

DRAFTING CONSERVATION EASEMENTS

By

Jessica E. Jay, Esq.
CONSERVATION LAW, P.C.

52 Meadowlark Drive
Evergreen, CO 80439

Phone: 303-674-3709

Fax: 303-674-3715

Email: conservationlaw@msn.com

Website: www.conservationlaw.org

I. Drafting Conservation Easements

Drafting the conservation easement influences everything about the protected property after the easement's grant: it guides the landowner's use of the protected property, it guides Land Trust's monitoring and stewardship of the property, and it guides Land Trust's enforcement of the conservation easement against the original landowner and all future landowners, forever. Land Trust's policies will complement drafting, stewardship, and enforcement of the conservation easements it holds, but details and requirements specific to that property achieved through the easement's drafting are contained in the final, recorded deed of conservation easement. The challenge of drafting conservation easements lies in creating documents that endure and are enforceable for perpetuity, and this requires creating both flexibility and fortitude in the document.

*Two Principles/Questions should guide ALL conservation easement drafting:

- (1) What are the Conservation Purposes/Values of THIS conservation easement? and
- (2) How are the Conservation Purposes/Values connected to/impacted by permitted and prohibited uses and all other provisions of the conservation easement?

A. What Are the Conservation Purposes/Values of THIS Conservation Easement: Determining/Defining Conservation Purposes/Values of a Specific Conservation Easement

- Law: guides and provides our framework for determining/defining conservation values and purposes
- Baseline Inventory: can show all of a property's qualities and characteristics, some of which may be defined and identified as conservation values/purposes in the conservation easement; landowners may seek less breadth than the baseline inventory, or more clarity as to specific conservation values, which can and should be accomplished through the easement's drafting (see below).
- Landowner/Land Trust: together decide what aspects of the property are worthy of protection in the public's interest for perpetuity, using as parameters the qualifying law for tax benefits and the baseline report, together with Land Trust and landowner's observations about the property.

LAW:

- **If CE is to Qualify for a Federal Income Tax Deduction: Internal Revenue Code/ Treasury Regulations:**
Qualifying for Income Tax Deduction. (Internal Revenue Code §170(h) (26 USC §170) and Treasury Regulations §1.170A-14 (26 CFR 1.170A-14))
 - a. A “**qualified conservation contribution**” satisfies the Internal Revenue Code requirements for a charitable contribution and income tax deduction. A “qualified conservation contribution” is a:
 - i. “**Qualified real property interest**”,
 - ii. Donated to a “**qualified conservation organization**”,
 - iii. For “**conservation purposes**”. (26 USC §170(h)(1))
 - b. A “**qualified real property interest**” is an “**easement or other interest** in real property that under state law has attributes similar to an easement”. (26 USC §170(h)(2))
 - c. A “**qualified conservation organization**” is either a:
 - i. A qualified, tax-exempt **501(c)(3)** charitable organization, which must generally be in the land conservation field or have a mission of land conservation, or
 - ii. A **governmental entity** (26 USC §170(h)(3)), and

- iii. With the **resources** and **commitment** to protect the conservation values of the gift in perpetuity.
- d. “**Conservation purposes**” include the following:
 - i. The preservation of land for **outdoor recreation or education** for substantial and regular use for the public;
 - ii. The protection of the **natural habitat** of fish, wildlife or plants;
 - iii. The preservation of **open space, including farmland and forestland**, where such preservation is for the scenic enjoyment of the general public or is pursuant to a clearly delineated governmental conservation policy and will yield a significant public benefit; and
 - iv. The preservation of **historically important land** or a certified historic **structure**. (26 USC §170(h)(4))
- e. The Easement’s conservation purpose(s) must be protected in **perpetuity**. (26 USC §170(h)(5)). Protected in perpetuity according to the Code and Regulations requires several factors:
 - i. **No surface mining** on the easement property is permitted.
 - ii. **Mortgage** holders must subordinate to the right of the easement holder to enforce the terms of the conservation easement. (26 CFR §1.170A-14(g))
 - iii. **Documentation** of the conservation easement sufficient to establish the condition of the property at the time of the gift is required, usually in the form of a baseline inventory. (26 CFR §1.170A-14(g))
 - iv. **Extinguishment and proceeds** from sale or conversion if the easement is terminated. If subsequent unexpected changes in the conditions surrounding the property subject to easement make impossible or impractical the continued use of the property for conservation purposes, the easement may be extinguished by judicial proceeding. Holder is entitled to proceeds in proportion to the easement’s value. (26 CFR §1.170A-14(g))

- **If CE is to Qualify in Colorado: Colorado Easement Enabling Act:**

Qualifying Conservation Easement Donation: A fully transferable interest in real property interest that is a conservation easement in gross. (CRS §38-30.5-101 *et seq.*)

Purpose: Maintaining the land predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value. (CRS §38-30.5-102)

- **If CE is to Qualify for Colorado Conservation Easement Tax Credit:**

Credit against income tax for Colorado taxpayers who donate conservation easements. (CRS §39-22-522). A credit is generated from the donation of a **single** perpetual conservation **easement** in gross which must be a **qualified conservation contribution** per 26 USC §170(h) (see above).

B. How Are the Conservation Purposes/Values Connected to/Impacted by Permitted and Prohibited Uses, and Other Provisions of the Conservation Easement?

- Draft each easement specific to that property and its defined conservation values;

- Adapt from the model easement options and alternatives appropriate for the specific conservation values and characteristics of that property;
- Do not regulate uses just because you can; make sure all permitted and prohibited uses have a nexus to the property's defined conservation values, and remember that each use you regulate carries with it a monitoring and enforcement responsibility, forever, and that those specific uses are the only ones you monitor for and enforce;
- Be objective in drafting for the public's benefit, and not subjective as to private benefits or personal opinions by always substantiating the nexus between the uses and purposes;
- Do not over-regulate where you do not need to, or where you may be able to rely on someone else who already does;
- Create flexibility and fortitude without impairing protected conservation values or your ability to enforce the conservation easement.

1. Draft each easement specific to that property and its defined conservation values (Do not regulate uses just because you can; make sure all permitted and prohibited uses have a nexus to the property's protected conservation values):

- Rely on the **model easement** as a starting point for your draft, but tailor each easement to the specific conservation values and purposes protected by that conservation easement; do not be afraid to modify, remove, or add certain provisions if they do or do not apply to that specific property or its protected values; the model easement should contain options and alternative language for different protected conservation values and drafting prompts to consider such alternatives based on the different values protected and the state of the land—*eg*: if the minerals are partially owned by the landowner, the mineral section should refer to a mineral remoteness inquiry and should anticipate both assembly and further severance of these rights, and address control and lack thereof over the surface impacts of any exploration or extraction by mineral owners;
- Consider the purpose and conservation values first and then draft the permitted and prohibited uses:
 - If the purpose and conservation value of the easement is **wildlife habitat protection ONLY** and the property is beautiful, but not visually accessible to the public, certain prohibited uses may not apply and ought not to be taken on by Land Trust as a monitoring and enforcement burden when there is no nexus to the purpose or defined conservation values—*eg*: color/materials of permitted buildings, which do not matter to the wildlife; use of alternative energy resources anywhere on the property provided they are not inconsistent with the wildlife habitat protection; by the same token, certain uses ought to be controlled *because* of the nexus between the use and the conservation value—*eg*: no mowing, digging, excavation, etc. in wetlands shown on the map/Exhibit B;
 - If the purpose and conservation values of the easement are **scenic open space pursuant to clearly delineated policies providing significant public benefit ONLY**, certain prohibited uses may not apply and ought not to be taken on by Land Trust as a monitoring and enforcement burden when there is no nexus to the purpose or defined conservation values—*eg*: wildlife-friendly fencing; by the same token, certain uses ought to be controlled *because* of the nexus between the use and the conservation value—*eg*: earth tone paint colors/exterior, non-reflective rooftops, alternative energy resources out of view or camouflaged, etc. *as long as the buildings/structures are visible to the public*;

- If the purpose and conservation values of the easement are **scenic, agricultural open space pursuant to clearly delineated policies providing significant public benefit, and wildlife habitat** BOTH, these purposes may need to be prioritized to show which trumps the other if they should come into conflict—*eg*: the primary purpose of the easement is for the continuation of the property’s agriculture use; a secondary purpose is the protection of wildlife habitat, with uses permitted to support the ag use of the property even if they conflict with some of the habitat protection, such as mowing, haying, irrigating, grazing, plowing, sowing, etc. If endangered or threatened species’ habitat are a concern, rely on the Endangered Species Act to protect these species and their habitat, and include a reference to the same if the prioritization is a concern; by the same token, certain uses ought to be controlled because of the nexus between the use and the conservation values—*eg*: structures to be built in locations outside of the public’s view, or regulated as to height/size/color; structures for ag and residential use to be built in a building envelope, *but unless visible to the public*, buildings not necessarily regulated as to size, color, height, etc. and rely instead on local/county building codes and requirements;
- **ALL** activities should be considered in light of their impact on conservation values both in Land Trust’s policies and in the conservation easement—*eg*: **notice** for activities with little to no impact on conservation values, and to adjust exhibits, **approval** for activities that may or will have an impact on conservation values or where there is a question as to impact; **enforcement** of violations with major and medium negative impacts to conservation values, letters of notice/**education** for violations with minor negative, no, or positive impacts to conservation values (such as not providing the proper amount of notice before permitted building).
- Ensure that the specific uses and activities you regulate in the easement are those that you specifically monitor for and enforce to protect; the specific easement/language must be considered during monitoring visits, and consulted prior to any enforcement action, not just general principles or beliefs about what should be protected on the property.

2. Be objective, not subjective in drafting for specific conservation values and public benefit:

- As much as a particular use or activity may bother or offend you personally, remember the use or activity is to be considered **objectively** in light of the property’s defined conservation values and the overall public benefit of the property’s protection, and not **subjectively** in light of your own disagreement with the use or activity—*eg*: you may be philosophically opposed to hunting and fishing, or the slaughtering of animals raised for food, or you may believe that all publicly funded or subsidized conservation easements should come with public access, but if these uses/activities are not inconsistent with the protection of the property’s defined conservation values, or, in fact, support the easement’s purpose or defined conservation values, they can be permitted at the least, and possibly justified as a public benefit at the most;
- Do not use subjective terms or terms you think you know the meaning of, but which may not have universally held definitions as adjectives or to modify uses—*eg*: “minor”, “major”, “low”, “high”, “small”, “large”, “promptly”, “shortly”, “reasonably”* (*which popular modifier is in the eye of the beholder, *ie*, the judge or jury), etc. Instead, quantify a use’s impact to the property and conservation values as a defined amount or area—*eg*: “gravel excavation and restoration and reclamation of any area affected by such activities shall not exceed one-half acre at any given time, and shall be restored and reclaimed within 45 days of disturbance”. If there is any question as to a term’s meaning, provide a

definition—*eg*: “‘footprint’ means the area of the ground upon which a foundation or the base of a building is set or sits”, or “‘floor area’ is defined as that total square footage within four walls of an enclosed building, and shall exclude basements, decks, and patios”, or “‘unenclosed structure’ shall mean a structure with three or fewer walls”;

- Do not be afraid to recognize and edit out a “**who cares?**” aspect of the easement—*eg*: alternative energy resources are permitted to be used on the property, but limited to use on the property, for and by the property owners only—ask yourself: “does sale of excess energy to the grid impact the conservation values” or is that a “who cares?” moment because it does NOT impact the conservation values, and furthermore, if the use is limited as to scale or visual impacts for scenic easements or sensitive habitats, and/or Land Trust retains approval of location or scale, what difference does it make if any excess energy is sold by to an electric company? BUT, if it does matter and it does impact the conservation values, explore how Land Trust will monitor and enforce for whether all energy is used solely on the property, or sold elsewhere (ask to review landowners’ Excel Energy bills?).

3. Do not over-regulate where you do not need to, or where someone else already does:

- Where a/the **County** regulates building type, height, use, density, materials, fire mitigation, access, etc., or where the **Division of Wildlife** regulates as to fencing, hunting, fishing, etc., consider deferring to these governing entities and their standards so as to mitigate some of this monitoring and enforcement burden for Land Trust in cases where less regulation by Land Trust is appropriate considering the conservation values—*eg*: where a property’s conservation values include scenic qualities, but the permitted structures or building envelopes are not visible to the public, state that building within the envelope may not exceed county standards as to type of building, number, density, use, height, fire mitigation, and access, unless any of these issues is related directly to a conservation value, such as for habitat protection or scenic access;
- Where a **homeowners’ association** will be in place, Land Trust can defer to this organization to control specifics of neighborhood/owner compliance—*eg*: paint colors, dogs on leashes, towels on railings, driveway access, fire mitigation etc. with Land Trust potentially retaining a separate, elective enforcement right should the HOA fail to enforce, unless some of these issues are directly connected to the conservation values, such as paint color for structures within view of the public for scenic conservation values, or loose dogs in sensitive habitats for habitat protection conservation values;
- Relying on other governing entities and their standards reduces Land Trust’s monitoring and enforcement burden in cases where conservation values are not impacted, and allows Land Trust to focus on monitoring and enforcing for uses that do impact conservation values.

4. Create flexibility and fortitude without impairing protected conservation values or your ability to protect them through enforcement.

- Build flexible documents by retaining **prior approval** of any/all known or unknown uses/activities that may negatively impact conservation values; **discretionary approval** of uses that may change in terms of impact over time, from the time of the grant; and by deferring specific and/or changing, reviewable management issues to **management plans** that can be easily altered, adjusted, and updated over time; remember we did not used to

draft for cell phone towers and now we are being asked to draft for emerging carbon markets!

- Consider requests for **amendment** as to who is benefitted by the request, the impacts of the proposed amendment on the conservation values and whether there is a net benefit or neutral impact to conservation values;
- Continue to set a judicially approved and high bar for **termination** with the possibility of using the *cy pres* doctrine to substitute for conservation values and purposes if the original purposes and values cease to exist, in order to continue the easement's existence; continue to emphasize that changed conditions surrounding the property are not justification for the easement's termination, only the total loss of all conservation values may justify termination, and even then, allow for substitution of new purposes for the public's benefit instead;
- **Retain** Land Trust's **rights** consistent with protection and restoration of defined conservation values for **access, enforcement, restoration, and damages**; rely on enabling act language for enforcement and damages; and consider realistic timeframes for both Land Trust and the landowner for access, notice, approval, mediation, and restoration.

[REGARDING APPROVAL AND ALTERNATIVE ENERGY RESOURCES, THESE LANDOWNER ARE MORE NARROWLY TAILORING AND PROVIDING CLEAR DEFINITIONS OF CONSERVATION VALUES BECAUSE OF LAND TRUST'S APPROVAL CONSISTENT WITH IMPACTS TO CONSERVATION VALUES]

3. *Prohibited and Permitted Acts.* . . . *The parties agree that the current use of and improvements to the Property are not inconsistent with the preservation and protection of the Property's Conservation Values, and are therefore permitted.* . . .

A.3. *Alternative Energy Facilities.* *Alternative Energy Facilities, defined as alternatives to a central power grid supply that may include current technologies such as wind and solar generation, future technologies, and any required associated power transmission facilities, ("Alternate Energy Facilities"), may be constructed with prior written approval by Grantee, anywhere on the Property for use in conjunction with those activities on the Property permitted by this Deed. Grantee's approval of these Alternate Energy Facilities shall be limited to the impact that such proposed facilities would have on the preservation and protection of the Property's scenic and wildlife habitat Conservation Values, as enumerated in Recital F, above.*

Alternative Energy Facilities and their associated power transmission facilities shall be camouflaged to the extent reasonably practicable. Grantee shall in good faith consider proposals by Grantor regarding Alternative Energy Facilities, and shall not unreasonably condition, delay, or withhold approval for the same. Approval for Grantor's proposal shall be granted or withheld within sixty (60) days of receiving Grantor's request for the same, and if Grantee is aware of a modification of or to the proposal that would render the same consistent with the purposes of the Easement, the preservation and protection of the Conservation Values, and make its approval possible, Grantee shall specify such modifications to render approval appropriate. . . .

H. *Consent.* *Except as otherwise specifically provided herein, in all cases where consent is required of Grantee, such consent, if withheld or granted, shall be evidenced to Grantor in a written document. Grantor shall provide notice and submit any documentation to Grantee for its decision in advance of the activity or use for which consent is sought. Grantee's determination to grant or deny consent shall be based solely upon whether a proposed use or activity is not inconsistent with the preservation and protection of the Property's Conservation Values as described in the Recitals [Recital F?], and shall be provided within sixty (60) days of receiving Grantor's request for the same, or within a timeframe allowing for one of Grantee's regularly scheduled board meetings, whichever is less, or shall be deemed consented to. If Grantee is aware of a modification of or to a proposal for approval that would render the same consistent with the purposes of this Easement, the preservation and protection of the Property's Conservation Values, and that would make Grantee's consent possible, Grantee shall specify to Grantor such modifications to render consent appropriate.*

Remember: "Perpetuity is a really long time, especially towards the end" (Woody Allen), and you want to draft easements that you can monitor and enforce, and that will survive the test of time, forever.