

# Guide to the Conservation and Preservation Easements Act



## Pennsylvania Act 29 of 2001

*Conservation organizations can avoid many potential difficulties in conservation easement stewardship by ensuring that their conservation easement documents are drafted to conform with the Conservation and Preservation Easements Act.*

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## Introduction

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Pennsylvania land trusts and governments formerly had to rely on the *common law* when managing their conservation easements. The common law derives from centuries of court decisions rather than on laws passed by legislative bodies. Pennsylvania's common law, like that of other states, contains ambiguities and features that present difficulties for easement stewardship.

The [Conservation and Preservation Easements Act](#), passed by the Pennsylvania General Assembly and signed into law by Governor Tom Ridge on June 22, 2001, provides a simple, easy-to-implement path for avoiding the common law difficulties. It also stands as a strong policy statement of the Commonwealth of Pennsylvania in support of conservation and preservation easements.

For an easement holder to take advantage of the [Conservation and Preservation Easements Act](#), the easement's granting document must conform with the act's requirements. Many easements pre-dating the act may already conform—no changes necessary. For an easement that doesn't conform, its granting document may be amended by the easement holder and the present landowners to bring it into conformance.

Conservation easements not conforming to the act remain valid and enforceable under the common law.

## Advantages over Common Law

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The Conservation and Preservation Easements Act provides distinct advantages to a conservation easement prepared in conformance with the act as compared to an easement relying solely on the common law. Key advantages include the following:

- **Easement presumed valid.** The common law places the burden on the easement holder to prove that the easement is valid. The Conservation and Preservation Easements Act changes this. At its heart, the act says that, as a matter of public policy in Pennsylvania, conservation easements conforming to the act are valid.
- **Ambiguity resolved in favor of conservation.** The common law dictates that ambiguity should be resolved in favor of the landowner. The act

reverses this. Ambiguity is resolved in favor of the easement's and act's purposes.

- **Enforceable by holder but not just anyone.** The act clarifies key matters as to who has the right to enforce a conservation easement.

The following subsections elaborate on these advantages.

### Conservation Easements Are Valid

The Pennsylvania General Assembly, in establishing the Conservation and Preservation Easements Act, strongly validated conservation easements as a conservation tool in the Commonwealth:

- In §2 of the statute, “[t]he General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements....”; and
- The statute’s §6, entitled “Validity,” affirms that a conservation easement is valid even though it has certain characteristics that the common law traditionally found to be problematic.

### Ambiguity Resolved in Favor of Conservation

Section 5(c)(2) of the act reverses the common law rule that if a restrictive covenant or other servitude can be interpreted in more than one way, the interpretation most favorable to the landowner governs. (This rule makes sense when interpreting ordinary access easements but not when applied to easements established to provide public benefits consistent with public policy.) The act directs the courts to interpret in favor of the purposes of the easement and the policy and purpose of the act.

### Enforceable by Holder Named in the Grant

Section 6 of the Conservation and Preservation Easements Act resolves any uncertainty about the possibility that a court could invalidate a conservation easement under the common law rules. A particularly vexing problem under traditional common law was the rule that a negative easement (such as a conservation easement) could be enforced only by an adjoining landowner. A 1956 Pennsylvania Superior Court decision (see [Appeal of J.C. Grille](#)) brought an end to this rule in Pennsylvania; however, the Pennsylvania Su-

preme Court never weighed in on the matter. The act removed the possibility of invalidation of conservation easements lacking an adjoining landowner as the holder if the Supreme Court were ever to take up the issue and decide to dramatically part ways with the Superior Court.

### Enforceable Only by Certain Persons

The 1956 Superior Court decision greatly expanded the universe of persons who could claim to be beneficiaries of a restrictive covenant. Anyone in the vicinity, whether or not owners of land adjoining the restricted property, and whether or not specifically identified as an intended beneficiary, could have rights of enforcement if a court finds that they are one of the class of persons intended to be benefitted by the restriction. For conservation easements under the common law, this creates an administrative nightmare: each member of a poorly defined group of beneficiaries may challenge a holder's easement management decisions and changes agreed to by the easement holder and landowners.

Section 5(a) of the act addresses this problem by narrowing the universe of those who have standing to bring legal or equitable actions affecting a conservation easement to:

- An owner of the real property burdened by the easement.
- A person that has any interest or right or holds an estate in the real property.
- A holder of the easement (e.g., the land trust).
- A person having a third-party right of enforcement (a qualified entity named in the easement).<sup>1</sup>
- A person otherwise authorized by Federal or State law.<sup>2</sup>

<sup>1</sup> Since “third-party right of enforcement” is defined in §3 as a right provided *in the easement document* to an entity that is *qualified to be a holder* (e.g., a land trust or local government), few if any entities will have standing under this category.

<sup>2</sup> Some ambiguity exists regarding who is a “person otherwise authorized by Federal or State law”; the category

- The owner of a coal interest: (1) in property contiguous to the eased property; or (2) which has been severed from the ownership of the property.

This list greatly limits those persons and entities entitled to appear in court to bring suit to enforce an easement in accordance with their perceptions of what is correct. The act denies court access to persons and entities not listed and who, under common law, might have sought redress that holders thought was inappropriate or overly zealous.

For more information, see the guide [Who Has Standing? Conservation Easements in Pennsylvania Courts](#) at [ConservationTools.org](#).

## Drafting Necessities Under the Act

### Statutory Notice of Potential Impairment of Coal Mining

Section 9(d) of the act requires a notice, signed by the grantor of the easement, that the conservation easement may impair future mining of workable coal seams within the property. The acknowledgment must be printed in *no less than 12-point type*, and must be preceded by the word “Notice” in *no less than 24-point type*.

#### Example of Notice 1

The [Model Grant of Conservation Easement](#) published by the Pennsylvania Land Trust Association addresses this requirement by including in the document’s penultimate article the following provision:

#### Coal Rights Notice

The following notice is given to Owners solely for the purpose of compliance with the Conservation and Preservation Easements Act:

**NOTICE:** This Conservation Easement may impair the development of coal interests in-

cluding workable coal seams or coal interests which have been severed from the Property.

The signing of the statement is accomplished with the Owners/grantors’ signatures required at the end of the document.

#### Example of Notice 2

Prior to establishing the model grant, the Pennsylvania Land Trust Association offered the following draft provision to be placed in the granting document:

The following notice is given to and accepted by [Grantor] for the purpose and with the intention of compliance with the requirements of the Conservation and Preservation Easements Act. Nothing herein shall imply the presence or absence of workable coal seams or the severance of coal interests from the [property].

### Notice {24 point type}

This Conservation Easement may impair the development of coal interests, including workable coal seams or coal interests which have been severed from the [property]. {12 point type}

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Grantor signature

#### Absence of Workable Coal Seams

The [Model Grant of Conservation Easement](#) includes the statutory notice as a matter of course. It may be omitted if no workable coal seam exists, but the better practice is to leave it in. The Pennsylvania Land Trust Association has confirmed which counties contain areas with presently workable coal seams and which do not. However, it has been unable to find an expert willing to state *with 100% certainty* that no workable coal will *ever* be found in a particular county. Thus, unless an expert can determine that no coal is present on a particular property, it would be wise to include the coal notice.

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likely includes the Pennsylvania attorney general but few others.

## Easement Boundaries Must Be Clearly Delineated

Section 4(b) of the act requires that a metes and bounds description of the portion of property subject to the easement be provided in the easement document “[e]xcept when referencing an easement’s boundary using setback descriptions from existing deed boundaries or natural or artificial features, such as streams, rivers or railroad rights-of-way.”

## Other Drafting Matters Touching on the Act

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### Reference to the Act

Rather than take the chance that an easement may inadvertently fail to comply with the act’s requirements, a “saving” provision may be included in the granting document stating that the easement is constructed with the intention of conforming to the requirements for conservation easements under the act. For example, §7.09 “Guides to Interpretation” of the [Model Grant of Conservation Easement](#) contains the following text in subsection (d):

This Grant is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation easement under the Conservation and Preservation Easements Act.

### Entities with Third-Party Rights of Enforcement

As discussed above, the act limits the universe of persons with rights to enforce a conservation easement in court. Consequently, if the landowner and would-be easement holder want to ensure that another land trust or government entity has a right to enforce the easement, that entity must be named in the easement document.

Users of the [Model Grant of Conservation Easement](#) are instructed to name those entities, if any, in §1.07 of the model and to identify the specific nature of their rights in Article V of the model.

**Organizations Qualified to Accept Transfer** Easements typically contain language allowing the holder to transfer the easement to an organization that

is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code. Language could be appended to this provision to also require that the successor organization be qualified as a holder under the Conservation and Preservation Easements Act. (See §3 of the act for the definition of *holder*.)

### Noting Consistency with Commonwealth Policy

Easement drafters may affirm an easement’s role in advancing the policy of the Commonwealth by including the following statement in the public policy statements contained in the background section or opening recitals of the granting document:

The Pennsylvania General Assembly, in enacting the Conservation and Preservation Easements Act, stated that it “recognizes the importance and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of this Commonwealth.”

Users of the [Model Grant of Conservation Easement](#) are guided to include such public policy statements in the “Public Benefit” section of the model’s background article (§1.06(b)) or in the easement’s baseline documentation.

## Other Features of the Act

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### Acceptance of Third-Party Right

(See §3 and §4(c).)

An easement document may be written to grant an entity the right to enforce the conservation easement, often conditioned upon the failure of the holder to do so. Entities were and are sometimes named in a granting document as having enforcement rights or responsibilities without their having been consulted in the matter. The act protects entities from having undesired conservation easements foisted upon them without their knowledge or consent. They may elect to accept a right or duty to enforce by signing a written acceptance and record the acceptance. The flip side is

that, until they sign and record a written acceptance, they do not have rights of enforcement. Acceptance of enforcement rights may be part of the granting document or in a separate instrument.

Although the acceptance could be recorded at some future date, a good practice is to record the third-party's acceptance of the right to enforce from the outset as part of the easement document. This way the easement holder and landowner know that the chosen third-party has in fact accepted the responsibility and, if trouble should develop in the future, there will be one less hurdle for timely enforcement. Including the acceptance as part of the easement itself also simplifies future title work.

### Charitable and Tax Status

Non-governmental easement holders must maintain both their Bureau of Charitable Organizations registration and their IRS 501(c)(3) tax status (see §3).

A typical easement drafting practice is to note a holder's 501(c)(3) tax status in the "background" or "whereas" section of an easement. As a reminder of the importance of maintaining charitable registration, language may be added stating that the holder "is registered with the Bureau of Charitable Organizations of the Pennsylvania Department of State."

### Outside Activities Must Pose Substantial Threat

Section 5(b) of the act prohibits bringing suit for activities occurring outside of conservation easement boundaries except where those activities "pose a substantial threat of direct, physically identifiable harm" within the eased area.

### Merger Doctrine Discontinued

Section 6 of the act changes the common law rule that the lesser interest (the conservation easement) merges into the greater interest (fee simple ownership) when both interests are held by the same person. Thus, a conservation easement survives even if the easement holder becomes the owner of the property (for example, the landowner donates the land to the holder by will).

### Same as Other Easements

Section 4(a) of the act states that:

Except as otherwise provided in this act, a conservation or preservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.

### Duration

Conservation easements created after June 22, 2001 may not have a duration of less than 25 years (see §4(d)). This is generally not a problem since nearly all conservation easements are written for perpetuity.

### Condemnation

The act does not protect conservation easements from eminent domain; rather, it affirms the rights of government and other entities to exercise the power of eminent domain (see §5(d)).

However, the act goes on to provide for compensation for the easement holder "in accordance with the applicable provisions of the conservation or preservation easement which specify a particular allocation of damages..." (see §5(d)(2) and §5(e)).

The act also doesn't prevent purchase agreements in lieu of condemnation (see §5(e)).

### Applicability of the Act

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(See §7.)

The act applies to easements that comply with the Act and that are created after June 22, 2001, the date that Governor Ridge signed the legislation into law.

The act also applies to easements created before the Act if those easements comply with the Act and were recorded or, if not previously recorded, were recorded within 180 days of 6/22/2001.

The act does not alter, modify or supersede "either the method of creating, or the rights, duties, powers or obligations appurtenant to agricultural conservation easements" under the state's Agricultural Area Security Law.



## Comparison to Other States

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Each state's common and statutory law regarding conservation easements is unique. The differences can be quite substantial. The Land Trust Alliance publication [\*A Guided Tour of the Conservation Enabling Statutes\*](#) compares and contrasts the conservation easement enabling statutes enacted by states across the country and discusses the key issues addressed and not addressed by these statutes. First published in 2010, the report was updated in 2014 to reflect changes in state laws.

## Should Non-Conforming Easements Be Amended?

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Easements that do not conform with the act will continue to be interpreted under common law. Holders should consider amending these easements as necessary to come under the act. Whether a holder should pursue the amendment of any particular easement to bring it into conformance depends upon a number of factors:

- Would the present landowner be willing to make changes to the easement document?
- Would an amendment provide the holder the opportunity to make other improvements to the easement—for example, to upgrade the restrictive covenants or management terms to reflect the latest understanding of how best to achieve conservation objectives and manage conservation easements? Would an amendment provide the holder the opportunity to expand the conservation objectives of the easement?
- Are there changes that the landowner desires and the holder finds acceptable that could be bundled with the changes to bring the easement into conformance with the Act?
- Conversely, would opening the document to change cause the landowner to push for changes that the holder would not want to entertain and that would ultimately result in bad feelings?

## Resources at ConservationTools.org

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To find experts on the topics covered by this guide, see the right hand column of the on-line edition at <http://conservationtools.org/guides/89>. The on-line edition also contains the most up-to-date listing of related guides, library topics, and featured library items.

### Related Library Topics

[Conservation Easements](#)

[Pennsylvania Statutes](#)

### Featured Library Items

[Conservation and Preservation Easements Act](#)

[Model Grant of Conservation Easement with Commentary](#)

[A Guided Tour of the Conservation Easement Enabling Statutes](#)

[J.C. Grille \(1956 PA Superior Court\)](#)

### Related Guides

[Amending and Restating Grants of Conservation Easement](#)

[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#)

[Conservation Easement](#)

[Holders, Beneficiaries and Backup Grantees](#)

[The Nature of the Conservation Easement and the Document Granting It](#)

[Not a Charitable Trust](#)

[Not a Public Trust](#)

[Who Has Standing?](#)

## Submit Comments

Help improve the next edition of this guide. Email your suggestions to the Pennsylvania Land Trust Association at [aloza@conserveland.org](mailto:aloza@conserveland.org). Thank you.

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