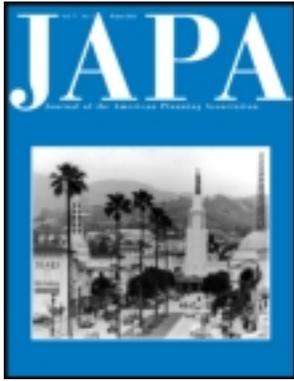


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Conservation Easements: An Analysis of Donated Development Rights

John B. Wright

Donated conservation easements protect over one million acres in the United States from development. Planners, however, are poorly informed about the characteristics and applications of this tool. This article defines conservation easements, traces their history, and explains the easement acquisition process. It also outlines the advantages and disadvantages of donated easements and discusses how planners can best use the technique.

Wright is an assistant professor of geography and planning at New Mexico State University. During the past seventeen years, he has negotiated and designed over sixty conservation easements covering 75,000 acres in the western United States. He is the author of *Rocky Mountain Divide: Selling and Saving the West* (University of Texas Press, 1993).

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Land use planners concerned with growth management, parks and recreation planning, and open space protection have a working knowledge of such tools as purchase of development rights (PDRs) and direct fee simple land acquisitions. Nine states have established PDR programs, which to date have protected over 205,000 acres (Daniels 1991). Federal agencies have bought development rights on 1.3 million acres of wildlife habitat (Wright 1990; Wolf 1981). The land purchase programs of government agencies and national conservation organizations cover vast areas. The Nature Conservancy alone has protected over four million acres in the U.S., mostly through direct acquisitions. The open space green belts and greenways in scores of communities have come into being predominantly through land purchases (Little 1990). For example, Boulder, Colorado, acquired 35,000 acres using \$60 million in local tax revenues (Mantell et al. 1990a).

Planners know very little, however, about another land protection tool—donated development rights—commonly called conservation easements. Conservation easements have been used in the United States to protect one million acres of ecologically and scenically important privately owned land from development (Land Trust Alliance 1991; Wright 1990).

General Overview

Fundamental to the idea of property ownership in the United States is the concept of fee simple title. A landowner is vested with all necessary rights to treat land as a fully marketable commodity. Any of these rights may be separated and legally conveyed in the marketplace. Water, mineral, and timber rights are examples of commonly transferred interests. These interests, along with such things as utility and road easements, are positive since they grant a right to do something.

Conversely, negative easements restrict rights of use. Any portion of the fee simple, such as the right to subdivide, build houses, or cut timber, can be transferred to another party and retired. Environmental protection is the principal application of restrictive or conservation easements (Whyte 1968; Lemire 1979; Hoose 1980; Montana Land Reliance and Land Trust Exchange 1982; Brenneman and Bates 1984; Diehl and Barrett 1988; Lind 1991). This device has also been called scenic easements, agricultural easements, open space easements, historic preservation easements, and conservation restrictions (Barrett and Livermore 1983). When a conservation easement is paid for, it is sometimes called a PDR rather than a purchased easement.

A conservation easement is a less than fee simple interest in land that is voluntarily donated or sold by a landowner to a unit of government or an IRS-recognized, nonprofit conservation organization for the purpose of protecting significant open space, recreation, ecological, agricultural, or historic resources (Brenneman 1967; Barrett and Livermore 1983; Lind 1991). Cities, counties,

federal land management agencies, national conservation organizations, and local land trusts are the most common easement receivers. Most easements are granted in perpetuity, although term agreements exist. Land use restrictions are negotiated between the property owner and easement receiver (grantee) based on an analysis of the property and on careful consideration of the landowner's needs. The conveyed easement serves as a jointly held and legally binding plan for how a property will be utilized.

Granting a conservation easement deed results in a legal division of ownership (Barrett and Livermore 1983). Therefore, unlike police power measures, which focus solely on regulating land use, easements also reconfigure types of land tenure. The receiver of an easement "owns" specific land use rights, which, if exercised, would damage the ecological health or beauty of a property. The easement holder can never use these rights but must instead monitor the land to assure that the agreement has been upheld. Violations that cannot be corrected voluntarily are resolved in court (Lind 1991).

Each easement requires its own careful design (Diehl and Barrett 1988). Land uses such as residential and recreational housing development, commercial and industrial uses, clearcutting of forests, and overgrazing are commonly prohibited. The control of other land use practices can require subtle easement language. Depending on the purpose of the project, an easement may be extremely complex or restrict just one land use.

The donation of a perpetual conservation easement to a qualified receiver, such as a county or land trust, is considered a tax-deductible charitable conveyance under federal law and the IRS codes (Small 1989; Tax Treatment Extension Act of 1980). Easements granted for a limited term are not tax deductible. For income, estate, and other tax deduction purposes, the gift of a permanent easement is similar to giving a cash donation to a church or the United Way. The amount of tax benefit is determined by comparing the appraised value of the land before and after the easement donation (Gunning 1963). The difference equals the value of the gift (Small 1979).

Grantors of conservation easements continue to hold title and pay property taxes. However, if the subdivision rights have been removed, the land can never be taxed as residential land. The owner may freely sell the property for whatever price it will bring on the open market. Since easements "run with the land," new owners must comply with the restrictions. Except in rare cases, conservation easements do not require the granting of public access.

History of Conservation Easements and PDRs

Donations and purchases of conservation easements have occurred for more than a century in the United States (Abbott 1982). Widespread use of purchased easements (PDRs) began in the 1930s with federal efforts to protect scenic open space next to the Blue Ridge and Natchez Trace parkways (Barrett and Livermore 1983).

The State of Wisconsin followed suit along the Great River Road in the 1950s. In the 1960s, the National Park Service used purchased easements to preserve the landscapes near historical landmarks such as Mount Vernon and outdoor playgrounds like Idaho's Sawtooth National Recreation Area.

Purchased easements have also been widely used to protect ecological elements of the landscape. Since the 1950s, the U.S. Fish and Wildlife Service has acquired easements on 1.3 million acres to prevent wetlands from being drained and filled (U.S. Comptroller General 1979; Wright 1993). California's Department of Parks and Recreation has used the tool since 1933 to safeguard ecologically sensitive coastal lands adjacent to such preserves as Pfeiffer-Big Sur State Park (Sutte and Cunningham 1968).

Nine states have established purchase of development rights programs, which have conserved over 205,000 acres at a cost of \$400 million (Daniels 1991). Maryland (80,000 acres protected), Massachusetts (28,000 acres), and Connecticut (17,000 acres) lead the way. In 1988, California voters approved a \$776 million bond to buy conservation easements on agricultural and open space lands (*Christian Science Monitor* 1990). In 1990, Floridians funded a \$3.2 billion bond (The Conservation Fund 1990). A related technique—transference of development rights (TDRs)—was pioneered during the protection of the New Jersey Pinelands and has now been applied by some sixty communities (Roddewig and Ingrahm 1987). However, this technique, which transfers development rights from environmentally sensitive areas to highly developable lands, has protected only about 35,000 acres, two-thirds of this in Montgomery County, Maryland (Mantell et al. 1990a).

The legal basis for donated easements initially came from common law provisions related to the acquisition of rights-of-way (Powell 1979). The first application was in Boston's program to save The Fens from development in the 1890s, but activity soon stalled (Abbott 1982). In recent years, the use of donated conservation easements has risen dramatically. The tool has been most effectively employed by local land trusts and national organizations such as The Nature Conservancy, the Trust for Public Land, and the American Farmland Trust (Wright 1992; Stokes et al. 1989). America's 889 local land trusts have protected a total of 2.7 million acres of private land from development (Land Trust Alliance 1991). Trusts have received donated easements on 450,000 acres and own 440,000 acres. The remaining 1.8 million acres has been secured through cooperative projects with other groups or by transferring management to public agencies. National organizations have fared even better. The Nature Conservancy alone has protected over 500,000 acres through donated easements (Burnham 1986).

Since 54 percent of all local trusts have budgets under \$10,000, these small groups depend on federal tax benefits alone to compensate easement donors financially (Land Trust Alliance 1991). Land acquisitions and purchased conservation easements are more often used by

the 124 trusts (23 percent of the total) with operating budgets in excess of \$100,000 and professional staffs trained in fundraising. Some local government planning and open space programs have successfully negotiated the donation of easements to implement comprehensive, park, and open space plans, but because of little staff training and experience, such cases are unusual (Sargent et al. 1991; Platt 1991; Mantell et al. 1990b; Lapping, Daniels, and Keller 1989; Brower and Carol 1987; Collins and Russell 1988).

The Conservation Easement Process

Whether in a government or land trust setting, the completion of a donated conservation easement involves ten basic steps (see Table 1). While these steps are presented in their most logical order, events often dictate a different sequence (Diehl and Barrett 1988; Lind 1991).

Step 1: Initial Meeting with Landowner

The landowner and personnel from the trust or agency tour the property. This meeting clarifies the potential qualifications of the land for easement protection and the willingness of the landowner to proceed with an easement donation (Milne 1977).

Step 2: Landowner Consults Advisers

The landowner is advised to discuss options with personal legal and financial advisers. All such expenses are fully tax deductible should the easement be conveyed (Small 1989). Lawyers and accountants are usually not aware of conservation easements and often react negatively to the concept. When this occurs, the landowner can be given the names of advisers familiar with the process. It is best to first reach an understanding of basic easement restrictions with the landowner, then let the attorneys craft the legal documents that reflect this understanding.

Step 3: Title Information

The landowner acquires an up-to-date title report. If less than the entire ownership is proposed for an easement, a survey must be completed to divide the parcel. This has its dangers since the landowner may later subdivide and develop the adjacent unrestricted tract. If the

developed parcel appreciates in value because of the easement, the IRS may recalculate the landowner's allowable tax deduction and initiate an audit. If the property is subject to an existing mortgage, a mortgage subordination agreement must be arranged. A subordination agreement is a legal contract with the mortgage carrier assuring that in the event of a foreclosure the easement will not be extinguished.

Step 4: Baseline Study and Qualification

A parcel of land must qualify or the donor cannot claim federal tax deductions from the easement gift. The following are the four qualification categories of "conservation purposes," which must provide "significant public benefit" as described in the Tax Treatment Extension Act of 1980 (P.L. 96-541), a Senate Finance Committee report (Senate Report 1980), and the Internal Revenue Code (Internal Revenue Service 1992; Barrett and Livermore 1983; Diehl and Barrett 1988).

- Recreation: "The preservation of land areas for outdoor recreation by, or the education of, the general public" (Internal Revenue Service 1992). This section is rarely used since few landowners are willing to grant the public perpetual access for recreational activities.
- Ecological: "The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems" (Internal Revenue Service 1992). If threatened and endangered species are found on a property, this nearly assures qualification. Properties of good quality that contribute to the ecological viability of parks, reserves, or the regional environment can also qualify.
- Open Space: "The preservation of open space (including farmland and forest land) where such preservation is: (i) for the scenic enjoyment of the general public, or (ii) pursuant to a clearly delineated Federal, State, or local government conservation policy, and will yield a significant public benefit" (Internal Revenue Service 1992). This is the most widely used and complex of all categories. For scenic open space, visual but not physical access is required from a road, waterway, or adjacent park. The aesthetic criteria include such subjective concepts as the "degree of contrast and variety" and "relief from urban closeness" (Internal Revenue Service 1992). Nonscenic lands, such as aquifers, airport noise buffers, farmland, and other areas deemed important pursuant to a "clearly delineated governmental policy," also qualify. A government policy can extend to any type of land targeted in a comprehensive plan.
- Historic: "The preservation of a historically important land area or a certified historic structure" (Internal Revenue Service 1992). Lands that contribute to the integrity of a historic site such as a Civil War battlefield or a structure on the National Register of Historic Places would qualify. The records of the state Historic Preservation Office help in assessing a property. Historic facade easements on buildings within redevelop-

TABLE 1: Steps in the conservation easement process

1. Initial meeting with landowner
2. Landowner consults advisers
3. Title information
4. Baseline study and qualification
5. Negotiate easement restrictions
6. Easement appraisal—tax benefits
7. Notify local planning board
8. Easement finalized
9. Easement deed filed
10. Stewardship—monitoring and enforcement

opment areas are the most common application within this category.

Each land trust or government agency has its own goals related to land protection. While a conservation easement needs to fulfill only one of the preceding four criteria, the qualification process must clearly identify *all* values found on a property. The federal standard is not met if the contribution, in accomplishing one conservation purpose, allows land use rights to remain that would destroy other significant resources of public interest.

Qualification is best achieved through the systematic assembly of baseline data on the characteristics and condition of the property. Field work often includes the creation of vegetation and soils maps, wildlife observations, inventories of existing structures and improvements, and the establishment of permanent, easily relocated photo points. The design of the easement restrictions flows logically from this broad-based understanding of the property's features. The baseline report should be clearly written to assure that future monitoring of the land for violations of easement terms is easily accomplished.

Step 5: Negotiate Easement Restrictions

Creating a viable easement is the central goal of the entire process (Barrett and Livermore 1983). Negotiation involves compromise, yet each side may have certain bottom line requirements. Landowners often want to retain the right to build one or two additional houses near existing dwellings. Easement receivers typically want to prohibit all future subdivision and development. Yet if the new structures can be located in areas that the baseline report has not "red-flagged," then the obstacle can be overcome. Negotiations can lead to dozens of similar mutually satisfying agreements (Lind 1991).

Easement restrictions usually address basic types of land use and avoid everyday land management issues. In time, agricultural practices and recreation use are likely to change. Because the conservation easement document is permanent, the following land use categories must be addressed with systematic care: agriculture, residential use and subdivision, commercial and industrial use, mineral development, and recreational use.

Good easement negotiations eliminate obviously destructive land use options, anticipate future conflicts, and craft restrictions that are clear, concise, and unambiguous. The more complex the terms become, the more difficult the easement is to acquire, monitor, and enforce. If an extremely complex set of restrictions is needed to properly protect the land, a direct purchase may be more appropriate. If a mutually acceptable set of easement restrictions can be worked out, a draft conservation easement deed is prepared.

Step 6: Easement Appraisal

The landowner or the receiving agency hires an independent, certified land appraiser to determine the monetary value of the land use rights to be donated (Land Trust Alliance and the National Trust for Historic Pres-

ervation 1984; Hembrick 1981). Generally the more rights transferred, the greater the potential tax benefits to the landowner (Browne and Van Dorn 1975). However, in cases where there is little market for an isolated parcel, a conservation easement will provide only minimal tax savings.

Each project carries its own tax implications. There are four general aspects of potential tax savings related to conservation easement donations (Small 1989):

- Federal and state income taxes: Owners may deduct the full fair market value of a perpetually conveyed conservation easement. The deduction in any tax year cannot exceed 30 percent of the taxpayer's adjusted gross income. Corporations are limited to deductions of 5 percent of their taxable income per year. If the value of the gift exceeds these limits, the excess may be carried forward for up to five additional years. Easement values can range from 10 percent to 90 percent of the full market price depending on development pressures.
- Capital gains taxes: A landowner can donate an easement over the property prior to selling it. This not only assures that the next owner will use the land responsibly, it provides the easement donor some shelter from capital gains taxes derived from the sale.
- Property taxes: Property cannot be taxed as residential, commercial, or industrial land if those rights are severed from a landowner's title. In states where property taxes are calculated on the basis of zoning or potential use rather than existing use, an easement may provide significant tax savings.
- Estate taxes: A conservation easement reduces the value of an estate that is subject to taxation. These taxes come into force at a rate of 37 percent on estates worth over \$600,000. This rate rises to 55 percent on estates over \$1 million. With the tremendous appreciation in real estate prices in recent years, many cash-poor, elderly landowners now hold extremely valuable property. Easements may be one way to keep the land in the family without selling off large tracts to pay estate taxes (Small 1988).

Step 7: Notify Local Planning Board

The enabling legislation in some states requires groups receiving conservation easements to notify the local planning authority when a project is about to close (Knight and Dye 1981). However, since easements are a free market transaction, the approval of the planning board or governing body is not required. The most effective land trust easement programs are functionally allied with local comprehensive planning goals and landscape conservation strategies.

Step 8: Easement Finalized

The final conservation easement deed is prepared. A back-up grantee may be designated to receive the easement should the original grantee organization cease to exist (Daugherty 1978).

Step 9: Easement Deed Filed

The deed of conservation easement is recorded as a perpetually binding legal document in the local clerk and recorder's office. The baseline report is also filed as a record of the condition of the property at the time of conveyance. Tax benefits begin.

Step 10: Stewardship

The landowner and easement receiver share land stewardship responsibility. The individual who granted the easement and all subsequent owners are legally bound to honor the arrangement. The land trust or government agency should monitor the land at least once each year for violations. Failure to monitor is viewed by the courts as an abandonment of the easement (Witkin 1973). Should there occur a violation of the easement restrictions, negotiations are begun to correct the problem. If negotiations fail, then the easement holder takes the landowner to court for breach of contract. Such cases are extremely rare due to the youth of most easements, the landowner's commitment to the environment, and the stiff penalties for violations (Lind 1991). Landowners found guilty are required to eliminate any offending structures and return the property to its former condition (Diehl and Barrett 1988).

Easements can later be vacated if, through no fault of the landowner, the original purpose of the easement can no longer be met (Powell 1979). For example, if a parcel set aside specifically as big game winter range becomes surrounded by residential dwellings on adjacent lands, the easement holder and landowner can jointly petition the district court to dissolve the easement. Conservation easements do not block eminent domain actions.

Evaluating Conservation Easements

Table 2 outlines the advantages and disadvantages of conservation easements in land use planning efforts (Wright 1992). The voluntary, compensating nature of the device renders it very politically acceptable and effective. Yet its greater use is hindered by two factors: Many landowners have no need for tax shelters and they claim that even if they did they would not grant an easement. These are not fatal flaws. A conservation easement is a highly flexible and creative tool whose proper application requires excellent negotiation and design skills. Land trust activities reveal that initially reticent landowners can be convinced to grant easements if approached with sensitivity by well-trained negotiators (Little 1992; Land Trust Alliance 1991; Mantell et al. 1990a; Brenneman and Bates 1984). If land use planners received proper technical training and negotiation experience, the implementation of easements could expand significantly. The training process, however, requires time and money, which many planning programs have in short supply. In all cases, conservation easements should not be seen as a no-growth mechanism, as a substitute for traditional forms of land use regulation, or as a replacement for land purchases. Planners can best use

TABLE 2: Evaluating donated conservation easements

Advantages	Disadvantages
Voluntary: acceptable compared with government regulations	Voluntary: landowner can choose not to donate
Financial compensation: federal income, estate, capital gains tax relief for donor	Financial compensation: vulnerable to changes in tax laws, many landowners have no tax shelter needs
Creative technique: flexible designs possible	Complex: long learning period for proper use
Negotiation-based	Training needed in negotiation skills
Permanence: perpetual easements	Permanence: perpetual monitoring and enforcement responsibility and expense
Nonbureaucratic application mostly by land trusts	Lack of coordination of land trust efforts with local comprehensive plans
Open space protection as primary purpose	Possible obstruction of needed development
Record: 1,000,000 acres under donated easements	Record: not widely used in some regions of the U.S.

the tool selectively to protect the scenic and ecological integrity of high quality, sustainably inhabited landscapes.

Unlike regulations, conservation easements are a permanent mechanism of land use control, which eliminates the need to address repeatedly development issues on the same parcel. The tool binds the easement receiver, however, to a perpetual and potentially expensive monitoring and enforcement responsibility. Easement holders must be financially prepared to prosecute landowners who violate land use restrictions.

Most easements have been completed by land trusts and national conservation organizations with the single mission of protecting landscapes. In too many cases these projects have not been coordinated with local comprehensive plans (Lapping, Daniels, and Keller 1989). Planners should avoid negotiating easements that may prevent building in areas served by expensive infrastructure and zoned for development (Lemire 1979). Planners must carefully select the properties appropriate for protection. The best application of the tool requires the careful coordination of voluntary landscape conservation efforts with regulatory schemes and specific comprehensive plan objectives (Wright 1993; Mantell et al. 1990b; Little 1990; Lapping, Daniels, and Keller 1989; Sargent et al. 1991; Collins and Russell 1988).

Americans are concerned with the continuing development of formerly open landscapes. The rapid growth in the use of donated conservation easements by land trusts and national groups presents the planning profession with an exciting opportunity to integrate compen-

satory and regulatory methods of land use control. Planners are urged to become better informed about this practical mechanism to be able to creatively and effectively apply it to appropriate aspects of the problem of overdevelopment in the United States.

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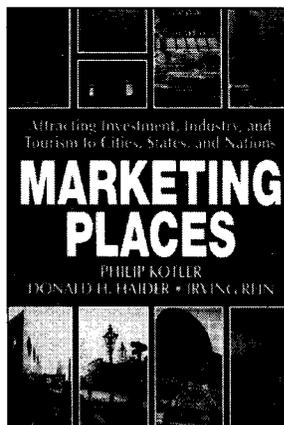
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