

CHAPTER 1

Answers to Common Questions About Easements

Note to easement program administrators: You may use these pages to develop your own fact sheets by tailoring the questions and answers to fit your unique program, locale, and audience.

What is a Conservation Easement?

A conservation easement is a legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property. Each easement's restrictions are tailored to the particular property and to the interests of the individual owner.

To understand the easement concept, think of owning land as holding a bundle of rights. A landowner may sell or give away the whole bundle, or just one or two of those rights. These may include, for example, the right to construct buildings, to subdivide the land, to restrict access, or to harvest timber. To give away certain rights while retaining others, a property owner grants an easement to an appropriate third party.

The specific rights a property owner forgoes when granting a conservation easement are spelled out in each easement document. The owner and the prospective easement holder identify the rights and restrictions on use that are necessary to protect the property—what can and cannot be done to it. The owner then conveys the right to enforce those restrictions to a qualified conservation recipient, such as a public agency, a land trust, or a historic preservation organization.

What is a Historic Preservation Easement? An Agricultural Easement? A Scenic Easement? A Conservation Restriction?

Easements often are called by different names, according to the resource they protect. Easements used to preserve the facade and surroundings of his-

toric structures or historic land areas are called historic preservation easements. When used to preserve an agricultural operation, they are termed agricultural or agricultural preservation easements. When the resources are primarily scenic, easements can bear that name. Another term for a conservation easement is conservation restriction. Whatever they are called, the concept is the same.

Why Grant a Conservation Easement?

People grant conservation easements to protect their land or historic buildings from inappropriate development *while retaining private ownership*. By granting an easement in perpetuity, the owner may be assured that the resource values of his or her property will be protected indefinitely, no matter who the future owners are. Granting an easement can also yield tax savings, as discussed below.

What Kind of Property Can Be Protected by an Easement?

Any property with significant conservation or historic preservation values can be protected by an easement. This includes forests, wetlands, farms and ranches, endangered species habitat, beaches, scenic areas, historic areas, and more. Land conservation and historic preservation professionals can help you evaluate the relative features of your property.

Who Can Grant an Easement? To Whom Can They Grant It?

Any owner of property with conservation or historic resources may grant an easement. If the property belongs to more than one person, all owners must consent to granting an easement. If the property is mortgaged, the owner must obtain an agreement from the lender to subordinate its interests to those of the easement holder so that the easement cannot be extinguished in the event of foreclosure.

If an easement donor wishes to claim tax benefits for the gift, he or she must donate it or sell it for less than fair market value to a public agency or to a conservation or historic preservation organization that qualifies as a public charity under Internal Revenue Code Section 501(c)(3). Most land trusts and historic preservation organizations meet this criterion.

Holding an easement, however, is a great responsibility. A property owner should make sure that the recipient organization has the time and resources to carry out that responsibility. An organization that accepts the donation of an easement typically will ask the owner to make a contribution toward the costs of monitoring the easement in perpetuity or will establish a monitoring fund from other sources.

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How Restrictive is an Easement?

An easement restricts development to the degree that is necessary to protect the significant values of that particular property. Sometimes this totally prohibits construction, sometimes it doesn't.

If the goal is to preserve a pristine natural area, for example, an easement may prohibit all construction, as well as activities that would alter the land's present natural condition. If the goal is to protect farm or ranch land, however, an easement may restrict subdivision and development while allowing for structures and activities necessary for and compatible with the agricultural operation. Even the most restrictive easements typically permit landowners to continue traditional uses of the land.

How Long Does an Easement Last?

An easement can be written so that it lasts forever. This is known as a perpetual easement. Where state law allows, an easement may be written for a specified period of years, and this is known as a term easement. Only gifts of perpetual easements, however, can qualify a donor for income and estate tax benefits. Most recipient conservation and historic preservation organizations accept only perpetual easements.

An easement runs with the land—that is, the original owner and all subsequent owners are bound by the restrictions of the easement. The easement is recorded at the county or town records office so that all future owners and lenders will learn about the restrictions when they obtain title reports.

What Are the Grantee's Responsibilities?

The grantee organization or agency is responsible for enforcing the restrictions that the easement document spells out. To do this, the grantee monitors the property on a regular basis, typically once a year. Grantee representatives visit the restricted property, usually accompanied by the owner. They determine whether the property remains in the condition prescribed by the easement and documented at the time of the grant. The grantee maintains written records of the monitoring visits. The visits also keep the grantee and the property owner in touch.

If a monitoring visit reveals that the easement has been violated, the grantee has the legal right to require the owner to correct the violation and restore the property to its condition prior to the violation.

Must an Easement Allow Public Access?

Landowners who grant conservation easements make their own choice about whether to open their property to the public. Some landowners convey certain public access rights, such as allowing fishing or hiking in specified locations or permitting guided tours once a month. Others do not.

If an income tax deduction is to be claimed, however, some types of ease-

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ments require access. If the easement is given for recreation or educational purposes, public access is required. For scenic easements, much of the property must be visible to the public, but physical access is not necessary. Access generally is not required for easements that protect wildlife or plant habitats or agricultural lands.

For historic preservation easements, either visual or physical access is required, depending on the nature of the property or building to be preserved.

How Can Donating an Easement Reduce a Property Owner's Income Tax?

The donation of a conservation easement is a tax-deductible charitable gift, provided that the easement is perpetual and is donated "exclusively for conservation purposes" to a qualified conservation organization or public agency. Internal Revenue Code Section 170(h) generally defines "conservation purposes" to include the following:

- the preservation of land areas for outdoor recreation by, or the education of, the general public
- the protection of relatively natural habitats of fish, wildlife, or plants, or similar ecosystems
- the preservation of open space—including farmland and forest land—for scenic enjoyment or pursuant to an adopted governmental conservation policy; in either case, such open space preservation must yield a significant public benefit
- the preservation of historically important land areas or buildings.

To determine the value of the easement donation, the owner has the property appraised both at its fair market value without the easement restrictions and at its fair market value with the easement restrictions. The difference between these two appraised values is the easement value. Detailed federal regulations govern these appraisals.

An example: A property has an appraised fair market value of \$100,000. Mrs. Price, the landowner, donates a conservation easement to a local land trust. The easement restrictions reduce the property's market value to \$64,000. Thus, the value of her gift of the easement is \$36,000. Assuming the easement meets the conservation purposes test, Mrs. Price—like any donor of appreciated property—is eligible to deduct an amount equal to 30 percent of her adjusted gross income each year for a total of six years, or until the value of the gift has been used up. If Mrs. Price has an annual adjusted gross income of \$60,000, she can deduct \$18,000 a year ($30\% \times \$60,000$) until she has used up the \$36,000 value. In this case, she will use up the gift in two years ($2 \times \$18,000 = \$36,000$), if her income does not change.

This is just a simple example. Easement donors may qualify for greater tax savings, especially when state income tax deductions are applicable. Potential easement donors should seek legal counsel.

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How Can Granting an Easement Reduce a Property Owner's Estate Tax?

Many heirs to large historic estates and to large tracts of open space—farms and ranches in particular—face monumental estate taxes. Even if the heirs wish to keep their property in the existing condition, the federal estate tax is levied not on the value of the property for its existing use, but on its fair market value, usually the amount a developer or speculator would pay. The resulting estate tax can be so high that the heirs must sell the property to pay the taxes.

A conservation easement, however, often can reduce estate taxes. If the property owner has restricted the property by a perpetual conservation easement before his or her death, the property must be valued in the estate at its restricted value. To the extent that the restricted value is lower than the unrestricted value, the value of the estate will be less, and the estate will thus be subject to a lower estate tax. (Note that if the property owner donates the easement during his or her lifetime, he or she may also realize income tax savings.)

Even if a property owner does not want to restrict the property during his or her lifetime, the owner can still specify in his or her will that a charitable gift of a conservation easement be made to a qualifying organization upon the owner's death. Assuming that the easement is properly structured, the value of the easement gift will be deducted from the estate, reducing the value on which estate taxes are levied. Again, a lower tax results.

Can Granting an Easement Reduce an Owner's Property Tax?

Property tax assessment usually is based on the property's market value, which reflects the property's development potential. If a conservation easement reduces the development potential of the property, it may reduce the level of assessment and the amount of the owner's property taxes.

The actual amount of reduction, if any, depends on many factors. State law and the personal attitudes of local officials and assessors may influence or determine the decision to award property tax relief to easement grantors.