

**A Private Landowner's Guide
to Voluntary Land
Conservation Options
in Southeast Alaska**



**Prepared by the Southeast Alaska Land Trust
Juneau, Alaska**

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Please Note:

This booklet is intended as a general guide to voluntary protection of private lands in Southeast Alaska. It is not meant as a substitute for legal or tax advice and should not be relied on as a sole source of information. Landowners wishing to protect land should consult advisors such as their attorney, tax accountant, or other professionals. Local and state government officials may also be able to provide useful advice to landowners.

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Introduction

An abundance of scenic and biologically productive public lands sets Southeast Alaska apart from most regions of the United States. Yet here, as elsewhere, landowners are recognizing the growing importance of protecting conservation values of private lands. The size of these private holdings varies from a few acres to thousands of acres. Some of these lands provide scenic backdrops for communities. Others protect ocean shorelines, streams, lakeshores, other important wetlands, or upland wildlife habitats. Private lands may have conservation value because of their significant historical or cultural features. Some undeveloped private wildlands may be particularly important because they are adjacent to a Congressionally designated federal Wilderness, an Alaska state game refuge, or a city or borough park.

The purpose of this booklet is to briefly describe some of the options that are available to private landowners whose primary goal is to leave a land legacy in which conservation values of their land are protected. All land conservation options (including inaction) can have direct or indirect tax or other financial implications for landowners, and those wanting to learn more about these have several sources of assistance available to them. One of the most important is a tax attorney, certified accountant, or other professional tax advisor who is familiar with the kinds of options mentioned in this paper. Staff here at the Southeast Alaska Land Trust are also available to explain the non-tax aspects of these options in greater detail. We are recognized by the federal Internal Revenue Service (IRS) as a non-profit, charitable organization committed to the conservation of natural, cultural, and recreational values of private lands throughout Southeast Alaska.

For those who also wish to research conservation options on their own, there is the Land Trust Alliance, a non-profit, national umbrella organization that provides technical guidance and support to the hundreds of land trusts across the nation. Its web site is www.lta.org and it offers a variety of books and other information sources that are useful for property owners and land conservation professionals alike.

Conserving Land by Placing Restrictions on Its Use

Conservation Easement

“Simply put, a conservation easement is a recorded restriction on what you and any future landowner can do with your land. A conservation easement is an agreement. It is a legal document, a signed contract between the landowner and an eligible donee organization, such as a land trust or a government agency. It is signed and notarized and recorded . . . The easement spells out what activities are prohibited on the property in the future and what activities are permitted on the property in the future. The easement is enforceable against you and any future owner of your land.” (nationally recognized tax attorney & author, Stephen J. Small)

Federal tax rules allow a conservation easement to be donated (granted) to a “qualified organization.” Simply stated, this means either a publicly supported and charitable conservation oriented organization like the Southeast Alaska Land Trust, or a government

agency. A conservation easement cannot be given to a private foundation. A conservation easement does not convey one's development rights. It extinguishes (terminates) them. Although conservation easements are said to be "donated" to a land trust, the only thing that is actually given to it is the right and legal obligation to enforce those restrictions that the landowner chooses to write into the conservation easement. In order for the donor (grantor) of a conservation easement to be eligible for federal tax benefits, the restrictions contained in the document must be applicable *in perpetuity*.

A conservation easement limits development or use of the property to protect its natural, recreational, or cultural values. This is different from the common use of the term in which an "easement" allows someone else, such a utility company, to use someone's property.

The Southeast Alaska Land Trust has identified the following criteria to determine if a property is of sufficient public benefit to qualify for a conservation easement:

- ▶ Includes important fish, wildlife, or vegetative habitat or other ecological values. (e.g. The property contains rare or endangered species or communities or contains critical habitat for one or more species).
- ▶ Borders or affects the integrity of a sensitive or ecologically important marine area, river, stream, creek, or other wetland.
- ▶ Contains significant educational, recreational, or scientific values.
- ▶ Is adjacent to existing protected areas such as national or Alaska state parks or wildlife refuges, or lands already under conservation easements.
- ▶ Preserves open space for the scenic enjoyment of the public (includes urban open space).

Each conservation easement is unique to a landowner's wishes and the values of their property. A conservation easement leaves land in private ownership. Landowners and their successors may live on or use the property in perpetuity. The land trust is bound by the conservation easement to ensure that owners of the property abide by the land use restrictions that the easement donor has decided upon. Some landowners who enter conservation easements want them to contain very restrictive conditions, some prefer more liberal conditions, and others may elect a combination of both. Since a land trust is accepting the responsibility to ensure compliance with easement restrictions in perpetuity, it will be interested in how readily enforceable the restrictions are and may encourage the property owner to avoid unnecessary ambiguities. Experience across the United States is that nearly every time a land use restriction in a conservation easement has been violated and legally challenged, the courts have upheld the restriction.

A conservation easement can be written to allow limited development and may even permit some commercial use. Depending on how large the property is and other site-specific circumstances, an example might be the presence of a bed and breakfast facility and hiking trails on the property, both of which would be available for use by

paying guests. A conservation easement may also apply to just a portion of a property, and it does not necessarily need to allow for public access in order for it to be of conservation value to the public. In fact, many conservation easements do not provide for public access.

A donated conservation easement may result in an income tax deduction for the easement donor and reduced property and estate taxes for either the donor or a subsequent owner of the property. The Internal Revenue Service criteria for determining if a conservation easement qualifies the easement donor for income tax or estate tax benefits are very similar to the criteria used by the land trust and indicated above. To the extent that the fair market value of a property is reduced by land use restrictions in a conservation easement, a property's assessed value and property tax may be reduced as well. Alaska law (AS 29.45.062) requires a local government property tax assessor to take a conservation easement into account when assessing land.

To determine the basis for federal income, estate tax, or local property tax benefits that might apply, a conservation easement donor needs to retain the services of a qualified land appraiser who is familiar with conservation easements. A list of qualified appraisers is available from the Southeast Alaska Land Trust. The property will be appraised in two ways, first for its market value without a conservation easement in place, and second, for its market value with the specific land use restrictions spelled out in the conservation easement in place. The difference between these two values is recognized by the IRS as a charitable contribution if the easement is donated to a land trust or other qualified recipient. The idea is that regardless of whether the conservation easement provisions allow for public access on the property, protection of conservation values is in the overall public interest. It is important to note that although the land trust becomes the donee (grantee) of the easement, by virtue of becoming a party to the conservation easement agreement, its role is essentially that of seeing that the landowner abides by the land use restrictions agreed to in the conservation easement. The land trust's contractual relationship is with the current landowner. The landowner is responsible for actions by others who might rent the property or provide services to the property.

The land trust does not benefit financially from a conservation easement. There is actually a cost incurred by the land trust in conducting periodic site monitoring visits and follow-up reporting back to the landowner as to the results of the visits. To cover this cost, the land trust will complete a worksheet for the easement donor indicating projected annual costs of such inspections, making a reasonable allowance for economic inflation and allowing for the fact that eventually there may be an issue over a land use that needs to be resolved with an owner of the property. From the worksheet, a stewardship endowment fund contribution from the easement donor will be calculated. The idea is for periodic site monitoring and reporting and possible issue resolution expenses to be paid for out of the interest earned on the endowment fund's principal, assuming it has been invested at a conservative annual percentage rate of return. The principal of the stewardship endowment fund is intended to be sustainable in perpetuity.

Some may say that "perpetuity" is a long time and ask what happens if a land trust does not exist forever. Conservation easements include language that requires a land trust to pass its responsibilities on to a similar successor organization, so that the original conservation easement donor's interests are protected in perpetuity. An example is where

two land trusts with contiguous geographic areas elect to merge, thereby combining their prior contractual obligations to conservation easement donors. Also, circumstances regarding the property may change over time, and the parties to the conservation easement can agree to amend its terms and conditions in a way that is consistent with its originally stated purpose.

There are occasional situations in which a governmental entity exercises eminent domain through private lands to accommodate construction of something like a federal highway. In anticipation of the possibility that a conservation easement property could become subject to condemnation through eminent domain, conservation easements normally include language that describes how any financial compensation for such condemnation is to be distributed between the landowner and a land trust. Easement language may also be written to indicate the uses to which the land trust's portion of the proceeds are to be put.



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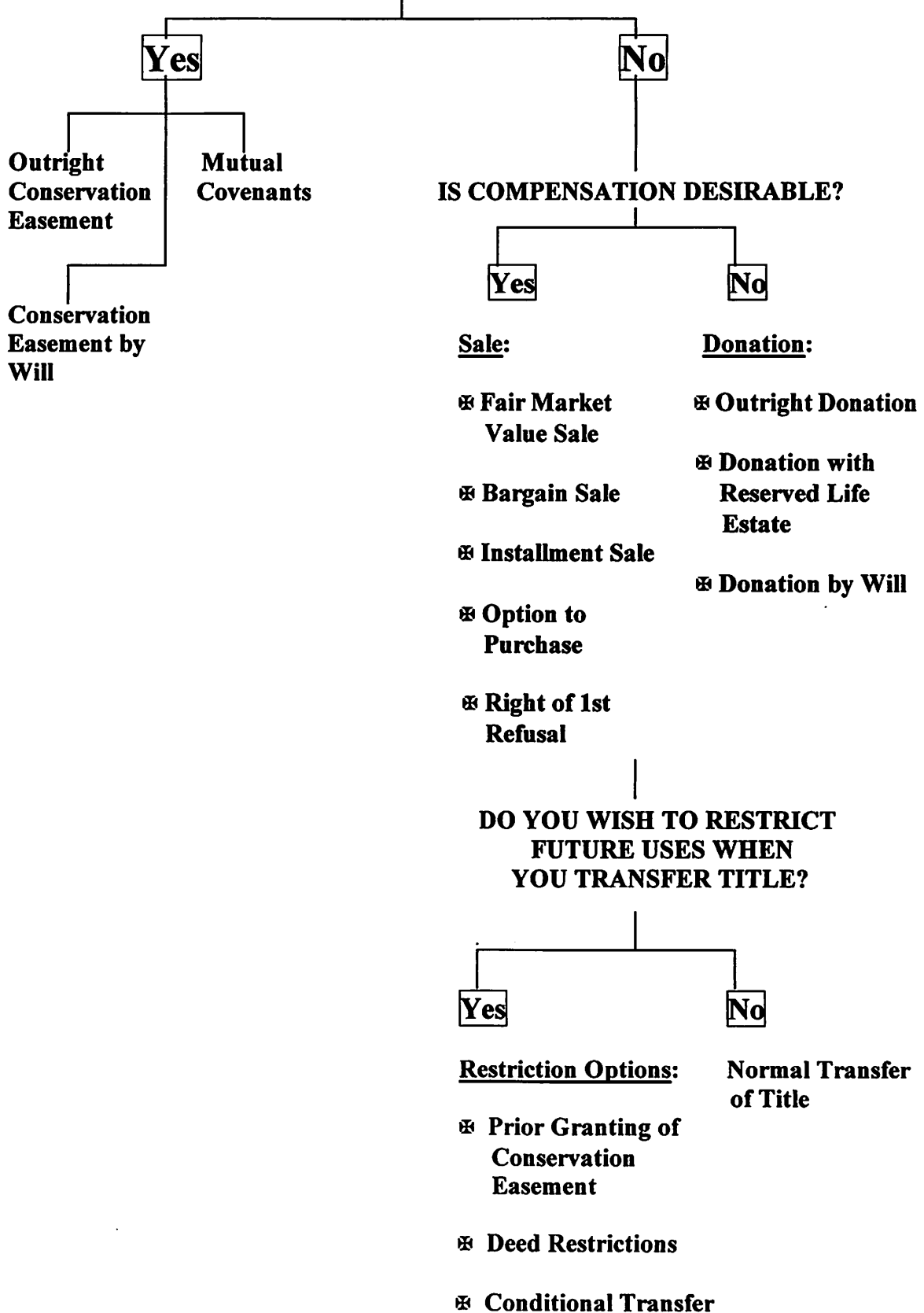
Willing a Conservation Easement

A property owner who wishes to see their land protected by a conservation easement but is not prepared to restrict use of their land during their lifetime may choose to provide for a conservation easement in their will. Like an easement donated during life, an easement donated by will should be negotiated between the landowner and the conservation organization to which one plans to donate it. This not only provides that the easement is crafted in such a way that it will achieve what is intended, but it enables the organization to accept an easement that meets its conservation objectives and that can be adequately monitored to ensure compliance with its land use restrictions. Otherwise, the organization would be under no obligation to accept the easement and take on the

Conservation of Private Land

~ Some of the Options ~

DO YOU WISH TO CONTINUE TO OWN THE LAND?



monitoring and compliance responsibilities that it implies. It is always advisable to attach as complete an easement document to the will as possible, granting the executor discretion to make such modifications as may be necessary to reach a final agreement with the conservation organization. It is also important to discuss with the intended easement donee the projected cost of monitoring and ensuring compliance with easement restrictions and to make provision in a will for meeting these costs.

Because a gift of an easement can take some time to negotiate, one may want to add a codicil (explanation) to the will stating the intention to grant an easement. In the event of death before its completion, the executor is instructed to complete the easement.

A variation of willing a completely drafted conservation easement or sufficiently detailed codicil in one's will is for a landowner to simply include in the will an intent that a conservation easement be prepared upon death. However, this scenario leaves it entirely up to the executor or heirs to determine what land management purpose and land use restrictions are to be included in the easement.

An advantage of providing for a conservation easement in a will rather than granting one earlier in life is that it allows landowners to retain, as long as they live and are capable of making such decisions, the full range of decision options as to the disposition of their property. A disadvantage may be that the owner will have forgone whatever federal income tax or property tax benefits might have accrued over the years had the conservation easement been granted earlier in their lifetime. Nonetheless, under IRS rules at the time of this writing, the landowner's heirs would be entitled to certain estate tax benefits as long as the conservation easement becomes effective within the agency's prescribed maximum number of months following the landowner's death.

This IRS allowance may also be realized even if there is no mention of a conservation easement in a landowner's will and the heirs decide on their own to grant one. Although not a legal matter, heirs may derive comfort from having known the landowner well enough to believe that he or she would have been agreeable to the purpose and the land use restrictions that they have included in an easement.

Mutual Covenants

If several landowners wish to protect the open space they collectively own or a view they all share, they can exchange mutual covenants to protect these features. Mutual covenants can be appropriate where the protected conservation values are important to a handful of owners but not of sufficient benefit to the general public to warrant a conservation easement.

Each landowner's covenant is enforceable by each of the other landowners and their heirs and successors, however, there is no guarantee that they will enforce it. There may be no tax deductions for mutual covenants, and they may not be permanent, since they can be nullified by subsequent agreement by all owners.

Essentially, the differences between a mutual covenant and a conservation easement are that the easement is permanent, benefits the general public, and often provides tax advantages, while the mutual covenant primarily benefits adjacent property owners, is not necessarily permanent, and does not provide tax advantages.

Transferring Land to a Conservation Organization

Donating Land

Donating one's property to a governmental entity, land trust, or other conservation oriented organization can be a simple and straightforward way to leave a conservation legacy. Across the U.S., land donations have contributed to nature preserves, parks, recreation areas, and other open space. Land donation may be attractive to landowners:

- ▶ whose land has significant conservation values and who do not have heirs who are likely to protect it;
- ▶ who own property that they no longer use;
- ▶ who own highly appreciated property the sale of which would result in large capital gains taxes;
- ▶ who have substantial real estate holdings and wish to reduce tax burdens; or
- ▶ who would like to be relieved of the responsibility of managing and caring for land that they otherwise treasure.

Benefits of outright donation are that it can involve a rather simple transaction and it releases one from the responsibility of managing the land. Also, it may provide substantial tax benefits while avoiding any capital gains taxes that would result from selling the property. There may be an income tax deduction for the full, fair market value of the property, as determined by a qualified appraiser. If the land is especially valuable, one may choose to donate it through partial gifts over several years until the entire property has been donated. This would allow one to extend the deduction over a number of years.

Most important, if the land is donated because of its conservation value, it can be permanently protected by the owner entering into a conservation easement prior to conveying ownership to another party. In this case, the conservation easement should be donated to a different party than the one the property is donated to. This will avoid a situation in which the party to which the land is donated would have the legal responsibility to enforce land use restrictions upon itself. (A temporary exception to this guiding principle is if a land trust accepts a piece of property with the written understanding that it will hold the land just long enough to place a conservation easement on it and that it will then convey ownership to another party.)

An example of how a donation would work is: a landowner wishes to donate land for a borough or city park, the local government is willing to accept the land with conservation easement restrictions in place, and a land trust agrees to accept responsibility for enforcing the land use restrictions that are spelled out in a conservation easement entered into by the donor of the property. It is important that agreement on the part of all three parties is reached before the land changes hands.

Other situations in which a landowner may wish to donate land to a governmental agency are when the land is adjacent to the Tongass National Forest, especially those portions of the forest that Congress has designated as Wilderness or National Monument. Private land adjacent to Glacier Bay National Park would be another example.

Land can be donated to a land trust which is willing to receive the property, and the donor can spell out in writing what their intent for future management of the land may be. Unlike having a conservation easement in place, this will not, however, provide assurance that conservation values of the land will remain protected in perpetuity. Again, it is important that any such donation be discussed thoroughly with the land trust to whom a landowner is considering donating the land to ensure that the land trust is willing to receive the property and that the prospective donor knows what level of protection the land is likely to receive in the years to come.

Finally, one can donate land that lacks significant conservation value to a land trust (or other charitable organization) willing to accept it. The land trust can then trade the property or sell it to help fund its conservation work. In this case, the conservation value is not in the land itself but rather in the financial wherewithal that it provides for protecting other lands that do have high conservation values. A gift of land may be seen as a charitable donation by the IRS.

Reserved Life Estate

One can donate land but continue to live on it by donating a remainder interest in the property and retaining a reserved life estate. Property owners may donate the property during their lifetime but reserve the right for themselves and any other named persons to continue to live on and use the property during their lifetimes. For example, they could donate to a land trust a "remainder interest" in the property. When the landowner or those specified die or release their life interests, the land trust will have full title and control over the property. An advantage of this approach is that the landowner has the assurance that their land gift has been accepted by a conservation organization, but actual possession does not take place until death. Furthermore, a gift of a remainder interest may entitle one to an income tax deduction when the gift is made.

The required transactions have the disadvantage of being rather complex, potentially resulting in some estate tax liability if the life tenant is someone other than the donor and, possibly yielding a quite small tax deduction if the life tenant is young. As with other private land conservation options indicated in this booklet, the reader is referred to a tax specialist for a more thorough understanding of the tax implications of donating with a reserved life estate.

Donation by Will

Some landowners wish to continue to own and control their land during their lifetimes and transfer the land to a land trust or government agency at the time of their death. This kind of donation is known as a donation by will. Before including the donation in a will, it is important to make sure the chosen recipient is willing and able to receive the gift. It is also a good idea to secure the agreement of an additional organization that can be identified in the will as an alternate recipient, in case the primary recipient changes its priorities and objectives over time and can no longer accept the gift after death.

When making a donation by will, it is important to work with the recipient landholding organization in developing a strategy to implement the landowner's wishes. A donation by will may be an allowable deduction from one's estate and may, therefore, reduce potential estate taxes. One may not claim a charitable income tax deduction for it, however, and the responsibility for paying property taxes remains. A donation by will provides flexibility because it can be revoked at any time by a change in the will.

Selling Land for Conservation

Fair Market Value Sale

Selling land at fair market value to a land trust may seem like an obvious way to protect it, but, as non-profit organizations, land trusts usually have very limited funds available for land purchases and can rarely pay what a developer would pay. They generally reserve fair market value purchases, if they can make them at all, for highly specialized parcels under imminent threat of development.

A fair market value sale may also not be as advantageous for the landowner as it might seem. Capital gains taxes on the property's appreciated value along with selling costs such as the realtor's commission can substantially reduce profits from a fair market value sale, particularly for those in higher tax brackets disposing of highly appreciated property.

Bargain Sale

One alternative to a fair market value sale is a bargain sale, in which the land is sold at less than its fair market value. A bargain sale combines the income-producing benefit of a sale with the tax-reducing benefit of a donation. It can also avoid the expenses of a sale on the open market. The difference between the land's appraised fair market value and its sale price is considered a charitable donation and can be claimed as an income tax deduction.

In cases where paying the fair market value of the property would not be possible, a bargain sale may bring the price down to one a government agency or a land trust can afford. For any bargain sale, the donor's intent to contribute the fair market value of the donated property in excess of the sales proceeds should be put in writing. For example, a clause could be included in the purchase and sale agreement recognizing that the value of the property is substantially higher than the sale price and expressing the seller's intent to make a charitable contribution to the buyer, or a letter could be sent to the donee prior to closing the transaction expressing the donor's intent. The value of the asset must be substantiated by a qualified appraiser in order to qualify for the deduction.

Installment Sale

In an installment sale, the seller agrees to accept a series of payments over time rather than a lump sum. Installment sales may give the landowner the advantage of spreading income over several years. They give a land trust or other conservation purchaser the advantage of making land acquisitions with much smaller initial outlays and of giving them time to raise the funds needed for the balance. Another way to stagger the income

and payments is to physically divide the property so that the land is purchased in stages until the entire property is transferred.

Option to Purchase

Sometimes a landowner may wish to sell land to a land trust or other conservation purchaser, but the organization does not have the funds to buy it immediately. The owner might then give or sell the land trust an option to purchase the property. Under an option, the landowner and land trust contractually agree on a sale price, and the land trust is given a specified amount of time in which to exercise the option. However, the land trust is not obligated to purchase the land.

During the option period, the land cannot be sold to another buyer. This gives the land trust time to raise the necessary purchase funds. It also enhances the land trust's fundraising ability because people may be more willing to donate when they know the money is going to protect a specific piece of land at a specific cost.

Right of First Refusal

Landowners who are not ready to commit to the sale of their land may wish to grant a "right of first refusal" to a land trust. This gives the land trust the opportunity to match any bona fide offer received. As with an option to purchase, a right of refusal does not obligate the land trust to purchase the land.

Selling or Donating Land with Conditions Attached

Deed Restrictions

Restrictions on such actions as land subdivision, construction, or logging can be recorded with the deed when property is sold or donated. However, enforcement of deed restrictions must be carried out by the original landowner rather than by a third-party conservation organization, as is done for conservation easements. This type of enforcement can be difficult, especially over time, because it requires landowners and their heirs to monitor their former property. Deed restrictions can be cancelled any time by mutual agreement between the landowner who imposed the deed restrictions and the current landowners.

An alternative would be to transfer the property to an intermediary conservation organization which would insert restrictions into the deed, then transfer the property to the final landholding party. Thus, the intermediary agency agrees to enforce the covenants.

Deed restrictions, by limiting development, can reduce the market value of a property. The IRS, however, may not allow reduction in value from the private imposition of deed restrictions to be claimed as charitable income tax deductions, as it does for conservation easements.

Conditional Transfer

Deeds granting conditional transfers may carry more force than deed restrictions. Again, deed restrictions are placed on the land before it is sold or donated. The transfer, however, is made on a conditional basis. Should the new landowner not heed the covenants, it can result in the actual loss of the title. If the new owner were to break one of the restrictions, the deed specifies that the land will automatically be returned to the original owner, or turned over to another party named in the deed, such as a conservation organization or agency. If, for example, property is sold with the restriction that no new houses be built on it to preserve its open space characteristics, the deed can require that if a subsequent owner of the property ever attempts to build, a named organization may take possession of the land.

In Conclusion

There is a range of conservation options for private landowners, and this booklet introduces some that are commonly considered. One of the most common recommendations that land trusts across the U.S. are likely to give a landowner is that the primary reason for selecting a land conservation approach for their property should be their concern for protecting its conservation values. In the words of Stephen Small,

“Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land. If you care about your land, a conservation easement is the best tool you have for protecting that land and preserving it, regardless of the tax rules.”

In a landowner’s determination as to whether a conservation easement or one of the other approaches introduced in this booklet is best for them, they will want to consider:

- ▶ the degree to which they wish to restrict land uses and activities;
- ▶ how long they want to see those restrictions in place;
- ▶ who they would like to see enforce those restrictions; and
- ▶ what the tax and other financial benefits and costs are likely to be for their unique land ownership situation.

Whatever conservation approach a landowner takes is likely to have tax or other financial implications. It has been an intent of this booklet to introduce the reader to various conservation options and to some of the potential tax considerations that they will want to explore in greater detail before deciding for or against any particular conservation approach.



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Definition of Terms

The following are definitions of terms that relate to options described in this booklet. Most have been adapted from the Land Trust Alliance (LTA) publication, *Conservation Options – A Landowner’s Guide*.

Appraisal: An estimated value set on property by a qualified appraiser.

Assessment: The valuation of property for property tax purposes in order to apportion a tax on it, according to its value or in relation to the benefit received from it.

Bargain Sale: A sale to a land trust (or other qualified entity) at less than fair market value. The seller receives the sale price, and the difference between that price and the appraised fair market value qualifies as a tax deductible, charitable contribution.

Charitable Donation: An outright gift or contribution, with a charitable intent, whose value is deductible pursuant to federal and state income and estate inheritance tax laws.

Charitable Trust: A gift of land as the beneficiary of a living trust or charitable remainder trust.

Codicil: An additional explanation to a will to change, explain, revoke, or add provisions.

Conservation Easement: A legal agreement by which a landowner a) limits, without relinquishing ownership, the development potential of property which has significant natural resource, open space or habitat value and b) grants the right to conserve those values. A conservation easement runs with the land – that is, the original owner and all subsequent owners are bound by the restrictions of the easement. The executed easement document is recorded at the State Recorder's Office. This enables all future owners and lenders to learn about the restrictions when they obtain title reports.

Conveyance: A written instrument used to transfer (convey) title to property, such as a deed.

Covenant: A written promise contained in a contract, lease, deed, or other form of agreement. A covenant limits future use of the property through conditions or restrictions.

Donation: An outright gift, with or without charitable intent.

Donee: A party accepting or receiving a donation, as in a land trust agreeing to accept a conservation easement (may also be referred to as *Grantee*).

Donor: A person who donates, as in donating a conservation easement or land (may also be referred to as a *Grantor*).

Fair Market Value: The price that a willing buyer would pay a willing seller, neither being under any compulsion to buy or sell and both having full knowledge of relevant facts surrounding the transaction.

Fee Simple Interest: Absolute ownership of property. A fee simple estate is the greatest interest that one can have in real property, being unqualified, of indefinite duration, freely transferable and inheritable. Ownership of "less than fee simple interest" in property is ownership of fewer than the total possible rights one may have in land.

Gift by Will: A gift of land through a person's will.

Installment Sale: A tax motivated mechanism that spreads the income from the sale over several years, thereby helping to reducing capital gains tax.

Irrevocable: Binding in perpetuity. Incapable of being revoked.

Land Trust: Non-profit organization that protects land directly, usually by helping landowners establish a conservation easement, accepting donations of property and easements, or buying land.

Market Sale: A sale of real property priced at fair market value.

Non-Financial Benefit: Non-monetary rewards such as public recognition, dispute settlement, mutual protection with neighbors, and peace of mind.

Ownership: Holding lawful title to property. (see *Title*)

Qualified Organization: What IRS tax rules would consider to be a publicly supported charitable organization or a government agency. The donee of a conservation easement generally has to be in the open space or resource protection field, so it will have a strong incentive to enforce the terms of any conservation easements it holds.

Remainder Interest: An interest in property which does not become possession of the property until the completion of a prior interest; for example, where a grantor deeds property to an organization subject to a “reserved life estate,” the organization has a remainder interest which will become possessory when the life tenant (usually grantor) dies.

Reserved Life Estate: The right retained by the owner or other named individuals to live on or use property.

Restriction: A limitation on the use of real property. Property restrictions fall into two categories – public and private. Zoning ordinances are examples of a public type. Land trusts use private restrictions in the form of permissible and nonpermissible land uses described in conservation easements.

Right of First Refusal: A recorded agreement that requires landowners, if they receive an offer to buy their land, to allow the land trust to match the offered price.

Tax Benefits: Income, property, or estate tax deductions derived from qualified charitable donations.

Term Conservation Easement: A conservation easement for a term of years. It is not in perpetuity, so it is not tax deductible.

Title: The right to or ownership of land. “Bundle of Rights” possessed by an owner. Combination of all elements constituting proof of ownership.