

Introduction to Conservation Easements for the Non-Lawyer

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A Few Words About Tax Law

A variety of tax benefits are available in return for the donation of qualified conservation restrictions. These include both federal and New Jersey state income tax deductions, reduction of federal estate taxes, and a special estate tax exclusion for preserved family lands. Although discussion of the detailed rules governing qualified conservation contributions is beyond the scope of this article, it is a good idea to have some familiarity with them. For the most part, the provisions IRS requires for qualified conservation easement donations are also appropriate for non-tax deductible easements, because they ensure long-term protection and effective enforcement.

I have seen a number of conservation easements, drafted by well-intentioned people, that failed to include one or more provisions required for favorable tax treatment. In some cases it has been possible to correct them, and in some cases it has not. Some easements aren't subject to tax requirements, although they are still subject to New Jersey's Conservation Restriction Act. For example, most easements given in connection with land use applications to protect stream corridors, steep slopes and so forth don't qualify as charitable contributions because they are given as a quid pro quo for zoning approvals. Even so, these types of easements would better protect the lands they are supposed to protect if they had the types of provisions described later in this article.

Briefly, Section 170(h) of the Internal Revenue Code requires that a qualified conservation easement:

- Satisfy at least one of the conservation purpose tests set out in the regulations (simply prohibiting additional subdivision is not enough);
- Be perpetual, i.e., it must last forever unless terminated by a judicial proceeding on the grounds that it is no longer possible to carry out its conservation purposes;
- Be accompanied by baseline information documenting the current condition of the property, if the owner has reserved rights the exercise of which may impair conservation interests;
- Prohibit all extraction and removal of minerals by surface mining methods;
- Not permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation, i.e., the owner

cannot reserve rights that would permit destruction of significant conservation interests:

- Give the easement holder the right to enter the property to monitor and enforce the easement (without notice in emergencies), and to require that the property be restored in the event of a violation;
- Require the owner to notify the holder in writing before exercising any reserved right that might impair conservation interests;
- Give the easement holder an immediately vested real property right, which must include the right to a proportionate share of any future condemnation award, or of the proceeds of sale following a termination of the easement, per a minimum formula based on values at the time of the gift;
- Prohibit transfer except to a qualified organization or governmental unit that agrees to carry out the conservation purposes of the easement as a condition of the transfer;
- Prohibit all but de minimis commercial recreational use (but this applies only if the donor wishes to be able to use the special estate tax exclusion in Code. Sec. 2031(c));
- Be recorded (not just delivered) before the end of the tax year for which the deduction is sought..

For a thorough discussion of these rules and many other aspects of conservation easements, see [The Conservation Easement Handbook](#) published by The Trust For Public Land and the Land Trust Alliance (2005).