

CONSERVATION EASEMENTS

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The IRS Code, Section 170(h) and numerous state tax codes, provide tax benefits to landowners who create a conservation easement on their land. A conservation easement is used in various situations, but mainly by private, non-profit land trusts as a way of preventing development on a particular tract of land in return for income tax deductions, a reduction in estate tax and lower property taxes — all lucrative enticements to landowners who are land rich and cash poor.

A Conservation Easement Qualifies As A Charitable Contribution If:

1. Granted in perpetuity — one of the most remarkable attributes of a CE is that it does not violate the Rule Against Perpetuities because the land trusts lobbied Congress and changed the law. In Real Estate law, no action can be taken to “tie the hands of future owners” on any real property, except for conservation easement.
2. Protects natural habitats of fish, wildlife or plants;
3. Preserves open space — including farms, ranches or forests; or
4. Preserves historically important land or certified historic structures.

To Qualify As A Conservation Easement, The Following Must Occur:

1. A signed conservation easement document or contract;
2. An inventory of the property’s condition — i.e. man—made structures, water resources, agricultural and ecological features;
3. A qualified appraisal no more than 60 days prior to the claiming of the deduction;
4. Title report, a copy of the deed and any mortgages;
5. A legal land survey;
6. A management plan that spells out any land-use practices and allows an agent of the land trust to enter the property for annual inspections. A violation of that agreement revokes the easement and the landowner loses his benefits and must pay all back taxes.

A landowner literally becomes the subservient owner and the land trust the dominant, managing partner in the property; Also, the CE allows the land trust to convey the agreement to any other government entity (Fish and Wildlife Service) and they then become the managing partner.

The value of the easement is generally the difference between the value of a property with the restrictions and the same property’s value without them. If the conservation easement meets IRS criteria, the landowner may deduct the full value of the easement from his adjusted gross income up to 30 percent of the landowner’s income for the year of the gift. If the donation exceeds this amount, he may deduct the excess balance for up to five succeeding years.

Conservation Easements are enticing, but landowners should seek advice from their attorney and accountant before ever binding themselves or their children forever.

Review of a Conservation Easement

Prepared by the American Land Foundation and LandGuaxd

Make no mistake, conservation easements (CE) and Purchase of Development Rights (PDRs), as defined in the IRS Code, are perpetual and virtually “non-negotiable.”

In order to realize the full tax benefits described, CEs and the PDRs must in perpetuity and be put into place for one of four specific conservation purposes, including public outdoor recreation and education, protection of habitats or ecosystems, preservation of “historically important land areas” or preservation of open space that will clearly yield a “public” benefit. Some CEs or PDRs may attempt to be for a term period of years, but the landowner will not receive the same tax benefits as a perpetual easement.

The owner must convey specific rights to a non-governmental organization (NGO) or a government entity and it must be in perpetuity. The ultimate purpose of a CE and a PDR is to control the use of the land and, some say, the eventual transfer of ownership of the land in part or whole to a third party. Both PDRs and CEs will be referred to in this paper as a CE.

A conservation easement is conveyed by the owner of the land, known as the Grantor to a non-governmental organization or a government entity (federal, state, local), who becomes the Grantee. The landowner or Grantor becomes the subservient (lesser) owner while the Grantee becomes the controlling owner. Therefore, the Grantee becomes the managing partner of your operation and your land. Jim Burling with Pacific Legal Foundation calls it “serfship.”

A management plan is created and applied to your land, in perpetuity; placing the Grantee in full control. While the Grantor cannot alter or modify the management plan, the Grantee can, using the catch-all phrase, “any methods not consistent with the terms of the easement.”

The following restrictions, rights, obligations and requirements come directly from a “model” conservation easement form supplied from a leading national land trust document

1. A “**baseline**” report is created to describe the original condition of the property to assure any future changes in the use of the property are consistent with the terms of the CE.
2. The CR is granted in **perpetuity**. You, nor your heirs or assigns, can alter the agreement. The grant in perpetuity is what creates the tax benefit. It is the only real estate transaction that does not violate the Rule Against Perpetuities (RAP). RAP is an interest in real property that when transferred, must vest (be conveyed) within a specified time; twenty one years being a common length of time in which an interest in land must vest. If it does not vest in the required length of time, the transaction is void and a court can strike it down. RAP does not apply to CEs because they have been specifically exempted in the law through efforts of powerful national land trusts.
3. CE’s create **negative easements** by restricting the original landowner from performing specific acts. Normal easements for roads, power lines, etc. are positive easements and don’t restrict the use or stop the landowner from using his land, constructing buildings, subdividing, putting up fences, etc.
4. **Purpose Clause** — to ensure the land will remain forever in its natural and scenic condition. The purpose clause *is* the most important paragraph in the entire agreement. Here, the Grantor promises never to perform any act “inconsistent with the purposes of the conservation easement.” In other words, the Grantee has the sole discretion regarding what is required of the landowner and the landowner is bound to abide by any changes made to the purpose or the management obligations under the CE.
5. **Property Uses** — Virtually none. “**Any activity on or use of the property inconsistent with the purposes of this CE is prohibited**”

- a. Property may not be subdivided.
- b. No construction of structures or improvements is allowed, except those negotiated and agreed upon when the CE is signed.
- c. Normal repair and maintenance is allowed, but is closely monitored.
- d. Limited mineral extraction allowed. No surface mining allowed. Must have limited and localized impact on land and must not interfere with purposes of easement. All extraction facilities must be concealed.
- e. Grazing is allowed, but only on “existing fields” at the time the agreement is signed. Set aside acreage might be considered an “existing field.” Cannot establish or maintain a commercial feedlot on the property;
- f. No timber harvest, except to provide firewood for residences on the property and for maintaining structures like residences, barns, corrals, fences, etc. No other timber harvesting for commercial purposes allowed.
- g. Buffer areas along rivers and creeks will be required and no grazing will be allowed within a specified distance from the water. This provision will be updated periodically to ensure soil stability; water quality and “other conservation values” are protected.
- h. Home business allowed as long as the business is located within the home.
- i. Hunting is allowed, but no form of motorized transportation can be used.
- j. No “ditching, draining, diking, filling, excavating, dredging, removal of topsoil, sand, gravel, rock, minerals, or other materials, mining, drilling, or removal of minerals, nor any building of roads or change in the topography of the property or disturbance in the soil in any manner” will be allowed. Those activities will not be allowed in river or creek beds either.
- k. Grantor can cut and remove diseased or exotic trees, shrubs, or plants, but only with prior approval and only if they are activities permitted under the easement. Firebreaks can be cut without prior approval, but only in emergencies. No planting of any non-native trees, shrubs, or plants will be allowed.
- l. No use of fertilizers, plowing, introduction of non-native animals, or disturbance or change in the natural habitat in any manner will be allowed, except to accommodate expressly permitted activities of the easement.
- m. Surface water — Other than wells to serve the activities of the easement, there can be no alteration, depletion, or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water, or any other water bodies on the property;
- n. No dams, impoundment structures or low water crossings are allowed.
- o. No pesticides or biocides, including but not limited to insecticides, fungicides, rodenticides, and herbicides can be used, except as approved.
- p. No dumping of trash, garbage or other offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks, no land fill or dredging spoils and no activity that causes erosion is allowed.
- q. Predator control allowed, but no broadcast method such as poisoning is allowed and only on an “as-needed” basis.
- r. No commercial or industrial use of or activity on the property; other than those related to agriculture, recreational, home businesses or mineral extraction is allowed.

Rights, Obligations Retained by the Landowner

1. Right to continue any existing activity or use at the time the easement is signed~
2. Right to transfer, sell, give, mortgage, lease, or otherwise convey the remaining interest in the land. However, those rights will remain subject to the terms of the conservation easement. Remember, the CE is forever.
3. Right to pay taxes on remainder of property.
4. Sole right to upkeep and maintain property.

Rights Retained by TNC or any other NGO

1. Right to Enforce —the right to protect and preserve the conservation values of the property and enforce the terms of the CE. Any other person or NGO can bring a third party action/lawsuit to enforce the terms of the agreement if they determine the original grantee is not adhering to the original agreement.
2. Right of Entry — Right of staff, contractors and associated natural resource management professionals to enter at least four times a year for the purpose of inspecting the property to make sure landowner is complying with the covenants and purposes of the CE.
3. Monitor and research plant and wildlife populations.
4. Right to manage, control, or destroy exotic non-native species or invasive species of plants and animals that threaten CE.
5. Legal Action to enforce the CE. Grantee shall give written notice of a violation and within 60 days, Grantor must begin good faith efforts to correct any violation. Grantee or third party has the right to go to court to obtain an injunction to force the Grantor to abide by the conditions of the CE. The Court can order the Grantor to restore the property to its original condition.
6. Right to Transfer. The Grantee shall have the right to transfer or assign the CE to any private NGO or a land use government entity which means another NGO or government entity like the US Fish and Wildlife Service, would be the managing partner on your land.

Termination of the Easement occurs when:

1. Conditions on or surrounding the property have changed so much that it is impossible to fulfill the purposes of the CE, a court may, at the joint request of the grantor and grantee, terminate the CE.
2. Condemnation of part or all of the property by a public authority terminates the CE. Interestingly, this action would then allow the government or its assigns to develop the land previously restricted from development under the CE because once terminated, the restrictions of the CE are lifted and whoever has title to the land can develop, subdivide, or perform any action they desire. The original landowner has been paid a third of the value of the land and has given up the opportunity **to** develop it in the future, which now resides with the government or their assigns.

Grantee has immediate vested real property rights. A split estate is automatically created where the Grantor becomes the subservient owner of his own property while the Grantee becomes the dominant owner with management powers. If the property is sold or taken for public use (condemned), the Grantee shall be entitled to a percentage of the gross sale proceeds or condemnation award equal **to** the ratio of the appraised value of the easement to the unrestricted fair market value of the property as determined on the date the CE is executed.

It is imperative that landowners frilly research and understand the long term consequences of signing a Conservation Easement of any kind.

Note, seek competent legal and accounting advice before signing any agreement.