

## Landowner Attorney Orientation Series

### Why Certain Conservation Easement Language is Non-Negotiable

The language in a deed of conservation easement is a purposeful combination designed to satisfy legal and contractual requirements with the sole objective of upholding the stated conservation values. The most common sources of such requirements are state law, federal tax law, *Land Trust Standards and Practices* (the Standards), the Land Trust Alliance Accreditation Commission, and some funders (if applicable).

In general, most land trusts start the process with their standard template, which is then modified to reflect the uniqueness of a property, its conservation values and the objectives of the land trust and landowner. The land trust drafts the conservation easement to ensure that the easement contains all necessary elements and that it reflects the organization's and the conservation profession's highest standards. But please note that the land trust cannot provide legal or tax advice. The following is not an exhaustive list of language that must be included in a conservation easement, but rather a sampling provided to orient attorneys for landowners on the variety of provisions which are non-negotiable. A fundamental point of difference in perpetual conservation easements and commercial term limited contracts is that the land trust is required by state and federal law as well as the Standards to have the sole discretion to protect the conservation values and to uphold the purposes of the conservation easement in perpetuity.

#### Eligibility for Charitable Donation Tax Deduction

Easement language must comply with [Section 170\(h\) of the Internal Revenue Code](#) and the corresponding [Treasury Regulations \(Section 1.170A-14\)](#) to qualify for federal income tax deductions. Extensive case law also directs the interpretation of these requirements. Following such rules is mutually beneficial, as land trusts are obligated to follow IRS rules for charitable donations and the landowner seeking the deduction wishes to avoid an audit or worse, disqualification of the deduction. Compliance with these tax requirements is also necessary for the land trust to comply with Practice 9E2 of the Standards. State law requirements under state enabling acts also require many of the same provisions.

The following key provisions must be addressed in the easements:

- Must be perpetual and tailored to the individual property with specific identification of conservation purposes. A conservation easement must be granted exclusively for conservation purposes. The Treasury regulations define the four categories of conservation purposes at substantial length and provide specific examples of conservation terms and types of properties that do and do not qualify (IRC § 170(h)(4)(A) and Treas. Reg. §1.170A-14(d)). The conservation of land that fits these categories will provide a public benefit and the conservation easement should demonstrate that benefit.
- Inconsistent uses. Allowing inconsistent uses can undermine the "exclusively for conservation purposes" requirement. (Treas. Regs. §§ 1.170A-14(e)(2) and (3)). Federal law

will not permit a conservation easement to qualify for federal tax benefits if uses are reserved to a landowner that, when exercised, would permit the destruction of significant conservation interests (Treas. Reg. §1.170A-14(e)). The Regulations state that if an easement permits such uses, the donation will not meet the requirement that it be “exclusively for conservation purposes.” The conservation easement should give the holder control over the exercise of those permitted rights to ensure the activity is consistent with the easement’s conservation values.

- Prohibition on surface mining. A conservation easement will not qualify if “any person” retains a “qualified mineral interest” and allows extractions or removal of minerals by any surface mining method. If the mineral rights have not been severed from the property, a blanket prohibition against surface mining in the easement deed should be adequate to meet this requirement. Note that there are limited exceptions and qualifications. (IRC §170(h)(5), Treas. Regs. §§ 1.170(A)-14(e), (g)(4), (b)(1)(i)).
- Extinguishment and proceeds provisions. The Treasury Regulations require that a tax- deductible easement must provide for a division of sales proceeds between the landowner and land trust in the event of a sale of the property after the complete or partial extinguishment of an easement (which includes condemnation and transfer as a matter of law). Treas. Reg. §1.170A-14(g)(6)(ii) currently requires that a conservation easement include:
  - The land trust’s interest in the easement must be a vested property interest (vested essentially means that the easement is owned by the holder).
  - The fair market value of the land trust’s interest must be at least equal to the proportionate value that the easement at the time of contribution bears to the value of the unrestricted property as whole at the time of contribution. (This is a heavily litigated area so please understand that the land trust’s clause cannot be altered.)
  - The proportionate value of the easement must remain constant.
  - In the event that the easement is extinguished, the proceeds of any subsequent sale, exchange or involuntary conversion of the easement property shall be divided between the owner of the easement property and the easement holder based on that proportionate value. Sometimes state law might have a different allocation, but it must be explicit.
  - The extinguishment can only be accomplished by judicial proceedings.
- Reference to the baseline documentation. If a landowner reserves rights on the land underlying a conservation easement, the landowner must provide the land trust with sufficient documentation such as surveys, maps, and aerial photographs before effecting the donation in order to establish the condition of the property at the time of the donation. (Treas. Reg. § 1.170A-14(g)(5)(i), Treas. Reg. §; 1.170A-13(c)(4)(ii)(M)). The land trust or a consultant prepares this for landowner review since they have the expertise. The landowner compensates the land trust or consultant for this work.
- Inspection rights. The Treasury Regulations require that the conservation easement to provide a right of the holder to enter the property at reasonable times for the purpose of inspecting the property to determine if there is “compliance with the terms of the

donation” (Treas. Reg. §1.170A-14(g)(5)(ii)) ..... [and] to enforce the conservation restrictions by appropriate legal proceedings” if necessary. This is an unqualified right and cannot be limited.

- Required notices. The Treasury Regulations require written notification to the land trust when the landowner plans to exercise reserved rights “which may have an adverse impact on the conservation interests.” (Treas. Reg. §1.170A-14(g)(5)(ii)). This allows the land trust to inspect the plans and implementation in order to protect the conservation values.
- Approval or consent provisions. Courts have affirmed the IRS’s rejection of conservation easement donations that include provisions granting automatic approval if the easement holder does not reply within a certain time to a landowner’s requested activity. Courts interpret these “deemed consent” provisions as violating the requirement that the nonprofit holder oversee charitable interests and is inconsistent with the easement being enforceable in perpetuity under IRC § 170(h)(5)(A). Instead, there must be a designation of when grantee review or approval is required and a process for obtaining review or approval.

The Treasury Regulations include a number of other requirements, including important details about appraisals. All of these requirements become particularly important in easement drafting.

### ***The Land Trust Standards and Practices, Practice 9E1***

The Standards describe how to operate a land trust legally, ethically and in the public interest, with a sound program of land transactions and land stewardship. All Land Trust Alliance member land trusts *must adopt the Standards as their guiding principles*. Standard 9E1 requires that for every conservation easement, a land trust must:

- Individually tailor it to the specific property;
- Identify the conservation values being protected;
- Allow only uses and permitted rights that are not inconsistent with the conservation purposes and that will not significantly impair the protected conservation values;
- Avoid restrictions and permitted rights that the land trust cannot monitor and enforce;
- Include all necessary and appropriate provisions to ensure it is legally enforceable; and
- Include a full right to enforce and to take immediate action as the land trust deems necessary in its sole discretion.

### ***Public funding (if applicable)***

If a land trust is working on a mitigation project or with government partners, it may not have the ability to modify the agency’s standard conservation easement template (such as including a termination and proceeds clause or reference to the baseline report). Whether it be from a federal, state, or local government or agency—the easement terms must meet the requirements of the public funding/program embodied in the funding agreement and the enabling legislation for the particular easement funding program. The easement drafter must be cognizant of the relevant and important federal or state laws and regulations—which can often be overlooked or ignored:

- Minimum deed requirements;

- Criteria for selecting the easements funded by the program;
- Mandatory appraisal practices;
- Specific limits on reserved rights;
- Specific protocols for monitoring, stewardship, and enforcement;
- Specific limits on discretionary acts, modification, or termination;
- Co-holder requirements; and
- Program and resource specific requirements (ex. Agricultural Conservation Easement Program, Land and Water Conservation Fund, Forest Legacy Program).

### Recovery of Fees and Costs

Typical commercial contracts provide that in a lawsuit attorney, expert or consultant fees and other costs and expenses go to the prevailing party. Since conservation easements are not commercial contracts, a reciprocal fees clause is not appropriate. Because land trusts carry all of the risk of successor owner's failure to uphold the conservation easement in perpetuity and land trusts are *explicitly* assigned the right to enforce the conservation easement, therefore, the land trust's costs and fees must be paid regardless of the ultimate result of any dispute or difference in interpretation. This requires a one-way fees and costs clause absent a court of competent jurisdiction determination of bad faith. The clause should include all costs, expenses and fees in connection with any controversy and its ultimate resolution under the conservation easement.

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