

Conservation Easements: Options for Preserving Current Land Uses¹

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Conservation easements are cost-effective means for government agencies or non-government conservation organizations to protect land. Instead of purchasing land outright, these agreements allow organizations to purchase the development rights of a property, thereby protecting the target resources and saving money. Conservation easements may be a viable option for landowners wanting to prevent future residential and commercial development of their land, and those who want to reduce their heirs' inheritance tax liability. They often work best for landowners who have a strong connection to their land and want to ensure its protection for many generations. Landowners are encouraged to enter such agreements carefully because they require several rights to be conveyed to the easement grantee and the duration of these agreements is typically perpetual. This publication will describe conservation easements, what is involved in establishing one, some of the tax implications of such agreements, the government and non-government organizations that commonly participate in conservation easements, and important considerations for landowners before entering into such an agreement.

What Is a Conservation Easement?

A conservation easement is a voluntary, legally binding agreement between a landowner and a government agency or non-government conservation organization. The agreement keeps land in natural habitat, agricultural and/

or open space uses. The agreement is customized to meet the landowner's and conservation entity's objectives and, in most cases, is perpetual.

In essence, the landowner sells or donates certain rights to use the land, which typically include the right to develop all or part of his/her land for non-agricultural or non-natural habitat, or non-open space uses to a conservation organization. Current uses, including residential and recreational uses, agriculture, forestry, and ranching, can continue under certain, legally-binding stipulations. The easement will protect qualities of the property such as wildlife habitat, open space, forest management, or aesthetics. Public access to the property is not a requirement to participate in a conservation easement, but the easement grantee will reserve the right to enter the property to monitor compliance with the agreement.

How the Agreement Works

Generally, conservation easements are donations rewarded by certain tax benefits to the landowner. In Florida, perpetual conservation easements may be either donated or sold to an agency or other organization through *less-than-fee payments* to the landowner. If the easement is to be sold, the payment is negotiated between the landowner and conservation entity and may be as much as an amount equal to the difference between the fair market value of the

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land without the easement and fair market value of the land as encumbered by the easement.

For example, Joe and Jolene Landowner have property in Alachua County with planted pines, old pastures, and mixed hardwoods. The family is interested in growing and harvesting pines, hunting, bird watching, and some future forestry and wildlife habitat improvements on the property. They want the property protected from residential and commercial development, and they plan to pass the property on to their children with a decreased tax burden, so they decide to convey a conservation easement. Being close to a growing urban area, the land has a fair market value of \$3,500 per acre. The property appraiser determines that the overall current value of the property with a conservation easement is \$1,500 per acre since no major residential or commercial development can occur on the property at any time in the future. Therefore, the landowner could receive as much as \$2,000 per acre for the easement, and since the placing of the easement generally reduces the estate value of the property, the heirs' estate tax liability should also be reduced.

Legal Stipulations

A conservation easement agreement will require the landowner to convey certain rights to the agency or organization that holds the easement and specifies uses prohibited on the property that will allow the easement to accomplish its intended conservation purposes. The grantor's (landowner's) reserved rights are also specified in the agreement. Examples of these stipulations, from a Florida Division of State Lands Deed of Conservation Easement, are outlined below.

Rights Granted to the Grantee

Some or all of these rights may be conveyed to the grantee (the entity that receives the conservation easement):

1. the right to preserve and protect the conservation values of the property;
2. the right to enter the property at reasonable times in order to monitor compliance with the agreement;
3. the right to prevent any activity on or use of the property that is not consistent with the purpose or provisions of the easement and to require the restoration of areas or features of the property that may be damaged by inconsistent activity or use at the grantor's cost;

4. the right of first refusal to purchase the property in fee if the grantor proposes to sell the property to a third party other than a lineal descendant, and the right to purchase the property from the estate or trust of the grantor (void if easement is a charitable donation for no consideration);
5. the right to be indemnified by grantor for any and all liability, loss, damage, expense, judgment, or claim arising out of any negligence, willful action, or activity resulting from the grantor's use of the property or use of the property by the grantor's agents, guests, lessees, or invitees.

Prohibited Uses

Activities on or use of the property not consistent with the purpose of the easement are prohibited under a conservation easement agreement. The following are some examples of prohibited activities specified in a conservation easement agreement:

1. no soil, trash, liquid or solid waste, hazardous materials, or pollutants defined by federal or Florida law shall be dumped or placed on the property;
2. activities or uses that will be detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat conservation;
3. activities or uses detrimental to the structural integrity or physical appearance of any portions of the property having historical, archaeological or cultural significance;
4. planting of invasive exotic plants listed by the Florida Exotic Pest Plant Council, and the grantor shall control invasive exotic plants on the property;
5. commercial or industrial activity or ingress or egress across or upon the property in conjunction with any commercial or industrial activity, except as may be required for the exercise of the grantor's reserved rights;
6. new construction or placing of buildings, mobile homes, signs, billboards, or other structures on the property;
7. creation of new roads or jeep trails;
8. no more intense agricultural use of the property than currently exists on the property, if any, and no conversion of non-agricultural areas to agricultural use;
9. activities that adversely impact threatened or endangered species;

10. any subdivision of the land.

Grantor's Reserved Rights

Some or all of these rights are reserved to the grantor and the grantor's representatives, heirs, successors, and assigns:

1. the right to observe, maintain, photograph, fish, hunt, introduce and stock native fish or wildlife on the property, to use the property for non-commercial hiking, camping, and horseback riding in compliance with federal, state, and local laws concerning such activities;
2. the right to conduct prescribed burning on the property provided that the grantor obtain and comply with the appropriate authorization from the regulatory agency having jurisdiction over this activity;
3. the right to harvest timber or other forest products in accordance with an approved forest management plan;
4. the right to mortgage the property;
5. the right to contest tax appraisals, assessments, taxes, and other charges on the property;
6. the right to use, maintain, repair, and reconstruct, but not relocate or enlarge, all existing structures, fences, roads, ponds, drainage ditches, and other facilities on the property.

Tax Implications of Conservation Easements

Many factors influence the decision of landowners to consider encumbering development and other rights of property ownership through a conservation easement. Among those are economic and tax implications of either selling or donating conservation easements. Some tax benefits depend upon whether an easement is donated or sold, and some do not. Tax implications generally fall into one of 5 broad categories: income taxes (federal and state), estate taxes (federal and state), and property taxes. Since Florida has neither a state income tax nor a state inheritance tax, we will not explore their implications here as they vary widely from state to state and cannot be generalized.

In general, a landowner who sells a conservation easement to a qualifying organization will have to report proceeds from the sale as either ordinary or capital gains income for tax purposes. Landowners who choose to donate an easement may receive federal income tax and additional federal estate tax benefits. Tax benefits are only allowed for

“qualifying conservation contributions” as defined by the Internal Revenue Code (IRC) Section 170(h).

Donations can also only be made to qualifying conservation organizations. The Internal Revenue Service keeps a list of those organizations. They generally include federal and state natural resource management agencies such as one of the five Water Management Districts in Florida, and IRC Section 501(c)3 nonprofit, tax exempt land trusts. A more complete list of qualifying organizations for Florida residents can be found on the Land Trust Alliance website (www.lta.org).

Federal Income Tax Benefits Extended

Gifts of all or part of a qualified conservation easement provide a charitable income tax deduction. An annual deduction of 50 to 100% of the donor's adjusted gross income can be claimed. If the donor cannot use the whole deduction in the year of the gift, he or she may deduct a portion of a current gift in each of the next fifteen years.

The Pension Protection Act of 2006 increased the tax benefits to landowners donating conservation easements. These incentives make it easier for average Americans, including working family farmers and ranchers, to donate land. The legislation allows:

- a conservation agreement donor to deduct up to 50% of their adjusted gross income in any year;
- qualifying farmers and ranchers to deduct up to 100% of their adjusted gross income; and
- donors can take deductions for their contribution over as many as 16 years.

“Qualified farmer or rancher” is a defined term that means a taxpayer whose gross income from the business of farming (as defined under Section 2032A(e)(5) of the tax code) is greater than 50% of the taxpayer's gross income for the taxable year in which the conservation easement is donated.

For example, the fair market value of a landowner's donated conservation easement is \$500,000 and the terms of the easement assure that the land will remain available for agriculture use. If the landowner qualifies as a farmer and has an adjusted gross income of \$80,000, then the charitable deduction for the year of the transfer is \$80,000 (100% of \$80,000). This leaves \$420,000 (\$500,000 - \$80,000) to carry over for about the next 6 years (5 years x \$80,000/year = \$400,000; in the 6th year, \$20,000 can be deducted). Thus, in this example, the taxpayer will have zero federal

taxable income for six years plus \$20,000 deducted from the seventh year.

These income tax provisions were extended through December 2011. For more on this, see the Land Trust Alliance website at <http://www.landtrustalliance.org/policy/taxincentives>.

Property Tax Benefits

Florida House Bill 7157 went into effect in January 2010 under 196.26 and 193.501, Florida Statutes (F.S.). This law provides property tax exemption for real property dedicated in perpetuity for conservation purposes (form DR-418C) and a current use tax assessment of land used for conservation (form DR-482C). Section 196.26(2), F.S. states that: "Land that is dedicated in perpetuity for conservation purposes and that is used exclusively for conservation purposes is exempt from ad valorem taxation." According to the statute, land that is "dedicated in perpetuity" is "land encumbered by an irrevocable, perpetual conservation easement." The criteria for qualification for conservation assessment are lengthy and available in a Property Tax Oversight Bulletin at: <https://taxlaw.state.fl.us/wordfiles/PTO%20BUL%2009-23.pdf>.

Landowners who meet the criteria and wish to apply for this assessment need to submit the proper application and all supporting documents to their county property appraiser's office. The applications are located on the Department of Revenue website under the "Ad Valorem Tax" subheading. Links to forms: <http://dor.myflorida.com/dor/forms/2009/dr418cfillable.pdf>. <http://dor.myflorida.com/dor/forms/2009/dr482cfillable.pdf>.

Keep in mind that if your property is already receiving favorable tax treatment via an agricultural assessment (or other "current valuation"), a conservation assessment outside of that associated with a perpetual conservation easement may or may not further reduce the property tax. An agricultural assessment is an agricultural production-oriented classification. Land not already in an agricultural classification or some other tax-favorable classification may benefit from a conservation assessment depending upon the post-easement fair market value, the types of encumbrances specified in the conservation easement, future land use options, and other considerations.

Federal Estate Tax Benefits

Federal estate taxes may be significantly reduced through either selling or donating a conservation easement. Additional tax benefits may accrue if the easement is donated.

The most direct benefit results from reductions in fair market value and thus the value of the gross estate and the ultimate estate tax burden.

Additional tax benefits may result when easements qualify as a charitable contribution. Section 508 of the Taxpayer Relief Act of 1997, as amended by the IRS Reform Act of 1998 and the Economic Growth and Tax Reconciliation Act of 2001, allows the exclusion of up to 40% of property value encumbered by a conservation easement from the gross estate value. This is in addition to any reduction in taxable estate value resulting from the easement itself. The gross estate exclusion amount is currently limited to \$500,000. Also, the 40% exclusion is the maximum amount and is on a sliding scale. This amount is reduced if the value of the conservation easement is less than 30% of the unencumbered property value. The 40% rate is reduced by 2% for every 1% the value of the easement is less than 30% of the unencumbered property value.

Participating Organizations

What organizations will purchase a conservation easement? The major state agencies involved with conservation easements in Florida are the: Department of Environmental Protection (DEP) and Water Management Districts. These agencies are particularly interested in buying easements, usually in large blocks, in order to protect watersheds.

Typically, conservation easements are donated to charitable nonprofit land trusts. However, occasionally these organizations may purchase easements for subsequent resale to a government agency, or as an effective leveraging tool to protect more land for less money because fee ownership, possession and many other rights remain with the landowner. A listing of some of these conservation organizations can be found on the Land Trust Alliance website (<http://www.landtrustalliance.org/>).

Concluding Remarks

Since a conservation easement should be customized to meet specific objectives for you and the conservation entity, the agreement should contain some flexibility to allow for desired future uses. Try to anticipate future uses that you or your heirs may want to allow on the property that are consistent with the conservation objectives for the property. For example, John Landowner currently has no plans to harvest or plant pines on his land, but he or his heirs may want to allow those types of activities in the future and this activity is consistent with the conservation objectives for the property. A conservation easement is forever, so

it is important to consider as many desired future uses as possible before finalizing the agreement.

It is also essential that the landowner carefully review the implications of the easement with legal and financial advisors before the final agreement. Also, bear in mind that your property will be subject to periodic visits (usually one scheduled visit per year) by the conservation organization to verify compliance with the agreement.

The following are some important questions to answer before entering a conservation easement agreement:

- What resources do you and the conservation entity want to protect on your property?
- What activities do you and the conservation entity want to prohibit on your land now and in the future?
- What activities do you want continued on your land?
- Are you willing to convey the rights as required in the agreement?
- What other activities, in addition to those taking place currently, might you or your heirs want to do in the future, which are compatible with your and the easement grantee's conservation objectives?

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