

# **UNDERSTANDING CONSERVATION EASEMENTS**

**August 11-12, 2003**

**“Legal Consideration of Conservation Easements”**

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## “Legal Considerations of Conservation Easements”

### 1. Preliminary Considerations for Conservation Easements:

(a) Legal Documents: The conservation easement or restrictive covenant is a part of a legal transaction that involves a number of procedures and professionals prior to beginning the document preparation stage. The operating documents may include baseline documentation, appraisals, affidavits, title reports, management plans and other commitments.

(b) Goals and Intentions: The easement and all related documents and proposed management will depend on development and determination of the Grantor's goals and intent, the purpose (land protection, charitable donation, income and estate tax deductions, or obtaining a permit to conduct regulated activities), and the future of the property.

(c) Grantee Organization: State statutes and federal tax law dictate that the Grantee Organization be a qualified organization pursuant to parameters set forth in those laws. Normally, the organization must be a government entity or a charitable organization whose primary purpose (at least, a stated purpose) is to acquire property for conservation purposes or acquire an interest in such properties by conservation easements, etc. The Grantor must be satisfied that Grantee Organization's policies, management and future will be a compatible fit.

### 2. Preparation of the Conservation Easement:

(a) Once other preliminary matters have been decided and accomplished, the parties may then proceed with formalizing the relationship and drafting the conservation easement agreement. State, local, and federal laws and regulations should be identified,

reviewed, and consulted throughout the drafting process. The drafting should take place with independent legal representation of the Grantor and the Grantee to ensure that there are clear understandings of all of the ramifications, purposes, and agreements of the parties.

(b) The provisions of the conservation easement agreement should be carefully drafted to reflect the full intention of the parties, the purposes of the agreement, and to fully comply with any applicable law. While many items could be considered for inclusion, basic provisions, at a minimum, should include the following:

1. Recitations
2. Identification of the Grantor
3. Grantee Organization
4. Grant and Conveyance
5. Purpose and Duration
6. Prohibited Uses and Activities
7. Grantor's Reserved Rights
8. Enforcement and Inspection
9. Other Provisions

(1) **Recitations:** The recitations should be extensive and provide the background information and the understandings of the parties. Examples of information that should be included in a recitation includes providing a confirmation of title, explaining the desires of the Grantor and Grantee, explaining the desire to create a long-term commitment (if not perpetual), reference to state or local laws supporting the conservation purposes, a description of the structural, functional and statement of public benefit values of the property, and reference to the baseline documentation, if not included as a part or exhibit to the conservation easement.

(2) **Identification of the Grantor:** The owner of the property and type of ownership should be identified. In addition to recitations and the identification of the Grantor in the document, a title report or abstract that will confirm title and type of ownership of the Grantor should be obtained. A title report will also identify any claims, judgments, or lien holders who may have an interest or claim an interest in the property. Examples of such liens would include:

- \*Judgment of creditors
- \*Lawsuits pending against the owner
- \*Taxes
- \*Mortgage or pledge
- \*Easements/rights of way
- \*Prior reservations
- \*Recorded leases

(3) **Grantee Organization:** The Grantee organization should be identified as an organization that can accept and hold the interest granted.

(i) “Holder” under most statutes is defined as:

- (a) A governmental body empowered by the law of the state or the United States to hold an interest in real property; or
- (b) A private, non-profit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real properties, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality, or preserving the natural, historical, architectural, archeological or cultural aspects of real property which is the recipient or Grantee of a conservation easement.

(ii) A determination of who the Grantor wants to do business with, who will hold the easement and, if necessary, who will enforce the easement are

critical to the long-lasting relationship and existence of the conservation easement and purposes of the conservation easement.

(iii) In the conservation easement agreement, the Grantee should be identified as a governmental body or charitable organization with requisite purposes and powers described by the statutes.

(iv) For Internal Revenue Service purposes and for tax considerations, the Grantee Organization should be a qualified organization as defined in IRC Section 170(h)(3).

(4) The Grant and Conveyance: The conveyance and grant of an easement must be for consideration or value to be effective. This may be by way of reciting that the consideration is the payment of money from the Grantee to the Grantor or by covenants and promises made, such as covenants of the Grantor to the Grantee, mutual covenants, or covenants of the Grantee to the Grantor. State laws should be consulted for full compliance.

The grant and conveyance (whether for money or gift) should be made voluntarily by the Grantor of the conservation easement to the Grantee “Grant” “Bargain” and “Sell” are statutory words of warranty in Alabama. Use of these words, though they may be limited expressly by the language of the instrument, provide that the Grantor has the right to transfer an interest in the property, transfer unencumbered title to the property, and is in peaceful possession of the property. Exceptions and limitations to these statutory warranties are expressly allowed by statute. Ala. Code. § 35-4-271.

Conveyance should recite the statute or law applicable (most state conservation easement statutes require that the statute be specifically mentioned). The easement should be granted for one or more specific purposes set forth in the statute, or referenced and described in a separate provision of the agreement.

(5) **Purpose and Duration:** The purpose of the conservation easement should be spelled out in specific terms, either in the granting clause or in a separate purpose provision. The purpose should be explained by an affirmative description. Each state statute recites general categories of recognized conservation purposes.

IRC Section 170 (h) defines “conservation purpose” as follows:

- (a) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (b) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (c) the preservation of open space (including farmland and forest land) where such preservation is –
  - 1. for the scenic enjoyment of the general public, or
  - 2. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (d) the preservation of an historically important land area or a certified historic structure.

State statutes should be consulted to determine what, if any duration requirement may be necessary to qualify an easement as a conservation easement. The time period in Alabama, for example, can be the lesser of 30 years or the life of the Grantor. The duration or term can be stated from one year (or less) to “in perpetuity.” In order to qualify for federal income or estate tax deductions, the term must be perpetual. The Louisiana statute provides that a conservation easement duration will be unlimited unless the parties agree otherwise.

(6) **Prohibited Uses:** This provision may be called “Prohibited Uses” or “Conservation Restrictions” as described in the Alabama Forever Wild Amendment. The provision may be general in description, however, the more specific the prohibited activity, the less interpretation or construction necessary to enforce the easement terms. The prohibited activities should be designed to protect the conservation purposes of the

easement or, as described in Louisiana, the servitude. Examples could include restrictions on subdivisions, land clearing, filling or excavation, restrictions on construction of structures and commercial use (other than compatible uses or consistent uses, such as farming, timber management, limited buildings, educational activities, and hunting or fishing).

Those rights and uses that are not prohibited may be exercised by the Grantor by implication or specific reservation. “Other rights” may be further restricted by allowing the use “so long as such use does not adversely affect or impair the conservation purposes” of the easement.

Federal law prohibits surface mining, except as regard a “qualified mineral interest.” A qualified mineral interest includes subsurface hydrocarbons and access thereto unless the ownership of minerals was severed from the surface prior to June 13, 1976, and there is a very remote likelihood of production of the minerals. IRC § 170(h)(5)(B) and § 170(h)(6).

(7) **Grantor’s Reserved Rights:**

**Specific Matters:** Like other provisions of the easement, these “reserved rights” should be specific. Grantor can and will argue that any right or use not prohibited can be exercised. Reserved rights should not be inconsistent with the conservation purposes or adversely affect the conservation purposes or functions. Examples of reserved rights will vary greatly depending on purpose, location, Grantor, and site-specific features.

Subdivisions, buildings, improvements, recreational activities (hunting, fishing, trapping, camping, boating), research, pile-supported structures, timber management, mineral extraction, occupation of the property, farming or ranching



activities, or the ability to lease the property to others are some general reserved rights that come to mind.

(8) **Enforcement and Inspection:** Provisions expressing the rights of the Grantee Organization and any third parties to enforce the provisions of the easement, to protect the purposes, and to periodically inspect the property are very important to the intent of the parties.

(9) **Other Provisions:** Other essential provisions should address tax liability, indemnities, condemnation, assignment by the Grantee Organization, amendments to the easement, abandonment, or termination.

Each conservation easement or restrictive covenant is different and should be treated on a site-specific and Grantor-specific basis. Knowledge of the Grantor or the Grantor's family, the Grantor's intentions and goals, the land and the Grantee Organization must be obtained to successfully draft the easement agreement and address the duties of each party.

The examples attached to this presentation are provided solely for discussion and reference. You should note that no form can or will be suitable for any situation without attention to detail and the need to customize the documents. Additional reference materials that should be of interest and usefulness include the following:

(i) *Conservation Easement Handbook* by Janet Diehl and Thomas S. Barrett, Land Trust Alliance, 1988.

(ii) *Model Conservation Easement and Historic Preservation Easement*, 1996, Thomas S. Barrett and Stefan Nagel, Land Trust Alliance, 1996.

(iii) *Preserving Family Lands, Book III*, Stephen J. Small, 2002.

(iv) *The Federal Tax Law of Conservation Easements*, Stephen J. Small and Land Trust Alliance, 1997.

Bick and Harry L. Haney, Jr., 2001

3. **"In Perpetuity"**: The duration or term of a conservation easement is usually discussed in state statutes such as the Alabama Conservation Easement Act. The Alabama Act supports the duration contained in the Easement Agreement or if no duration is stated, it will be "the lesser of 30 years or the life of the Grantor, or upon the sale of the property by the Grantor." In other words, the Alabama Act can be interpreted to allow a duration "in perpetuity".

"In Perpetuity", magic words that are essential to qualify a conservation easement for the Federal tax benefits under IRC Section 170(h).

"IRC Section 170(h) provides in part as follows:

...

**(2) Qualified Real Property Interest** - - for purposes of this subsection, the term "qualified real property interest" means any of the following interests in Real Property:

- (A) The entire interest of the donor other than a qualified mineral interest.
- (B) A remainder interest, and
- (C) A restriction (granted in perpetuity) on the use which may be made of the real property.

...

**(5) Exclusively for Conservation Purposes**  
- - for purposes of this subsection--

Conservation purpose must be protected - - A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity...."

**“In perpetuity” is also extensively discussed in the Treasury Regulations § 1.170A-14.**

**“Perpetual” is defined by Black’s Law Dictionary as “continuous”, “never ceasing”, “enduring”, and by Webster’s Dictionary as “continuing forever”, and “everlasting”. Will a conveyance of a conservation easement in perpetuity then last forever?**

**The perpetual nature of the character, duration, existence and obligations under a conservation easement may be affected by a number of events, circumstances and provisions of the agreement such as:**

- (1) amendment**
- (2) condemnation**
- (3) changed circumstances**
- (4) extraordinary events**
- (5) termination**
- (6) modifications**
- (7) inheritance**
- (8) judicial interpretation**

**4. Challenges to Existing Easements: As the conservation easement movement ages, the challenges of perpetuating the original structure of the conservation easement becomes more evident. Once the conservation easement is in place and operations restricted by the terms, reality, second-guessing and to some extent, regret may enter the picture.**

**Land trusts and recipient organizations should be cautious to involve and educate all of the potential grantor family including the individuals, or family members, stockholders or interest holders. Involvement, understanding and consent by all will not prevent future problems, however, they will help build a long term cooperative relationship.**

The motivation to challenge or remove the development restrictions of a conservation easement on property may involve the original grantor whose intentions have changed, financial conditions, next generation's opinions and desires to control the property, changes in organization structure or agenda, changes in society or cultural trends, or enforcement actions.

What we do today to protect the natural environment or pieces of it, seems a great advancement from our procedures 20 years ago. What will our actions of today look like 20 years from now?

Challenges may be filed to invalidate restrictions or to enforce restrictions contained in conservation easements.

An excellent article addressing various challenge issues is by M. Thompson and J. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Theme and Approaches To Date*, 78 Denver University Law Review 373 (2001). In the article, the authors describe several categories of challenge cases including third party enforcement and defense, actions that attack the validity of the restrictions, and enforcement and judicial interpretation.

- (a) Burgess v. Breakell, 1995 Conn. Super. LEXIS 2290 (Conn. Aug. 7, 1995), involved an action by a neighbor, a third party, against the landowner, Breakell, alleging violations of a conservation easement which restricted the Breakell property requiring it to be maintained wild and natural for scientific, educational and environmental purposes for the preservation of its natural features. Breakell was conducting a logging operation on the property. The state court reviewed the conservation easement statute and concluded that the third party did not have standing and dismissed the suit

holding that only the holder of the easement could file suit to enforce the restriction.

**(b) Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992)**

involved a reservation and conservation restriction on Shining Mountain Ranch in Montana in a deed of property from The Nature Conservancy to the predecessors in title to Madden. The title acquired by Madden, according to the court, was subject to the restrictions and the reservation of enforcement rights by The Nature Conservancy. The court looked at the intent of the original parties and the whole document to render its interpretation.

**(c) The Court in Redwood Construction Corporation v. Doornbosch, 670 N.Y.**

**S. 2d 560 (N.Y. App. Div. 1998) held that the conservation easement language did not specifically prohibit Redwood's activity. Redwood owned property adjacent to the Doornbosch property which was encumbered by a conservation easement restricting improvements that affected the natural open and scenic nature of the property. Doornbosch though, in granting the conservation easement, reserved the right to convey the property or other rights therein so long as the conveyance was consistent with the terms of the easement. Redwood offered to purchase an access easement across the Doornbosch property (and conservation easement) from the Redwood development to a public road. The holder of the easement objected, but the court, interpreting the language of the conservation easement, found that the proposed use would not be inconsistent with the terms of the easement.**

5. **Alternatives:** Although conservation easements are a relatively new protective device available to landowners and conservation interests in Alabama, there are other alternative protection procedures available and in use.

- a. **Purchase of Property:** Often called a bargain sale, the outright purchase of property by a conservation organization, government agency or land trust has been the traditional procedure used throughout Alabama.
- b. **Charitable Donation:**
- c. **Deed Restrictions:**
- d. **Deed Reservations:**
- e. **Restrictive Covenants**
- f. **Management Agreements**
- g. **Local Ordinances**