

## **A LOOK AT CONSERVATION EASEMENT STEPS**

A few years ago, placing a conservation easement on a property was a simple undertaking: An attorney would prepare a templated easement, a surveyor would draw up a map, and a real estate appraiser would opine on the gifted property's value. The landowner would claim a substantial tax deduction, and the IRS would generally accept it without question.

In 2003, several high-profile abuses of conservation tax incentives prompted Congress and the IRS to look more closely at conservation easements—and to adopt more rigorous and complicated compliance standards. In 2006, the tax laws governing open space dedications were changed further still, creating both new incentives and new potential pitfalls. More recently, a Connecticut tax court proceeding challenged prevailing notions about what does and does not constitute a qualifying conservation contribution, prompting greater caution among tax attorneys and easement planners.

The good news is that landowners who follow the rules can still realize significant tax benefits by preserving portions of their property as open space (in fact, conservation tax incentives have never been more financially attractive). The bad news is that planning and implementing a conservation easement that can withstand IRS scrutiny and protect the long-term value and marketability of a property has become more complicated and expensive.

The table on the following pages outlines the steps associated with properly undertaking a conservation easement in the current regulatory climate. The actual tasks involved in preserving a particular land parcel will be a function of its size and development history; the presence of existing encumbrances, such as mortgages, utility easements, and rights-of-way; the amount of steep slopes, wetlands, and other development constraints on the property; the extent and detail of survey work, soil testing, and other fieldwork completed to date; the land-use regulations to which the property is subject; the complexity of development rights an owner wishes to retain; and the nature of the highest-and-best use configuration used as the basis for valuing any terminated development rights.

Landowners who are tempted to cut corners based on a friend's advice, a realtor's suggestion, or the successful outcome of an easement done casually in the past should take careful note: The rules have changed, the IRS is looking more closely at conservation easements, and the penalties, interest, and back taxes you will owe if your tax deduction is disallowed will likely be substantial. Cutting corners carries the additional risk of forgoing tax benefit value due to inadequate field work and land-use planning, or inadvertently terminating development rights in a manner that precludes critical future improvements, which can reduce the value and marketability of a property profoundly.

While planning and implementing a conservation easement properly is not inexpensive, doing it right costs far less than running afoul of the IRS, leaving legitimate tax deductions on the table, or permanently impairing your property in a way that inadvertently diminishes its usability and value.

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<i>Phase/Step</i>	<i>Task Owner</i>	<i>Purpose</i>
<b>FEASIBILITY ANALYSIS</b>		
Conservation Values Assessment	Ecologist, Easement Planner / Tax Attorney	Determine whether or not property is likely to meet IRS standards for a qualifying conservation contribution
Preliminary Development Potential Analysis	Land-Use Planner / Land-Use Attorney	Assess approximate development potential of property
Preliminary Financial Analysis	Real Estate Appraiser, Easement Planner, Financial Planner	Estimate tax benefit value, determine your ability to utilize the tax benefits, estimate implementation costs, determine likely net financial return
Donee Identification	Owner / Easement Planner/ Attorney	Identify land trusts or government agencies interested in accepting an easement
Mortgage Subordination	Mortgage Lender	Confirm lender will entertain agreement to subordinate mortgage to conservation easement

Subtotal

### **RESOURCE INVENTORY**

Title Search	Title Searcher	Determine property history and encumbrances that may impact conservation & development potential
Basic Property Map	Surveyor	Determine precise acreage, basic soils and topography data, and footprints of existing structures and improvements
Ecological Baseline	Ecologist	Formally inventory and document property's conservation values and current condition
Wetlands Delineation	Soil Scientist	Identify boundaries and extent of wetlands and watercourses, as necessarily to determine/ document development potential
Field Verification of Soils	Soil Scientist	Field verify composition of soils where linked to development potential, as necessary
Field Verification of Slopes	Surveyor	Conduct aerial or field topographical survey as necessary to determine/document development potential
Deep Hole & Percolation Tests	Engineer, Excavator, Health Official	Determine locations for viable septic systems, maximum septic potential
Detailed Property Map	Surveyor	Incorporate information generated during Resource Inventory phase into Basic Property Map

Subtotal

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<b>REGULATORY ANALYSIS</b>		
Development Potential Assessment	Land-Use Planner / Land-Use Attorney	Determine full development potential under applicable land-use regulations based on Resource Inventory findings
Conservation Policy Assessment	Ecologist, Easement Planner / Tax Attorney	Identify properties conservation merits under applicable local, state, and federal conservation plans and policies
Subtotal		
<b>FUTURE NEEDS ANALYSIS</b>		
Owner Wish List	Owner / Family, Land-Use Planner / Land-Use Attorney	Develop wish list of future improvements, such as a barn, guest house, home for a family-member, pool, etc.
Future Owner Wish List	Realtor	Identify future improvements crucial to maintaining property's long-term value and marketability
Subtotal		
<b>MASTER PLANNING</b>		
Future Improvements Plan	Easement Planner, Engineer, Land-Use Planner / Land-Use Attorney, Surveyor	In context of conservation imperatives, identify locations for potential future improvements, ensuring compliance with applicable land-use regulations
Conservation Plan	Ecologist, Land Trust, Town/State, Land-Use Planner, Tax Attorney	Identify areas to be protected as open space
Identification of Development Rights to Be Retained	Easement Planner, Land-Use Planner, Land-Use Attorney, Tax Attorney	Determine any rights to be retained on conservation land for accessways, septic fields, agricultural structures and uses, etc.
Subtotal		

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<b>EASEMENT DEVELOPMENT</b>		
Draft Easement	Easement Planner / Attorney / Land Trust / Government Agency	Develop and working draft conservation easement, outlining grantor and grantees rights and obligations
Final Easement	Easement Planner, Tax Attorney	Review and revise easement to ensure protection of donors interests and tax code compliance
Letter of Enforceability	Attorney	Prepare opinion letter confirming that terms of easement are enforceable under local law
Subtotal		
<b>MORTGAGE SUBORDINATION</b>		
Subordination Agreement	Easement Planner / Attorney, Mortgage Lender	Negotiate agreement for subordinating mortgage to conservation easement
Lender Processing Fee	Mortgage Lender	Lender's Legal, Processing Fees
Lender Appraisal Fee	Mortgage Lender's Subcontractor	Third-party appraisal of property & impact of conservation easement
Subtotal		
<b>EASEMENT EXECUTION</b>		
Grantee Approval	Land Trust, Government Agency	Board resolution or other formal action approving easement
Signature	Grantor, Grantee, Witnesses, Notary	Place easement in force
Recordation	Easement Planner / Attorney / Land Trust / Government Agency	Record easement, conservation map, and mortgage subordination agreement (if applicable) in local land records
Subtotal		
<b>BOUNDARY MARKING</b>		
Signs/Monuments	Surveyor	Mark easement boundaries on property with monuments, signs, or other permanent markers
Subtotal		

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<b>APPRAISAL PREPARATION</b>		
Highest & Best Use Configuration	Land-Use Planner / Land-Use Attorney, Appraiser / Realtor, Surveyor, Tax Attorney	Determine the development configuration likely to yield the highest fair market value in the context of applicable land-use regulations and local real estate market conditions
Highest & Best Use Supporting Documentation	Engineer, Health Official, Land-Use Attorney, Surveyor, Etc.	Provide documentation that Highest and Best Use Configuration, including density, driveways, septic, etc., is viable
Recorded Conservation Easement	Owner / Easement Planner / Attorney	Obtain copy of officially recorded and stamped easement
Conservation Easement Plan	Surveyor	Indicate conservation easement boundaries
Ecological Baseline	Ecologist	Provide copy of report
Subtotal		
<b>APPRAISAL</b>		
Conservation Easement Appraisal	Qualified Conservation Easement Appraiser	Calculate the fair market value of the property at in Highest & Best Use Configuration, the value of the property after the conservation easement is placed in force, the discounted cash flow factors, and the net tax deduction value (nb: This is different from a standard real estate appraisal)
Subtotal		
<b>TAX COMPLIANCE</b>		
Letter of Determination	Land Trust	Obtain copy of IRS letter of determination confirming donees tax-exempt status
Complete IRS Form 8283	Tax Preparer, Conservation Appraiser, Land Trust / Government Agency	Document deduction for your income tax return
Subtotal		

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<b>MAINTENANCE</b>		
Easement Monitoring	Land Trust / Government Agency	Endow maintenance fund to facilitate annual easement inspections
Landscape Management Plan	Forester, Botanist, Land Trust/ Government Agency	Develop plan, as needed, to manage forests, remove invasive plant species, etc.
Subtotal		
<b>PROJECT MANAGEMENT</b>		
Manage Easement Project	Owner / Attorney / Easement Planner	Select and coordinate vendors, manage completion of project steps and tasks, assemble easement documentation
Subtotal		