

Conservation Easement v. Deed Restriction

Q Since we are a nonprofit with a permanent existence, is there any difference between our receiving a restriction on land by deed covenant and a restriction on land by conservation easement?

A Deed restrictions and conservation easements are essentially the same thing... legally binding restrictions on the use of land in the form of a written instrument that affects the title to the land and is generally recorded where deeds are recorded. The only significant difference is that the conservation easement, if written properly and granted to an eligible grantee, is entitled to many more protections of the law under most states' statutes. It is generally accorded greater deference by courts in the event of a dispute. Another major difference is that conservation easements that meet certain qualifications are eligible for income tax treatment as a charitable gift. Because of these added benefits, there is no reason why a qualified grantee should ever take a simple deed restriction.

Deed restrictions are a creature of "common law," the law we inherited from England, as interpreted by court decisions. Those decisions have resulted in some significant drawbacks for deed restrictions that the state conservation easement statutes were designed to eliminate. While it may differ from state to state, a deed restriction is not permanent unless it is "appurtenant" to nearby land. It must benefit that nearby land, and run with the title to both properties. Otherwise, it is enforceable only during the lifetime of the grantor. Neither is it assignable by the grantee—in other

words, a land trust cannot transfer a simple deed restriction to another land trust or public agency.

Another disadvantage to simple deed restrictions is that the case law of most states require the courts to resolve any ambiguity in the interpretation of a common law deed restriction in favor of the less restricted use. Moreover, deed restrictions can be terminated by a court based on economic hardship or impracticability, without regard to public benefit. None of these impediments are applied to properly written conservation easements. In fact, some state laws instruct courts not to consider financial hardship in evaluating whether to terminate or modify an easement for "changed circumstances." Even in the absence of such specific protection, courts are apt to give greater deference to conservation easements because of the public benefit they serve.

If a full-blown easement is unappealing to a landowner and he or she doesn't care about tax deductions, in many states it is possible to draft a very simple document that more resembles a deed restriction, but which meets the requirements of the easement statute, and therefore qualifies for all of its protections. In Maine, for instance, the following language added to short and simple deed restriction language will make it a permanent conservation easement, without even mentioning the easement statute.

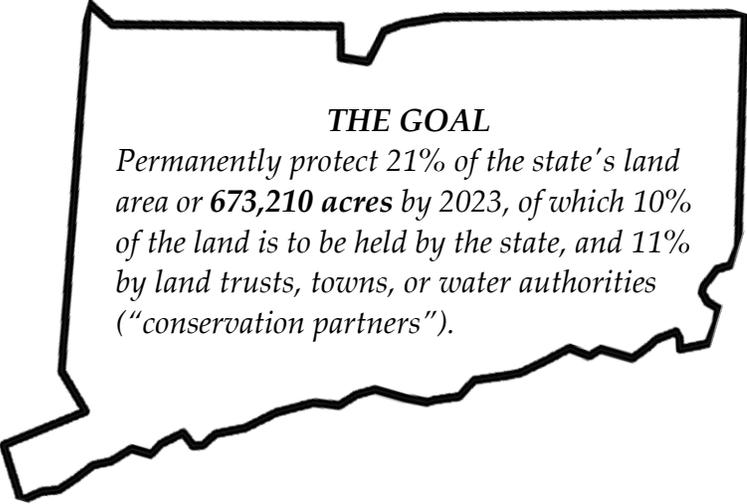
This covenant is for conservation purposes and shall run with and burden the premises in perpetuity, and The Land Trust, its successors and assigns, shall have the right to

enforce the same at law or in equity, and the right to enter the premises at a reasonable time and in a reasonable manner in order to monitor compliance herewith.

This kind of clause can also be used to turn a deed restriction in a deed from the land trust to another organization or person into a conservation easement. In fact, with just a few more sentences, an abbreviated version of the boilerplate language required by the IRS for income and estate tax recognition can turn the otherwise qualified restriction into a qualified conservation contribution under the tax code. The assistance of experienced counsel is essential, of course.

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Excerpt from “Ask an Expert”, *Exchange*, Spring 2001

Land Conservation in Connecticut: A Primer



THE GOAL

Permanently protect 21% of the state's land area or **673,210 acres** by 2023, of which 10% of the land is to be held by the state, and 11% by land trusts, towns, or water authorities ("conservation partners").

THE STATUS

As of 2024, a total of approximately **517,511 acres** have been acquired for conservation by the state and its conservation partners – approximately 16% of the state's land area. More than 200,000 of these acres have been protected by Connecticut's community of **over 130 land trusts**.

WHAT'S NEEDED

To reach Connecticut's goal, the state and its conservation partners will need to acquire **over 56,748 and 98,951 acres**, respectively.

State Conservation Funding Programs

Open Space and Watershed Land Acquisition Grant Program (CGS Section 7-131d et. seq.)

- Main source of state funding that has enabled land trusts, towns, and water companies to permanently protect forestland, farmland, and other open space for conservation
- Funded by bonding and through the Community Investment Act
- Grants typically cover 50 to 65% of a property's purchase price
- Since the program's inception in 1998, \$146 million in grants has supported the acquisition of 41,500 acres in 139 municipalities

Recreation and Natural Heritage Trust Program (CGS Section 23-74 et. seq.)

- Primary vehicle of Connecticut Department of Energy and Environmental Protection (DEEP) for acquiring state lands for parks, forests, wildlife, fisheries, water access, and natural resource management areas
- Funded by bonding
- DEEP has acquired over 51,650 acres under this program since its inception in 1986

Conservation Terms

Conservation restriction: a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will, or other instrument executed by or on behalf of the landowner, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic, or open condition or in agricultural, farming, forest, or open space use

Conservation easement: a voluntary legal agreement between a landowner and a land trust (or government entity) that permanently restricts certain aspects of land use in order to protect the conservation values of the property

Qualified Organization: an organization that is qualified to hold conservation easements, such as a conservation organization or government agency

Deed restriction: terms placed in a deed to a property that restrict certain uses of the real estate by subsequent owners

Fee simple ownership: a landowner grants all his or her rights, title, and interest in a property to a land trust, who then owns and manages the land

Stewardship: the activities related to maintaining the conservation values of a protected property, including monitoring for encroachments and violations

Selection of Conservation-Related Connecticut General Statutes (C.G.S)

1. C.G.S. §47-33h (2001) Excludes conservation easements (CEs) from Marketable Record Title Act.
2. C.G.S § 47-27(b) (2002) Bars adverse possession and prescriptive easement claims against non-profit land holding organizations.
3. C.G.S §47-42d (2005) Requires notice to CE holders of permit applications with state and local land use agencies and building officials.
4. C.G.S. §52-560a (2006) For encroachment on land trust land or CEs, court can award restoration or cost of restoration including: management fees, attorney fees, costs, equitable relief, and penalty of 5x restoration cost or \$5,000 in statutory damages. Attorney General can also enforce.
5. C.G.S. § 47-6b Easements must be signed by grantor and grantee (PA. 04-114 now 47-6b) or they are potentially voidable (response to easements granted without land trust permission).
6. § 12-81. Par. 7. Land trust property is generally exempt from property tax even without public access.
7. § 47-2. Charitable uses. "All estates granted.....for any other public and charitable use, shall forever remain to the uses to which they were granted, according to the true intent and meaning of the grantor, and to no other use."

Additional References

1. Connecticut Council on Environmental Quality. (2021). [Environmental Quality in Connecticut 2020.](#)
2. Connecticut Department of Energy and Environmental Protection. [Open Space in Connecticut.](#)
3. Connecticut Land Conservation Council. (2021). [CLCC Advocates for State Open Space Grants and other Land Conservation Programs.](#)

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#LoveYourCTLandTrust

Our Mission

The Connecticut Land Conservation Council advocates for land conservation, stewardship and funding, and works to ensure the long-term strength and viability of the land conservation community across the state.

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