

Conservation Easement Drafting Guidelines

Utah Open Lands makes use of the following guidelines, as policy, in the creation of every conservation easement put in place under our trust.

Identification and documentation of the conservation values and reserved rights/resource management issues comprise the majority of the land protection process. The conservation values are the primary concern and the starting point of the entire process. The conservation easement should then be drafted to protect the conservation values.

While as individuals we may have biases towards certain values and how these values should be protected, a good question to ask throughout the process is "How does this provision protect the conservation values?" If the provision does not provide some sort of protection for the conservation values, then it may not be necessary.

What are conservation values?

Section 170(h) of the Internal Revenue Code addresses qualified conservation contributions, which include conservation easements. A qualified conservation contribution is "a contribution of a qualified real property interest, to a qualified organization, exclusively for conservation purposes". To meet the conservation purposes test, a property must either preserve land for outdoor recreation or education by the public, protect relatively natural habitat, preserve open space, or preserve a historically important land area or structure.

Determining the conservation values of a particular property is partially a subjective process. Internal Revenue Code section 170(h) provides excellent parameters to help determine what may qualify. However, identifying the conservation values and whether they meet the conservation purposes test can vary geographically, between different land conservation practitioners and organizations, and between individual properties. It is therefore important to determine whether a property may meet the test on a case-by-case basis.

Drafting Guidelines

A conservation easement must provide a benefit to the public. Congress and the IRS have determined that the following conservation purposes are in the public's benefit:

- a. outdoor recreation or education,
- b. the protection of relatively natural habitat,
- c. the preservation of open space, or
- d. the preservation of an historically important land area or structure.

Each conservation easement should explicitly state which of the previous conservation values the easement is trying to protect. In addition, there should be consistent, supportive/descriptive statements within both the conservation easement and the Present Conditions Report that substantiate the conservation values. These statements may ultimately be the basis for defending the easement.

Outdoor Recreation or Education

To qualify, the easement must be for the "substantial and regular use of the general public. Consider the following factors:

1. Identify the outdoor recreation or educational opportunities.
2. Identify the type and amount of use/potential use by the general public.
3. Identify the type of public access to the property and limitations to the access.
4. Identify any relevant outdoor recreation plans (local, regional, etc.).

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Relatively natural habitat of fish, wildlife or plants, or similar ecosystem

For this category, some alteration of the ecosystem will not result in a denial of the deduction; however, the species must exist in a relatively natural state. Limiting public access is permitted and, in some circumstances, may be necessary. Consider the following factors:

1. Identify the habitat.
2. Identify the extent to which the habitat has been altered by human activity.
3. Identify habitats for rare, endangered, or threatened species of wildlife, fish, or plants.
4. Identify natural areas that represent high quality examples of terrestrial or aquatic communities.
5. Identify natural areas on the property that are included in, or contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.
6. Identify the type of public access to the property.

Open space, including farmland and forestland

This conservation purpose is perhaps more complicated than the other categories. In general, the protection of open space will qualify if it is for the scenic enjoyment of the general public and will yield a significant public benefit or if it is pursuant to a clearly delineated Federal, State, or local governmental conservation policy and will yield a significant public benefit.

1. Identify the public benefits of the preserved open space. Consider the following factors (excerpts of 170(h):
 - a. The uniqueness of the property to the area.
 - b. The existing and potential intensity of land development in the vicinity of the property.
 - c. The consistency of the open space use with public and/or private conservation programs.
 - d. The likelihood that the development of the property would contribute to the degradation of the scenic, natural, or historic character of the area.
 - e. The opportunity for the general public to use the property or to appreciate its scenic values.
 - f. The importance of the property in preserving a local or regional landscape or a resource that attracts tourism or commerce to the area.
 - g. The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights.
 - h. The cost of enforcement.
 - i. The population density of the area.
 - j. The consistency of the open space use with a legislatively mandated program identifying specific parcels for protection.
2. Identify the clearly delineated Federal, State, or local government policy 170(h) in:
 - a. Identify the specific, identified conservation project.
 - b. Identify a wild or scenic river on the property.
 - c. Identify the state program that preserves farmland for flood prevention and control.
 - d. Is the property contiguous or integral to surrounding existing recreation or conservation sites?
 - e. Identify the preferential tax assessment or zoning by the government.
 - f. A general and broad statement by a single official or legislative body is NOT sufficient to qualify.
3. A deduction is not allowed if the easement allows a degree of development that would interfere with the scenic quality of the land or with the governmental conservation policy.
4. A contribution for open space preservation may also be for scenic enjoyment. Physical access to the property by the general public is not necessary; however there must be at least visual access to or across the property. As a result, you must specifically identify the "park, nature preserve, road, waterbody, trail, or historic structure or land area" from which the public can see the property (excerpt from 170(h)). Other factors to consider include the following:
 - a. The compatibility of the land use with other land in the vicinity;
 - b. The degree of contrast and variety provided by the visual scene;
 - c. The openness of the land...;

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- d. Relief from urban closeness;
- e. The harmonious variety of shapes and textures;
- f. The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;
- g. The consistency of the view with a methodical state scenic identification program...;
- h. The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process.

Historic

To qualify, the historic structure or land area must have visual public access or must allow the public to view it on a regular basis. Consider the following factors:

1. Identify the historic structure or land area listed in the National Register.
2. Identify the historic structure or land area located in a registered historic.
3. Identify the public access.

Reserved Rights and Resource Management

Many conservation easements also specify the need for a management plan. UOL identifies general principles in the conservation easement and then, if necessary, creates a management plan for more specific guidelines. UOL tries to avoid the temptation to use a plan to defer conflicts or difficult topics until later. These issues should be addressed at the time of the drafting of the conservation easement.

Resource Management Topics

1. Timber

UOL does not have much experience with working forests. However, if a property has timber, our easement addresses issues such as thinning to prevent forest fires, habitat management, cutting to prevent property damage, and dead or diseased trees. If there are substantial timber activities on the property, a management plan by a professional forester may be necessary. An example of language that addresses basic activities is:

Timber harvesting is prohibited except as set forth below. On a limited and localized basis, trees may be cut to control insects and disease, to control invasive non-native species, to prevent personal injury and property damage, and for domestic uses on the Property such as firewood and construction of permitted buildings and fences. Tree thinning activities may take place to maintain the character and nature of the habitat. Timber harvesting other than the foregoing on the Property shall be conducted in substantial accordance with a forest management plan prepared at Grantor's expense, approved by Grantee, by a professional forester.

2. Mining

Mining issues related to conservation easements are governed by Internal Revenue Code section 170(h) and case law. For all easements, the extraction of mineral resources through surface mining methods, or through any methods that are inconsistent with the conservation purpose, or irretrievably destructive of the conservation values, is prohibited. If the landowner does not own all of the mineral rights, as is common in the West, a qualified geologist must determine that "the probability of extraction or removal of minerals by surface mining is so remote as to be negligible" in order for the easement to meet IRS standards and to ensure that the conservation values will not be negatively impacted by the severed mineral interests.

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In cases of potential oil and gas development, UOL attempts to look at what impacts the mineral development may have on the conservation values on a case-by-case basis. If it is determined that there is little or no negative impact to the conservation values, limited oil and gas development may be permitted. The development should be dealt with in the easement by acknowledging the impact and trying to limit it, such as by providing parameters for extraction and restoration.

The Treasury Regulations acknowledge that a deduction will not be denied for “certain methods of mining that may have limited, localized impact on the real property but that are not irretrievably destructive of significant conservation interests” (excerpt from 170(h)). Of utmost importance is that the methods will not interfere with the overall conservation purposes of the easement.

3. Agriculture

Agriculture is somewhat unique as a conservation value. Qualified conservation values reflect resources present on the property – open space, scenic, natural, or historic. Agricultural lands certainly possess resources – rich soils, irrigation systems, high quality forage, etc. But agriculture as a conservation value differs from the others (along with forestry) because it is based upon an economic land use. As such, the maintenance of agricultural conservation values is dependent upon many evolving factors: changes in markets, changes in technology, changes in infrastructure, etc. For that reason, a conservation easement with agriculture as a conservation value must allow flexibility for the inevitable changes that will occur in the industry. At the same time, each property must be evaluated on a case-by-case basis to determine whether practices are beneficial or detrimental to the conservation values of the particular tract. Such practices as herbicide use, pesticide use, soil erosion, over grazing, etc should be addressed, both as they relate to the agricultural use and to the other conservation values of the property.

It may be appropriate to prioritize the conservation values. For example, for a recent project on a ranching property with endangered species, a management plan was created for those portions of the property that contained the endangered species’ habitat. In those areas, the species was given higher priority than agriculture and specific management practices beneficial to the species were identified. In the remaining portion of the property, agriculture had a higher priority and the management plan practices did not apply.

The land trust should also contemplate what happens when the landowner no longer wants to continue agriculture. A conservation easement that requires, rather than permits agriculture may have long-term problems. For example, it is unlikely that a court will compel the landowner to continue to practice agriculture. In addition, if agriculture is no longer economically viable on the property, the terms of the conservation easement may not allow for any other economic use. As a result, the landowner may be uncooperative or may abandon the property. On the other hand, a conservation easement that does not mandate agriculture should contemplate likely and acceptable future land uses (for example, a land cover that will prevent the property from being overtaken by noxious weeds).

4. Water

Water is often critical to the conservation values of a property. Determining the importance of water to specific conservation values should be done at the time of the drafting of the conservation easement and the preparation of the Baseline documentation. Identifying the rights necessary to maintain this water on the property should also be done at this time. The conservation easement should then specify these rights (often as an exhibit) and the provisions necessary to maintain them for the conservation values. In addition, the land trust should consider how to track the water use and, if the water right is under threat of abandonment, how the land trust and the landowner will maintain the water right for the conservation values on the property. Policies and practices regarding water rights in conservation easements is rapidly changing, reflecting the complexity both of water systems and water law. It may be necessary to consult with an attorney experienced in water law to determine how to monitor for and prevent abandonment.

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5. Recreation/Public Access

If outdoor recreation and/or education by the public is a conservation value, the conservation easement must allow for public access to qualify for a charitable donation. Potential adverse impacts of public access on other conservation values should also be addressed, and in some cases, it may be appropriate to prioritize conservation values in a manner similar to that previously discussed for agriculture. It may be necessary, for example, to identify areas of the property where recreation is prohibited or where it is a priority (e.g. – keep recreation out of sensitive areas such as wetlands or allow recreation along nature trails).

Building Rights

1. Existing Buildings

It is always important to determine the impact of existing or new development on the conservation values and draft the conservation easement accordingly. Existing buildings must be identified in both the text of the conservation easement and on the map exhibit of the property (The identification must be consistent in the Baseline documentation as well). If there are provisions to enlarge, replace, repair, etc. buildings, the land trust must monitor for these changes. To accomplish this, a proper photo and map record of the existing conditions, as well as identification of photo points for monitoring, should be established. (see “Monitoring Checklist” for a more detailed discussion).

2. New Building Envelopes

Many conservation easements identify building envelope(s) where development is permitted within certain restrictions. An envelope allows building within a specific area and prevents building from occurring randomly on the property. Minimizing the impact on the conservation values should help determine an appropriate location and size for the building envelope. As with existing buildings, it is important to document on a map exhibit where the envelope is located.

The conservation values should determine what aspects of the building should be restricted and what is permitted within the building envelope. For example, if a conservation value is scenic quality, the conservation easement should locate the building envelope to minimize the scenic impact (e.g. – avoid locating on a ridgeline or in a view corridor and placed in an area not easily seen by the public), as well as contemplate other restrictions such as height, color, mass, etc.

The inverse of these principles also applies. If the conservation values are not affected by the building or the building envelope, then it should not be unnecessarily restricted. If, for example, the conservation values of a property are agriculture and natural habitat, it is unlikely building height or color will have an impact on those values. Therefore, it would be inappropriate to restrict height and color in the easement. If there is a consensus that building height or color would adversely affect important scenic resources, then the easement should be re-drafted to include scenic qualities as a conservation value.

It may also be possible to identify the building envelopes in the future with the approval of the easement holder. In this case, it may be important to identify either areas where building envelopes are acceptable or areas where they cannot build, such as in sensitive habitat areas or wetlands.

The conservation easement should also clarify in the conservation easement document, common terms that may not be clear. For example, square footage (cumulative, enclosed, finished), building height (low point, high point, median height, profile – elevation line vs. height), natural building materials (natural appearing or natural materials) are all common terms with multiple definitions. In many cases, the conservation easement should also identify a maximum size of both individual buildings and the maximum cumulative size of all buildings. Careful consideration of these factors helps create a clear easement that may be easier to defend in the event of a violation.

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How much development is too much? With the increased scrutiny of conservation easements and the practices of land conservation organizations, this question is often raised. While the answer to this question depends on the particular property, the geographic region, and the conservation values of the property, it is clear that land trusts are being asked to determine the answers. What is also clear is that the underlying issue is one of conservation values – what level of development is sustainable without negatively impacting the conservation values.

As we began this discussion, the starting point of the entire process is the premise that there are conservation values that deserve protection. Given that premise, development should be restricted, at a minimum, to the level necessary to protect those conservation values. As Stephen J. Small points out, “there was a sense that some very limited development could be permitted under some conservation easements, but the emphasis had to be on protection of conservation qualities” (2003, 33). Ultimately, building restrictions should not be arbitrary. They should be governed by the conservation values and what is practical to enforce.

3. Other improvements

Typically, conservation easements address other improvements such as roads, utilities, and fences. As with the previous discussions, these provisions should be drafted based upon their impact on the conservation values. These existing and permitted improvements should also be identified in the conservation easement, on the map exhibit, and in the Baseline documentation. Please see “Monitoring Checklist” for a more complete discussion.

General Provisions

1. Enforcement

In the event enforce an easement is necessary, there must be a solid foundation:

- Clearly identified conservation values based upon the IRS regulations;
- Clearly documented conditions of the property in the Baseline Documentation;
- Provisions in the conservation easement that relate to the conservation values; and
- Consistency among the provisions and among the documents.

In addition to these, there must be a consistent and well-documented monitoring history for the property. Overall, having a clear, consistent, and well-documented land protection process will aid in the defensibility of the conservation easements.

Summary

The topics covered in this drafting guidelines document may not cover all of the scenarios encountered by Utah Open Lands. These guidelines help to formulate well-drafted easements for an individual property. The clear message is that the conservation values will govern not only the drafting of the conservation easement, but also the entire land protection process. The following document, “Model Conservation Easement”, is an example of our draft easement. This document is continuously updated to reflect new ideas and practices at Utah Open Lands. It is only a starting point and must be tailored to meet the individual needs of the landowners and the property.

Cited Resource

Small, Stephen J. “Conservation Easements Today: The Good and the Not-So-Good.”
Exchange Spring 2003: 32-34.

