

The "Hazards" of Conservation Easements



Conservation easements are promoted as a way to gain tax advantages and protect private lands from development. For those who fail to read the fine print, they can be a nightmare of legal proceedings, extreme regulations and the eventual loss of cherished property.

The background:

In a typical conservation easement, a Land Trust purchases some or all of the "bundle" of a property owners' rights. Once signing the agreement, the owner's rights are legally subservient to his new partner, the trust.

Owners make this trade to gain tax benefits, cash payments, protect their property from development or avoid the threat of government land acquisition or regulation.

To receive the benefits the owner agrees among other duties to one or several of the following: protect animals, plants or eco-systems, preserve open spaces for farming, outdoor enjoyment or recreation for the public; historic preservation and to follow best land management practices. The trust enforces the restrictions.

The benefits:

Benefits have the greatest value for wealthy owners. The relief of estate taxes was a primary driver of conservation easements as inheritance laws forced many heirs to sell property to developers to pay the IRS. Conservation easements avoided this sell-off.

Today, trusts sell easement programs to lower income owners who may gain little from tax benefits. Instead, trusts promote cash payments, assurances land will not be sold to developers, safety for heirs and good environmental stewardship. In this way, trusts, collaborating with public agencies, gain control of vast amounts of private property in perpetuity as part of an ecological initiative.

- The property owner receives charitable deductions on federal taxes based on the difference between the values of the land before and after granting the easement.
- The property owner receives relief from federal estate or inheritance taxes.
- Many states provide income tax credits and property tax relief for conservation easements.
- Owner receives a payment for development rights.
- Property usage and development is strictly controlled.

The hazards:

- Under a conservation easement, the owner sells his development rights and therefore no longer has controlling interest in his or her property.
- Trusts often re-sell the easement to government agencies, which alter best management practices, driving up compliance costs. Eventually, these cost increases can force owners to sell their land at a reduced price.



- Third party trusts, non-profit organizations or government agencies can attack or enforce your easement restrictions even if your trust does not.
- By law, conservation easements can be challenged by third parties, but only if the party can issue conservation easements. Therefore, there can be no third party challenge by the landowner or even a supporter of the landowner.
- Because the ownership rights are muddled between taxes, restrictions and best practices requirements, it can be difficult to find a buyer willing to pay a fair market price for the land *or* the tax deductions. Further, it will be hard to find a lender or to get full title insurance.
- The IRS demands the easement remains in perpetuity. This ignores changes in science, nature and even the definition of what is ecologically beneficial over time.
- The cozy promises of a friendly working partnership between the landowner and the trust prior to the contract have no bearing in a court of law. The Ninth Federal Circuit Court of Appeals has ruled pre-contract discussions unenforceable.
- Land Trusts are in the sales business. They are under no legal obligation to disclose information detrimental to closing the sale.
- Often land trusts "flip" your easement to a public agency to make a "pre-acquisition" profit. (In one example, The Nature Conservancy paid \$1.2 million for an easement and promptly sold it to the Bureau of Land Management for \$1.4 million. This enabled a non-scrutinized transfer of private property to the federal government while avoiding publicity, regulations, zoning changes or eminent domain.)
- Through "mitigation banking," and "habitat protection" your property can be condemned and used to offset damage, loss of endangered species, wetlands or proposed development to another ecosystem or habitat; it can be allocated to complete a contiguous wildlife habitat.

- *According to a Gulf of Maine Times article, "The Maine Coast Heritage Trust has sold more than 700 of its 850 easements and acquisitions to federal and state agencies."*
- *Additionally, more than 2/3 of The Nature Conservancy's operating budget is to purchase private lands that are then sold to federal and state agencies, says American Enterprise.*

What you can do:

- Think twice before selling anyone your property development rights.
- Be aware that federal, state and local governments collaborate with Land Trusts every day for the purpose of acquiring private land through conservation easements. Arguably, this is to protect the environment. Practically, it forever severs your personal property rights, which are the foundation of freedom.
- Know that once you sell your development rights you have sold the control of your property for you and your heirs. Your remaining rights will likely decrease in value.
- Remember, nothing the land trust representative or the government representative says; nor anything manuals or brochures depict, prior to signing the contract, is binding or legal. The only words that matter are those in the contract.
- Be aware that you can protect the environment without surrendering your property rights.
- Before signing any documents, discuss your wants, needs and expectations with your family. Read every document.
- Hire an unbiased attorney of your choosing, not the land trust's, government's or broker's. Choose one who will place your rights above all else to review each document before entering into any agreements.



Sources:

- Uniform Conservation Easement Act - National Conference of Commissioners on Uniform State Laws, Approved by the ABA
- Big Meadows, Big Mistake - American Land Foundation
- Colorado Landowners Burned By Conservation Easements - Fred Grant
- Conservation Easements and Title Insurance - L.M.Schwartz
- Conservation Easements: The Good, the Bad, and the Ugly - National Center for Public Policy Research
- Environmental Protection Agency Website - Mitigation Banking Factsheet

For more info go to: www.didyouknowonline.com/agenda21.php and www.americanpolicy.org/issues