

## Part One

# Conservation Easements

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Preservation of land for the use and benefit of future generations as well as for the protection of wildlife and plant species has typically been viewed as the responsibility of government. Historically, such preservation has been accomplished through the establishment of federal, state and local parks and open space areas.

The continuing growth, however, of urban and suburban areas along with development of farmland and other undeveloped land has increased the need for preservation of land. Competition for government funding for such preservation remains fierce. There is a sense of urgency on the part of those committed to preservation that land available now may not be available later.

A few dedicated conservationists seeking private methods to accomplish the preservation of land have created a legal instrument known as a conservation easement. This unique instrument permits a landowner to retain ownership and limited use of the land while ensuring its preservation in perpetuity. The land to be preserved does not need to be purchased by the government, thus saving limited public resources. Many private organizations, primarily land trusts, have embraced the conservation easement to preserve land.

### Structure

A conservation easement is a legal document that contains permanent restrictions on the use or development of land. In essence, it is a voluntary contract entered into between a landowner (the grantor), and a land trust or a government entity (the grantee), for the purpose of preserving certain values of the property. These values include wildlife habitat,

forests, open space, agricultural lands, scenic vistas, or historic structures.

The document is signed by the grantor and grantee, is recorded in the county real estate records, and restricts title to the land it encumbers. A conservation easement is usually a permanent restriction on the land that automatically binds not only the grantor, who is the current owner of the land, but also any future owners of the land.

The grantee of a conservation easement can be a qualified private organization, such as a land trust, or a government entity, such as a county, city, state or federal agency or other quasi-governmental entities. The grantee has responsibility for enforcing the use restrictions contained in a conservation easement, and will periodically inspect the property to verify compliance with the terms of the conservation easement.

### Restrictions

The conservation values of each parcel of land are unique. Each easement must be individually drafted to reflect both the specific conservation values and the goals and desires of the landowner. There are, however, certain activities that most conservation easements uniformly prohibit. These include surface mining, industrial uses, non-agricultural commercial uses, construction of buildings and homes (unless otherwise reserved in one or more home sites) and other similar uses which by their nature would not protect the conservation values.

Conservation easements on working lands such as farms, ranches, and forests have special provisions designed to perpetuate traditional uses of the land while preserving natural values.

## Land Owner Motivation

A land owner may have a number of motives for granting a conservation easement. The most noble motivation is a desire to ensure that the land is forever preserved and protected from development. There are also significant tax benefits which may be derived from conservation easements, including federal and state charitable income tax deductions, state income tax credits, federal and state estate tax deductions and exclusions (including post-mortem elections), and real property tax relief. (These tax benefits will be explored in Part 2 of this article in a future issue of *Facts & Findings*.)

Another common motivation for a landowner's grant of a conservation easement can arise in situations where farming or ranching activities on the land do not produce enough income to pay for property taxes and upkeep. Many landowners who would otherwise like to preserve their land are forced to sell to avoid continuing losses.

In addition, the heirs of deceased landowners may be forced to sell their inherited land to pay estate taxes. Under these scenarios, a conservation easement can permit such landowners to preserve their land by providing estate and property tax relief when a conservation easement is donated. Some conservation organizations and governmental entities will buy a conservation easement from a landowner thereby infusing the landowner with funds to pay taxes and to continue or even expand farming or ranching operations.

Another method to provide a landowner with funds or flexibility while still preserving the land is to permit the landowner to reserve home sites. A landowner may reserve the right for a certain number of sites that can each be developed into a single-family residence and sold or kept by the landowner to pass on to family members. These home sites would remain restricted by the conservation easement in order to minimize the effect of such development on the conservation values of the land.

The number of sites the landowner can reserve will depend upon various factors particular to each easement, including the size of the easement and the proposed location of the sites in relation to the conservation values to be protected. Usually these sites are identified in the conservation easement to avoid location in important wildlife habitat and to protect scenic views.

## Land Trusts

The most common grantees of conservation easements are land trusts, which are typically private, non-profit corporations. There are a variety of land trusts, including national organizations, which are dedicated to the preservation of flora

and fauna, such as the Nature Conservancy, Rocky Mountain Elk Foundation, and Ducks Unlimited.

Land trusts can also be created by local open space and nature preservation associations. In these local organizations, the members of the board of directors of the land trust are typically members of the community in which the land trust operates.

Many land trusts have a specialty or focus on a particular use of the land, such as ranching or agriculture, or on the protection of a specific type of wildlife or plant habitat. These specialized land trusts often include board members with expert knowledge regarding the specialty of the land trust. These trusts can provide education to landowners as to the latest techniques and methods available to protect the conservation values of their land.

The Land Trust Alliance (LTA) is the trade organization for land trusts, based in Washington, D.C. The LTA ([www.lta.org](http://www.lta.org)) publishes many excellent books, videos and a newsletter, and holds regional seminars, workshops, and an annual educational convention in different areas of the United States.

## Legislation

Although conservation easements have become a popular land preservation tool, the legal structure of a conservation easement is unique. In other typical easements (*e.g.*, an access easement), the easement burdens one parcel of land (the land crossed by the access easement) for the benefit of an adjacent parcel of land (the destination of the access easement).

A conservation easement, on the other hand, does not provide a benefit to an adjacent parcel of land but confers a responsibility upon an entity or an individual to enforce use restrictions on the land. Therefore, the conservation easement is a negative easement in gross and is disfavored by the common law.

Without common law support, conservation easements have become primarily creatures of statute. Nearly all states except Wyoming and Pennsylvania have adopted enabling acts which recognize conservation easements as a real property interest, with the full weight of statutory authority. Absent this statutory authority in Wyoming and Pennsylvania, valid conservation easements are granted in practice by the landowner conveying an acre of land to the grantee and making the conservation easement for the benefit of the acre of land.

Despite the lack of common law support, all states have authority or mechanisms in place to grant valid conservation easements.

## Conclusion

The popularity of conservation easements will continue to increase for all the reasons presented as well as for the significant tax benefits to be described in Part II. Given that the gov-

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ernment has limited funds to single-handedly preserve all lands worthy of protection, conservation easements remain the most effective private tool to preserve land for future generations.

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