken, and a thumbnail explanation of each of the major types of provisions found in a good conservation easement. What follows is, of course, an abbreviated guide. It is not a “model” easement. It is not intended to substitute for the guidance of experienced legal counsel, or the input of qualified land stewards and conservation biologists in the planning and preparation of easement documents for particular parcels of land. Likewise, this article will only touch on federal and state tax benefits that may be available when a conservation easement is donated or sold in a bargain sale, and the requirements that apply to conservation contribution deductions.

Conservation easements can take many different forms depending on the nature of the property, the particular resources the parties wish to protect, and the activities the owner wishes to engage in after the easement is recorded. Some easements are intended to protect wildlife habitat and biodiversity, and therefore require that the land be left in its natural state, allowing only passive recreational use. Others are primarily meant for farmland preservation and permit various agricultural activities on the property, some of which can be fairly intensive uses. Still others create greenway corridors, protect scenic views, or assure sustainable woodland management practices. In my practice, I have often combined several of these purposes in a single easement.

The term “conservation easement” is used in this outline in a generic sense, to refer to any easement that limits future development of land in order to protect open space, wildlife and natural resources, whether it be a pure conservation restriction, an agricultural easement, an easement for forest management, or

an easement for public recreation. However, there is no such thing as a “generic easement”—one that is suitable for all properties. At the very least, every conservation easement must be drafted to take into account the unique characteristics of the particular property on which it will be placed. In addition, the parties involved may have different ideas about what should and should not be included. Moreover, the laws of the jurisdiction in which the property is located and the requirements of various funding agencies will frequently dictate variations in the form of conservation easements. The best easement is one that meets the reasonably foreseeable needs of the parties, effectively protects the resources you are trying to preserve, and provides the holder of the easement with the necessary rights and remedies to enable it to monitor and enforce the easement over the long haul. More often than not, the document will also need to qualify for a charitable contribution deduction for state and federal income tax purposes, and for reduced property valuation and special tax exclusions available for federal estate tax purposes.

One may draw a useful, albeit loose, analogy between conservation easements and lease agreements. The essential purpose of both is to define the relationship between two parties, each of whom will have an interest in the same real estate. Of course, the nature of these relationships is fundamentally different. Nevertheless, easements and leases are alike in that they must accomplish two things if they are to work effectively; first, they must anticipate and deal with foreseeable problems that may arise over time, and second, they must define as clearly as possible the relative rights, duties and obligations of the parties so as to avoid future misunderstandings and disputes. In addition, because a conservation easement is intended to last in perpetuity, it must be sufficiently flexible to allow the parties to respond appropriately to unexpected circumstances. A well-drafted easement should, at the least, inform the parties as to what is required of them, help them to avoid disputes in the future, and provide the legal tools to ensure that the easement is respected by future owners.

Accomplishing this generally requires more than just a three or four page restriction. Again, the lease analogy may be instructive. Typically designed to last only for five to ten years, most commercial lease agreements are nevertheless lengthy, detailed documents, containing explicit provisions to govern such things as permitted uses and alterations of the leased premises, insurance, repairs, liability, remedies for breach, and a host of other matters. Conservation easements deserve no less attention to detail.