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Preserving Local Land

A Look at Conservation Easements

What Attorneys Need to Know About Conservation Easements

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Photos courtesy of the Land Conservancy of Hamilton County



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Many homeowners, farmers, and other property owners in the Tri-State love their land so much that they are willing to forgo a profitable development opportunity in order to preserve their land for all time.

They are taking advantage of voluntary land conservation options available to area landowners. This includes the "conservation easement" (CE) donation — a legal mechanism employed with increasing frequency by eco-conscious landowners. A permanent deed restriction which "runs with the title" to the property, a CE binds future owners to its terms.

There are additional advantages. A CE donation can provide important tax saving opportunities in a landowner's lifetime and aid in the transfer of land from one generation to the next.

Attorneys active in real estate practice and title examination, as well as probate attorneys and those who draft wills and advise clients in estate planning, should understand the significance of conservation easements. To better serve landowning clients, they should consider how a CE donation — which can become a tax-deductible charitable contribution — could protect clients' land and reduce federal income taxes, real estate taxes, and estate taxes.

CEs: TIME-HONORED AND LEGAL

The CE is an agreement between a property owner and the qualified organization that accepts it, such as a non-profit land trust or public agency. The intent is to protect a property's conservation values — farmland, hill-

sides, wooded areas, wetlands or other natural features — by forever limiting the property's use and development. The CE is individually drafted to meet the personal needs of the landowner. The exact terms of the deed restriction are the subject of negotiation between the landowner and the conservation organization. When completed, the CE is filed with the county recorder.

The CE typically prohibits subdividing the property. In some cases, the owner reserves the right to build an additional home or two, usually for a family member. Essentially, the property owner voluntarily surrenders development rights to the conservation

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organization, which then has the legal right to monitor and enforce the restrictions. A CE usually does not permit public access to the land, but could do so if the owner chooses.

The landowner continues to own the property and live there, and use it in any way consistent with the CE. The owner can sell the property, mortgage it, lease it, and/or will it to heirs, but the property remains subject to the terms of the recorded easement.

CEs AND LAND TRUSTS

There is widespread use of CEs nationally, and their popularity is

growing, due largely to the efforts of non-profit land trusts at work in every state. According to the Land Trust Alliance, there are more than 1,200 local and regional land trusts that permanently protect a grand total of 6.2 million acres of open space. Of that total, 2.6 million acres are protected by CEs.

In the Tri-State, land trusts work with private landowners to permanent-



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ly protect land and water resources. These include the Land Conservancy of Hamilton County; Oxbow Inc.; Little Miami Inc.; the Hillside Trust; and Western Wildlife Corridor in Cincinnati. Also, Boone Conservancy works in Northern Kentucky; Three Valley Conservation Trust in Butler County; and Whitewater Valley Land Trust in Indiana.

Each organization has a different focus or mission. Together, they hold and monitor CEs protecting hundreds of acres, and own even more land outright. Land trusts protect wetlands at the confluence of the Great Miami

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and Ohio rivers, farmland in Hamilton and Butler counties, stream corridors along the Little Miami, critical hillsides in the heart of Cincinnati and along the northern banks of the Ohio River, and viewsheds along Interstate 74.

Typically, land trusts are incorporated as non-profits under the laws of the state where they are based or operate. The IRS officially recognizes them as 501(c)(3) organizations under the Internal Revenue Code. As such, land trusts can accept donations of funds, interest in land, or other assets. Because of land trusts' non-profit status, these contributions are tax-deductible.

CONSERVATION EASEMENT LAW IN OHIO

Conservation easements have been referenced in the Ohio Revised Code since 1979. RC 5301.67(A) defines a CE as "an interest in land held for the public purpose of retaining land, water or wetland areas predominately in their natural, scenic, open or wooded condition ... that imposes any limitations on the use or development of the site."

RC 5301.68 permits a landowner to donate such a CE either to a unit of local or state government or to a charitable organization recognized by the IRS as a 501(c)(3) organization.

RC 5301.69(B) specifically authorizes 501(c)(3) organizations to hold CEs.

DONATED CEs AND TAX SAVINGS

Together, these statutes reflect Ohio's public policy of encouraging citizens to donate CEs to qualified entities, and by reference, reflect the federal government's policy, enacted in 1980, that such charitable contributions qualify as federal income tax deductions. H.B. 431, an Ohio bill that proposes a state income tax deduction for donated CEs, is pending. And, CE donors can exclude from estate taxes a portion of the value of the land that would otherwise be subject to estate tax.

Regarding real estate taxes, RC 5713.01 provides in relevant part that "the auditor shall revalue and assess at any time all or any part of the real estate ... when a conservation easement is created under sections 5301.67 to 5301.70."

Further, RC 5713.04 provides that "each separate parcel of real property shall be valued at its taxable value ... taking into account the diminution in value as the result of the existence of any conservation easement created under sections 5301.67 to .69 of the Revised Code."



▲ Aileen Ettensohn walks the fields of her nine-acre homestead in Green Township. The wooded, single-family property is distinguished by hundreds of pine trees she and her late husband planted more than 50 years ago. Her cherished land is protected from any future development by a conservation easement she donated to the Land Conservancy of Hamilton County in January 2002.

Thus, when a landowner donates a CE to a qualified organization, the result can be a reduction in the donor's federal income tax obligation, and also a reduction in the real estate tax valuation of the property.

CEs THAT SATISFY IRS REQUIREMENTS

A landowner's desire to protect the land is the primary reason for donating a CE to a land trust. However, it is frequently the tax incentives that tip the balance.

continued



▲ The Land Conservancy of Hamilton County worked with conservation partners to purchase 10.7 acres of woods along I-74, west of North Bend Road interchange, to permanently protect scenic views.

A CE donation must meet certain IRS requirements found in IRC 170(h). For example, land must be preserved for its natural, scenic, historic or agricultural values, and provide a public benefit. Land devoid of natural features, such as a parcel burdened with demolition debris and old tires, would not qualify.

To take an income tax deduction for the donation, the IRS provides strict guidelines. The value of the CE (the difference between the land's value with the easement, and its value without the easement) must be determined by a "qualified" appraisal from a "qualified" appraiser. It must be completed within 60 days of the date of the donation to a qualified conservation organization.

ROLE OF THE ATTORNEY FOR THE CE DONOR

A CE is for all time and should not be undertaken lightly. To make informed decisions affecting the use and value of property, there is no substitute for financial and estate planning by professional advisors who know the tax code and can "run the numbers."

It is the role of the attorney advising a potential donor to make clear to the client that a CE once granted cannot be rescinded, and also, that a CE will lower the fair market value of their land. At the same time, it is not the place of the attorney to discourage a landowner from making such a commitment if that is their wish and they understand the significance of the commitment.

Learn More About CEs at Upcoming Seminar

Attorneys interested in learning more about legal land conservation options, including conservation easements, can attend a local seminar November 12 called "Preserving Family Lands" by tax attorney Stephen J. Small. A national authority on federal income and estate tax planning for landowners, Small, before going into private practice, was attorney-advisor in the IRS' Office of Chief Counsel in Washington D.C., where he wrote the federal income tax regulations on conservation easement donations.

The seminar will be held at the Fitton Center in Hamilton and is sponsored by a coalition of Tri-State conservation organizations and the Dayton Bar Association. A morning session designed for professionals is \$70; CLE credits are available. An afternoon session for landowners is \$20. Both sessions include a copy of Small's book, *Preserving Family Lands III*, published in 2002.

For more information, contact Three Valley Conservation Trust at (513) 524-2150 or visit www.GreenUmbrella.org.

Additionally, the attorney should assure the donee organization's tax-exempt status is current and is qualified to do business in your state.

Because the terms of the CE are the subject of negotiation between the landowner and the donee organization, the attorney for the landowner can help clarify his or her client's wishes.

A CE donation can be included as a bequest in a will. This could be appropriate if the preservation-minded landowner anticipates the possible need to sell his land to finance his retirement or for another reason.

If the property is mortgaged, the lender's permission to donate a CE must be obtained, otherwise the landowner

will be in violation of the mortgage. If the lender refuses to subordinate, the CE donation can be made in the landowner's will.

The attorney must also advise the client to make sure that the appraisal for the CE meets all IRS requirements, if the donor intends to seek an income tax deduction. And, it may be necessary for the attorney to assist the landowner in seeking a reduction in land valuation from the county auditor, particularly if the auditor balks and an appeal to the board of revision is necessary.

SAVING FAMILY LANDS

With values of developable land in some areas of the Tri-State soaring, estate taxes are eating up the proceeds of many an inheritance. Heirs may be forced to sell off land they had hoped to keep in their families.

With increasing frequency, landowners are turning to CEs as a legal tool to preserve their land. More would do so if only they knew such opportunities exist. Attorneys can help their eco-conscious clients by recommending a conservation easement as a way to protect their land and accomplish their financial and estate planning goals. ■



▲ Agricultural CE protects 58-acre Turner Farm in Hamilton County.