

The Nature of the Conservation Easement and the Document Granting It



By statute and by common law interpretation, a conservation easement is a real estate interest and is governed by real estate law, in particular, the law of servitudes. This guide analyzes the nature of the conservation easement and the operation of the document granting the easement. It includes discussion of the mechanisms that assist in upholding the easement's conservation objectives in perpetuity.

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Summary

Grant of Conservation Easement. The legal document granting the conservation easement (the "grant") conveys to the easement holder an interest in the land itself—splitting the ownership into two concurrent interests: the conservation easement and the remaining fee simple ownership interest as encumbered by the easement.

Conservation Easement. The conservation easement interest may be described as the power to block land uses within a particular property that are inconsistent with the conservation purposes of the easement. The conservation purposes of the easement define the scope of the easement holder's power and the corollary limits of landowners' freedom to use the property as they wish.

Covenants. Besides the conservation easement, the grant establishes covenants running with each of the concurrent land ownership interests created by the grant of conservation easement.

Holder Covenants. The easement holder declares covenants on its interest enforceable by beneficiaries of the grant. The holder covenants are safeguards to assure that the power conveyed to the holder by the grant of conservation easement will remain robust and viable in perpetuity. In addition to named beneficiaries, Pennsylvania judicial decisions allow courts to infer that an entity qualified to be holder, albeit unnamed in the grant, was an intended beneficiary. In regard to land trust-held easements, a finding that the Attorney General is such a beneficiary is supported by the au-

thority of the Attorney General under the common law doctrine of *parens patriae* to protect charitable assets from misuse or diversion of purpose. The municipality in which the eased property is located may also cite the authority of the Conservation and Preservation Easements Act¹ (the “CPEA”) to support a finding that it was an intended beneficiary of the grant.

Landowner Covenants. The landowners declare covenants on their land ownership interest to clarify the land uses that are, or are not, understood to be consistent with the easement’s conservation purposes at the time of the grant.

Servitudes Under Real Estate Law

An Interest in Real Property

The Conservation and Preservation Easements Act codifies and elaborates on the nature of the property interest known as a conservation easement, clearly defining a conservation easement as a real estate interest and squarely placing it in the subset of real estate law called the law of servitudes. Section 2 of the CPEA defines *conservation easement* as follows:

A nonpossessory interest of a holder in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which include, but are not limited to, retaining or protecting for the benefit of the public and economic benefit the natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open-space use; protecting, conserving or managing the use of natural resources; protecting wildlife; maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.

¹ Pennsylvania’s [Conservation and Preservation Easements Act](#), the act of June 22, 2001 (P.L. 390, No. 29) (32 P.S. §§5051-5059) was enacted in its final form as House Bill 975, PN 2294 (hereafter called the “CPEA”).

Grant of Conservation Easement and Declaration of Restrictive Covenants

In the early years of conservation easements, the documents establishing them were titled “Grant of Conservation Easement and Declaration of Restrictive Covenants.” Some practitioners still follow this practice and do so for good reason. The title was, and remains, the most accurate description of the nature and effect of the document that grants the conservation easement.

The document called the grant in this guide operates to convey a real property interest from the landowners to the holder; thus it is properly categorized as an instrument of conveyance just like a deed.

The Grant is Not the Conservation Easement

Over time, many practitioners began abbreviating the title of the grant to “Grant of Conservation Easement” and, eventually, to appear even less legalistic, “Conservation Easement.”² Confusion has arisen with these abbreviated titles. Conflation is the error in logic of treating two distinct concepts as if they were one. With the use of abbreviated titles, the unwary may conflate the instrument of conveyance—the piece of paper—with the property interest conveyed by the instrument. But, just as a deed is not the fee ownership of land, *the grant is not the conservation easement.*³

² Later, to emphasize that the parties are entering a real estate transaction voluntarily, the title “Conservation Agreement” saw some use. Unfortunately, for the uninformed, the word *agreement* can inadvertently and falsely suggest that conservation easements are grounded in contract rather than property law.

³ This is an important distinction for a number of reasons. For one, changing the text of the grant (an amendment) may or may not change the conservation easement. The easement is an interest in the conserved land. It cannot be amended although it may be changed (strengthened or weakened) by a change to the grant. The perpetuity requirement in §170(h) of the Internal Revenue Code applies to the conservation easement—not the grant.

The Grant Establishes Servitudes

Law of servitudes is governing law

The body of law that applies to the creation, interpretation and enforcement of easements and covenants is the law of servitudes. A servitude is a non-possessory (not a leasehold) interest that the holder holds in a real estate interest owned by another.⁴ Both easements and covenants are servitudes and the law governing servitudes is the *only* appropriate body of law to apply to the creation, interpretation and enforcement of these land-based legal relationships.

Three different servitudes established by the grant

The grant is a legal instrument that performs three functions, each of which is discussed separately below.

The conservation easement

The landowners “grant and convey”⁵ to the holder an interest in the land itself, referred to as the conservation easement.

The holder covenants

The holder burdens its easement interest in the land with covenants running with its conservation easement interest in the land (called “holder covenants” in this guide). The holder covenants are enforceable by those land trusts or governmental entities identified as beneficiaries in the grant. If none is identified or willing to do so, the Commonwealth of Pennsylvania acting through the Office of the Attorney General (the “Attorney General”) may also act to assure that the easement is held by a land trust or governmental entity ready, willing and able to uphold its purposes in perpetuity. Drafting practices vary but, in Pennsylvania, holder covenants are often written to:

- Assure that if the holder seeks to transfer the easement, the transferee will be a land trust or governmental entity that is ready, willing and

able to use its power to block land uses inconsistent with the conservation purposes of the easement (referred to in this guide as the “safeguard on transfer”);

- Commit the holder to use for conservation purposes the proceeds payable to holder on account of a taking in condemnation or other court order that releases the eased property, in full or in part, from the burden of the conservation easement (referred to in this guide as the “safeguard on extinguishment”);
- Bind the original holder and all future holders to manage the easement responsibly so that landowners are not free to engage in land uses inconsistent with conservation purposes (referred to in this guide as the “safeguard on conservation purposes”); and
- Put the easement holder’s interest at risk of forfeiture and transfer to another holder upon a judicial finding of a violation of a holder covenant (referred to in this guide as the “forfeiture remedy”).

The landowner covenants

The landowners burden their remaining fee simple interest in the land with covenants running with the land (called “landowner covenants” in this guide). The landowner covenants clarify the understanding of the granting landowners and the holder as to what is, or is not, consistent with the purposes of the conservation easement. The covenants typically place limitations on:

- Subdivision and land development;
- Improvements; and
- Activities, uses and disturbance of resources on the land.

The Nature and Operation of the Conservation Easement

A Fully Vested, Non-Contingent, Perpetual Interest in the Land Itself

The grant of an easement splits the ownership of the land itself into multiple interests held by different

⁴ Restatement of the Law Third, Property (Servitudes) §1.2(1) (hereafter referred to as the “Restatement”).

⁵ Any deed or instrument in writing that is conveying or releasing land in Pennsylvania is, by the use of the words “grant and convey” effective to pass fee simple title in the premises conveyed to the grantee [or, if so designated, a lesser estate], if the grantor in fact possessed such a title. 21 P.S. §2.

owners at the same time (called “concurrent interests”) and the law of servitudes has devised rules to sort out their priority vis-a-vis each other. The interest of the holder of an easement is paramount or dominant compared to the interest of the fee simple owner of the property. The holder of the servient estate (the landowner) is legally obligated not to interfere with the uses authorized by the easement. Another way to describe the relationship of the two land holdings is that the easement holder holds a power and the landowner is under a disability (the inability to stop the holder’s exercise of easement rights).

Those who fail to understand the power and dominance of the easement holder’s property interest are led to the erroneous conclusion that the public interest in conservation is poorly protected. Nothing could be further from the truth.

Powerful Remedies

Holders of easements (including conservation easements) have a number of powerful remedies available to them in Pennsylvania. They are empowered to enter the land to remove an interference to its authorized uses if it can be accomplished without violence or threat of injury.⁶ The easement holder is also entitled to injunctive relief for the same purpose⁷ whether or not compensatory damages might suffice. These remedies are particularly important as applied to conservation easements because swift action to preserve resources may be imperative.

Negative Easement in Gross for Conservation Purposes

The legal scholars who characterized a conservation easement as a *negative easement in gross for conservation purposes* understood the operation of, and spoke the language of, the law of servitudes. That compact, but tightly packed, definition is deconstructed below for those who lack familiarity with the terms used in the classic definition.

⁶ *Frale v. Green*, 2 Pa. D&C 4th 179 (1989); *Manbeck v. Jones*, 190 Pa. 171.

⁷ *Tide-Water Pipe Co. v. Bell*, 280 Pa. 104 (1924).

Easement over specifically defined property

The real estate interest granted to the holder is properly characterized as an easement⁸—the holder has the right, whether or not landowner consents, to enter the land for the purposes of the easement. Easements always include the concept of the easement holder having the right to do something, or block something, in land of another. Many easements, such as early versions of telephone and electric easements, are not specific to a particular location—they can float until the holder determines the location to be committed to the easement purpose. That is not true with conservation easements established pursuant to the CPEA; the boundaries of the area subjected to a conservation easement must be clearly described in the grant.⁹

Negative easement

A conservation easement is properly categorized as a negative easement because the key feature of a conservation easement is the power to block activities and uses within land of another for certain purposes.¹⁰ The grant may, and often does, include affirmative easements in support of the negative easement. These include the power to enter the land to monitor compliance and to exercise holder’s remedies to restore natural features.

Negative easements (sometimes referred to as scenic easements or easements for light and air) have applicability beyond conservation. For example, the value of a tower project in Manhattan will be increased exponentially if the developer has acquired the power to block construction of other buildings in the vicinity that may spoil the view or cut off light to interior spaces.

In gross

The phrase “in gross” added after “negative easement” clarifies that the benefit of a conservation easement need not run only to an *adjoining* landowner (such as the developer of the office tower in the above exam-

⁸ An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. *Taylor v Heffner*, 359 Pa. 157 (1948).

⁹ CPEA §4(b).

¹⁰ *Simplex Precast Industries Inc. v. Biehl*, 395 Pa. 105 (1959).

ple) but may also run to the benefit of a *non-neighboring holder* such as a land trust.¹¹

For conservation purposes

The conservation purposes are an integral part of the conservation easement. All easements must serve specific purposes; otherwise, the holder’s power is not protected from landowners’ interference. As long as the easement holder is acting to protect those natural and scenic resources described as the conservation purposes of the easement, the landowner may not interfere with the exercise of the holder’s powers.

Conservation Purposes and Perpetuity

Easements by their nature are granted and held for specific purposes. An easement without a useful, viable purpose is a nullity and may be removed as an encumbrance on the land by a court of competent jurisdiction.¹² Thus, a clear description in the grant of the valuable and viable purposes of the easement extending over an indefinite period of time is the foundation for an easement enforceable in perpetuity.

Conservation purposes and conservation objectives

The purposes specifically stated in a conservation easement are called the “conservation objectives” in this guide and in the [Model Grant of Conservation Easement](#) (the “Model Grant”).¹³ This is to differentiate the purposes for a particular easement from the more general conservation purposes required to support a qualified conservation contribution as described in the

¹¹ Adoption of Pennsylvania’s CPEA was desirable but not necessary to ensure the rights of non-neighboring holders. Grants of conservation easements before the adoption of the CPEA in 2001 created legally valid and enforceable real estate interests under the common law whether or not running in gross or appurtenant to the land subject to the easement. For a more detailed discussion, see the discussion of *Appeal of J.C. Grille*, 181 Pa. Super. 460 (1956) in the guide [Conservation and Preservation Easements Act](#) published by the Pennsylvania Land Trust Association and available at <http://conservationtools.org/guides/show/89>.

¹² *McCullough v. Commonwealth DOT*, 134 Pa. Commw. 95; 578 A.2d 568 (1989).

¹³ Published by the Pennsylvania Land Trust Association at http://conservationtools.org/libraries/1/library_items/323.

Internal Revenue Code (the “IRC”) charitable gift rules.¹⁴

Power to Block Land Uses Inconsistent with Conservation Purposes

In summary, the classic definition of a conservation easement may be restated in plain language as follows. This is the sense in which the phrase conservation easement will be used throughout this guide.

The holder of a conservation easement holds the power to block land uses within a specifically identified property that are inconsistent with the conservation purposes of the easement.

Covenants Running with Holder’s Interest in the Land

A covenant running with the land is a promise declared by the owner of a real estate interest in the land to do, or not do, something that touches and concerns the land. In the grant, the landowners declare covenants applicable to their rights and privileges to do what they want with their property. Less readily apparent is that, in the grant, the holder declares restrictions and limitations on its conservation easement interest.¹⁵

Typical Holder Covenants

Grants may include any one or more of the holder covenants noted in the servitudes discussion above

¹⁴ 26 U.S.C. 170(h)(4)(A). 26 I.R.C. §170(h) and accompanying regulations will be referred to in this guide as the “IRC charitable gift rules.”

¹⁵ The focus of this guide is on Pennsylvania law and practice. No exhaustive survey has been made of grant forms in use in other states. References to holder covenants included in forms other than the Model Grant are based upon personal experience of the authors and review of the model form included in the *Model Conservation Easement and Historic Preservation Easement*, 1996, (Land Trust Alliance, 1996) authored by Thomas S. Barrett and Stefan Nagel (the “1996 LTA Model”) and the sample provisions included in *The Conservation Easement Handbook* (2nd ed., Land Trust Alliance and The Trust for Public Land, 2005) authored by Elizabeth Byers and Karin Marchetti Ponte (the “2005 LTA Provisions”).

(the safeguard on transfer, the safeguard on extinguishment, the safeguard on conservation purposes, and the forfeiture remedy). The nature and operation of these covenants are individually addressed below. The parties to a grant may expand upon these holder covenants to address other issues of concern, if any.

Safeguard on transfer

The purpose of the safeguard on transfer¹⁶ is to limit transfer of holder's easement interest to a nonprofit charity committed to conservation of natural resources or a governmental entity. The Model Grant uses the term "qualified organization" as defined in the IRC charitable gift rules to summarize the qualifications of an acceptable transferee.¹⁷ Although a restraint on alienation,¹⁸ the restriction is reasonable because it assures that all future transferees will have the commitment to enforce the easement in perpetuity and will qualify as successive holders under the CPEA.¹⁹

Safeguard on extinguishment

The purpose of the safeguard on extinguishment²⁰ is to assure that, in the event all or a portion of the eased property is the subject of either a taking in condemnation or a court order releasing the easement from the property, (i) the holder is entitled to be compensated for the loss of its easement interest in an amount commensurate with the value of the easement; and (ii) that the holder must use such proceeds in furtherance of conservation purposes.

¹⁶ Model Grant §7.03(a). The corresponding holder covenant in the 1996 LTA Model is found at ¶10 (Assignment) and in the 2005 LTA Provisions at ¶14.C.

¹⁷ IRC Regulations section 1.170A-14(c).

¹⁸ Restraints against alienation (transfer) are not enforceable under the law of servitudes unless they are reasonable. Reasonableness is measured by balancing the utility of the purpose served by the restraint against the harm that is likely to flow from its enforcement. §3.4 Restatement comment c.

¹⁹ The CPEA defines an easement transferee as a "successive holder." Only a land trust or a governmental entity is qualified to be a holder or a successive holder.

²⁰ Model Grant §1.06(e).

Safeguard of conservation purposes

The purpose of the safeguard of conservation purposes²¹ is to assure that the holder and all successive holders will exercise their easement rights as and when needed to protect the natural and scenic resources of the eased property.²² The safeguard of conservation purposes rounds out the safeguard on transfer by providing assurance that, not only will the holder have proper qualifications to serve as holder but will, in fact, take action, when necessary, to block land uses inconsistent with the conservation objectives of that easement.

Application to Amendment Issues

The safeguard of conservation purposes operates to prohibit all sorts of actions, or failures to act, on the part of holder, that jeopardize the resources that the easement protects. Entering into an amendment of the grant inconsistent with the conservation purposes is one such example. If additional clarity on this point is desired, the safeguard of conservation purposes may be expanded, or an additional holder covenant added, to address limitations on amendment.²³

Forfeiture Remedy

In Pennsylvania, many holders, including users of the Model Grant, have demonstrated their commitment to enforce easements in perpetuity by voluntarily putting their easement assets at risk of forfeiture and transfer to a successive holder should they fail to do so.²⁴

²¹ Model Grant §5.02(a); the 1996 LTA Model does not contain a specific duty to enforce in perpetuity; the 2005 LTA Provisions provide in §14.B. that the holder has "the commitment to preserve the conservation values of the Protected Property."

²² The only exception to this general rule is that the holder is not obligated to contest a taking of the conservation easement under eminent domain. CPEA §4(d).

²³ §5.03(a) of the Model Grant provides Holder the right to "enter into an Amendment with Owners if Holder determines that the Amendment is consistent with and in furtherance of the Conservation Objectives; will not result in any private benefit prohibited under the Code; and otherwise conforms to Holder's policy with respect to Amendments."

²⁴ Model Grant §6.01. The 1996 LTA Model provides, as a supplementary provision, an executory limitation to follow ¶10 that provides for automatic transfer to a backup grantee

These land trusts accept that if, for whatever reason, the holder at some time in the future is no longer able or willing to exercise its power to block land uses inconsistent with conservation objectives, then the power ought to be removed from that holder and transferred to another.²⁵

Accountability for abandonment or failure to enforce

The forfeiture provision creates a future contingent interest in the holder’s landholding, which may be diagrammed as follows: O to A but if condition X occurs then to B. The future interest is categorized as a shifting interest subject to condition subsequent. When incorporated into restricted gift agreements, this structure is recognized as imposing a measure of accountability by motivating the alternative beneficiary to monitor compliance with the terms of the gift.²⁶ In the case of a conservation easement, the structure provides the means for a beneficiary of a holder covenant to oust an ineffectual holder and transfer the easement to a successive holder willing and able to enforce the easement.

if grantee ceases to exist or to qualify as a qualified organization under the charitable gift rules. ¶16.A. of the 2005 LTA Provisions provides that “If Holder shall cease to exist or to be a qualified organization under §170(h) of the Internal Revenue Code, or to be authorized to acquire and hold conservation easements under [state law] or should Holder acquire the entire fee interest in the Protected Property, then Holder’s rights and obligations under this Easement shall become immediately vested in [a backup grantee or as determined by a court of competent jurisdiction].

²⁵ Those who opine that the conservation purposes of an easement are not protected in perpetuity unless a public trust or charitable trust is imposed on them have not considered whether, as a general rule, charitable organizations (other than land trusts) are willing to put their charitable assets at risk of forfeiture, without compensation, for failure to use them responsibly in furtherance of their charitable mission. If land trusts are notable exceptions to that general rule, and voluntarily follow a *higher* standard than other charitable organizations, then it would appear that conservation easements are afforded *greater* protection from misuse than charitable assets held by other charitable organizations.

²⁶ Eason, John K., *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 Fordham L. Rev. 693, 704 (2007). <http://ir.lawnet.fordham.edu/flr/vol76/iss2/7>.

Court ruling required before forfeiture

The Model Grant provision avoids, for several reasons, an automatic shifting of the easement interest from the existing holder to the successive holder. One reason is to protect the holder by requiring a court determination that the condition subsequent has, in fact, occurred before the easement interest shifts from the existing holder to the successive holder. The holder is entitled to due process of law before a beneficiary of the grant declares a forfeiture for failure to enforce the easement. Another reason is to protect the successive holder from finding itself, without warning, obligated to enforce a poorly funded, mismanaged or disputed easement. The court proceeding will allow the successive holder the opportunity to raise these issues for resolution before accepting the easement.²⁷

Relevance of Holder Covenants to Federal Charitable Gift Rules

The Internal Revenue Code’s charitable gift rules, which are relevant if a donor seeks federal tax benefits for the gifting of an easement, necessitate the establishment of covenants regarding transfer and extinguishment:

- The federal regulations explicitly require a *safeguard on transfer*:
- “A deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement (or, in the case of a remainder interest or the reservation of a qualified mineral interest, the property), whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qual-

²⁷ In Pennsylvania, the successive holder is not obligated to enforce the easement until it signs and records an acceptance in the public records. CPEA §4(c). See discussion of “Automatic Shift to Backup Grantee” in the guide [Hold-ers, Beneficiaries and Backup Grantees](http://conservationtools.org/guides/show/122), published by the Pennsylvania Land Trust Association at <http://conservationtools.org/guides/show/122>.

ifying, at the time of the subsequent transfer, as an eligible donee..."²⁸

- The federal regulations also explicitly require a *safeguard on extinguishment*:

When a change in conditions give [sic] rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.²⁹

The IRC charitable gift rules do not require incorporation of a specific holder covenant requiring holder to exercise its easement rights in perpetuity in furtherance of the conservation purposes of the easement. Nevertheless, a *safeguard of conservation purposes* evidences that the holder qualifies under the gift rules as an organization having the commitment to protect the conservation purposes of the donation.³⁰

The IRC charitable gift rules also do not require a *forfeiture remedy* but, again, such a remedy evidences the commitment to protect the conservation purposes of the donation.

Running of the Burden of Holder Covenants

Servitudes law requires separate analysis of the running of the burden of a covenant from the benefit of a covenant. In the case of holder covenants, the burden

²⁸ Reg. 1.170A-14(c)(2).

²⁹ Reg. 1.170A-14(g)(6)(ii).

³⁰ Regulations section 1.170A-14(c). See the guide [Amending Grants of Conservation Easement](#), published by the Pennsylvania Land Trust Association at <http://conservationtools.org/guides/show/83>, for a discussion of items furnishing evidentiary support for a finding that a land trust is a qualified organization under the IRC charitable gift rules.

runs with holder's easement interest in the land and each successive holder of that interest.

Running of the Benefit of Holder Covenants

The benefit of the holder covenants runs to those who have the power to compel holder to comply with the holder covenants either by being specifically named as a beneficiary in the grant, by application of the CPEA, or as a result of a court order in which the court recognizes certain persons as having enforcement rights with respect to the easement notwithstanding that they are unnamed in the grant.

The general rule in Pennsylvania is that a covenant may run to anyone intended to be benefited by it. The common law rule that restrictive covenants only run to the benefit of adjoining landowners (the privity of estate requirement) was discarded in Pennsylvania by a 1956 appellate court decision (*Appeal of J.C. Grille* cited above). One result of that decision is that grants of conservation easement and declarations of restrictive covenants were legally valid and enforceable before passage of the CPEA. Another result of that decision is that there is no clarity under Pennsylvania law as to the universe of persons who may claim that they are intended beneficiaries³¹ of a restrictive covenant. That is true as a general rule but, as to conservation easements, the CPEA limits beneficiaries (those eligible to hold third-party enforcement rights) to land trusts and government.³²

Parties to the grant

The grant is not a contract; thus, there is no reason to assume that the benefit of the holder covenants runs

³¹ The meaning of "beneficiary" may change depending upon the context. When applied to the discussion of servitudes (other than conservation easements), as is the case here, it means the person intended to benefit from a covenant. The CPEA narrows the range of beneficiaries of conservation easements to land trusts and government. Trust law beneficiaries are determined by an entirely different set of principles as discussed in [Not a Charitable Trust](#).

³² The CPEA defines *third-party right of enforcement* as "[a] right provided in a conservation easement to enforce any of its terms, granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder." §3.

to the original easement grantors or the then-current landowners.

Beneficiary identified in the grant

If a land trust or other entity qualified to be holder³³ is identified as a beneficiary in the grant, the identified beneficiary will have the right to enforce the holder covenants³⁴ running to its benefit.

Beneficiary established by CPEA

The CPEA provides that, if the holder ceases to exist and no beneficiary is specifically named in the grant, and no qualified organization is found to voluntarily accept transfer of the holder's interest in the land, the municipality in which the land is located automatically becomes the default holder.³⁵

Beneficiary established by court order

Pennsylvania courts are not bound by traditional common law rules limiting the running of the benefit of covenants. The court may hold, on the basis of the particular facts and circumstances of the case, that the benefit was intended to run to others who are not party to the covenant, not named as a beneficiary of the covenant and not the owner of neighboring land.³⁶ The possibility that the Attorney General may be recognized by Pennsylvania courts as having a third-party right of enforcement of the holder covenants, whether or not specifically identified in the grant, is discussed below.

³³ The CPEA requires a holder to be a governmental body or a charitable corporation, charitable association or charitable trust registered with the Pennsylvania Bureau of Charitable Organizations, exempt from taxation pursuant to IRC §501(c)(3) or other statute, and having a conservation purpose. CPEA §3.

³⁴ See [Holders, Beneficiaries and Backup Grantees](#) for suggestions as to agreements providing for notice and opportunity to cure before covenant beneficiaries take action to enforce holder covenants.

³⁵ CPEA §4(d). The CPEA provision does not explain how that transfer will occur without adjudication by the courts nor does it consider how an unwilling municipality may be compelled to accept the transfer.

³⁶ As to conservation easements, the CPEA limitation to land trusts and government remains applicable.

Covenants Running with Landowners' Interest in the Land

In the typical form of grant, the covenants running with the landowner's interest consume a large part of the text; for example, in the Model Grant the entirety of Article II (Transfer, Subdivision), Article III (Improvements) and Article IV (Activities and Uses) address issues that may arise in the future pertaining to what landowners may or may not do with the land. Some have jumped to the mistaken conclusion that these covenants, erroneously described as a contract between landowners and holder, are the essence of the conservation easement.³⁷ As discussed above, the landowner covenants are but one of the three servitudes (conservation easement, holder covenants and landowner covenants) included in the grant. Of the three, the landowner covenants are accorded the lowest priority. They are subordinate to the conservation easement and the holder covenants burdening the superior interest held by the holder.

Nature and Purpose of Landowner Covenants

Clarifying consistency with conservation objectives

The grant of the conservation easement vests in the holder the power to take action to protect the conservation objectives of the easement. The landowner covenants handle the details about whether existing or future practices and improvements are or are not consistent with the conservation objectives.

Example. Landowners assume that farming and timbering in accordance with their past practices is consistent with conservation objectives and, thus, do not interfere with the conservation ease-

³⁷ The erroneous conflation of landowner' covenants with the conservation easement results in the erroneous assumption that the ability to change landowner covenants without governmental oversight is the ability to eradicate the efficacy or even extinguish the conservation easement at will. "Conservation Easements: Perpetuity and Beyond" at page 702. As discussed below, beneficiaries are empowered to enforce the easement even if holder and landowners seek to render the easement unenforceable.

ment. The holder may not have fully considered whether all of their existing practices are, or are not, consistent with the conservation objectives. A discussion of the rules typically included in the holder's form of grant affords them both the opportunity to address concerns and set a program satisfactory to both that allows farming and timbering to continue subject to a set of limitations that will avoid a later dispute about whether a particular practice is or is not consistent with conservation objectives.

Relationship between holders of concurrent estates

Covenants establish an ongoing relationship between the holders of concurrent estates or interests in the property. They serve a useful purpose (avoiding disagreements and mistaken assumptions) whenever multiple parties hold different interests in the same property at the same time. Well-drafted real estate documents typically include both a grant of the interest (for example, easement or leasehold) and a detailed list of covenants documenting the arrangements between the holders of the concurrent interests.

Simple Example: One neighbor grants an access easement over a shared driveway to the adjoining neighbor. A well-drafted granting document will address issues such as intensity of use and responsibilities for repair and maintenance to achieve the common goal of shared access without disputes or misunderstandings.

Sophisticated Example: The developer of an office park records a declaration in which easements for roads and other common facilities are established for the common purpose of serving a number of buildings within the development. The declaration then establishes, by a program of affirmative and negative covenants, a reasonable and responsible system for multiple owners, lessees and mortgagees to coexist and share responsibilities to achieve the common goal of a well-operated, functional office park.

Running of the Burden of Landowner Covenants

The burden of landowner covenants runs with the fee simple estate in the land. Any transferee of landowners' interest in the land is bound to observe the landowner covenants. That includes not only subsequent owners but any grantee of an easement, lease or other real estate interest by, through or under the landowners.

Running of the Benefit of Landowner Covenants

The Model Grant, as is the case with other documents granting conservation easements, explicitly provides the holder with a right of enforcement of the landowner covenants.³⁸ However, the analysis of the running of the benefit does not end there under the law of servitudes. Covenants may run to others who are not parties to the grant. Is anyone else entitled to the benefit of the landowner covenants either by the terms of the grant or by applicable law?

Co-holder of easement

A land trust or governmental entity named as a co-holder of the easement has a direct right to enforce the landowner covenants exactly the same as the first-named holder.³⁹

Beneficiaries identified in the grant with direct right of enforcement

The Model Grant provides an opportunity in Article I to specifically identify beneficiaries of the easement and, if one or more beneficiaries are named in Article I, a provision (Commentary §5.06) is added to identify the specific rights accorded each beneficiary. Identified beneficiaries are often public sources of funding acquisition of easements or may be other land trusts willing to take over responsibility for enforcement of the landowner covenants should holder fail to do so⁴⁰.

³⁸ See, for example, §5.1 of the Model Grant.

³⁹ For an in-depth discussion of the relationships between easement co-holders, see [Holders, Beneficiaries and Backup Grantees](#).

⁴⁰ The Model Grant provides a menu of up to four options the beneficiaries may select as their beneficial rights with respect to the grant (or craft their own provision). One of

Both of these types of entities qualify as holders of third party enforcement rights under the CPEA and have standing to intervene in a matter involving the conservation easement under the CPEA.⁴¹

Other owners subject to same grant?

The law in Pennsylvania is that landowners who purchase lots subject to a common plan of development have equitable rights to enforce the plan limitations as against each other. A conservation easement plan, or a program for limited development included in the covenants of a grant, may be found to be such a common plan. However, the common law right of landowners to enforce, among themselves, restrictions inferable from a common plan does not elevate them to persons holding a “third-party right of enforcement” under the CPEA.⁴² Those rights can only be held by an entity qualified to be a holder.⁴³ Individuals are excluded as beneficiaries; nevertheless, the landowners under a single grant have standing under §5 of the CPEA to commence a legal or equitable action affecting a conservation easement. Presumably this is to preserve their rights, if any, to enforce (as against other lot owners) a common plan of development.

the choices is the right to enforce the terms of the grant should holder fail to do so; another is the right to approve any amendment to the grant. The first choice (enforcement) is always chosen; the other (amendment approval) is selected less often. The inference that may be drawn from these anecdotal observations is that these beneficiaries are comfortable leaving amendment issues to easement holders unless the change is tantamount to a failure of enforcement.

⁴¹ CPEA §5(a). For a fuller discussion of issues pertaining to standing to intervene in a matter involving a conservation easement, see the guide [Who Has Standing?](#) published by the Pennsylvania Land Trust Association at <http://conservationtools.org/guides/show/121>.

⁴² Holders of third-party rights of enforcement are limited to persons eligible to be holders—land trusts and governmental entities. CPEA §3. For an in-depth discussion of the rights of “Beneficiaries” as defined in the Model Grant and as persons holding “Third Party Rights of Enforcement” in the CPEA, see [Holders, Beneficiaries and Backup Grantees](#).

⁴³ The Model Grant rules out other owners as potential beneficiaries of the grant although the Commentary provides alternate provisions if it is intended that the owners of lots bound by the same grant have the right to rely upon the easement plan as a common plan of development.

Unconventional Legal Theories

Some advocates for increased policing of a holder’s management of its conservation easements have looked to the public trust doctrine or charitable trust law as a means to impose governmental oversight upon amendment (and perhaps other) management decisions of easement holders. The policy objective of these advocates is clear: to insert the Attorney General or the courts as a control on the discretion of the holder’s governing board so as to better assure the continuing achievement of the conservation purposes set forth in grants of conservation easement.

As explained in the guide [Not a Public Trust](#),⁴⁴ no legal precedent exists in Pennsylvania for finding that a conservation easement acquired by a private land trust is a public trust and, should such a claim be asserted, this would constitute a taking for which compensation would be due to the land trust. (The applicability of either the public trust doctrine, or its codification in the Donated or Dedicated Property Act, to government-held conservation easements is beyond the scope of *Not a Public Trust* and this guide.)

The guide [Not a Charitable Trust](#)⁴⁵ discusses the application of charitable trust principles to donated conservation easements. In brief, there is little evidence to support that a gifted conservation easement, in the absence of a charitable trust agreement (not to be confused with the grant), is a charitable trust in Pennsylvania; indeed, there is compelling evidence to the contrary.

The conclusions that public trust doctrine and charitable trust theory are largely inconsequential to conservation easement management in Pennsylvania do not discount a potential role for the Attorney General in conservation easement oversight. To the contrary, the following section identifies two pathways by which the Attorney General may justify a role in ensuring the perpetuity of the natural resource protections provided by conservation easements.

⁴⁴ Published by the Pennsylvania Land Trust Association at <http://conservationtools.org/guides/show/136>.

⁴⁵ Published by the Pennsylvania Land Trust Association at <http://conservationtools.org/guides/show/137>.

Enforcement of Holder Covenants by Attorney General

The Attorney General has at least two bases of authority upon which to justify taking action when necessary to protect the long-term viability of conservation easements held by land trusts. The first basis is to exercise its rights as an intended beneficiary of holder covenants provided in the grant either because it is named in the grant or a court finds it an intended, albeit unnamed, beneficiary. The second basis is to exercise the Attorney General's legal authority to protect charitable assets from irresponsible use or diversion from their charitable purposes.

As an Intended Beneficiary

The holder covenants⁴⁶ are included in the grant to assure enforcement of the easement in perpetuity. Such assurance is grounded upon the assumption that an entity with the authority to take appropriate action, and standing to commence an appropriate action, must at all times be available to do so. There is no certainty that another land trust or a governmental entity identified as a beneficiary will, at some indefinite time in the future, be available or willing to take necessary action. *What happens if the viability of an easement is jeopardized by a holder unable or unwilling to take appropriate steps to uphold the conservation purposes of the easement and there is no named beneficiary available or willing to do so?*

⁴⁶Except as required by the IRC charitable gift rules, there is no legal requirement that a grant include any holder covenants. The land trust community may want to turn its attention to this policy issue (rather than the extraneous issue of whether the text of the grant may be changed without governmental oversight) because it directly addresses concerns about the integrity of land trusts and public concerns about the long-term viability of conservation easements as a tool for resource protection. Moreover, inclusion of meaningful holder covenants in every grant assures that *all* conservation easements are accorded the same level of protection. The charitable trust theory treats a large swath of easements as unworthy of protection; for example, those not donated and those containing an amendment clause in the grant. Proponents of the charitable trust theory offer no explanation why these easements are less deserving of protection.

Judicial inference of intended beneficiary

Pennsylvania law permits a court of competent jurisdiction to preserve the viability of covenants by inferring the existence of beneficiaries not identified in the grant and not appurtenant landowners.⁴⁷ An example of the legal argument that may persuade a court to recognize the Attorney General as a third-party beneficiary of the holder covenants is as follows:⁴⁸

- The holder covenant providing for the remedy of forfeiture and transfer to a successive holder was intended to protect the viability of the conservation easement in perpetuity.
- The condition triggering forfeiture has occurred because the existing holder is unable or unwilling to take the actions necessary to uphold the conservation purposes of the easement.
- There is no beneficiary identified in the grant available or willing to petition the court to exercise the remedy provided in the grant in the event of the existing holder's failure or inability to perform its responsibilities under the easement.
- Absent a beneficiary ready, willing and able to enforce the holder covenants, the remedy provided in the grant is a nullity.
- Assuming that *some* qualified organization must have been intended to be a beneficiary of the holder covenant in perpetuity, it is reasonable to infer that the Attorney General, in its capacity as guardian of charitable assets, is that beneficiary so as to exercise the remedy of forfeiture and transfer to a qualified organization ready, willing and able to uphold the conservation purposes of the easement.

⁴⁷ *Appeal of J.C. Grille* cited above.

⁴⁸ For example, the Attorney General may want to exercise the forfeiture remedy contained in a grant that does not explicitly identify a beneficiary. While the taking of a conservation easement by the government for transfer to another holder is an illegal condemnation, a lawful means to accomplish the goal of upholding the conservation easement's purposes may be for the Attorney General to proceed as the beneficiary of that holder covenant.

Identify Attorney General as beneficiary in grant?

The Model Grant furnishes the opportunity to name beneficiaries of the easement and to specify the rights accorded to each. If agreeable to the parties, the Attorney General may be specifically identified in the grant to provide assurance of the availability of at least one easement beneficiary authorized to enforce the easement if neither the holder nor any other identified beneficiary is ready or willing to do so.

Standing as holder of third party right of enforcement

In its capacity as an intended beneficiary of holder covenants (a holder of third party rights of enforcement), the Attorney General has standing to intervene in matters affecting a conservation easement under §5(a)(5) of the CPEA.

Authority to Protect Charitable Assets

The Attorney General has authority under Pennsylvania common law to intervene to protect the public interest⁴⁹ in the responsible use of charitable assets.⁵⁰ Included in this general authority is the right and duty to exercise oversight to see that charitable assets are used consistent with the purposes for which the charity was formed and accorded favorable tax and other treatment under applicable law.

⁴⁹ The General Assembly has recognized the public interest in conservation easements; for example, §3 of the CPEA provides as follows: “The General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements in the ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of this Commonwealth.

⁵⁰ Property committed to charitable purposes has special protection under the law because it relieves the public burden by advancing one or more general or specific charitable causes. As soon as money or property is donated or committed to a charitable purpose, the Attorney General acts on behalf of the public’s interest to ensure it is duly administered; including the assets held by nonprofit organizations formed for charitable purposes. [Handbook for Charitable Non-profit Organizations](#) published by Commonwealth of Pennsylvania, Office of Attorney General at <http://www.attorneygeneral.gov>.

Protection of charitable purposes

The Attorney General has authority to act to ensure that assets committed to charitable purposes are not wasted, frittered away or diverted.⁵¹ Conservation easements are charitable assets, whether purchased or gifted. Thus, apart from the power to enforce holder covenants directly as an intended beneficiary, the Attorney General has the authority to intervene when easement assets are abandoned, used irresponsibly or diverted from their conservation purposes as indicated in the below examples:

- *Example of waste.* If the holder fails to use the power granted to block uses inconsistent with conservation objectives, the Attorney General may find that dereliction of duty to be the wasting of a charitable asset.
- *Example of frittering away.* If an amendment to a grant materially diminishes the holder’s power to block land uses inconsistent with conservation purposes, that may be found to be frittering away a charitable asset.
- *Example of diversion of purpose.* If a conservation objective of the easement is abandoned or changed so as to no longer protect the natural and scenic resource intended to be protected by the easement, the Attorney General may find this to be a diversion of purpose.⁵²
- *Example of abandonment/easement extinguishment.* The general rule applicable to servitudes is that a court may clear the landowners’ title to the land from the burden of an easement when the easement holder fails to make use of the easement

⁵¹ The Attorney General is responsible for public supervision of charities through his *parens patriae* powers. *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002).

⁵² 15 Pa.C.S.A. §5547 (b) provides as follows: Nondiversion of certain property.--Property committed to charitable purposes shall not, by any proceeding under Chapter 59 (relating to fundamental changes) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the court an order under 20 Pa.C.S. Ch. 61 (relating to estates) specifying the disposition of the property. (Dec. 21, 1988, P.L.1444, No.177, eff. Oct. 1, 1989).

because it no longer serves a useful purpose.⁵³ The Attorney General, as representative of the public interest, is entitled to notice of, and an opportunity to intervene in, an action to clear title to land from the burden of a conservation easement.⁵⁴

“person otherwise authorized under Federal or State law.”

Standing under the common law power to protect charitable assets

The Attorney General has standing under §5(a)(6) of the CPEA to exercise its authority to protect the public interest in the responsible use of charitable assets as a

⁵³ As applied to grants of conservation easements, the possibility of judicial extinguishment is reason to resist restricting easement purposes to a few narrow objectives (which may become defunct over time) and, instead, support expansive easement objectives with a greater likelihood of remaining viable over an indefinite period.

⁵⁴ *In re Preservation Alliance for Greater Philadelphia*, O.C. No. 759 (Ct. Com. Pl. of Philadelphia County, PA June 28, 1999). Restatement §7.11 provides the following with respect to “Modification and Termination of a Conservation Servitude because of Changed Conditions”:

A conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:

- (1) If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the cy pres doctrine, except as otherwise provided by the document that created the servitude.
- (2) If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude.
- (3) If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.
- (4) Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.

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Acknowledgements

[Patricia L. Pregmon](#), attorney at law, is the primary author, and [Andrew M. Loza](#), the contributing author and editor.

The Pennsylvania Land Trust Association published this guide with support from the William Penn Foundation, the Colcom Foundation and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.



Colcom Foundation

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