

# Conservation Easements for Forest Landowners

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# Conservation Easements for Forest Landowners

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## I. What is a conservation easement?

### Definition

At its most basic level, a conservation easement is a legal agreement that restricts the type and amount of development that may occur on the subject property. It is termed a “negative” easement because rather than giving the easement holder an affirmative right to use the property in some way, it allows the holder to prevent certain alterations or uses of the land. The primary landowner controls and may exercise any property rights not expressly granted to the easement holder.

In practice, a conservation easement reflects an often detailed and complicated division of the “bundle of sticks” representing all the rights in a piece of real estate. The easement document will often set out rights and obligations for both the landowner (grantor) and the easement holder (grantee). The document can be specifically tailored to meet the needs of both parties and take into account the unique conditions on the property.

Although a conservation easement may run for a set period of time, most are perpetual. They will “run with the land,” staying in effect through successive owners, except under a small set of special circumstances.

### History

Conservation easements originated in the 1880s and were first used to protect Boston’s Emerald Necklace, a set of interconnected parks and parkways designed by landscape architect Frederick Law Olmsted. In an effort led by another landscape architect, Charles Eliot, the Massachusetts legislature established the first private land trust in 1891. The Trustees of (Public) Reservations was and remains a non-profit corporation with voluntary trustees operating “for the purposes of acquiring, holding, maintaining and opening to the public...beautiful and historic places...within the Commonwealth.”

The use of conservation easements moved to new areas of the country in the 1930s when the National Park Service used them to protect scenic vistas along sections of the newly established Blue Ridge Parkway and Natchez Trace Parkway.

In 1954, a statute enacted by the Massachusetts legislature authorized the Boston Metropolitan District Commission to purchase open space “in fee and otherwise [to acquire] lands and rights in land.” This bolstered the addition of easements and other less-than-fee instruments to the conservation toolbox.

The U.S. Internal Revenue Service provided a boost to the use of conservation easements when in 1965 the agency advertised donations of easements to governmental entities as valid deductions in calculating federal income taxes. Congress reinforced the practice in 1980 when it

enacted I.R.C §170(h) which allowed deductions for donations of conservation easements, provided that they were granted in perpetuity to qualified charitable organizations for one or more specific conservation purposes.

The National Conference of Commissioners on Uniform State Laws, a national non-profit association, appointed the Drafting Committee for the Uniform Conservation Easement Act (UCEA) in 1978 and adopted the committee's work product in 1981. The UCEA has been enacted in whole or in part by about half the states. It creates a common framework and set of definitions for the use of conservation easements and eliminates certain common law impediments that might invalidate them.

### **Statutory basis in Florida**

Florida is not one of the states that adopted the UCEA. Instead, the legal basis for conservation easements in Florida is found in Section 704.06 Florida Statutes. This statute was first enacted in 1976, five years prior to the UCEA.

Under the current statute a conservation easement is defined as:

“a right or interest in real property which is appropriate to retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition; retaining such areas as suitable habitat for fish, plants, or wildlife; retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses and which prohibits or limits **any or all** of the following:

- (a) Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground.
- (b) Dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials.
- (c) Removal or destruction of trees, shrubs, or other vegetation.
- (d) Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface.
- (e) Surface use except for purposes that permit the land or water area to remain predominantly in its natural condition.
- (f) Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation.
- (g) Acts or uses detrimental to such retention of land or water areas.
- (h) Acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance”. (Emphasis added)

It is important to note that the wording “any and all” means that a conservation easement is must only prohibit or limit one or more of the items in the foregoing list. This allows a substantial amount of customization to fit the easement to the precise needs and desires of the parties involved.

Additionally, Section 704.06 Florida Statutes provides that conservation easements:

- are perpetual, undivided interests in property and may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the property.
- may be acquired by any governmental body or agency or by a charitable corporation or trust whose purposes include protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving sites or properties of historical, architectural, archaeological, or cultural significance.
- shall run with the land and be binding on all subsequent owners of the servient estate.
- shall be recorded and indexed in the same manner as any other instrument affecting the title to real property.
- may provide for a third-party right of enforcement.

### **The conservation easement document**

The form and content of conservation easements may vary widely depending on factors including:

- the requirements of the parties involved,
- the complexity of the property,
- the laws of the particular state, and
- the preferences of the attorney drafting the document.

In general, however, the easement document will cover four main areas:

- restricted or prohibited uses,
- the grantor’s (landowner’s) reserved rights,
- the affirmative rights of the grantee (easement holder), and
- general provisions including conflict resolution.

The restricted or prohibited uses will include, in some fashion, one or more items from the list in Section 704.06 F.S. These provisions often contain specific standards defining the permissible extent of certain activities. For example, the easement may only allow the construction of one single family residence with a maximum footprint of 5,000 sq. ft. The clarity and precision of these provisions are extremely important since they will be the basis for monitoring and enforcement by the easement holder throughout its term (i.e., in perpetuity).

Many easements contain a provision that the landowners may not engage in any activities or uses of the property not expressly permitted. Such a provision reduces the risk of unforeseen

impacts to the protected resources for the easement holder and may be acceptable to the landowner at the time the easement is granted. However, the landowner may be severely limited in the way he or she can respond to future conditions affecting the ability to manage or even retain ownership to the property over time. In all cases, but particularly when such a provision is included, the landowner should be thorough in the itemization of the grantor's reserved rights.

At the top of the list of reserved rights are those considered to be the basic rights of land ownership such as the right to sell or transfer ownership or the right to control access to the property. A landowner may retain the right to mortgage the property, but in most cases any lender must agree to subordinate the mortgage to the rights of the easement holder.

Typically, a list of reserved rights will then include those activities or uses currently underway or anticipated by the landowner. These may begin with silviculture, hunting or grazing, but may also extend to mitigation banking, the sale of carbon credits, or other potential revenue generation activities.

Some of the grantor's reserved rights may simply be the inverse of some of the prohibited or restricted uses. Timber harvesting, for instance, may be prohibited in wetlands, but may be an expressly reserved right of the landowner in upland areas. Even then, that right may be checked by requirements to adhere to best management practices or follow a pre-approved management plan.

The basic provisions that allow the easement holder to monitor and enforce the conservation easement are found among the affirmative rights of the grantee. Inspections of the property are usually allowed with prior notification of the landowner at least once a year. If the easement holder believes the conditions observed during an inspection do not conform to the provisions of the easement, legal remedies may be pursued to enforce those provisions. The easement holder may also be granted the right to take direct action to protect the resources on the property. For example, the easement holder may have the right to treat invasive exotic plants or conduct prescribed burns in fire-dependent natural communities when the landowner will not or cannot do so.

Among the various general provisions in the conservation easement, those relating to conflict resolution are arguably the most important. Given a conservation easement's multigenerational term, it can be expected that disagreements in the interpretation or implementation of a conservation easement will arise. A reasonable approach to handling the inevitable disagreements will likely be best for the protected resources in the long run as well, as saving the parties to the easement significant sums in legal expenses. Typical provisions prescribe a process of mediation, sometimes progressing to arbitration if the issue remains unsettled.

## **II. Incentives for landowners**

A basic enticement for landowners to consider granting a conservation easement is the prospect of receiving some valuable consideration while continuing to own and use the property in much the same manner as before. That said, a successful transaction is dependent on the ability of a potential easement holder to deliver or assist the landowner in obtaining consideration in a form and amount to sufficiently offset the restrictions imposed by the easement.

### **Preferential tax treatment**

Traditionally, non-profit organizations and governmental agencies have relied on the donation of conservation easements by landowners able to take advantage of tax incentives. The two primary drivers of this activity have been provisions within the federal income and estate tax laws.

As noted earlier, the federal income tax code has long allowed and even encouraged charitable donations of real property interests for one of the following conservation purposes:

- Preserving land areas for outdoor recreation by, or for the education of, the general public.
- Protecting a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem.
- Preserving open space, including farmland and forest land, if it yields a significant public benefit. The open space must be preserved either for the scenic enjoyment of the general public or under a clearly defined federal, state, or local governmental conservation policy.
- Preserving a historically important land area or a certified historic structure.

Specific regulations have changed over time, but in general, taxable income may be reduced by the value of the donation, with some ability to carry any excess deduction into succeeding years.

Additionally, a long time concern for families who own real property is the ability to pass that property from one generation to the next. The portion of an estate subject to taxation has varied considerably over the years, but historically, it was not uncommon for families to be forced to sell inherited property in order to satisfy the estate tax obligation. Currently, \$5.43 million of an individual's estate (\$11.86 million for a married couple) is exempt from the federal estate tax.

A conservation easement either sold or donated during a landowner's life will reduce the value of the overall estate thereby lessening or eliminating any estate tax liability. If an easement is donated, its value can also be used as a deduction for current income taxes as described above. If an easement is sold, the proceeds would be subject to capital gains taxation and would require an adjustment to the basis in the retained real property interests.

Florida landowners may also use conservation easements to reduce their overall tax obligation through assessments and exemptions related to local property taxes. Similar to the “greenbelt” assessment, the county property appraiser is to base the taxable value solely on present use so long as the property is encumbered by a conservation easement or covenant that extends for a period of not less than 10 years from January 1 in the year such assessment is made. See, 193.501(3), Florida Statutes.

Further, under Section 196.26, Florida Statutes, land that is dedicated in perpetuity for conservation purposes and is used exclusively for conservation purposes is totally exempt from ad valorem taxation. Claiming this exemption does not prevent the landowner from receiving income from activities that are consistent with a management plan and so long as that income is used to implement the management plan. Land dedicated in perpetuity for conservation purposes but used for commercial purposes (e.g., silviculture) is still eligible for a 50% exemption from ad valorem taxation. Parcels of less than 40 contiguous acres do not qualify for these exemptions unless the use of the land for conservation purposes is determined by the Acquisition and Restoration Council to fulfill a clearly delineated state conservation policy and yield a significant public benefit.

### **Direct payments**

While the tax benefits from charitable donations have long been a primary driver for the conveyance of conservation easements, the rise in public land acquisition programs, particularly in Florida, has also created the opportunity for direct payments to landowners. Under the public programs and processes to be described later, governmental agencies may use funding derived from various sources to purchase conservation easements on lands that meet their objectives and criteria.

Payment for the sale of a conservation easement is typically based on a negotiated price for no more than the value determined by an appraisal procured by the agency. Gain from such a sale will be subject to capital gains tax and the basis on any remaining lands or interests in land will need to be adjusted.

While not exclusively the case, non-profit conservation organizations often acquire land and easements from the private owners specifically for resale to a governmental agency. A land trust may buy and hold an easement, but may also look for a grant or donation to establish an endowment for the future monitoring and enforcement costs.

### **Mitigation**

Conservation easements are also commonly used to satisfy regulatory requirements in environmental permitting programs of various local, state, and federal programs. Their most typical use is as part of a mitigation plan to offset the adverse impacts to natural resources caused by land development.

Mitigation refers to a set of actions which may include creation, enhancement, or preservation of an ecological community or imperiled species habitat to compensate for negative impacts to other similar resources. In this context, a conservation easement is granted under an approved

mitigation plan in order to obtain the right to develop or disturb land where a protected resource exists. Dredging or filling wetlands is the most common activity requiring mitigation, but impacts certain upland habitats such as those used by to gopher tortoises and sand skinks are also offset through analogous systems. The sale of carbon credits to address climate change is essentially one more system of mitigation. In each case, conservation easements are used to apply permanence to a mitigation project.

When a conservation easement is granted as part of a mitigation plan, the regulatory agency may have developed a conservation easement form that it routinely uses and has deemed acceptable. For example, in Florida, the Department of Environmental Protection and the state's five water management districts have all adopted consistent conservation easement forms for use in the Environmental Resource Permit program. See Forms 62-330.301(8) through 62-330.301(17) found in Appendix C of the Environmental Resource Permit Applicant's Handbook, Volume I. These forms are available on any of these agencies' websites.

The landowner whose land will be used to mitigate for resource impacts may be benefited through the receipt of a permit or other approval to develop his or her own lands, or compensated by a developer through payment under an agreement to mitigate on behalf that developer. The latter may occur either on a single project basis or through the sale of credits from an approved mitigation bank.

### **Guiding future land use**

Many landowners who have a lifelong relationship with family lands or who have worked over the years to assemble their land holdings would like to ensure that the property remains intact and protected through succeeding generations. The sale or donation of a conservation easement can yield immediate monetary benefits, but can also guide the use of the property into the future. So long as there is sufficient revenue generating potential, heirs can continue to profit from and enjoy the property in the same manner as the current owner.



### III. Conservation easement programs

Governmental agencies at all levels as well as private organizations use conservation easements as a tool to meet their natural resource objectives. These objectives vary widely as do the organizations' criteria for evaluating the resources on a property, their acquisition procedures, and their sources and levels of funding. The goal for both the landowner and the potential easement holder is to match property characteristics, easement provisions, and consideration (i.e., payments or other compensation to the landowner) with the needs and abilities of each party. In essence, both parties are looking for good partners to take into perpetuity.

The following is a summary of specific programs or types of programs through which agencies and organizations acquire, fund, or facilitate conservation easements. Some programs may have direct points of entry for landowners while others primarily provide grant funding for projects or programs initiated by other entities.

#### Federal Programs

The **Wetland Reserve Program** is part of the larger Agricultural Conservation Easement Program administered by the U.S.D.A. Natural Resource Conservation Service (NRCS). It provides technical and financial assistance to private landowners to restore, protect and enhance wetlands and associated uplands in exchange for retiring eligible land. To be eligible, the land must be former or degraded wetlands occurring on agricultural lands.

Landowners may participate through the sale of permanent or 30-year conservation easements at 100 % or 75% of the easement's appraised value, respectively. The program will pay for associated restoration costs using the same percentage rates. Stand-alone restoration cost share agreements are also available at payment rates of up to 75% of eligible costs. In most instances the landowner must have owned the property for at least seven years. Applications are accepted year-round and evaluated periodically by NRCS staff when funding is available.

**Additions to National Wildlife Refuges** are made by the U.S. Fish and Wildlife Service (USFWS) in accordance with an approved Land Protection Plan identifying an authorized acquisition boundary for the refuge. The Fish and Wildlife Service may purchase fee title or conservation easements within that boundary. Acquisitions target nationally significant resources involving migratory birds, endangered species, wildlife habitats, wetlands, fisheries, or biodiversity. The acquisition process is managed through the regional office in Atlanta in coordination with the refuge manager.

Protection of the Everglades Headwater Conservation Area within the Kissimmee River basin is being coordinated by the USFWS in coordination with federal and state agencies, non-profits, and private landowners. The effort focuses on maintaining the rural landscape and the connectivity of natural areas to benefit wildlife habitat, natural communities and water resources. USFWS may acquire fee title on up to 50,000 acres and conservation easements on up to 100,000 acres. Management agreements or other forms of assistance may be available as well. Activities are being coordinated through the Pelican Island National Wildlife Refuge.

**Readiness and Environmental Protection Integration (REPI)** is a program of the U.S. Department of Defense designed to maintain compatible land uses around military installations while also protecting environmental resources. REPI provides funds to governmental and non-profit organizations for the purchase of fee title or conservation easements over suitable lands located within a three-mile buffer around designated bases. Funding usually requires a match by the recipient in either funding or donation value. Those bases identified in Florida are: Avon Park Air Force Range, Camp Blanding, Cape Canaveral AFS, Eglin AFB, NAS Pensacola, NAS Whiting Field, and OLF Whitehouse.

The **RESTORE Act** provide a mechanism for the distribution of 80% of the civil penalties arising from violation of the Federal Water Pollution Control Act related to the Deepwater Horizon oil spill. Those funds deposited in the Gulf Coast Restoration Trust Fund, of which 60% are administered by the Gulf Coast Ecosystem Restoration Council. One-half of these funds will go toward implementation of the Council's Comprehensive Plan, and one-half will be directed to the states based on the degree of impact from the oil spill. Another 35% of the Trust Fund is to be divided evenly among the affected states. Projects will address the restoration or protection of Gulf coastal resources and may include the acquisition of fee or less-than-fee interests in land by agencies or non-profit organizations.

The **Gulf Environmental Benefit Fund** was established with payments arising from the settlement of criminal charges associated with the Deepwater Horizon oil spill. The Fund is administered by the federally established National Fish and Wildlife Foundation. Under the settlement agreements, 50% of the funds are to support projects that "remedy harm to resources where there has been injury to, or destruction of, loss of, or loss of use of those resources resulting from the oil spill." Florida will receive \$356.16 million for projects that could include the acquisition of fee or less-than-fee interests in land by agencies or non-profit organizations.

### **State of Florida**

**Florida Forever** is the State's program for the acquisition of conservation and recreation lands. The program has been funded through the documentary stamp tax and divided among various agencies according to a formula. The Department of Environmental Protection Division of State Lands (DSL) administers the expenditure of 35% of the funds. Each project must meet multiple objectives from among areas including water resources, wildlife habitat, recreation, and cultural resources. Projects are reviewed by the Acquisition and Recreation Council and added to a priority list that is approved by the Governor and Cabinet. Depending on the resources to be protected, the purchase of either the landowner's fee simple estate or a conservation easement will be considered. Offers to the landowner will be based on fair market appraisals that may be kept confidential by DSL staff. The purchase agreement must be approved by the Governor and Cabinet.

The **Rural and Family Lands Program** is administered by the Florida Forest Service. It is funded through Florida Forever, but is strictly limited to the purchase of conservation easements. The program is designed to protect valuable agricultural and forest lands, focusing on wildlife habitat, floodplains, and aquifer recharge. The Florida Forest Service conducts advertised

application periods after which submissions are evaluated and ranked. Agency staff obtain appraisals and conduct negotiations similar to the Division of State Lands. Purchase agreements must be approved by the Governor and Cabinet.

Florida's five **water management districts** acquire land and conservation easements, principally with the use of their 30% share of funding from the Florida Forever program. Their acquisitions must address the goals of the state program, but each district develops its own Florida Forever work plan. Each plan is tailored to the district's particular resources and issues associated with flood control, water supply, water quality, and natural systems. The work plan is approved by the district governing board. A district may also acquire lands for its projects using other funding sources including its levy of ad valorem taxes. Offers to the landowner will be based on fair market appraisals that may be kept confidential by district staff. In most cases, the purchase agreement must be approved by the district governing board.

### **Local government**

More than 20 Florida counties have implemented local acquisition programs for the protection of ecological and cultural resources and to provide recreation for residents and visitors. Typically, these programs are funded by a limited-term, local option sales tax combined with grant funding. Most target fee acquisition, although some programs may also acquire conservation easements. The programs may be administered by county staff or a by a non-profit organization under contract. Purchase decisions are made by the county commission although the requirements of outside funding bodies may apply to or even control the process.

### **Private organizations**

Numerous non-profit organizations at the national, state, and local level work to acquire fee or less-than-fee interests in land for the protection of ecological, recreational, or cultural resources. Particularly in Florida, many work to facilitate acquisitions by governmental agencies, taking title only on an interim basis, if at all. Very few purchase fee title or conservation easements to hold long term. They may take title to donated lands or easements, thereby allowing landowners to reduce their federal income or estate taxes. The non-profit organization may hold the property in its inventory of conservation lands or sell it to generate funds to further its goals elsewhere. If the property is to be held, the organization may also require the landowner to donate funds for the establishment of a management endowment.

A market for carbon credits exists but is still developing. Cap and trade systems in California and a consortium of states in the northeastern U.S. drive the market for credits, expressed in CO<sub>2</sub> equivalents, issued for projects that capture and store greenhouse gases or reduce their potential emissions. Private organizations, both for-profit and non-profit, develop projects and submit them for verification and issuance of credits. Credits certified for trade in the California market have been issued for projects throughout the country. Protocols exist for a wide range of project types including afforestation, agricultural crop management, grassland management, improved forest management, and livestock waste management. California has adopted protocols for projects related to livestock, mine methane capture, ozone depleting substances, U.S. forests, and urban forests.