

CHAPTER  
13Model  
Conservation  
Easement and  
Commentary*Thomas S. Barrett*

## Introduction

**T**he model conservation easement is an abstraction. It is not the product of negotiation on specific facts but a studious synthesis of responses by the land conservation community, on diverse facts, to recurring drafting concerns.\* The intention is that it serve as a reliable standard reference on drafting issues. Of course, no one document can hope to serve as a standard for all situations. There is no way, once and for all, to fix the variables that come with context—legal jurisdiction, character of land and resources, productive uses, conservation objectives, motivation, financial terms, degree of governmental involvement, to name the most obvious. The model's function is not to provide a solution to the puzzle each easement transaction presents but to offer an analytical framework for solving the puzzle on its own terms. It is a guide, not a rule; one approach among many.

## The Checklists: A Key to Structure

The emphasis is on structure. As the checklists that follow illustrate, the model is constructed of a succession of overlaying provisions that can be grouped according to the nature of the concerns they address. In its most fundamental form, a conservation easement is a straightforward conveyance, and the short

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\* In the course of preparing the model easement and commentary, the author reviewed over 100 conservation easements, considered responses by some 40 practitioners to a questionnaire on the subject, and consulted directly with more than 20 recognized authorities in this field, including representatives of conservation organizations, governmental agencies, and the private bar.

form, outlined in Checklist II, indicates the essential terms. These provisions are the core of the model and, depending on the circumstances, may be all that is required.

As experience with managing conservation easements has developed over the years, however, the terms of the instrument have evolved. The unilateral conveyance, sufficient in some cases, may fall short in others where bilateral rights and obligations are appropriate. Analogous to what occurred over time in the development of real property leasing law, the conservation easement has begun to take on the characteristics of a contract as well as a conveyance. A conservation easement creates a relationship of shared control over the future of land. The perpetual nature of that relationship, designed as it is to outlast the original parties, suggests the need for a governing document in which predictable points of potential friction are anticipated and provided for and in which behavioral ground rules—for the grantee as well as the grantor—are established. These are contractual considerations, and Checklist III indicates the provisions in the model that are intended to address them.

At the same time, perpetuity counsels flexibility—the need for a mechanism for adapting to the unforeseen, a capacity for stretch. An easement is more than the sum of its restrictions; it is a right to protect certain values. The more drafters focus on the future, which cannot be known, the more emphasis they place on articulating those values in the easement. As critical for an easement's long-term enforceability as its express restrictions, the thinking goes, is the clarity with which its purpose and intent are set out. The provisions that are most indicative of purpose and intent are shown in Checklist IV.

Finally, of course, where deductibility for income or estate tax purposes is an issue, the Internal Revenue Service's detailed requirements must be met. Provisions responsive to the IRS requirements are outlined in Checklist V.

## Drafting to Fit the Facts

The model is not exhaustive. There are bound to be concerns, on some facts, that it does not address. Likewise, some of the concerns it does address may not be an issue in some cases. As for the language chosen, there is no magic to it. Even the IRS, though it does require certain provisions, does not require any particular language. Drafters of legal documents develop their own individual styles, and the model in no way seeks to impose the author's. The shared goal, an elusive one, is formal clarity. Rare is the document that cannot be improved upon in this regard. The hope is that even where the model falls short of the goal, the commitment to pursuing it will be sufficiently apparent to serve as a source of encouragement to others.

Ultimately, the facts determine what should go into an easement. Some terms are more fact-dependent than others, though, and they are the hardest to deal with in a model intended for general application. Recitals of specific conservation values, and the express restrictions and reservations, are inextricable from the facts—a distinction that the model calls attention to by leaving them out. They are dealt with, instead, in the commentary. In an

easement negotiation, the parties, for good reason, are likely to focus more on the express restrictions than any other aspect of the agreement—particularly if they are negotiating an open-space easement that requires a careful balancing of permitted and prohibited uses. Accordingly, the commentary devotes considerable space to the discussion of hypothetical restrictions. It should be understood, however, that there is such a wide disparity of views on how to approach the drafting of these provisions—resulting mostly from the wide divergence of objectives people bring to them—that there is little in the way of real substantive guidance to pass on. As section 16 of the commentary states, the sample restrictions strive for two virtues: balance and coherence. Beyond that—like everything else in the easement, but more so—drafters have to think it all through for themselves, carefully, critically, case by case.

## Trial and Error

People who work in this field are aware that, in terms of the legal development of the concept, they are present at the creation of the conservation easement. State enabling statutes are all of recent vintage and there is no case law to speak of, which makes these—to the satisfaction, no doubt, of those who do not wish us well—“interesting times.” But newness can be a blessing as well as a curse. The opportunity to shape the concept, to give it definition, is an exciting one and drafters should be stimulated by the fact that, in a real sense, the conservation easement is, for now at least, whatever they say it is. There will be mistakes, of course, unavoidably, and as the concept matures and the courts become involved, there will be a welcome narrowing of approaches, and the lines of a “right way” will become clearer.

The process, though, will take time and will involve—day by day, year by year—practitioners learning, by trial and error, what it is an easement can and cannot do. All the while, their understanding of the land and the relationship of people to the land—and through the land, to each other—will be deepening, to the end that future generations may benefit not only from the open spaces they protected but from their hard won knowledge of how—and how not—to go about it. The model conservation easement and commentary are presented to the land conservation community in the hope that, by bringing this solitary exercise in trial and error to light, the author will have contributed in some small way to the winning of that knowledge.

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# Model Conservation Easement

*Note: The boxed numbers inserted in the text of the easement correspond with the subheading numbers in the commentary that follows.*

## DEED OF CONSERVATION EASEMENT [1]

THIS GRANT DEED OF CONSERVATION EASEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by \_\_\_\_\_ and \_\_\_\_\_, husband and wife, having an address at \_\_\_\_\_ (“Grantors”), in favor of \_\_\_\_\_ a nonprofit [state of incorporation] corporation [qualified to do business in (state where property is located)], having an address at \_\_\_\_\_ (“Grantee”). [2]

### WITNESSETH:

WHEREAS, [3] grantors are the sole owners in fee simple of certain real property in \_\_\_\_\_ County, \_\_\_\_\_ [state], more particularly described in Exhibit A attached hereto and incorporated by this reference (the “Property”); [4] and

WHEREAS, the property possesses [e.g., natural, scenic, open space, historical, educational, and/or recreational] values (collectively, “conservation values”) of great importance to Grantors, the people of [county, locale, or region] and the people of the State of \_\_\_\_\_; [5] and

WHEREAS, in particular, \_\_\_\_\_ [describe specific conservation values]; [6] and

WHEREAS, the specific conservation values of the Property are documented in an inventory of relevant features of the Property, dated \_\_\_\_\_, 19\_\_\_\_, \_\_\_\_\_ [on file at the offices of Grantee—or—attached hereto as Exhibit B] and incorporated by this reference (“Baseline Documentation”), which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant; and [7]

WHEREAS, Grantors intend that the conservation values of the Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to [e.g., farming, ranching, or timber production] existing at the time of this grant, that do not significantly impair or interfere with those values; and [8]

WHEREAS, Grantors further intend, as owners of the Property, to convey

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to Grantee the right to preserve and protect the conservation values of the Property in perpetuity; and [9]

WHEREAS, Grantee is a publicly supported, tax-exempt nonprofit organization, qualified under Section 501(c)(3) and 170(h) of the Internal Revenue Code, whose primary purpose is     [e.g., the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, and/or open space condition]    ; and [10]

WHEREAS, Grantee agrees by accepting this grant to honor the intentions of Grantors stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and the generations to come; [11]

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of     [state where property is located]     and in particular     [specific state statutory authority]    , Grantors hereby voluntarily grant and convey to Grantee a conservation easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement?"). [12]

1. Purpose. It is the purpose of this Easement to assure that the Property will be retained forever [predominantly] in its     [e.g., natural, scenic, historic, agricultural, forested, and/or open space]     condition and to prevent any use of the Property that will significantly impair or interfere with the conservation values of the Property. Grantors intend that this Easement will confine the use of the Property to such activities, including, without limitation, those involving     [e.g., farming, ranching, timber production, public recreation or education]    , as are consistent with the purpose of this Easement. [13]

2. Rights of Grantee. To accomplish the purpose of this Easement, the following rights are conveyed to Grantee by this Easement:

(a) To preserve and protect the conservation values of the Property;

(b) To enter upon the Property at reasonable times in order to monitor Grantors' compliance with and otherwise enforce the terms of this Easement; provided that such entry shall be upon prior reasonable notice to Grantors, and Grantee shall not unreasonably interfere with Grantors' use and quiet enjoyment of the Property; and

(c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to paragraph 6. [14]

3. Prohibited Uses. Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited: [15]

[Insert Express Restrictions] [16]

4. Reserved Rights. Grantors reserve to themselves, and to their personal representatives, heirs, successors, and assigns, all rights accruing from their

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ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement. [Without limiting the generality of the foregoing, the following rights are expressly reserved:] <sup>17</sup>

[Insert Express Reservations, if desired] <sup>18</sup>

5. Notice of Intention to Undertake Certain Permitted Actions. The purpose of requiring Grantors to notify Grantee prior to undertaking certain permitted activities, as provided in paragraphs \_\_\_\_\_, is to afford Grantee an opportunity to ensure that the activities in question are designed and carried out in a manner consistent with the purpose of this Easement. Whenever notice is required Grantors shall notify Grantee in writing not less than [e.g., sixty (60)] days prior to the date Grantors intend to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Easement.

5.1 Grantee's Approval. Where Grantee's approval is required, as set forth in paragraphs \_\_\_\_\_, Grantee shall grant or withhold its approval in writing within [e.g., sixty (60)] days of receipt of Grantors' written request therefor. Grantee's approval may be withheld only upon a reasonable determination by Grantee that the action as proposed would be inconsistent with the purpose of this Easement. <sup>19</sup>

6. Grantee's Remedies. If Grantee determines that Grantors are in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantors of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantors fail to cure the violation within [e.g., thirty (30)] days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a [thirty (30)] day period, fail to begin curing such violation within the [thirty (30)] day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement or injury to any conservation values protected by this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Property to the condition that existed prior to any such injury. Without limiting Grantors' liability therefor, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent

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or mitigate significant damage to the conservation values of the Property, Grantee may pursue its remedies under this paragraph without prior notice to Grantors or without waiting for the period provided for cure to expire. Grantee's rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantors agree that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity. [20]

6.1 Costs of Enforcement. Any costs incurred by Grantee in enforcing the terms of this Easement against Grantors, including, without limitation, costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantors' violation of the terms of this Easement shall be borne by Grantors. If Grantors prevail in any action to enforce the terms of this Easement, Grantors' costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantee. [21]

6.2 Grantee's Discretion. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantors shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantors shall impair such right or remedy or be construed as a waiver.

6.3 Waiver of Certain Defenses. Grantors hereby waive any defense of laches, estoppel, or prescription. [22]

6.4 Acts Beyond Grantors' Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury to or change in the Property resulting from causes beyond Grantors' control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantors under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. [23]

7. Access. No right of access by the general public to any portion of the Property is conveyed by this Easement. [24]

8. Costs and Liabilities. Grantors retain all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantors shall keep the Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantors. [25]

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8.1 Taxes. Grantors shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request. [Grantee is authorized but in no event obligated to make or advance any payment of taxes, upon [e.g., three (3)] days prior written notice to Grantors, in accordance with any bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement, or estimate, and the obligation created by such payment shall bear interest until paid by Grantors at the lesser of \_\_\_\_\_ percentage points over the prime rate of interest from time to time charged by [designated bank] or the maximum rate allowed by law.] <sup>26</sup>

8.2 Hold Harmless. Grantors shall hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents, and contractors and the heirs, personal representatives, successors, and assigns of each of them (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' fees, arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, unless due solely to the negligence of any of the Indemnified Parties; (2) the obligations specified in paragraphs 8 and 8.1; and (3) the existence or administration of this Easement. <sup>27</sup>

9. Extinguishment. If circumstances arise in the future such as render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by [state] law at the time, in accordance with paragraph 9.1. Grantee shall use all such proceeds in a manner consistent with the conservation purposes of this grant. <sup>28</sup>

9.1 Proceeds. This Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of paragraph 9, the parties stipulate to have a fair market value determined by multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of the Easement at the time of this grant to the value of the Property, without deduction for the value of the Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the Internal Revenue Code of 1954, as amended.



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For the purposes of this paragraph, the ratio of the value of the Easement to the value of the Property unencumbered by the Easement shall remain constant. [29]

9.2 Condemnation. If the Easement is taken, in whole or in part, by exercise of the power of eminent domain, Grantee shall be entitled to compensation in accordance with applicable law. [30]

10. Assignment. This Easement is transferable, but Grantee may assign its rights and obligations under this Easement only to an organization that is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), and the applicable regulations promulgated thereunder, and authorized to acquire and hold conservation easements under [state statute] (or any successor provision then applicable). As a condition of such transfer, Grantee shall require that the conservation purposes that this grant is intended to advance continue to be carried out. [31]

11. Subsequent Transfers. Grantors agree to incorporate the terms of this Easement in any deed or other legal instrument by which they divest themselves of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantors further agree to give written notice to Grantee of the transfer of any interest at least [e.g., twenty (20)] days prior to the date of such transfer. The failure of Grantors to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way. [32]

12. Estoppel Certificates. Upon request by Grantors, Grantee shall within [e.g., twenty (20)] days execute and deliver to grantors any document, including an estoppel certificate, which certifies Grantors' compliance with any obligation of Grantors contained in this Easement and otherwise evidences the status of this Easement as may be requested by Grantors. [33]

13. Notices. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantors:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To Grantee:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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or to such other address as either party from time to time shall designate by written notice to the other. <sup>34</sup>

14. Recordation. Grantee shall record this instrument in timely fashion in the official records of \_\_\_\_\_ County, \_\_\_\_\_ [state] and may re-record it at any time as may be required to preserve its rights in this Easement. <sup>35</sup>

15. General Provisions.

(a) Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of \_\_\_\_\_ [state] .

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purpose of \_\_\_\_\_ [state statute] . If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. [No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with paragraph \_\_\_\_\_ (see supplementary provisions re: Amendment.)]

(e) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

(f) Joint Obligation. The obligations imposed by this Easement upon Grantors shall be joint and several.

(g) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property.

(h) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(i) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

(j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party

who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling. [36]

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever. [37]

IN WITNESS WHEREOF Grantors and Grantee have set their hands on the day and year first above written.

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\_\_\_\_\_  
Grantors

\_\_\_\_\_  
Grantee

by \_\_\_\_\_

its  [Official Capacity]  [38]

[Acknowledgments]

**SCHEDULE OF EXHIBITS**

- A. Legal Description of Property Subject to Easement
- [B. Baseline Documentation]
- B. or C. Site Descriptions/Map.
- [C. or D. Identification of Prior Mortgage]

**Supplementary Provisions [39]**

(Paragraph numbers indicate relative position in model.)

[5.2] Arbitration. If a dispute arises between the parties concerning the consistency of any proposed use or activity with the purpose of this Easement, and Grantors agree not to proceed with the use or activity pending resolution of the dispute, either party may refer the dispute to arbitration by request made in writing upon the other. Within  [e.g., thirty (30)]  days of the receipt of such