

GENERAL GUIDELINES for CONSERVATION EASEMENT PROJECTS

Please read this information carefully and completely as it discusses many important legal and cost issues that a prospective easement donor should consider.

BRANDYWINE CONSERVANCY'S MISSION

The Brandywine Conservancy is committed to the belief that preservation and wise use of natural, agricultural, and cultural resources provides for the health, education, beauty and increased quality of life of individuals and communities. The mission of the Brandywine Conservancy's Environmental Management Center is to conserve the natural, historic, agricultural, and scenic resources of the Brandywine River watershed and other selected areas with primary emphasis on conservation of water quality and quantity. One of the most important and effective tools for achieving this mission is the conservation easement.

WHAT IS A CONSERVATION EASEMENT?

A conservation easement is a landowner's voluntary covenant to restrict the use and development of his or her property. The easement is granted in perpetuity and run with the land, binding all future owners. The landowner continues to own, use, and manage the property subject to the terms of the easement. The conservation easement grants the right of enforcement to the easement holder (e.g., the Brandywine Conservancy). The easement holder would then have a duty to uphold and defend the terms and conditions of the easement. This is an obligation that the Brandywine Conservancy is prepared to accept as long as the easement meets the Conservancy's standards and it is provided the resources to fulfill its obligations as easement holder.

Conservation easements involve a highly technical area of the property and tax law, so we want to be sure you are fully aware of all the implications before proceeding with your donation. *All easement donors are encouraged to seek the advice of legal counsel.* If any questions arise, be sure to consult with an attorney and/or a member of our staff.

SCOPE OF WORK

Completing a conservation easement involves a number of specific activities leading from the first meeting with the landowner to the final recording of the easement document. The process includes extensive fieldwork to inventory, map, and photograph the property's existing conditions and improvements and its natural and cultural resources. The results of this research would be included in a baseline documentation report. The report would also include a summary of how the easement meets the federal conservation purposes test. *(Federal regulations require that the condition of the property at the time of the gift be documented in cases where the donor reserves rights, which if exercised could impair the conservation values of the property.)* The report would serve as an information baseline for monitoring easement compliance.

The easement agreement would be prepared by the EMC staff and based in part on the findings

in the documentation report. Each easement is tailored to the individual property, the landowner's objectives, the resources being protected, and the Conservancy's easement standards, which generally match the federal regulations found in section 170(h) of the Internal Revenue Code. Our staff would utilize the Conservancy's latest model conservation easement agreement. We would prepare the easement and associated documents once the Conservancy and the landowner are in agreement regarding the scope and direction of the project and the terms of the easement.

PROJECT ENDORSEMENT - BILLING

The costs reported in the conservation easement project proposal would be based upon current billing rates and our best estimate of the time and expense required to complete the project. Landowners are charged only for staff time actually spent on their project. Staff time and expenses are invoiced to landowners on a monthly basis. If we anticipate substantially exceeding the original budget, the landowner would be notified.

Current and near-term staff commitments have been evaluated to ensure that appropriate personnel are available to work on a project in a timely fashion. Should the prospective easement donor be unable to commit to the terms of the Conservation Easement Project Proposal within 30 days, the Conservancy reserves the right to reevaluate the proposal terms before entering into the project at a later date. Necessary adjustments, if any, in time frame, cost, personnel, etc., would be identified and discussed with the landowner at that time. We hope, therefore, to receive the landowner's endorsement of our project proposal prior to the reevaluation deadline. The proposal also anticipates that the easement donation would occur in the current calendar year, unless otherwise stated.

WHAT IS TAX DEDUCTIBLE?

Generally, the donation of a conservation easement is treated as a tax deductible charitable contribution if it (a) meets the "qualified conservation contribution" requirements of the Internal Revenue Service Code, Treas. Reg. §1.170(h) (copy available upon request), (b) is given without receipt or expectation of receipt of adequate consideration, and (c) is made with charitable intent. A "qualified" easement must also be granted in perpetuity and contributed exclusively for at least one of the four conservation purposes described in the regulations and outlined below.

- The preservation of land areas for recreation by, or the education of, the general public, provided such access is for substantial and regular use;
- The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
- The preservation of open space (including farmland and forestland) when pursuant to a clearly delineated government conservation policy or for the scenic enjoyment of the general public. In both cases, such open space preservation must yield a significant public benefit; or
- The preservation of a historically important land area or a certified historic structure.

The Pension Protection (H.R. 4 – 2006), which authorized the special tax incentives described below, also imposes special rules and additional requirements with respect to easements that are

intended to preserve certified historic structures.

Although our staff makes every effort to ensure that the technical requirements of Treasury Regulations are met, the Conservancy cannot guarantee that an easement would meet the requirements of a qualified conservation contribution or that a tax deduction would result from a specific easement donation.

It is important for prospective easement donors to understand that a tax deduction would only be allowed if the easement meets the conservation purposes test and the grant is a true gift for which no bargained-for benefits are anticipated. If the easement meets one of the enumerated conservation purposes but permits destruction of other significant conservation interests, the easement would not qualify as a tax deductible contribution. Therefore, it is essential that the landowner's land-use objectives be carefully reviewed for conformity with IRS requirements.

IRS Notice 2004-41 was issued in 2004 to put taxpayers and charities on notice that the Service is paying close attention to charitable contributions and particularly conservation easement donations. IRS Notice 2007-50 provides taxpayers with guidance regarding the new conservation easement tax incentives and regulations adopted in 2006. Generally, these incentives increase the limitation on the amount a taxpayer may deduct each year to 50% of their adjusted gross income and increase the carry forward period to 15 years. For qualified farmers and ranchers, the annual deduction limit is 100%. These special tax incentives expire at the end of 2011, but effort are underway to make them permanent.

Each easement donor should consult with their attorney or tax advisor regarding the taxable treatment of a conservation easement gift.

STATE CONSERVATION EASEMENT LAWS

Each conservation easement must also comply with applicable state conservation easement laws. Conservation easements on land in Delaware are subject to The Delaware Land Protection Act (Title 7, Chapter 69 of the Delaware Code). Easements in Pennsylvania are subject to The Conservation and Preservation Easements Act (Act 29 of 2001). Copies of these Acts are available from the Conservancy upon request.

WILL THERE BE ADDITIONAL EXPENSES?

Besides the easement preparation fees, donors would likely incur other costs, such surveying (if required), and appraisal fees. These costs might only be partially deductible for tax purposes. A contribution to endow the easement would also be requested, and in the past, we have been advised by counsel that the endowment contribution would be fully deductible to the taxpayer. Easement donors should also anticipate additional expenses for tax accounting and/or legal assistance. Be sure to consult a tax advisor to confirm the tax treatment of all such expenses.

APPRAISALS

In order to claim the value of a conservation easement donation as a tax deductible charitable

gift, the donor must obtain a “qualified appraisal” of the easement prepared by a “qualified appraiser.”

As recipient of an easement gift, the Brandywine Conservancy is prohibited from representing its value and has been advised by counsel to maintain an "arms length" relationship in the hiring of appraisers. *Therefore, it will be the donor's responsibility to engage an appraiser to determine the value of the easement.* We can provide a list of appraisers who are experienced in appraising conservation easements.

Taxpayer abuses of the conservation easement tax incentives, such as reporting excessively high values, have come to the attention of the IRS. *As a result of these abuses, the IRS has set higher standards for easement appraisals, increased the penalties for overvaluations, and imposed additional information requirements when a donor files their income tax return.*

The IRS now defines “qualified appraiser” to mean one who has earned an appraisal designation from a recognized professional appraiser organization or who has met minimum educational and experience requirements established by the Treasury Secretary through regulations. A “qualified appraisal” is one that is prepared by a qualified appraiser and meets regulations or other guidance prescribed by the Treasury Secretary. Generally, donors are cautioned to make certain that the easement appraisal meets the Uniform Standards of Professional Appraisal Practices (USPAP). *A review of these new standards and definitions has been issue by the IRS in Notice 2006-96.*

The cost of an appraisal depends upon the complexity of the easement, the size of the property, and the fee schedule of the individual appraiser. Treasury regulations govern the substantiation and reporting requirements for gifts of appreciated property whose value exceeds \$5,000 (copy available upon request). For non-cash charitable gifts with an appraised value of \$500,000 or more, a complete copy of the appraisal must be provided to the Internal Revenue Service with Form 8283. An experienced easement appraiser should be familiar with these rules.

The gift of a conservation easement is considered a non-cash charitable contribution. Therefore, easement donors will need to file IRS Form 8283 with their federal income tax return in order to claim the appraised value of the easement as a tax deductible charitable gift. (See Conservancy handout, *Claiming a Tax Deduction Upon the Gift of a Conservation Easement*, for more information on preparing Form 8283.)

PROJECT CONDITIONS

The Conservancy cannot accept an easement gift if conditions exist on the property that would violate the proposed easement's terms. If easement-violating conditions such as dumps or resource damaging land use practices are found, the landowner would be informed at once and advised as to the corrective measures that would need to be undertaken.

Standard provisions in our model easement document include restrictions and/or prohibitions on commercial and industrial uses, excavation, filling, dumping/depositing of junk and waste,

alteration of streams, ponds and wetlands, timbering, posting of signs, installation of underground storage tanks, and blocking scenic public views. Conservation practices are established for agricultural practices. The easement will typically limit or sometimes prohibit subdivision and the construction of new residences and other improvements and, when new construction is reserved by the landowner, restrictions on the size and location of new structures and cap on impervious ground coverage is usually established.

Our model conservation easement agreement also contains extensive boilerplate provisions relating to our administration and enforcement of the easement. It includes a representation and warranties section, by which the landowner warrants to the best of their knowledge that no hazardous or toxic substances have been dumped, release or otherwise exist on the property. As easement holder the Conservancy does not have possessory interest in the property. Therefore, the easement contains provisions by which it shall be indemnified and held harmless from claims based on actions not caused by the Conservancy or its staff. The easement's boilerplate provisions also address liability protection, condemnation, future property transfers, and numerous other issues. These provisions reflect current laws and regulations, as well as experience gained from over 40 years preparing and holding conservation easements. Should an easement donor or their attorney seek revisions to these boilerplate provisions, we would need to confer with Conservancy legal counsel. Legal fees incurred in this regard would be charged to the landowner.

All conservation easements must be reviewed and approved by the Brandywine Conservancy's Environmental Committee before the Conservancy can legally accept the easement. Individual easements would be presented to the Environmental Committee when the terms and conditions of the easement are known and generally agreed to by the landowner and the Conservancy's staff.

A conservation easement represents a real property interest conferred to the easement holder. Therefore, the Conservancy would be potentially liable for the cleanup and disposal of any hazardous materials found on eased land even though we have no active land management responsibility. Based on past uses or observed conditions on the property, we may require that a Phase I, II, or III Environmental Assessment be obtained. We also require a clause in the easement indemnifying the Conservancy against any liability associated with the presence of hazardous or toxic materials.

If the landowner intends to claim a tax deduction for the granting of a conservation easement and the Conservancy believes that (a) the easement does not meet the requirements of Internal Revenue Code ("I.R.C.") §170(h) and Treasury Regulation §1.170A-14, (b) the granted easement was not a true gift, or (c) the appraised value of the easement seems excessive, the Conservancy will notify the landowner of these concerns and may refuse to sign Form 8283.

EASEMENT ENDOWMENT

In accepting a conservation easement, the Brandywine Conservancy assumes a legal duty and obligation to uphold its terms and conditions. These responsibilities include regular annual inspections of the eased property, review of construction and subdivision plans, administration of all easement documents and records, and legal defense of the easement provisions. The Brandywine Conservancy does not wish to place a hardship on easement donors, but it must have the resources to monitor and enforce each easement as required by the federal regulations. Therefore, we request that an endowment contribution be provided with each easement to cover the staff time and expenses necessary to meet these obligations.

The size of the requested endowment will generally be based on the size of the property, its location, the complexity of the easement, and the number and/or type of construction and other rights that the landowner may have reserved. Board policy allows us to use up to 5% in figuring the annual endowment draw. Should the final easement terms materially change from what is contemplated in the project proposal, we would adjust the requested endowment amount.

Payment of the endowment can be accomplished in a variety of ways. Some landowners pay a single lump sum (by check or stock transfer). Others spread their endowment contributions over two or three years, in which case, we ask that the donor to provide a pledge letter confirming the schedule for installment contributions and provide 50% of the total endowment when the easement is signed. Pledges should not exceed three years in duration. If discussed in advance, other means for endowing an easement may be acceptable.

CONFIDENTIALITY AND PUBLICATIONS

The Conservancy makes every effort to respect a landowner's privacy during the course of an easement project. Conservancy officers and staff will have knowledge of the project and its details.

Once the easement is completed and has been recorded, it becomes a matter of public record. At this point, Conservancy publications may identify the property and the easement or an article may be written about the project. We also list the names of our easement donors in our annual report and on a plaque on a wall at the Brandywine River Museum. For notable projects, we may prepare a project description sheet that is used for public relations purposes or included with brochures provided to prospective easement donors. Lastly, we sometimes prepare articles or press releases about easement projects for publication in the local, regional, or national press. If you wish to remain anonymous, please notify us.

CONSERVANCY COMMITMENT

Our commitment does not end when the easement is recorded -- it just begins. A conservation easement is forever. We would monitor the property on a regular basis and maintain records of all communications, land use activities, conveyances, and site inspections. If necessary, we would defend the easement in court.

We would be available to answer inquiries, provide assistance with plan reviews and land

management practices, provide information on local property tax issues, and work with your attorney or accountant if questions arise regarding the donation. We hope the owner of the eased land would consider us their full time, on-call conservation advisors. Easement donors would also receive our newsletter, *Stewardship Perspectives*, which is dedicated solely to easement landowners, and a complimentary one-year membership to the Brandywine Conservancy.

Building a cooperative relationship with the owners of eased land and their successors is vital if we are to meet our obligations to defend the easements and to be good stewards of the land.