

CONSERVATION EASEMENTS IN CONNECTICUT

“Soup to Nuts” April 4, 2009



Linda P. Francois, Esq.
Cooper, Whitney, Cochran & Francois
PO Box 1898, 51 Elm Street
New Haven, CT 06508
(203)865-7380 lfrancois@cooperwhitney.com

What is a Conservation Easement?

- **Bundle of Rights**

- What is Fee Simple (a/k/a the “fee”)?
- Easements in Gross v. Easements Appurtenant
- Owner still owns, manages, insures, pays taxes
- Perpetual, “runs with the land”

Why a Conservation Easement?

- **Fee ownership by LT : title is not restricted.**
 - Land can be voluntarily or involuntarily sold, is potentially subject to creditors [
 - If fee is not to a land trust, but to a town, they have other mission than land protection
- **Deed Restrictions –**
 - Enforcement problems –
 - who legally can enforce, can it be undone?
 - who has the will to enforce,
 - who will monitor,
 - who will insure perpetuity? Will it run with the land?
 - Generally less detailed, unclear
 - Deduction problem: ruins value of conservation donation.

Why a Conservation Easement? (cont'd)

- Pros
 - Flexible
 - Attractive to Landowner -Can live on land and use it, sell subject to easement, pass on to heirs restricted with less estate tax, get tax benefits during lifetime
 - Attractive to Land Trust – does not have to monitor as often, or maintain (one landowner to worry about)
 - Can be intervivos, testamentary, or postmortem

Why a Conservation Easement? (cont'd)

- **Cons**

- Flexible – complex, differing terms,
- One landowner to worry about! Initial grantor satisfaction high, successors lower; less commitment to purpose, more incentive to violate or attack; less clarity in position
- Donor IS giving up value, limiting pool of purchasers
- Higher transaction costs, more requirements; more expensive complex appraisal, baseline documents, two attorneys to review and negotiate terms; highly scrutinized.

State Enabling Legislation

- **1971 Conn. Gen. Stats §47-42a, b & c.**
 - **Makes any conservation easement (called a "Conservation Restriction") enforceable. Conservation Restriction includes every “restriction, easement, covenant or condition, in any deed, will or other instrument ...whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use”**
 - **To “Not-For-Profit Conservation Organization”**
 - **Or to a “Public Body”**

Connecticut Statutory Formalities/Issues

- Signatures, two witnesses per signature, & acknowledgements
- Recorded on land records
- Easements must be signed by grantor and grantee or they are potentially voidable

Liability Issues: CT Recreational Use Statute C.G.S Sec. 52-557g.

- “an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes.”

Federal Requirements (for deductibility)

- ✓ Restrictions must be perpetual
 - Legally enforcement rights – incl. recordation
 - Baseline documentation (S&P Standard 11 B. requirement)
 - Not subject to a prior mortgage
 - Required “boilerplate” –extinguishment, notice before exercise of a retained right having possible adverse effect, amendment, assignment, merger etc.
- ✓ Gift to a “Qualified Organization” like a 501(c)(3) Land Trust or Governmental Entity
 - ✓ “No Goods or Services” letter/ not quid pro quo !!!!!!!!!!!
- ✓ Qualified Appraisal – complex & strict rules

Federal Requirements for deductibility (cont'd)

- ✓ “Conservation Purpose”*
 1. Public recreation and/or education
 2. Significant natural habitat
 3. Preservation of open space (including farmland or forest land) that
 - is for the scenic enjoyment of the general public, or
 - is pursuant to a clearly delineated federal, state or local government conservation policy **and** will yield a significant public benefit
 4. Historic preservation

**Identification of conservation purpose & public benefit are S&P Standard 8D,8F and 9E requirements*

Why does the land trust care if donor gets deduction?

- Incentive to land protection
- Reputation of land trust
- S&P Standard 10 *“The land trust works diligently to see that every charitable gift of land or easements meets federal and state tax law requirements”*
- Most federal requirements (other than valuation issues) are about PERPETUITY

Initial Drafting Considerations

- Know the Property
 - What are the conservation values?
 - That the land trust wants to protect
 - That the IRS recognizes
 - What rights does the landowner want to retain?
 - Review potential conflicts. Decide on a bottom line
 - be as specific as possible, yet build in flexibility
- Keep in mind that there are:
 - 1) general prohibitions,
 - 2) landowner rights
 - 3) land trust rights
- If you don't want to enforce it, don't put it in

Other Drafting Issues

The conservation values drive the drafting. A working lands easement should not be drafted like a “forever wild” easement.

- Future division of the property?
- Future land uses?
 - Agriculture –define
 - Forest management – what conditions, forest management plan? use goals
- Affirmative rights: Preservation of open areas – reciprocal right; transfer fees?
- Trails - owner or land trust?

More Drafting Issues

- Permitted structures
 - Building envelopes – in or out of easement?
 - Easy to understand, quantifiable restrictions – limit size, not use if possible –
 - footprint, height (tricky), setbacks, clustering
 - Utilities, wells, septics
 - Define and limit driveways, permeable? width?
 - Accessory structures? In a building envelope or specific limitations (barns, tennis courts, pools, paddocks
 - Temporary structures with no foundations
- Now try to make these consistent from Conservation Easement to Conservation Easement!

Federal Tax Benefits

- Income Tax Deduction
 - New increased incentives for qualified conservation easements through 2009
 - Deduction of value of gift up to 50% of AGI
 - 15 year carry-forward
 - 100% AGI for qualified farmers and ranchers
 - After 2009 goes back to 30% of AGI with 5 year carry-forward

Income Tax Deduction Example

- Ex: Property value 1 million. Basis 10,000.
Donated easement reduces value by \$600,000.
Adjusted Gross Income (AGI) \$100,000.
- Deduction \$50,000 1st year, plus \$50,000/yr x 11 years (or up to 15 years until \$600,000 deduction used up). Entire 600K used.
- Compare old formula \$30,000 x 6 years =
only \$180,000 utilized
- No Capital Gains tax on gift portion

Federal Tax Benefits (cont'd)

- Estate Tax Reduction
 - Value given up is out of estate
 - Additional estate tax reduction on value of retained property
 - up to 40% of land value excluded from gross estate
 - Postmortem conservation easements allowed
 - But tricky to do, generally requires pre-planning

Types of Conservation Easement Transfers

- Full Donation
- Bargain Sale- Part sale, part gift
- Sale for Full Fair Market Value

Property Tax Assessment of Easements

- *A public relations issue.*
- Assessment may not change if property already specially assessed under P.A. 490 at “current use value”
- C.G.S. §12-63 Rule of Valuation “The present true and actual value of all other property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof...”
- But law contemplates that wide discretion is to be accorded to assessors.

Advantages of Conservation Sale

- **Exempt from State and Local Conveyance Taxes CGS §12-498**
- **(Presumably) no real estate broker fees**
- **Conservation cuts are exempt from subdivision requirements CGS §8-18**

Corporate tax incentives

- **State corporate income tax credit of fifty percent of any donation** (or bargain sale component of a transfer) of open space land to a nonprofit land conservation organization or a political subdivision of the state. Requires a permanent conservation easement on the land. Includes Water Co lands. Carry forward up to 10 years (C.G.S. §12-217dd; P.A. 00-203)
- **Exempt from State Corporate Capital Gains Tax on conservation sale.** A corporation that sells land or an interest in land at any price to state, municipality or non-profit land conservation organization for conservation purposes is exempt from capital gain on the sale on the corp.'s taxable income under the state corp. business tax) (current state corp tax rate is 7.5%)(C.G.S. §12-217 P.A. 173, Sec. 39)

Thank you for being here!

- Questions
- Comments

