

CONSERVATION EASEMENTS, PART TWO

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In the last Business Journal we gave a fairly broad, general overview of conservation easements, explained what they are, how they are used and some of the potential issues. This article will go into some of the details of a conservation easement.

CONSERVATION EASEMENTS ARE COMPLEX LEGAL DOCUMENTS WITH MAJOR LONG TERM IMPLICATIONS. Before signing any such agreement, consult an attorney. For the purpose of this article, it is assumed that a conservation easement is being granted and that title to the property is not changed.

Purpose and Intent: The conservation easement should clearly state the purpose of the conservation easement and what it is intended to conserve. It is important that the “conservation value” of the conservation easement area (watershed, habitat, scenic, agricultural, etc.) be clearly identified and quantified.

Term: In almost all cases, conservation easements are granted in perpetuity. However, that should be clearly stated in the conservation easement deed.

Definitions: Any words used in the conservation easement deed that may have a special or unusual meaning (other than a dictionary definition) should be defined. The definition of key words and terms could be critical over time should there be any question about the scope, intent, or specific provisions of the conservation easement.

Rights being conveyed: The conservation easement deed should be specific as to what rights, such as development rights, are being conveyed in the conservation easement. Simply put, this is a description of what the property owner is giving up.

Rights being reserved: The conservation easement deed details what rights, such as the right to farm, are being retained by the property owner. The conservation easement should list what uses, either continuing or new uses, are allowed in the conservation area. If uses are not listed, the presumption would usually be that they are not allowed.

Compensation/value: The conservation easement deed should address the manner in which the owner of the property is being compensated for granting the conservation easement. If the grantor is being paid for the conservation easement, the method, terms, and conditions of that payment should be spelled out. If the grantor is conveying the conservation easement as a gift, the value of the “gift” and how that value was determined should be specified.

Grantee Approval of Subsequent uses: In many cases the land owner will have some continued use of the conservation easement area, particularly in an agricultural conservation easement. The conservation easement document should identify what subsequent uses do or do not require the approval of the conservation easement holder.

Grantor Approval of Subsequent uses: The land owner who granted the conservation easement may want to have some control over subsequent use of the conservation easement area. The conservation easement document should identify what subsequent uses do or do not require the approval of the owner.

Responsibility for the Maintenance of the Conservation Easement Area: The conservation easement deed should be specific as to which party is responsible for the “care and maintenance” of the conservation easement area. This might include maintaining fences, brush clearing, litter removal, etc.

Enforcement: After the conservation easement is conveyed, there may be some disagreement about the use of the conservation easement area, a claim that the agreement has been violated, or the question of the meaning of certain parts of the agreement. The agreement should include the process by which a disagreement is to be resolved.

Public Access: This is a potentially huge issue. Depending upon the purpose of the conservation easement, there may be some desire on the part of the conservation easement holder to allow the public onto the property for different purposes such as hiking or research. However, the owner of the land or owners of adjoining land may not want public access for a number of reasons, such as protection from trespass, maintenance, or liability. This issue should be clearly spelled out.

Water/Mineral/Oil Rights: The ownership of the land entitles the property owner to the water, minerals and oil under the property or those rights may have been previously assigned. The conservation easement deed should specify who is entitled to the resources within the conservation easement area, under what circumstances the resources can be used, or if the rights are being extinguished.

Transfer of the Property: The conservation easement should address if the property upon which the easement is located may be sold. While a conservation easement does not preclude the subsequent sale of the property and the easement will transfer with the sale, the issue should be addressed in the conservation easement deed.

Transfer of the Conservation Easement: The conservation easement should address if the easement may be transferred from one entity to another. As with the transfer of property, a conservation easement typically will not preclude the transfer of the conservation easement; the issue should be addressed in the conservation easement deed.

Extinguishing the Conservation Easement: As noted earlier, a conservation easement is typically granted forever. The conservation easement agreement should spell out the circumstances and process of how the agreement can be terminated.

These points are just a few of the issues that need to be addressed in the conservation easement deed. These agreements are very complex and may have significant ramifications on the short and long term use of the lands and have major financial and tax impacts. The agreements should only be entered into after extensive consultation with both legal and financial consultants.