CONSERVATION EASEMENTS IN CONNECTICUT: Soup to Nuts
incl. the CT Model Conservation Easement

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What is a Conservation Easement?
(and What is a Conservation Restriction ?)

• **Bundle of Rights**
  - What is Fee Simple (a/k/a the “fee”)?
  - Owner still owns, manages, insures, pays taxes
  - CE is Perpetual, “runs with the land”
State Enabling Legislation: protects “easements in gross”

• 1971 C.G.S §47-42a, b & c. Makes any CE (called a "Conservation Restriction") enforceable.

• CR 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”.

Why not just own it (in fee)?

• **Fee ownership by LT: title is not restricted.**
  - Land can be voluntarily or involuntarily sold or transferred; subject to creditors
  - If fee is not to a land trust, but to a town, they have other missions than land protection

• **Deed Restrictions are problematic** –
  - Enforcement –
    - Who legally can enforce, can it be undone?
    - Who has the will to enforce?
    - Who will monitor?
    - Who will ensure perpetuity? Will it run with the land?
    - Generally less detailed, unclear

  - Deduction problem: fmv?
Why to choose a Conservation Easement:

• 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 – less monitoring, no maintaining (only one landowner)

• Can be inter vivos (during life), testamentary, or postmortem
Why NOT to Choose a Conservation Easement

• Flexible – complex, differing terms

• One landowner: Initial satisfaction high, successors lower; less commitment to purpose, more incentive to violate or attack

• Donor IS giving up value, limiting pool of purchasers

• Higher transaction costs, (more requirements; expensive complex appraisal, baseline documents, two attorneys to review and negotiate terms); AG oversight; highly scrutinized and more subject to attack by the IRS.
Types of Conservation Easement Transfers

• Full Donation

• Bargain Sale - Part sale, part gift
  o “Before and After” valuation generally

• Sale for Full Fair Market Value
Land Trust Standards & Practices

- Created by land trusts nationwide; “held in trust” by the Land Trust Alliance. Statutory law, IRS and case law, best practices/aspirational
- Updated 2x, not since 2004
- 12 Standards, 88 Practices
- First 7 Standards common to all nonprofits, next 5 only to land conservation organizations
- Standards 8-10: Land Acquisition practices (project selection, planning and tax considerations)
- Standards 11-12: Easement & Fee Stewardship
- For today’s purposes, helpful to be familiar w/Standards 8, 9, 10 & 11

Find them (& other guidance) on the Learning Center: [http://learningcenter.lta.org/](http://learningcenter.lta.org/)
S&Ps and Easement Projects

8B: Consistent with your project selection criteria
8C: LT reviews to ensure meets federal/state requirements, particularly if a deduction claim is anticipated
8D: must confer a public benefit
8F: documentation of conservation values
9A/B: landowner and LT should both be represented by counsel
9E: Easement Drafting
9G: Recordkeeping – safeguard “originals” of recorded easement, signed baseline, title search documentation, donor appraisals, LT appraisals (for purchase), 8283s, critical correspondence, surveys if any
9H: Title investigation
9J: Recording
10ABCD: Notification to landowner, and LT responsibilities w/r/t IRC Section 170(h)

An Acquisitions Policy &/or Project Planning Checklist, is very helpful
S&Ps vs. Accreditation Requirements

• Land Trust Accreditation Commission separate org & people: www.landtrustaccreditation.org

• Accreditation program basis in S&P, picked 26 “Indicator Practices”

• Requirements Manual shows how to meet requirements

• Indicator Practices are
  o 8B (project selection criteria)
  o 8D (public benefit)
  o 9E (easement drafting)
  o 9G (recordkeeping)
  o 9H (title investigation)
  o 10B (appraisals)
  o 11B (Baseline Documentation Report)
Requirements 9E. Easement Drafting

• CLCC worked to ensure consistency with the requirements

• Key Elements (prospective)
  o Individually tailored “according to a project plan or process”
  o Only permit uses and reserved rights that will not significantly impair the important conservation values
  o Easement is within the capacity of the organization to monitor
  o Enforceable
  o Drafter has the necessary knowledge or there is legal review
  o Basic elements ([3 page list](#)) are included (yes for CLCC template)
  o If there is a broad discretionary consent clause, then organization should have guidelines addressing discretionary consent
  o Meets IRC/Treasury Dept Regulations (basic elements do this)
Federal Tax Benefits

• Income Tax Deduction
  o 30% of AGI with 5 year carry-forward
  o No capital gain on appreciated gift
  o Unappreciated property 50% of AGI with 5 year carry-forward
Federal Tax Benefits: Estates

• Estate Tax Reduction

  o Value given up is out of estate

  o Additional estate tax reduction up to 40% on value of retained property

  o Postmortem conservation easements allowed, but tricky to do, generally require pre-planning
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

LT should not have to pay full price, but beware using specifics re: tax benefits
Property Tax Assessment of Easements

• A public relations issue.

• Assessment may not change if already 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.
Corporate tax incentives

• **Federal corporate tax benefits limited.** Acquisitions from developers limited to basis. Corporations limited to 10% of taxable income with five year carry forward

• **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)
What needs to be in a Conservation Easement?

- Parties
- Property
- Purposes, What you are protecting (CVs)?
- State and IRS requirements
- Limitation terms
- Enforcement provisions
- Amendment and termination provisions
- Legal gobble-de-gook

Very easy to miss something, it’s not something on the bar exam, a moving target, so....
Origin of the CT Model Easement
2014

• We needed:
  o A starting place for construction of templates
  o Terms to review existing templates
  o Source of boilerplate

• The Model
  o Uses: Generally “forever wild” situations
  o One set of limitations
  o Not working lands or historic preservation
  o Not intended as a substitute for existing carefully crafted land trust templates
Structure of Easement - Overview

• Prohibit Everything
• Give back specific rights

What does this mean about approaching landowners?
Initial Drafting Considerations

- Know THE PROPERTY- What are the “conservation values” (CVs)?
  - 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
- What terms CAN you and DO you really want to monitor and enforce? (S&P St. 9E); Choose best tool, protect CVs S&P St. 8 H.)
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
Federal Requirements for deductibility

✓ Restrictions must be perpetual
  • Legally enforcement rights – incl. recordation
  • Baseline documentation (S&P St. 11 B.)
  • Not subject to a prior mortgage (subordinated)
  • “Boilerplate” – extinguishment, notice before exercising 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
Deductions: Why does the land trust need to know the requirements? Isn’t it the donor’s problem?”

Yes, but...

• Incentive to land protection
• Reputation of land trust
• *S&P St. 8C., St. 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
Federal Requirements for deductibility: Baseline Report

• Documents “Conservation Values (CVs)” – intent and purpose

• Required for:
  Deduction; S&P; Accreditation; Terrafirma

• Referenced in “Recitals”/”Whereas Clauses”

• Contemporaneous

• Document condition/facts for enforcement & institutional memory
Federal Requirements for Deductibility: Conservation Purposes

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 St. 8D, 8F and 9E requirements
Landowner retained rights:

- The Conservation Values drive the drafting. A working lands easement should not be drafted like a “forever wild” easement

- Future owner uses?
  - Agriculture – define
  - Forest management – what conditions, forest management plan, goals
  - Recreational uses?
  - What structures/subdivision permitted
Land Trust Rights

• Enforcement of Conservation Easement (of course)
  o Restoration, injunction, damages, costs

• Affirmative land trust rights:
  o Preservation of open areas? Maintenance? creation of trails?
  o Public access?

• Approvals, Discretionary Consent and Amendment standards and procedures!!!!!!!

Now try to make these somewhat consistent from Conservation Easement to Conservation Easement!

Create a template and USE IT
A few words about easement appraisals:

- “Before and after” format
- Special rules on aggregating nearby parcels
- Form 8283 and special requirements for an attachment
- Conflicting opinions on role of land trust in signing 8283 – smell, grandma & 60 minutes tests. IRS advisories, *S&P St. 10*

- Still Need No Goods or Services Letter
- LT must get a copy of appraisal and executed 8283 *S&P St. 10*
Advice on the Filing Package
per Steve Small & LTA

- Complete 8283 - See instructions
- Supplemental Statement - See instructions
- Qualified Appraisal
- Copy of recorded easement
- Very nice looking and complete baseline
- Gift (f8) acknowledgment letter
- Correct mortgage subordination

Show up front that you have done all the necessary requirements
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.”
CT State Laws Protecting Land Trusts:

- C.G.S. §47-33h (2001) excludes CE’s from Marketable Record Title Act.

- C.G.S § 47-27(b) (2002) bars adverse possession and prescriptive easement claims against non-profit land holding organizations.

- C.G.S §47-42d(2005) requires notice to CE holders of permit applications with state & local, land use agencies & building officials.

- C.G.S. §52-560a (2006) For encroachment on LT land or CEs, court can award restoration or cost of restoration incl. management fees, atty fees, costs, equitable relief & penalty of 5x restoration cost or 5K statutory damages. Attorney General can also enforce.
The Language of Conservation*

• “Conservation Easement” (negative) v. “voluntary land preservation agreements” (positive)

• “Permanent” v. “limits use even after owner passes”

• Explain why CE is better than fee – i.e. more cost effective than buying, protect more land

• Stress protection of natural areas, working farms, wildlife and water quality, while leaving in owners’ hands - NOT “OPEN (unused?) SPACE”

*2004 study and memo by Lori Weigel, John Fairbank and Dave Metz
And above all: “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it’s the only thing that ever has.” Margaret Mead