

Common Conservation Easement Agreement Provisions

What goes into a conservation easement agreement? There are a host of considerations that should be dealt with in the Conservation Easement Agreement to ensure that there is clarity for both the landowner and the land trust.

There is no strict, one size fits all, template for conservation easement agreements. Often the organization holding the easement will have a proposed agreement for consideration. Augmenting these agreements depends on negotiations.

Typical provisions of a conservation easement agreement

1. Agreement Preamble.

The preamble presents a narrative regarding the inception and intent of granting the conservation easement. It reflects an executive summary of why the agreement was made and may be used by a court (or arbitrator) to inform an interpretation of the agreement. For conservation easements for agricultural purposes it will be highly relevant to identify if there is more than a single purpose for entering into an easement and whether one purpose is viewed as being paramount over the other(s).

- Introductions to the grantor and grantee
 - Indicating their legal ability to grant and accept easements.
- Location of land subjected to easement
 - The short legal land description and more general geographic location of the land that is subject to the agreement.
- Area of agricultural land
 - A general articulation of the extent of agricultural land on the easement and its character.
- Importance and purpose of easement
 - An articulation of the public or community benefit that is derived by the entry into the agreement (particularly if the grantee is a charitable land trust).
 - An articulation of the purpose for which the easement agreement is being entered. This may reflect agricultural, social and environmental outcomes that are the goals of entering the agreement.

- Multiple purposes
 - If there are multiple purposes and values to the land base any hierarchy of land values should be articulated.
- Relevance of entering into the agreement to meet national, provincial or municipal planning goals (if applicable). This in turn may be tied to community and public benefit.
- Relevant areas of easement by purpose - (e.g. X acres of “prime” agricultural land and Y acres of wetlands) with reference to maps in schedules to the agreement.
- Statutory foundation
 - Articulation of the basis under which the easement is formed, i.e. the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (ALSA) at s.29.

2. Definitions

The inclusion of definitions is standard and is important for clear interpretation and enforceability of the easement agreement. Many standard definitions of a conservation easement will be relevant and express incorporation of relevant *Alberta Land Stewardship Act* definitions should be made by reference. Depending on the intent of the qualified organization it is likely that additional definitions will be relevant for conservation easements for agriculture.

These may include defining or incorporation of relevant statutory definitions for:

- Agricultural purpose
- Agricultural land or Productive Agricultural land
- Traditional agricultural practices
- Sound agricultural practices
- Agricultural standards
- Management plan
- Nutrient Management Plan
- Conservation Plan
- Tradable development credits/rights
- Offsets
- Municipal development plans
- Developable area
- Residence / agricultural buildings
- Allowable development

- Ecologically significant lands
- Agricultural trails
- Beneficial/Best Management Practices

3. Granting of Easement

The main intent of this section of the agreement is to indicate clearly and concisely the granting of the conservation easement from the grantor to the grantee.

- Transfer of rights
 - Establishment of the ability of the grantor to convey the conservation easement (fee simple title and legal land description).
 - Express granting of the conservation easement from the grantor to the grantee.
- Term of easement
 - Express articulation of the term of the easement or an indication that the easement is granted in perpetuity.
- Specific easement area
 - A legal description (or reference to attached schedule) of the area that is the subject of the easement(s).
 - An articulation between geographic areas subjected to each easement purposes if the agreement is entered into for mixed purposes.

The specific geographic area to which the easement pertains may be included at this point or may be better suited under definitions or in provisions dealing with land use restrictions and permitted uses (particularly where there are mixed uses).

4. Purpose

The purpose provisions of the agreement are highly relevant to establishing the intent of entering into the agreement. To highlight the importance of this concept, some land trusts are also having landowners write a “letter of intent” to further support this section of the conservation easement as a separate document.

- Conservation or preservation of ecological characteristics
- Conservation or preservation of esthetic or open space values
- Conservation of recreational values
- Conservation of watershed functions
- Conservation of land and soils with high agricultural value

- Prevent use of property that would impair or interfere with the viability of stated purpose(s)
- If applicable, the hierarchy between purposes

5. Rights reserved by grantor

The rights reserved by the grantor are often articulated as fee simple entitlement to their lands as augmented by the remainder of the conservation easement agreement. Where the conservation easement relates to agricultural purposes some landowners may wish to articulate a scope of agricultural practice that is allowed under the agreement. Common rights reserved by the grantor include:

- Control of access
- Fee simple ownership
- Agricultural practices exclusion

6. Implementation & restrictions/permitted uses

The permitted uses, or conversely, the restrictions placed on conservation easements will vary with the objectives and purposes of the easement. Provisions may include land use restrictions and related permissions regarding:

- Limits on subdivision
- Restrictions on commercial/industrial activities
- Soil conservation (to meet or exceed requirements of the SCA)
- Vegetation management/preservation & timber harvest
- Recreational and educational uses
- Management of water bodies and water courses (limits on alteration)
- Allowable or restricted infrastructure - trails, roads, fences & utilities
- Limits on mining (gravel) extraction
- Use of pesticides (general or specific)
- Management of agricultural “waste” (as defined)
- Farming practices (nature of)
- Forestry practices if applicable
- Number of dwellings - residences for family/farm labour
- Number and nature of outbuildings/agricultural structures and improvements

Many restrictions may be waived in specific instances with the consent of the grantee (as negotiated).

7. Management and administration of easement

This section deals with how the land base is to be measured and monitored and how the agreement will be enforced. It provides for the nature and process requirements around monitoring and enforcing of the easement, including any requirements for notice, available remedies, and enforcement process (such as binding arbitration).

- Measurement and recording of baselines
- Rights of inspection, monitoring and enforcement by grantee (and/or grantee's delegate)
 - Notice provisions
 - Remedies – injunctive relief, damages
 - Right of enforcement
- Transfer of lands
- Amendments to easement and/or management plans
- Legal nature of consents

8. Termination and modification

While the *Alberta Land Stewardship Act* stipulates some aspects of when and how a conservation easement may be modified and/or terminated there is great flexibility in the agreement itself to articulate certain circumstances where modification or termination will be agreeable to both parties.

- Provisions where modification with written consent of grantee
- Possible triggers of termination and financial consequences

9. Enforcement

Enforcement of a conservation easement agreement, in the absence of contractual provisions to the contrary, will occur through the courts. The holder of the easement may enforce against the grantor or may have designated another qualified organization to enforce the easement.

The agreement may also have provisions prescribing binding arbitration or voluntary mediation and dispute resolution and describe how these processes will occur (choice of arbitrator, costs, enforcement of results).

10. Warranties

Warranties are parts of the agreement that can be used to deal with issues that may be resolved through an award of damages but does not impact that fundamental nature and provisions of the contract itself. A typical warranty relates to environmental matters, such as a grantor's warranty that the land under the easement is not contaminated with pollutants.

11. Indemnification

Indemnification relates to one party promising to cover costs and/or damages related to a specific loss (under the contract) suffered by the other party to the contract.

12. Obligations of Grantee

This section outlines the requirements placed on the grantee and reflects statutory requirements to transfer easements upon winding up. There may also be obligations created for the grantee regarding notice and any other preconditions to assignment of the conservation easement to another qualified organization

- Assignment of easement
 - General
 - Upon winding up
- Duty to give notice prior to access

13. Insurance

Maintaining insurance related to various liability issues related to the land may be dealt with in the agreement, particularly where public access is allowed.

14. Taxes

Municipal property taxes will typically be payable by the owner of the fee simple title of the land unless otherwise stipulated in the agreement. Some qualified organization may agree to pay a portion of the municipal property tax.

15. Options to purchase

The holder of the easement may wish to have the option to purchase the underlying fee simple interest in the event that the grantor wishes to sell the property.

16. Severability

Severability relates to how the provisions of the contract should be interpreted to be standalone. This means that if there is a violation of part of the agreement or if one provision is found to be void or unlawful that the contract as a whole still stands and is enforceable.

17. Notice

This provision provides the address for the purpose of legal notice provided under the agreement (such as access notification, notification of assignment of the agreement, and notification of sale).