

# A Guide to Conservation Easements for the Real Estate Industry

Berkeley County Farmland Protection Board

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## About this Guide

*This document explores the basics of conservation easements, including many of the restrictions an easement places on real property. The intended audience is real estate professionals and lawyers who oversee land sales. Because conservation easements can be complex, involve multiple parties with perpetual interests in the land, and frequently interact with US income tax law, this guide can only provide an overview of an easement. It is strongly recommended that parties involved in the sale or purchase of a conservation easement first contact the Berkeley County Farmland Protection Board for specific information about the easement.*

*Please note that this document does not provide specific legal or tax advice. Vested parties should always seek legal and financial advice from a qualified professional.*

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## What is a Conservation Easement?

A conservation easement is a legal agreement between a landowner and a land trust or county farmland protection board that permanently protects the scenic and natural qualities of the land while allowing the private landowner to continue to own and enjoy his or her property. The landowner retains the title to the property and continues to use it, subject to certain, specific voluntary restrictions that protect the land from future real estate development or commercial or industrial use. Easements in West Virginia are defined in two sections of code. General conservation and preservation easements are enabled in WV Code §20-12 *et. seq.* while agricultural (e.g. managed through a county farmland protection board) are enabled in WV Code §8A-12 *et. seq.*

**How long does a conservation easement last?** Under West Virginia law, all conservation and preservation easements must be perpetual in nature. For federal tax purposes, conservation easements must be perpetual as well (IRS Code section 170(h)(2)(C)). Because an easement protects the land in perpetuity, all future landowners are bound to the restrictions. The easement is created in the form of a deed. This Deed of Conservation Easement is recorded in the county land records. Because it is recorded with the property deed records, future landowners are put on notice of the land protections that have been recorded.

**Who owns the land?** The grantor of the easement continues to own his or her property, retaining authority just as they did before the easement was recorded, subject to the restrictions in the easement. The land can be transferred, sold, and inherited as it was before. The Berkeley County Farmland Protection Board holds a perpetual interest in the rights and restrictions as defined in the Deed of Conservation Easement. This is a vested interest in the property.

## **What Are the Property Owner's Rights?**

This is a very basic and short list of the uses permitted by conservation easements. Each easement deed language may be different, so always consult the controlling deed for the exact rights granted by the easement. In general however, most conservation easements grant the following uses:

- Reside on the property (if a residence or a residential envelop exists) and benefit from all aspects of the quiet enjoyment of the property.
- Engage in personal recreational uses that require no development.
- Engage in any and all agricultural uses of the property.
- Right to maintain, construct, and place agricultural structures contributing to production (limited by the maximum square footage for impervious surface).
- Businesses directly related to the retail of farm products.
- Activities for religious, charitable, or educational purposes or to foster tourism.
- Home based businesses (only those that do not require a WV Department of Environmental Protection permit).
- Non-commercial forestry (there are limitations). Some more recent deeds permit commercial forestry or conversion of woodland to agriculture – all with specific limitations.

## **What Activities are Restricted or Prohibited?**

Like the list of permitted activities, always refer to the controlling deed for specific details. This is a general list of the activities or features which are restricted or prohibited on an easement property.

- Dwelling & appurtenances must be contained inside a 2-acre parcel, limited to 5,000 square feet per dwelling; 9,000 square feet for the entire 2-acre parcel.
- Subdivision of land is prohibited.
- Impervious surface for the entire eased area is limited to 2% of the total square footage.
- Ditching, draining, dike construction, filling, excavating, removal of topsoil or sand, gravel or rock on the property is prohibited.
- Except for agricultural structures, no constructing or placing of any buildings; manufactured homes; swimming pools or other recreational facilities; commercial lighting or any temporary structure or facility on or above the premises.
- No advertising signs or billboards.
- No trash, garbage, hazardous substances, abandoned vehicles or machines.
- No underground or above ground public utility systems.

- No pollution or alteration of wetlands or water bodies.
- Construction of new farm ponds: size predetermined on the deed of conservation easement.
- No right of access is conveyed by conservation easement to the public.
- Easement holders inspect property annually to confirm compliance to the conservation easement.
- Taxes are to be paid before delinquency.
- Subsequent property transfers must include all provisions of the initial conservation easement.

## **What are the Financial Implications?**

All conservation easements have value, which is usually determined using a specialized appraisal (usually a restricted use appraisal or a so-called Yellow Book appraisal before the easement closes, or an IRS appraisal around the time of closing). The value of the easement is the difference between the appraised fair market value of the land and the restricted use value of the land. Because in such a before and after scenario only the development rights change, these technical appraisals do not consider the value of any existing improvements. The easement is valued based on the extinguishment of any potential subdivision or development rights.

In the future, when an easement property goes back on the market, it generally will not appraise at the same amount as a similar, unrestricted parcel. The effect of the restriction on future subdivision and many future uses tends to keep the fair market value down. This is only a general rule – there are cases where the market will bear an asking price similar to, or even more than, unrestricted parcels, especially if the restricted parcel has some other desirable value (being on water as an example).

One positive benefit from this potential reduction in fair market value is that the property may be attractive to a young farmer, or a neighboring farmer who wishes to expand their acreage. Individuals who wish to have some open space around them are also potential buyers.

While the value of the easement property may be reduced, the value of adjacent parcels may increase. This is because many people would prefer to purchase a lot where the open space view is guaranteed to be there forever. This increase in the value of adjacent properties is not easily to quantify but conservation organizations and the IRS are aware of this effect on neighboring properties.

## **Can an Easement be Modified?**

Only for extremely specific reasons may an existing easement be modified. West Virginia law permits amendments to a conservation easement but amending an easement also falls under the jurisdiction of the Internal Revenue Service (since many easements enjoyed some sort of federal tax relief and farmland protection boards are recognized 501(c)3 organizations). The only reasons an easement may be modified or amended are:

- **To correct a defect in the wording of the easement document.** Misspelling a grantor's name, stating the acreage incorrectly, and failing to reference an exhibit are examples of this type of need to amend.
- **To strengthen the conservation values of the easement.** Adding additional acreage on an adjacent parcel or removing an exemption envelope are examples.
- **To abide by a ruling by a judge from a court of competent jurisdiction.** Only judicial action can invalidate or otherwise modify an existing conservation easement. This has yet to happen in West Virginia. Many of our easements have a co-holder or third party interest by the United States Department of Agriculture, so presumably the US Department of Justice would also be involved in any court action.

Under no circumstances may easements be modified in a way that:

- **Creates a private party benefit.** Moving an existing residential envelope to a location that clearly increases the market value of the property is an example. Swapping the location of an exemption area to increase road frontage of the exemption is another example.
- **Is contrary to the primary mission of the grantee** (e.g. the farmland protection board). Allowing an otherwise prohibited business is an example. Moving an exemption area to increase potential marketability is another. These aren't part of the primary mission of a farmland protection board.

## As a Professional, How Should I Proceed?

It is critical that you do your due diligence when working with property protected by a conservation easement. If the seller fails to inform you of the easement that should serve as a red flag.

All conservation easements are recorded as a Deed of Conservation Easement and a related plat and both are filed in the County Courthouse. In addition, the Berkeley County Farmland Protection Board can provide information on any of the easements it holds. As a professional that deals with land transactions, when handling an easement property your duty is to ensure that you fully understand the Deed of Conservation Easement, the recorded plat that describes the easement property, and the Easement Documentation Report (the property owner should have a copy and the Berkeley County Farmland Protection Board maintains physical and electronic copies). These three documents together fully lay out the terms and conditions of the conservation easement. Easements can be very attractive to certain buyers and you can leverage this fact to market the property to specific groups.

In addition, it is important that the buyer of an easement property is fully informed as well. Potential buyers should make themselves familiar with what they are buying; BCFPB's *Guide to Conservation Easements* is a good place to start. Because a conservation easement is a restriction that runs with the deed, it is important to disclose the restrictions in the marketing process to avoid a last-minute disclosure, which would likely derail the transaction. Any deed that memorializes the transfer of a conserved property to a new owner must make a clear and specific reference to the controlling Deed of Conservation Easement. Failure to make this reference or

including text that implies a change to the original terms and conditions of the conservation easement will be viewed by the Berkeley County Farmland Protection Board as an invalid attempt to modify or amend the original Deed of Conservation Easement. Under such conditions the board will insist that the defective deed be corrected.

## **In Conclusion...**

Conservation easements are very technical and represent an intersection of state and federal laws and regulations, as well as standard industry practices among real estate and legal professionals. The strong desire of the Berkeley County Farmland Protection Board is to ensure that new owners of existing easements are fully supported so they have a clear understanding of the restrictive nature of the controlling deed of conservation easement.

The Board feels that only by open and honest conversation can this goal be achieved. As such, the Board is always open to questions about any of our existing conservation easements. By striving for open communication all parties share a common understanding of the relevant easement and therefore any risk of misunderstanding, or possible litigation, is greatly reduced.