

Conservation Easement Checklists – Legal Counsel

Introduction

The following checklist outlines considerations that legal counsel may use in advising a client involved in a conservation easement.

The relevant legal considerations will vary depending on when in the process a client has consulted you for advice and the priorities of the grantor of the easement.

A. Prior to entering a conservation easement agreement

- Client's reasons for entering into an easement are clearly understood. What are the objectives for the landowner? Proper advice is not possible without knowing a client's motivations for considering an easement.
- Consider other conservation tools – gift of fee simple, lease, or conservation directive or other contractual agreement and the related advantages and disadvantages of each approach.
- Consider what qualified organization is appropriate for your client – what are the features that they want maintained.
- Confirm it is valid qualified organization and eligible under the federal ecological gifts program (if applicable).
- Evaluate and discuss the timing of the conservation easement occurring – During the landowner's lifetime or as part of will and estate planning.
- Discuss with client the nature of the legal interest being created in the land –usually in perpetuity (timelines).
- Discuss limits on land use and development rights –and what rights they may wish to retain
- Consider tax implications of proposed conservation easement, whether paid or donated
- Outline tax options and implications to client, including split receipting option (this may qualified organization dependant)
- Consider applicability of Ecological Gifts program (where applicable)
- Seek independent appraisal of conservation easement
- Obtain property tax assessment information from the municipality and implication

resulting from a conservation easement

- If needed, negotiate with qualified organizations of agreement costs including survey (if required), appraisal, and legal.

B. Review of a conservation easement agreement

- Thoroughly discuss with the granting landowner the expectations they have for allowable activities on the land
- Seek qualified organizations agreement template

Review and advise client regarding easement agreement contents, considering:

- The permitted or discretionary land uses and how they are to be expressed in the conservation easement agreement
- The geographic description of conservation easement agreement area to fit grantor's needs
- Ensure purpose of easement is clear and reflects parties intent
- Ensure permitted and prohibited activity discretion are detailed and not overly open to interpretation (inviting enforcement actions).
- Ensure effective date and timing of agreement is appropriate

Liabilities and coverage of costs:

- Consider and advise grantor of liability potential for third party access.
- Ensure liability and indemnification obligations are expressed in the agreement
Typically indemnity clauses in agreements –indemnifying the QO against any losses or damages sought by another party that are a result of activities undertaken by the grantor, their employee or agent, in the carrying out of their obligations under the agreement.
- Ensure insurance coverage is dealt are dealt with in the agreement, including who is responsible to continue with that insurance.
- Obtain assessment information from the municipality regarding property tax assessments
- Ensure agreement dictates party responsible for property taxes

- Consider designation of additional qualified organization for purpose of monitoring and enforcement
- Review of management plan:
 - Confirm the management needs of the property
 - Confirm responsible parties regarding management
 - Confirm costs associated with management obligations of the client.
- Outline other potential costs associated with easement
 - Remedying non-compliance –liable for costs of enforcement (pursuant to the rules of court) and may need to pay the costs of remedying the non-compliance.

C. Tax implications

- Evaluate the complexity of tax and estate planning issues and retain outside legal expertise if needed
- Outline to client the tax treatment of easement lands, whether donation or purchased –ITA gift rules
- Outline treatment of Ecological Gifts (if relevant)
- Outline estate planning options considering:
 - Reason for easement
 - Estate plans and capital property deemed disposition
 - Affects on current or future will
 - Details required to effect a CE agreement after death (i.e. sufficient instruction for executor)
- Confirm impact of CE designation on property taxes.

D. Agreement Registration

- Complete and send Form (*Conservation Easement Registration Regulation*) providing notice of intent to register to relevant parties (municipal council, Minister of Infrastructure, Minister of Transportation, et al.)
- Send registration to Land Titles Office for Registration no earlier than 60 days from official notice

- Complete statutory declaration for registration (Form 2 *Conservation Easement Registration Regulation*)
- Discern whether priority on title for CE can be obtained and seek title priority

E. Post execution -management and sale

Purchase and Sale implications

Before property is listed

- Are there any requirements in the conservation easement agreement to notify parties of intention to sell or listing or rights of first refusal?
- Does my client have concerns about maintaining the confidentiality of environmental information about the property? If my client has confidentiality concerns, what assistance and advice can I provide?

When the property is listed

- Do any warranties in the listing agreement about environmental information or the environmental condition of the property need to be modified or changed?
- Is the seller aware of the implication of failing to disclose certain types of information about the property?
- Does the seller understand all warranties that he or she has given or intends to give in the listing agreement about environmental information or the environmental condition of the property?