

Deed Restriction Versus Conservation Easement



In most circumstances, a conservation easement is a far better tool for conserving land than a deed restriction. This guide explains how the tools differ.

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Summary

Both deed restrictions and conservation easements can be used to restrict the use of land. Each tool is implemented through a written, legal instrument recorded in the public records, and each binds both present and future owners of the land to their terms. However, the two differ significantly in their ability to protect a property’s natural and scenic resources in perpetuity.

A conservation easement has many advantages over a deed restriction in ensuring that land continues to be conserved over time, including but limited to the following:

- A conservation easement and the conservation protection it provides are accorded significantly more respect under Pennsylvania law than a deed restriction. Courts will give greater deference to a conservation easement than to a deed restriction in the event of an argument over the restrictions.
- Every conservation easement has a holder that has the responsibility to monitor compliance with the easement’s restrictions and, if necessary, enforce the easement’s restrictions in court. In contrast, although one or more persons might have the right to enforce a

deed restriction, no one has the duty to enforce or even watch to see that the restriction is respected.

- A deed restriction may be vacated—essentially undone—by getting a judge to agree that circumstances have changed and the restriction is no longer appropriate. A judge may or may not do so, but if no one defends the restriction in court, the risk is great. With a conservation easement, the easement holder has an obligation to uphold the easement’s conservation objectives.
- A deed restriction is sometimes simply ignored; no one notices or cares enough to challenge the violation in court or otherwise. In contrast, a conservation easement has a holder that cares about the protections the easement provides to the land and that is tasked with monitoring compliance with the easement’s restrictions.
- Unlike a deed restriction, donation of a conservation easement meeting tax code requirements may be eligible for a federal income tax deduction.

A conservation easement is a property interest conveyed by a landowner to a land trust or government entity—a holder. The holder holds rights in the real estate as described in the easement document, those rights consisting chiefly of the power to block actions inconsistent with the easement’s conservation objectives. A deed restriction, in contrast, is not a property interest; rather, it is a promise to do or not do certain things with the real estate. The implications of this are described in the sections below.

WeConservePA publishes [extensive guidance](#) on conservation easements as well as guides about deed restrictions including [Using a Deed Restriction to Protect Land: A Path for When Neither a Land Trust Nor Government Can Help](#) and [Restricting Development to What Is Approved in a Subdivision and Land Development Plan](#).

How does the law favor one tool over the other?

Deed restrictions are a creature of our legal system's *common law*, which is the record of judge-made decisions (as opposed to legislated or statutory law). Common law disfavors limitations on owners' use of their property. This leads Pennsylvania courts to resolve ambiguities in interpretation of deed restrictions in a way that favors the less restricted use.

The enactment of the Pennsylvania [Conservation and Preservation Easements Act](#) (the "CPEA"; the Act of June 22, 2001, P. L. 390, No. 29; 32 P.S. §§ 5051-5059) was designed to eliminate many of the drawbacks involved in using deed restrictions to preserve open space. The CPEA codifies that a restriction on land fashioned as a conservation easement is valid even though it has certain features that were disfavored at common law (e.g., it is an easement in gross rather than an easement appurtenant to an adjacent parcel). (See also CPEA §6.)

Section 5(c)(2) of the CPEA also clarifies that:

[A]ny general rule of construction to the contrary notwithstanding, conservation or preservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of this act.

Who enforces a deed restriction or conservation easement?

Deed restrictions generally are enforceable by individuals with some type of property interest in the land or adjacent property owners who can show that the deed restriction was intended to benefit their properties. Deed restrictions written into planned subdivision documents are enforceable by the homeowners' association. But unless the document spells out which of these parties may enforce the restrictions, it often is unclear who has legal standing to bring suit. And even if it is clear, that person (or the volunteer-run homeowners association) may not have the will or the financial means to challenge a violation.

So, with a deed restriction, you are relying on the concern, effort, and finances of some unidentified future person to provide oversight of the property.

Conservation easements, on the other hand, explicitly convey enforcement rights and responsibilities to easement holders and designated beneficiaries, which are non-profit land trusts or government agencies. Many land trusts, in fact, ask easement donors (and others) to make stewardship contributions at the time of an easement's establishment to help ensure that the organization has the financial resources to enforce easement restrictions in perpetuity.

These holders and beneficiaries must sign and record an acceptance of the enforcement right before they can exercise these rights.

Are there limits on who can enforce?

Deed restrictions traditionally were not treated as permanent by the courts unless they were *appurtenant* to adjacent or nearby property. The restriction had to benefit a nearby lot and be included in the title to both lots. Otherwise, it would be considered a restriction *in gross* that was *personal* to the grantee and would be non-assignable and enforceable only while the grantee was alive. A 1956 Pennsylvania Superior Court decision (see [Appeal of J.C. Grille](#)) brought an end to this rule in Pennsylvania. As noted in WeConservePA's guide [The Nature of the Conservation Easement and the Document Granting It](#):

The general rule in Pennsylvania [now] 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.... [A] 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 beneficiaries of a restrictive covenant [i.e., a deed restriction]. 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.

The CPEA also makes clear that neighbors and other parties without a property interest in the eased land do not have standing to sue to enforce the easement. (See CPEA §5(a).)

How can violations be uncovered?

Someone who wants to determine if a deed restriction provision is being complied with (e.g., is the wetland buffer of sufficient size?) does not have an automatic right to enter the property to determine compliance *unless* the deed restriction expressly provides this right. Many loosely drafted deed restrictions fail to do so.

Conservation easements, by contrast, are as a practice drafted to grant the easement holder the right to monitor the property for compliance (which they usually do at least once a year in accord with Land Trust Standards and Practices). See, for example, WeConservePA's [*Model Grant of Conservation Easement and Declaration of Covenants*](#) §5.02 (a), (b).

How easy is it to modify or extinguish a deed restriction or conservation easement?

Without an entity that has clear responsibility for upholding the terms of a deed restriction in perpetuity, vacating a deed restriction may be a simple matter of arguing “changed circumstances” before a judge. The person seeking to terminate or modify the restriction may claim that the surrounding area or even economic circumstances have changed so much that the restrictions can no longer fulfill their original purposes. A judge may or may not agree with this argument, but if no one defends the deed restriction in court, the risk is great. With a conservation easement, on the other hand, the easement holder has an obligation to defend against such court challenges. The stewardship funds collected by the land trust or the tax resources of local government (if a municipality is the holder) assures that the private or public holder has the resources to protect the integrity of the easement.

A well-drafted conservation easement will address the issues of modification or termination and provide appropriate disincentives and remedies. See, for example, the [*Model Grant of Conservation Easement and Declaration of Covenants*](#) §6.04 and §7.10 (d), (e). A conservation easement following the WeConservePA model also will contain easement holder covenants that safeguard the perpetual nature of the easement grant (such as requiring subsequent any transfers to be only to other land trusts or government entities; covenanting that the holder will take action to block uses and activities inconsistent with the easement's conservation objectives; addressing compensation in the event of condemnation or taking; and requiring any amendments to be consistent with the easement's conservation purposes). See the section “Covenants Running with Holder's Interest in the Land” in WeConservePA's [*The Nature of the Conservation Easement and the Document Granting It*](#).

Is there a financial advantage in using a conservation easement rather than a deed restriction?

A landowner cannot claim a charitable tax deduction for a loss in market value due to placing a deed restriction on a property. That same diminution in value from donating or bargain-selling an easement on the property may be eligible for federal tax benefits.

If a property owner inserts a deed restriction into their property before donating the property to a land trust or municipality, the value of the gift for tax purposes is only the property's *restricted* value. If, on the other hand, the owner places the land under conservation easement and then donates the property to a municipality or land trust, they can potentially secure a tax deduction for the property's full value: a charitable deduction for the conservation easement plus a deduction for the value of the underlying fee interest.

What about deed restrictions in property conveyed to municipalities?

It is not uncommon for a deed restriction to be recorded when an individual donates or bargain-sells property to a local government to provide parkland or other public benefit. This can help establish that the municipality accepted the property in trust for the public, with use of the property restricted to the purposes for which it was conveyed. (See Pennsylvania's Donated or Dedicated Property Act, the Act of December 15, 1959, P.L. 1772, 53 P.S. §§3381-3386, as well as the guide [Parks in Perpetuity](#).)

WeConservePA's [Model Declaration of Public Trust](#) can be used to further ensure that properties conveyed to local government for public recreation or other conservation benefits will continue to serve those purposes. Local governments use the tool to permanently dedicate land to the public purposes set forth in the declaration.

Deed restrictions relating to subdivision and land development plans are addressed in the guide [Restricting Development to What Is Approved in a Subdivision and Land Development Plan](#).



The latest version of this guide and related resources are posted at WeConservePA.org.

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