

Conservation Restrictions

A Tool for the Landowner and for the Community

By Robert Levite

Author's note: The following article is designed to be educational and is not intended to be legal advice. If you or a member of your family is interested in exploring conservation restrictions as a tool in your estate planning, please contact legal counsel to discuss the specifics.

Over the next 15 to 20 years, millions upon millions of acres of land are going to change hands and very possibly change use, as landowners plan, or do not plan, as the case may be, for what is going to happen to their land. This is because the principle private landowners in this country are older, most over the age of 60.

Since 1969, a little known state law has been instrumental in helping Massachusetts families protect thousands of acres of open space, farmlands and forests, while retaining ownership of the land. In that year, the Massachusetts legislature passed the Conservation Restriction Act, which sets forth the procedures for creating conservation restrictions on land. A conservation restriction (often referred to as a conservation easement) is a voluntary, binding legal agreement in which a property owner restricts the type and amount of development that may take place on his or her property in order to protect specific conservation and resource values in the land. These restrictions may be donated to or purchased by a town or government agency or a charitable conservation organization such as a local land trust. The restrictions must be approved by the selectman of the town in which the property is located and by the Secretary of the Executive Office of Energy and Environmental Affairs. In order to qualify for inclusion in this program, the restrictions must be sufficient to protect the identified conservation values of the property and the Secretary must take into consideration the public interest in such conservation. Because conservation restrictions run with the title, when ownership of the property changes all successive owners are subject to the same restrictions.

The easiest way in which to imagine a landowner's rights in his land is to think of a bundle of sticks. Each stick represents some right that the landowner has that permits the use of his or her land in a particular manner. For example, the right to use the land for recreation, hunting and fishing, the right to farm the land, or the right to practice forest management are different sticks in that bundle. In granting conservation restrictions, the landowner gives up some of these sticks, or rights, and retains others. Thus, terms of the conservation restrictions may vary. The landowner, however, continues to own the land and can use it, sell it or bequeath it, subject to terms of the restrictions.

The beauty of such restrictions is their flexibility. The landowner can retain those rights that are important to his or her enjoyment and use of the land. On the other hand, the landowner may give up other rights, such as the right to clear, cut or destroy trees, the right to subdivide or otherwise develop the land, or the right to build roads. Often these restrictions permit public access, but just as often, as is the case with farmland, the public may have no right of access to the property. The exact terms of the restrictions are negotiated between the landowner and the entity to which he or she donates or sells the restrictions. These terms are often guided by the nature of the property's resources and the landowner's needs.

This particular type of land protection technique has generally been underutilized for several reasons. Aside from the fact that there is little done to publicize the nature of this technique, unfounded fears that restrictions reduce the town's tax base and a simple lack of understanding of what restrictions accomplish are to blame for the limited use of the technique. Those towns which have encouraged the use of conservation restrictions (over half the towns in the Commonwealth have lands under conservation restrictions) have found them to provide for the protection of open space without the need for the town to spend money on land acquisition. In addition, protected open space, farmland and forests provide a positive cash flow for a town from a tax perspective, since they do not require the expensive municipal services that developed land does, while they continue to bring in small streams in tax income.

The benefits to the landowner also go beyond the permanent protection of his or her land and natural resources. Conservation restrictions that are donated in perpetuity and that meet certain criteria set out by the Internal Revenue Service can qualify the donor for a substantial federal income tax deduction. Such restrictions also normally reduce the landowner's real estate taxes (often by as much as 80-95%) and may reduce a landowner's estate taxes.

Conservation restrictions offer landowners, their families and local communities a good opportunity to preserve family lands, while preserving local open space and helping to stabilize local tax rates, a win-win situation for everyone involved.

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