

# **Introduction to Conservation Easements for the Non- Lawyer**

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## **Easement Provisions In Brief**

Form agreements can seldom be pulled off the shelf and used as is, and this is certainly true of conservation easements. Drafting an easement that it will do what it is intended for a given piece of property takes considerable investment of time and effort by the parties and their counsel. Although many provisions can be characterized as “boilerplate,” they are often negotiated to some degree and, of course, you will always need specific provisions tailored to the unique circumstances of the land and the parties. Moreover, as more and more experience is gained with conservation easements, they inevitably evolve and improve. The following summarizes the provisions found in many of the easements I have prepared for land trust clients, including easements that allow various degrees of residential use, agricultural uses, and woodland management.

### Recitals

The recitals portion of a conservation easement typically contains background information describing the property, the features and natural resources the easement is intended to protect, and other information important to understanding the legal and factual basis for the easement. Recitals are not an operative part of the document, i.e., they do not actually create restrictions or agreements among the parties. But, they can be important in interpreting the easement terms, and should enable the reader to understand the conservation values the property possesses and any governmental policies that favor its protection.

Where a contribution is involved, the recitals also set the stage for establishing tax deductibility by describing the public benefits to be derived, the conservation purposes of the grant, and the qualification of the grantee to receive conservation donations. The recitals section should be fleshed out with such things as a description of habitats, adjacent streams, soil types, threatened or endangered species, if any, scenic characteristics, applicable governmental policies or planning initiatives affecting the property (such as inclusion in an open space plan), etc.

### Definitions

A separate definitions section conveniently brings together in one place all of the various defined terms used in the easement. This makes for easy reference when reading the document. Some defined terms are simply a shorthand way to reference things without repeating all the details every time. Other definitions contain important substantive language.

### Term, Future Instruments & Notice Of Transfer

The easement should include a provision making it absolutely clear that it is effective in perpetuity. It is also a good idea to require that the owner include a reference to the easement in future deeds and notify the easement holder when the property is sold. This helps to assure that future owners will know about the easement, and reduces the risk of inadvertent violations. By giving notice of a pending sale, the easement holder can arrange to meet with the new owners, go over the easement with them, and establish a good working relationship. Without such notice, a year or more could pass before the easement holder realizes that there are new owners.

### Purposes

The purposes section provides a touchstone for interpreting the easement, and an aid to determining the permissibility of actions that may not be explicitly mentioned in the document. However, it is not intended to be an exhaustive recitation of every specific purpose furthered by the easement.

### Rights Of Grantee

An easement should confer upon the grantee certain specific rights. These are intended to enable the easement holder to carry out its monitoring and enforcement responsibilities and to do those things necessary to ensure that the conservation purposes of the easement are carried out. Among these are the right to have access, to protect the property and enforce the easement, to place easement boundary signs, and, in some circumstances, to control invasive and other pest species that might otherwise damage the conservation and wildlife values associated with the property.

### Prohibited Uses

The Prohibited Uses section of an easement, as the heading suggests, prohibits uses of the property that would be inconsistent with the conservation and other purposes of the easement. In addition to this general prohibition, a number of specific prohibitions are usually set forth in detail. Prohibitions are often tailored to address circumstances peculiar to the particular property. The approach I usually take is to use broadly worded prohibitions that will apply unless there is a specific reserved right stated elsewhere in the easement. Some prohibitions may also contain built-in exceptions. Subject to specific reserved rights, a typical easement will prohibit commercial or industrial uses, new buildings, roadways and other improvements, removal of vegetation (other than pest and invasive species, and trees that are in danger falling), mining and other mineral extractions, changes in surface topography, storage of hazardous materials, dumping of refuse and waste materials, inappropriate use of chemical fertilizers, herbicides and pesticides, diversion of streams, creation of water impoundments, activities within wetlands buffers, off-road vehicle use, and other activities inconsistent with conservation purposes.

## Grantor's Reserved Rights

Unless you are dealing with a pure conservation easement, the landowner will want to retain the right to engage in various activities on the property. They will necessarily vary from one easement to the next, although certain reserved rights provisions are fairly common. If the property was going to be used partly for agriculture, partly for timber harvesting and partly for residential use, the reserved rights section would be rather extensive, detailing the terms and conditions attached to each of these various rights.

It is very important that reserved rights not become so intrusive as to permit the landowner to significantly compromise conservation values. That would undermine the very purpose of having a conservation easement. As noted above, no tax deduction is allowable if a donor reserves rights the exercise of which would destroy significant conservation interests associated with the property. Moreover, most organizations aren't interested in devoting time, attention and resources to an easement that gives the owner extensive development rights, for the simple reason that it doesn't further their conservation mission.

The potential impact of specific reserved rights needs to be carefully evaluated on a case by case basis. For example, if the primary purpose of the easement is to protect scenic views, it should prohibit walls, fences, hedgerows, tree lines, and other structures in locations that would obstruct or degrade the public's view from nearby roads and vantage points. Limitations on impervious coverage, and perhaps floor area ratio, building size and location, will assure that conservation interests are protected against the impact of future development. It can be difficult to imagine what a maximum build-out under your easement would look like. You might want to consult other organizations or visit other properties to get a visual idea of how properties look with various amounts of lot coverage, what the typical sizes are for barns, riding facilities, run-in sheds, and so forth.

## Residential Use Provisions

Many New Jersey conservation easements involve properties on which there is at least some residential use. Sometimes it may be useful to deal with the residential aspects in a separate provision, and to "carve out" a specific area on the property to which the residential activities will be restricted. Such provisions are really just a more detailed form of reserved right, outlining the particular restrictions that will apply in any designated "residence areas" of the property. Carving out a small area around an existing house or houses and treating that area differently is appealing to many landowners, since it provides a sort of residential enclave free of most of the easement restrictions, while not excluding them from the easement entirely. The main restrictions applicable to these areas would typically be a limitation to single-family residential use, and a prohibition against activities that would result in contamination or damage to other protected areas of the property. If you use this approach it is highly desirable to keep

residence areas as small a possible, consistent with the need to allow sufficient space for the residential structures themselves and associated gardens and lawn areas. Remember, these areas exist only in the easement. They are not separate building lots, and there is no need for them to meet the minimum requirements applicable to subdivided lots. Thus, a residence area could be one acre, or even one-half acre, even though the local zoning ordinance might require minimum five acre lots.

Landowners sometimes insist on being able to create one or more additional residential sites on the property in the future. Often, they will not know yet the exact boundaries of the area they will want to use. In that case, the easement should contain provisions setting forth a procedure for delineating such areas, obtaining land trust approval of them, and amending the easement to incorporate them, as well as specifying the uses to be made of those areas in the meantime. Since the precise boundaries are often not known at the time the easement is conveyed, the general location is shown on a map attached as an exhibit to the easement. In some cases, such as where the State is providing funding for the acquisition of the easement, there may be no choice but to specify metes and bounds descriptions of future residence areas and include them in the easement document.

### Woodland Management

Woodland management easements contemplate that some degree of woodland management and harvesting of timber products will take place on the property, or within the designated woodland management area. Naturally, the cutting of trees, especially in New Jersey forests, is a somewhat sensitive issue. A land trust is not likely to support clear-cutting as a method of woodland management. This is seldom a significant issue, since woodland management activities in New Jersey are often driven by the desire to qualify land for reduced property tax assessment. In easements I have drafted I have identified detailed woodland management objectives oriented toward sustainable yield management techniques, preservation of habitat, aesthetic considerations, and discouragement of invasive species. These objectives operate as a guide to future management decisions, and are to be implemented in a written woodland management plan approved by the easement holder. In some cases, production of wood and timber products is merely a means of preserving special assessment for the property. Where that is the case, consideration should be given to including a “sunset” provision so that such activities will no longer be permitted if such special assessment statutes are repealed, or equivalent preferential assessment is afforded to conservation lands. Finally, an arbitration provision is sometimes included as a means of resolving any disputes concerning the appropriateness of a proposed woodland management plan.

### Transfer & Extinguishment of Development Rights

The net effect of a conservation easement is, of course, to significantly reduce the developments rights available to the landowner. This relinquishment of development rights must be formalized by a specific provision in the

document. I recommend that such a provision also transfer in advance any additional new development rights that may accrue to the property as a result of future changes in law. Transferable development credits would be a good example. Thus, if the property would have accommodated 100 housing units before the easement and only one unit after the easement, those development rights will have been transferred to the easement recipient. They could not, for instance, be used to increase development density on other property owned by the grantor or a third party.

### Access

Most access provisions state that no access rights are intended to be given to members of the public, absent some express provision to the contrary. The land trust, however, should specifically be given the right to enter upon the property for purposes of monitoring inspections, enforcement and restoration actions. If the property affected by the easement does not have good road access, you should make sure that the grantor gives the land trust the right to enter upon other lands owned by the grantor, or the right to use easements for ingress and egress that the grantor has on lands owned by third parties. Without clear access, monitoring and enforcement will be virtually impossible.

### Notice Before Undertaking Certain Activities

Federal tax law requires that the landowner be required to give the easement holder advance notice before undertaking any reserved rights that might significantly harm or damage the conservation values associated with the property. In addition to being a tax requirement, this is a common sense approach to avoiding costly mistakes before they happen. In the drafting stage, you should try to identify those reserved rights the exercise of which pose a potentially significant risk of harm. New construction is certainly one. The landowner should be required to supply enough information with the notice to enable the easement holder to make an informed judgment as to whether the activity is permitted by the easement and whether any special precautions should be taken. In the long run, the ability to discuss these matters before violations occur is a substantial benefit to both parties, and adds considerably to the long-term effectiveness of the easement in protecting the land.

### Grantee's Approval

As noted in the preceding section, certain activities may be so potentially destructive of conservation values that they should be permitted by the easement only if they are approved in advance by the easement holder. Generally, the issue often arises as to whether the easement holder's approval right is completely discretionary, or whether the granting of approval cannot be unreasonably withheld. This is really a judgment call. Essentially, a "reasonableness" requirement attached to an approval right establishes a presumption in favor of the activity. In the case of activities that have the potential to pose a risk of significant harm to the conservation or scenic purposes of the easement, it may be more appropriate to provide that the decision to approve or

disapprove is within the sole discretion of the easement holder, or at least to establish conservation-related standards and criteria that must be satisfied in order to carry out the activity. Sometimes an owner may want to build in some flexibility to expand the permitted uses of the property in the future if the use is an appropriate one. This is dangerous territory, but can be managed by provision stating that the use will be allowed only if the grantee land trust determines that it is consistent with the conservation purposes of the easement, and that this determination will be in the sole and absolute discretion of the grantee.

### Property-Related Costs, Taxes & Liabilities

It is useful for the easement to spell out various responsibilities of land ownership that remain the obligation of the landowner (such as paying real estate taxes, property upkeep and maintenance, insurance, obtaining required permits, etc.), and to protect the grantee from liability with respect to those matters, including environmental claims.

### Remedies

The remedies provision gives teeth to a conservation easement. Although some remedies are probably available without having to state them in the document, it is better to spell them out than leave them to chance. The New Jersey Conservation Restriction and Historic Preservation Restriction Act (which enables conservation restrictions as a separate property right) merely states that conservation restrictions are enforceable in the same manner as other interests in land. Obviously, this is not very specific. And thus far we do not have enough judicial decisions to establish the remedies available to a conservation easement holder at common law. By way of example, a rule in most jurisdictions is that litigants are not entitled to injunctive relief unless they can show that monetary damages are inadequate. Since our legal system is grounded on the assumption that money will compensate for most legal wrongs, you cannot assume that a court would grant an order requiring, for instance, that property be restored after a violation has taken place. A well-drafted remedies provision avoids this problem by stating that the easement holder will be entitled to injunctive relief without first having to prove the inadequacy of money damages. As mentioned above, the IRS mandates that such a provision be included in a tax-qualified conservation easement. This provision might also set forth a basis for determining money damages in connection with violations that cannot be fully rectified through restoration efforts.

The remedies provision should also give the easement holder the right to be reimbursed for its legal fees and other litigation costs if it has to take enforcement action to correct a violation. A court will not award such fees absent an agreement. Note that I do not consider it appropriate to make this right reciprocal. The holder is legally obligated to enforce the easement, violations are entirely under the control of the landowner, and failure to get a court to force the owner to correct a violation may have nothing to do with the fact that it took place.

Exposing the holder to possible payment of the owner's litigation costs has a powerful and wholly inappropriate chilling effect on enforcement.

### Assignment & Secondary Right Of Enforcement

It sometimes is necessary or desirable to assign a conservation easement to another organization that will undertake ongoing monitoring and enforcement responsibilities. For example, another land trust may already have, or subsequently acquire, an easement on a nearby property. The easement should allow such an assignment to take place, provided the assignee is qualified to accept and enforce the easement and assumes those responsibilities. If Green Acres Program funding will or might be used to acquire the easement, you will need to include a provision that allows the grantee to give the State a "standby" enforcement right, called a "Secondary Right of Enforcement." This operates as a safety net for the State if the easement holder were to become unable or unwilling to carry out its obligations at some future date. The concept for this "standby" legal right was developed in cooperation with the New Jersey Attorney General's Office for use in private easement acquisitions funded by the Green Acres Program. The actual form for granting this right to the Department of Environmental Protection is available from the State.

### Condemnation & Termination

Federal tax law requires that the holder of a qualified conservation easement be entitled to a proportionate share of the value of any award in the event all or a portion of the restricted property is condemned. The condemnation and termination provision should implement that requirement. Even where no donation is involved, it is appropriate that any future condemnation award be shared between the landowner and the easement holder. IRS requires that the easement holder be entitled, at a minimum, to the proportion of the value of the easement to the value of the restricted fee at the time of the grant. But, it may be appropriate to provide that, if higher than the IRS minimum, the easement holder be entitled to the amount determined as of the date of the condemnation. The same sharing provision should apply in the case of a judicial termination.

Under Section 170(h) of the Internal Revenue Code, a conservation easement must state that it cannot be terminated except through a judicial proceeding, and then only if the court determines it is impossible to accomplish the conservation purposes of the easement. Impossibility should not be measured by the landowner's subjective desires, or the fact the one or more reserved rights can no longer be carried out due to changed circumstances, economic considerations, or the like.

Bear in mind that the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1, et seq., imposes additional newspaper notice, public hearing and DEP approval requirements as a precondition to the "release" of all or any portion of a conservation restriction. This includes amendments that would allow the owner to engage in previously

prohibited activities, and such things as would be considered “diversions” under Green Acres Program rules.

### Baseline Documentation

The gathering and documentation of baseline data describing the current condition of the property, including in appropriate cases an inventory of species found on the site, special features and characteristics of the property, the size, appearance and location of existing structures, the nature and extent of existing activities and operations on the property, and similar kinds of information, is a very important part of the transfer or a conservation easement. Under federal tax law, the landowner is required to provide such documentation to the easement holder at the time of the donation, although in practice this is usually a joint undertaking. Without adequate baseline data, it may be difficult or impossible to evaluate whether there has been compliance with the easement as time goes on. The baseline data should, in addition to narrative descriptions, include appropriate maps and photographs, and possibly even a species inventory. This information should be signed or initialed by the grantor of the easement, and kept in a very well protected storage area maintained by the easement holder for this purpose.

Speaking of storage, baseline photographs should be of archival quality prints stored in accordance with archival standards. Do not rely solely on digital files stored on a computer hard drive, floppy disc, compact disc, or similar medium.

### Representations & Warranties

Both parties to an easement rely upon the truth and accuracy of certain factual matters in giving and accepting the easement. The landowner wants to know that the recipient is qualified to hold and enforce easement restrictions both under applicable tax law, and under state law. The land trust needs to know that the party with whom it is dealing is in fact the legal owner of the property and has the right to convey the easement, that no one has been given the right to carry out activities detrimental to the intended preservation of the property, that the landowner is in compliance with laws applicable to the property and whatever operations the owner conducts on the property, and that there are no known environmental contaminants or environmental liabilities affecting the property.

Certificate Concerning Compliance A prospective purchaser, lessee or mortgage lender will sometimes request assurance from the easement holder that the landowner has not violated the easement. Well-drafted easements often provide a mechanism for requesting and obtaining such a certificate. The cost of preparing the certificate, including, if necessary or appropriate, the staff time involved in conducting a new inspection of the property, are most often made the responsibility of the landowner.

### General Provisions

This section of the easement contains miscellaneous provisions concerning such things as the manner of giving notices, choice of law, binding effect, entire agreement, attorney's fees, and so forth.

### Donation Of Monitoring

Fund As noted previously, many land trust organizations request that the landowner establish a fund to cover the future expenses of monitoring and enforcement, since this is an ongoing liability for the organization. Where such a fund will be established the easement should acknowledge that fact and require that the fund be used in connection with the organization's monitoring and enforcement activities (although not necessarily for that particular property). In the event of a future assignment of the easement, the easement may (and usually does) also provide that the fund will be transferred to the organization to which the easement has been assigned, for the same dedicated purpose.