

Estate Planning for Landowners #3

This fact sheet is designed to educate the reader and is not to be considered legal advice. Before making any plans or arrangements or taking other steps regarding your assets, contact competent professional help to advise you as to the particulars relevant to your own special circumstances.

Conservation Restrictions as a Land Protection Tool

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What is a Conservation Restriction?

A conservation restriction is a voluntary agreement in which a landowner limits specified uses (e.g., development) of his or her property while retaining private ownership of the land. The limitations are designed to prevent harm to the features or qualities sought to be protected. It is a legal document restricting future uses of the land. The restriction is signed by the landowner (the restriction donor) and the non-profit entity (often a land trust or a municipal conservation commission), receiving the restriction. The recipient accepts the restriction with the legal responsibility to enforce the terms of the restriction in perpetuity. After the restriction is signed, it is recorded with the town hall or County Registry of Deeds (check your state law) and all future owners of the land are bound by the terms of the restriction.

Why do Property Owners Grant Conservation Restrictions?

Landowners grant conservation restrictions because they want to protect a property's natural and scenic features, while limiting development, but also because they wish to retain ownership of their land and keep it in their family for future generations. By granting a conservation restriction, a landowner can be assured that the property will be protected and cared for forever, regardless of who owns the land in the future. Significant federal income and estate tax benefits, as well as local real estate tax benefits, can result from the granting of such a restriction. The Internal Revenue Service allows a federal income tax deduction if the restriction is perpetual, donated "exclusively for conservation purposes", granted to a qualified conservation organization (or proper government entity) and supported by a "qualified appraisal". The amount of the tax deduction is determined by the value of the conservation restriction.

What Activities Are Allowed on Land Protected by a Restriction?

The terms of a restriction will vary from property to property, depending upon the goals of the landowner (grantor) and the conservation entity (grantee). In some instances, no further development is allowed on the land. In other circumstances, some additional development is allowed, but it is limited. Conservation restrictions may be designed to cover all or only a portion of a property. Every restriction is unique, tailored to a particular landowner's goals and his/her land.

Can the Landowner Still Sell or Give the Property Away?

The landowner continues to own the property after executing a restriction. Therefore, the owner can sell, give or lease the property, as before. However, all future owners must abide by the restriction.

Does the Public Have a Right of Access to Restriction Protected Property?

The public does not automatically have access to property protected by a restriction unless the original landowner who grants the restriction specifically allows such access. Most restriction donors do not wish for, and therefore do not allow, public access to their property.

How Long Does a Restriction Last and Who Upholds It in the Future?

To be eligible for a federal income tax deduction, the easement must be “perpetual”. The restriction holder monitors the property, generally once a year, to assure that the restriction is being upheld. If the restriction has been breached the restriction holder will take whatever steps are necessary to uphold the terms of the restriction, including legal action. Because of this obligation, the restriction holder may request a donor to make a financial contribution to the holder’s endowment fund. This fund ensures long-term monitoring and enforcement of every restriction the holder holds. The contribution to the endowment fund may also be tax deductible.

Who Holds the Conservation Restriction?

To qualify for a tax deduction, the restriction must be donated to the government or a qualifying conservation or historic preservation organization. Many land trusts qualify as a federally recognized public charity under Internal Revenue Code Section 501(c)(3).

Who Owns and Manages Restriction Protected Land?

The landowner retains full rights to control, manage and convey his/her property, subject to the limits of the restriction. The landowner continues to bear all costs and liabilities related to ownership and maintenance of the property. The holder of the restriction monitors the property to ensure compliance with the restriction’s terms, but it has no other management responsibilities and exercises no direct control over other activities on the land.

Does the Restriction Have to Cover All of the Landowner’s Property?

No. Some restrictions cover only a portion of the landowner’s property. Again, it depends on the landowner’s wishes.

What Kind of Land Can be Protected by a Conservation Restriction?

It is possible to place a conservation restriction on different types and sizes of property, dependent upon what the owner wishes to achieve and what his purpose is. The law differs from state to state in terms of what can be protected and under what circumstances it can be protected. In Massachusetts, for example, it is possible to legally place a term restriction on a property for a set period of years. In order to qualify for a federal income or estate tax deduction, however, IRS regulations require that the property

have “significant” conservation values and that the conservation restriction be permanent. This includes forests, wetlands, important wildlife habitat, beaches, scenic areas and much more. Many land trusts have their own criteria for accepting restrictions. At the request of a landowner, a land trust or the proper government agency will evaluate your property to determine whether it meets these criteria. Because a term limit restriction does not satisfy the federal IRS regulations for tax deductions, land trusts and government organizations may be unwilling to hold the restrictions in this type of situation

Who Should “Hold” the Restriction?

The relationship between the present and future owners of the land and the holder of the restriction will last indefinitely. In a sense, the owner and holder of the restriction are co-owners, dependent upon each other for mutual cooperation and assistance in stewarding the land. The organization (governmental body or qualifying conservation organization) should be compatible with the goals of the landowner. And it must be able to carry out the responsibilities imposed by the restriction. Local and regional land trusts are often the typical recipients of conservation restrictions. Some municipal, state and federal agencies also play this role.

It is extremely important to document the condition of the property at the beginning of the restriction. The federal tax code requires this documentation. This documentation is also essential to minimizing the potential for disputes between the property owner and the holder of the restriction.

Steps in Donating or Selling a Conservation Restriction

In order to accomplish the donation or sale of a conservation restriction, the landowner will have to work closely with the organization or government entity that will receive the restriction. This work may include, but is not necessarily limited to: (1) touring the property to evaluate and discuss the planned restriction; (2) getting approval from the restriction holder’s board of directors; (3) consulting with legal and tax counsel; (4) preparing baseline documentation of the property and an environmental inspection report; (5) performing a title search and obtaining mortgage information; (6) obtaining a mortgage subordination from the lender if there is an existing lien; (7) negotiating the restrictions and drafting the document; (8) obtaining a “qualified” appraisal (if wishing to claim a deduction valued at over \$5,000); and (9) signing and recording the final conservation restriction and related documents.