

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

About The Easement Transfer Process

When considering the transfer or acceptance of an easement, one of the first things that should happen is for the landowner and staff members of the recipient organization to tour the property and identify its most significant conservation-related features and characteristics, as well as the type and number of existing structures and the nature of existing uses. The land trust should become acquainted with the owner's vision for the property's future, what the family goals and objectives are, and what conservation, agricultural, woodland, and other values can be preserved through an easement on the land. This is all part of the first step in an easement transaction: making sure that a conservation easement makes sense for the property and the parties, and that the recipient organization is interested in holding and administering an easement on the land in question.

Easements can be acquired in several ways: by donation, through a tax-free exchange and, in appropriate cases, by purchase either at market value or through a bargain sale. Donation of conservation easements has become a popular way to preserve family lands. Sometimes the motivation is to enable the family to keep its land instead of having to sell it to pay estate taxes. Sometimes a family simply wants to make sure the land they've come to love will remain free from development. As you might expect, most organizations' ability to acquire easements by purchase is limited by the availability of public funding, and competition among projects for those limited funds.

One of the most important and time-consuming tasks in arranging the donation or purchase of a conservation easement is drafting the easement document itself. The parties must give careful thought to activities and uses that should be permitted to occur on the land, and their likely impact on the conservation and other goals applicable to the property.

You should evaluate which special or unique features warrant extra protection, and how the property is likely to be used in the future. Clarify how much in the way of further development rights the landowner wishes to keep. While the right to build additional structures is often desirable and appropriate, one must be sensitive to the impact that such rights might have. On some properties, even a small amount of additional development could seriously compromise conservation values. Consideration should be given to locating building envelopes in less sensitive areas and establishing appropriate limits on impervious lot coverage, size and number of buildings, and other bulk restrictions. It can be difficult to form a good mental picture of how a property would look if all reserved rights were fully utilized, but this is very important.

If the easement is donated and an income tax deduction will be sought, the donor should keep in mind that reserving the right to build additional houses and other buildings will reduce the value of the easement for tax purposes. Indeed, retaining substantial development rights could result in complete disallowance of a contribution deduction on the ground that the easement fails to further a legitimate conservation purpose. While the recipient of an easement can discuss tax rules in general terms, it should never give tax advice to a landowner. Landowner should be encouraged to seek help from competent tax advisors.

Once the fundamental decisions have been made, including special features of the property that need to be protected and uses that the landowner wishes to make of the property (residential use, future house lots, farming, woodland management, etc.), these should be summarized in a term sheet. This will serve as a guide for counsel in preparing an appropriate easement document.

The following are the most common steps required in order to conclude the transfer of a conservation easement:

- ✓ The parties must agree on the conceptual framework for the easement, including the kinds of things discussed above and, in particular, the size and location of areas to be designated for residential and other uses, the amount of additional development that will be allowed, if any, and other special provisions. This information will be given to the attorney so that a draft easement can be prepared and circulated.
- ✓ If the easement will be purchased, an option or purchase contract will have to be negotiated. The details of such agreements are beyond the scope of these materials, but the terms will often be influenced by the anticipated sources of funds, their funding formulas and grant matching requirements, appraisal and other due diligence requirements, and the amount of lead time the funding agency can be expected to require. In cases of donation, the organization will generally request a letter confirming the donor's intention to donate the easement, and an undertaking to reimburse costs and expenses in the event the donation does not occur.
- ✓ The landowner should provide the recipient with an inventory of existing structures on the property, if there are any, along with their approximate size and, if possible, their location on a survey map. If there are existing tenancies, land leases, or farming agreements, copies should be provided, if written, or a summary prepared if they are verbal. This will aid in determining where various uses should occur, what additional structures would be acceptable, and whether there are any special concerns related to third parties.
- ✓ The specific terms of the easement will have to be agreed upon, with input and advice of counsel for both parties.

- ✓ A survey map and various metes and bounds descriptions must be obtained and reviewed. This will include, at a minimum, a metes and bounds description of the property. If there will be different “use areas” on the property, such as a residence area, a future residence area, a conservation area or a farmland area, they too must be described. The survey and descriptions will require the help of a professional surveyor; generally one hired by the landowner. The land trust should be consulted before such survey work is begun, to ensure that proposed boundaries make sense from both a conservation and monitoring point of view.
- ✓ A title search must be obtained. This assures that there are no title issues that might affect the validity of the easement or impair its purposes. A copy of the owner’s existing title insurance policy, deed, etc. can help to expedite this.
- ✓ One or more appraisals of the easement’s value will generally be necessary. If the easement is being purchased in whole or in part, the state, county or local agency will usually require two professional appraisals. These are sometimes done at the agency’s expense, or the recipient may have to advance the cost of the appraisals. The government agency involved will review the appraisal reports and then arrive at its own certification of the value of the easement. If the owner is donating all or part of the easement’s value and wishes to claim a tax deduction, the tax law requires that the donor obtain his or her own appraisal of the easement’s value within certain time deadlines.
- ✓ It is sometimes necessary, and often advisable, to obtain a phase one environmental site assessment of the property by a qualified environmental consultant.
- ✓ Accurate baseline information describing the current condition of the property, including photographs, maps, an inventory of conservation features, and so forth must be gathered, documented, and acknowledged by the parties. This should be completed before the easement is transferred. It is useful to have this information early in the process, so that informed choices can be made about appropriate easement terms.
- ✓ If there are mortgage or other liens against the property, they will have to be satisfied or subordinated to the easement before it is accepted. Because lenders usually need time to evaluate subordination requests, you should notify them as early as possible. Provided the reduced value of the property continues to meet lenders’ loan to equity ratio requirements, they will generally be willing to cooperate.

Finally, a word about the stewardship costs involved in accepting conservation easements. Easements represent both an asset and a liability from a holder’s point of view. When an easement is accepted, the easement holder

assumes the obligation to monitor and enforce the easement restrictions. Besides the initial costs involved in preparing the easement, there are recurring expenses for such things as periodic inspections, preparing reports, photographs, updating baseline data, and so forth; and, unfortunately, there is always the possibility that enforcement action might have to be taken at some point in time. This represents a substantial commitment of staff, professional and other resources – a commitment that continues forever, not just for the time it takes to draft the easement, attend to closing preparations and gather baseline data. For these reasons, many land trusts request that an appropriate endowment be established to provide for such future monitoring and enforcement costs.