

Professional Training for Farm Succession Advisors in New England

Farmland Conservation and Farm Transfer

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I. Conservation Easements 101

A. Overview

- a. Conservation Easements are statutorily defined legal agreements between a landowner and an authorized organization (“Holder, see Section 1.C. below). The easement places restrictions on otherwise legal activities and uses of the subject property, in order to protect certain conservation values of the property. Agricultural Conservation Easements (“farmland easements”) are intended to permit commercial agricultural activities and development, while restricting non-agricultural development.
- b. Depending on the state, conservation easements may be called conservation servitudes, or conservation or preservation restrictions.
- c. Each conservation easement is tailored to the particular property it is intended to protect.
- d. Conservation easements are recorded in the registry of deeds, and are perpetual, running with the land, with the right of enforcement granted to the Holder(s). They are subject to interpretation in accordance with the enabling statutes, but generally are not subject to common law “rules” for easements and servitudes.
- e. For an in-depth general discussion of conservation easements, see The Conservation Easement Handbook, by Elizabeth Byers and Karin Marchetti Ponte, published by the Trust for Public Land and the Land Trust Alliance, second edition, 2005.

B. Enabling Statutes

- a. The statutes are similar, but have important distinctions state to state. Many are modeled after the Uniform Conservation Easement Act. For a comprehensive discussion and comparison of enabling statutes in the US, see the Land Trust Alliance’s report: A Guided Tour of the Conservation Easement Enabling Statutes by Robert H. Levin, included in Thumb Drive.
- b. Vermont: 10 V.S.A. Chapter 34 “Conservation and Preservation Rights and Interests” and 10 V.S.A. Chapter 155 “Acquisition of Interests in Land by Public Agencies.” Enables “qualified organizations” (governmental entities

and IRC 501(c)(3) organization with the stated purpose of acquiring property rights for a conservation purpose). No more “anchor parcels.”

- c. Maine: Me. Rev. Stat. Ann. tit. 33, § 476
- d. New Hampshire: N.H. Rev. Stat. Ann. § 477:45
- e. Massachusetts: Mass. Gen. Laws ch. 184, § 31-33
- f. Connecticut — Conn. Gen. Stat. § 47-42a
- g. Rhode Island — R.I. Gen. Laws § 34-39-1
- h. New York — N.Y. ECL Law §49-0301
- i. Note: In addition to ensuring that the provisions your particular state’s enabling statutes are met, where a conservation easement is to be donated, or where there is a bargain sale component, and the landowner intends to take advantage of federal law providing a deduction for charitable conservation contribution, counsel for the landowner must ensure that the provisions of I.R.C. sec. 170(h) are closely followed, as well.

C. Easement Holders – Co-Holders

1. All conservation easements must be granted to a Holder which is obliged to enforce the provisions of the easement in perpetuity. Holders can be qualified non-profit organizations or governmental entities, as described in each state’s enabling statutes. Often easements are co-held, or granted to a Holder and a “Third-Party Enforcer”.
2. VLT farmland easements are generally co-held with VHCB (state funding entity) with NRCS having a contingent interest (federal funding entity). VLT is primary steward pursuant an MOU with VHCB.
3. MFT’s farmland easements are primarily held solely by MFT; however, where there are additional funding partners (Land for Maine’s Future, NRCS) or local land trust partners, these may be included as contingent interests, Third Parties or co-holders, depending on the circumstances of the individual project.
4. Where there are multiple entities involved, there should be one entity named as the primary steward, either in the easement itself or in an MOU.

D. Rights / Obligations of the Landowner

1. Rights: farmland easements generally reserve the following rights to the landowner, all as more specifically defined and limited in the easement document:
 - a. Farm residence and farmworker housing
 - b. Agricultural Structures within a defined building areas
 - c. Agricultural activities
 - d. Forestry activities
 - e. Customary Rural Enterprises
 - f. Agritourism
 - g. Other activities which do not significantly negatively impact the agricultural resources and agricultural viability of the property

2. Obligations: specific obligations may vary considerably, but generally, the easements require
 - a. “Best Management Practices”
 - b. Forestry Management Plan (although limited harvest for landowner use often permitted without a Plan)
 - c. Maintaining marked boundaries (within reason—see Section 11.C below)
 - d. Siting permitted structures only within defined building envelopes (e.g., Farmstead Area, Agricultural Structures Areas)
 - e. Notice to Holder upon transferring title
 - f. Complying with applicable law, payment of property taxes, other general obligations of land ownership
 - g. Many farmland easements require the landowner to keep open fields clear at least by mowing or bush-hogging, except upon Holder approval for a change to forested use. However, most farmland easements DO NOT create an affirmative obligation to farm.
 - h. Conservation easements DO NOT create a right of public access; however, recreational use of the land is sometimes included, depending on the funding source if the easement is being purchased from the landowner.

E. Use of Easements in Transferring Farmland – Case Study/Example

1. Photos of Berthiaume Farm
2. Berthiaume Conservation Map
3. Berthiaume to Blodgett & VLT Case Study
4. Handouts:
 - Berthiaume to VLT PSA for Fee
 - Berthiaume to VLT PSA for Conservation Easement
 - VLT Assignment of Fee PSA to Blodgett
 - Berthiaume Lease to Blodgett
 - VHCB Grant Conditions
 - Berthiaume Farmland Conservation Easement

II. Land Trust Due Diligence

A. Soils and Viability

1. MFT farmland easement projects—easement project development is carried out by lands staff, who are guided by MFT policy that delineates certain criteria and additional considerations. (Policy included in the Thumb Drive.) Once the staff have met with landowners and performed the initial analysis, projects are presented to the Lands Committee. If so recommended by that committee, projects are brought to the board for acceptance.

- a. Example: Greenacre Project Summary (to be projected on screen)
 - b. Vermont Soils Classification
2. VLT - Soil quality is a driving force in the decision by VHCB and NRCS to fund acquisition of farmland conservation easement. Example: Berthiaume Soils Map

C. Survey and Title Issues

1. Title—Depending on the type of project, MFT requires title certification or insurance policy, and requires not only “marketable title” but also evaluation of the title exceptions to ensure they do not significantly undermine agricultural viability of the property, or could potentially result in extinguishment of the easement.
 - a. Mortgages must be subordinated or consented to. Some financial institutions will take exceptions to certain affirmative obligations of landowner (i.e., for mowing fields, giving notice of change of ownership, etc.)
 - b. Examples of problematic title exceptions
 - i. Easement for as yet undetermined utility corridor, 150 wide, across landowner’s property (CMP—1995)
 - ii. Access to neighboring woodlot “as now traveled”—but hasn’t been used in 20 years, “used to go across the field in winter only” says the landowner’s father
 - iii. Rights to use and maintain water well (does this impact water availability for ag use?)
 - iv. Severed mineral rights—to what extent will exercise of these rights make it difficult to farm the land?
2. Survey—Generally, land trusts require that the boundaries of a protected property are easily located.
 - a. Survey is preferable, and is generally required where there is state or federal funding
 - b. Traditional use and physical evidence can be acceptable alternative where survey is not mandated by funder
 - c. Easements generally require landowner to keep boundaries of the property and any building envelopes well marked
 - d. VLT- Vermont is an anomaly. Surveys of farmland parcels are rare. This has led to challenges in meeting the ALE requirement that surveys be obtained in many circumstances. Many “workarounds” where acreage discrepancies are the issue. Surveys of excluded parcels are now commonly obtained.

E. Monitoring and Stewardship

1. Monitoring and Stewardship –The granting of a conservation easement constitutes the landowners’ agreement to restrict uses of their land, but

at the same time imposes a perpetual obligation on the land trust to monitor and enforce those restrictions.

- a. Baseline—at the time of granting, the land trust and landowner will have worked together to establish a thorough **Present Condition or Baseline Documentation** report, signed by landowners and land trust project staff at closing. The original of this report, along with updates as appropriate, is filed off-site and maintained for potential use as evidence in the event of litigation over a serious violation. Working copies of the report are used by land trust staff, who monitor the easement properties. Maine law provides that monitoring be done at least every three years; however, most Maine land trusts meet with landowners and monitor properties annually. Some land trusts have begun aerial monitoring of large properties, but still perform on-the-ground monitoring at least every three years.
- b. Stewardship Funding—to fund the cost of this monitoring over the years, land trusts generally calculate the amount required that, when invested, will likely provide a return sufficient to cover annual monitoring costs. Most land trusts request a stewardship donation from the landowner, and augment funds as necessary to reach the stewardship requirement for the project. MFT’s Stewardship Fund Policy is included in the Thumb Drive.
- c. VLT and MFT—monitor each easement property annually (Berthiaume Monitoring Report) They also collect costs from the landowner to respond to requests for discretionary approvals and require that their stewardship endowment or fund be supplemented where land is approved for division.
- d. MFT- uses some aerial monitoring, but still does an on-the-ground monitoring at least every three years.

III. Option to Purchase at Agricultural Value (“OPAV”)

- A. VLT has always included a pre-emptive right in its farmland conservation projects. Until early 2000s, it was a ROFR. Since then, it’s the OPAV. Handout: Berthiaume Conservation Easement Section VII, starting on p. 10.
 1. Reason for OPAV – public money is expended to acquire conservation easements for the purpose of keeping productive farms in operation. “Estate” buyers drive up the price for conserved farmland, making the ROFR ineffective.
 2. Farmers are well paid for the OPAV. In some cases, more than for the underlying conservation easement.
 3. Certain transfers are exempt – qualified farmers, family, leaseholds of less than 15 years
 4. Land value is set and adjusted for inflation. Appraisal may be obtained (and, thus far, always has been obtained).

5. OPAV is “perpetual” which inhibits non-farm buyers who will sell subject to it.
6. OPAV is assignable.

V. Funding Sources

A. Agricultural Land Easements Program Requirements/ALE Plans

1. ALE is administered by NRCS which annually enters into cooperative agreements with public and qualified private entities to fund identified farmland conservation projects.
2. In Vermont, the state-funded Vermont Housing and Conservation Board has been the lead cooperating entity with its state funds being used to match the federal NRCS funds.
3. Other “matching” funds may come from local and community funds, private donations and bargain sales.
4. All ALE easements now require an ALE Plan. Handout: Berthiaume ALE Plan
Compliance with the ALE Plan is required under the conservation easement. It is updated as ag use changes.

B. State Funding

1. Maine’s land bond, Land for Maine’s Future, has provided funds for a number of farmland protection projects. Under the current administration, however, this source of funding is extremely limited.
2. Vermont funding: administered by the Vermont Housing and Conservation Board. See: <http://www.vhcb.org/farmland-conservation.html>
3. Massachusetts: Agricultural Preservation Restriction Program, provides state funding for qualifying projects. See: <http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html>
4. Other states: contact a land trust or your state’s Department of Agriculture to get current details and procedures on whether state funding is available, and if so, how to access.

C. Local and Community Funds

1. Town land bonds—In southern Maine, where the state’s development pressure is greatest, several towns have passed local land bonds for the purchase of open space and conservation land. At least one of these, Scarborough, has chosen to use a portion of these bond funds to purchase conservation easements on farmland, working with MFT for assistance in developing the projects, and to serve as easement co-holder.
2. Non-governmental funding—MFT has several programs for purchase of conservation easements to restrict non-agricultural development on farmland properties. To supplement the opportunities provided in State and Federal programs, MFT has raised funds for its own purchase of easements. These funds are often used in partnership

with local land trusts, to conserve active farms which meet a certain commercial production threshold. The program has two tracks.

- a. Appraisal-based: Like the state and federal funding programs, MFT's appraisal-based purchased easement program begins with an appraisal of the value of the development rights (the "easement value"), but then undergoes further formula-based analysis to determine what percentage of the appraised value MFT will pay. Payments generally range from 60% to 80% of the appraised value, based on such factors as the size of the farm, the amount of open land, the amount of agricultural soils and proximity to other conserved farmland.
- b. Formula-based: MFT also has a solely-formula-based purchased easement program. To establish a purchase price for a conservation easement under this program, various factors such as location within the state (relates to general development pressure), acreage of farmland soils, acreage of open land, etc. are factored into a formula. This program is intended to be much quicker and less burdensome for landowners to participate in. The price is generally significantly less than the assumed market value of the easement, but often the funds provide what is needed by the landowner, or, in the case of a transfer, brings sufficient cash to the table to facilitate the purchase of the property by incoming farmers.

D. Bargain sales, donations, bequests

1. Donations and Bargain sales—tax deductions

Donation of CE is a charitable contribution for conservation that can qualify for a tax deduction. A bargain sale, i.e., the sale of a conservation easement for less than its appraised value, can also qualify. Easement donors and "bargain sellers" must carefully follow I.R.C. sec. 170(h), which delineates requirements with respect to a "qualified conservation contribution", including rules for documenting value and for easement language. Warning: the attorney representing donor of a conservation easement, where a tax deduction is anticipated, must have sufficient expertise in this area. In *Carroll III v. Commissioner*, 146 T.C. No. 13 (April 27, 2014), the tax court upheld accuracy-related penalties in a case where the court determined that the conservation easement did not meet the requirements of Section 170(h). In that case the court found that the easement donors failed to seek competent advice from a tax attorney or other adviser to ensure the conservation easement's compliance with pertinent regulations, noting that their attorney was not a tax attorney and did not answer tax-related questions or give tax advice.

2. Bequests: For a number of reasons, some landowners want to conserve their farmland at the time of their death, rather than during their lifetime. For attorneys preparing wills or trusts to carry out this intention, it is best to contact the intended beneficiary land trust to see whether an easement on the land in question would likely be acceptable, whether they have suggested bequest language, and what their stewardship contribution requirements are. Also, some landowners may have

protection goals that are unacceptable to the land trust (such as, for MFT—limits or prohibitions on hunting and trapping, requirement that only organic practices be utilized, etc). MFT’s suggested language for bequests is included in the Thumb Drive . Our project people will work with the attorney and/or the client to help define conservation goals to be included in the bequest.

3. Risk/Cautions/Other Checklist:

- a. Medicaid planning—donation or bargain sale of a conservation easement is subject to Medicaid “look-back period”, 5 years in most states.
- b. Maine’s Improvident Transfer of Titles Act—If the grant of easement is for less than fair market value and landowner is age 60 or older, be aware of this Maine statute protecting the “elderly” from undue influence. 33 M.R.S. §§ 1021-1025
- c. Representing the granting landowner(s)
 - i. Are the restrictions in the easement fully understood by the client?
 - ii. Amendments other than to fix scriveners’ errors are not simple or easily attained. Best to get it right the first time, and, if possible, build in some flexibility.
 - a) Maine’s conservation easement statute, at 33 M.R.S. § 477-A(2)(B) provides, in pertinent part, “A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party.”
 - b) For building flexibility into the easement, here is example from MFT’s easement regarding restrictions on structures: **“Other New Structures.** No other structures may be built on the Property except with prior Approval of Holder. Holder shall require any Approved structures to be located so as to have minimal adverse impact on the agricultural productivity and other Conservation Values of the Property.”
 - iii. Negotiations with the land trust: while (obviously) counsel wants to protect client’s interests, especially with respect to liability and affirmative obligations, negotiating a conservation easement requires a different approach from that of negotiating a contract, in many respects. For example, your client and the land trust have a mutual interest in ensuring adherence to the terms of the easement in perpetuity. You want the landowner to agree to strong enforcement terms; it’s not likely that your client will be

pushing the limits of the restrictions, but the 2nd or 3rd generation owner may.

- iv. Anticipated Takings (Eminent Domain)—will a Conservation Easement help prevent a governmental taking?
 - a) Argument centers on conflicting public interests, e.g., best location for a public school vs. use of prime farmland for development, which in turn may encourage residential development and additional loss of farmland.
 - b) Existence of Conservation easement can provide a rallying point for public opposition to the taking, and may provide seat at the table with respect to final negotiations for alternative sites or revised plans for the proposed public use.
 - c) Note: because conservation easement is an interest in real property, compensation for a taking is shared between the landowner and the land trust holder. Calculations or procedure to determine allocation of such funds should be addressed in the conservation easement, and the language should carefully track the requirements of IRC Section 170(h) if a tax deduction is anticipated.