

Conservation Easements: An Option for Preserving Current Land Uses¹

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Conservation easements are cost-effective means for government agencies or non-government conservation organizations to protect land. Instead of purchasing land outright, these agreements allow organizations to purchase the development rights of a property, thereby protecting the target resources and saving money. Conservation easements may be a viable option for landowners wanting to prevent future residential and commercial development of their land, and those who want to reduce their heirs' inheritance tax liability. They often work best for landowners who have a strong connection to their land and want to ensure its protection for many generations. Landowners are encouraged to enter such agreements carefully because they require several rights to be conveyed to the easement grantee and the duration of these agreements is typically perpetual. This publication will describe conservation easements, what is involved in establishing one, some of the tax implications of such agreements, the government and non-government organizations that commonly participate in conservation easements, and important considerations for landowners before entering into such an agreement.



Figure 1. Conservation easements may be a viable option for landowners wanting to protect the current uses of their land and can reduce their property tax liability, as well as their heirs' inheritance tax liability.

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What is a conservation easement?

A conservation easement is a voluntary, legally binding agreement between a landowner and a government agency or non-government conservation organization. The agreement keeps land in natural habitat, agricultural, and/or open space uses. The agreement is customized to meet the landowner's and conservation entity's objectives and, in most cases, is perpetual.

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In essence, the landowner sells or donates certain rights to use the land, which typically include the right to develop all or part of their land for non-agricultural or non-natural habitat, or non-open space uses, to a conservation organization. Current uses, including residential and recreational uses, agriculture, forestry, and ranching, can continue under certain, legally-binding stipulations. The easement will protect qualities of the property such as wildlife habitat, open space, forest management, or aesthetics. Public access to the property is not a requirement to participate in a conservation easement, but the easement grantee will reserve the right to enter the property to monitor compliance with the agreement.

How the Agreement Works

Generally, conservation easements are donations rewarded by certain tax benefits to the landowner. In Florida, perpetual conservation easements may be either donated or sold to an agency or other organization through *less-than-fee payments* to the landowner. If the easement is to be sold, the payment is negotiated between the landowner and conservation entity and may be as much as an amount equal to the difference between the fair market value of the land without the easement and fair market value of the land as encumbered by the easement.

For example, Joe and Jolene Landowner have property in Alachua County with planted pines, old pastures, and mixed hardwoods. The family is interested in growing and harvesting pines, hunting, bird watching, and some future forestry and wildlife habitat improvements on the property. They want the property protected from residential and commercial development, and they plan to pass the property on to their children with a decreased tax burden, so they decide to convey a conservation easement. Being close to a growing urban area, the land has a fair market value of \$3,500 per acre. The property appraiser determines that the overall current value of the property with a conservation easement is \$1,500 per acre since no major residential or commercial development can occur on the property at any time in the future. Therefore, the landowner could receive as much as \$2,000 per acre for the easement, and since the placing of the easement generally reduces the estate value of the property, the heirs' estate tax liability should also be reduced.

Legal Stipulations

A conservation easement agreement will require the landowner to convey certain rights to the agency or organization that holds the easement and specifies uses

prohibited on the property that will allow the easement to accomplish its intended conservation purposes. The grantor's (landowner's) reserved rights are also specified in the agreement. Some examples of these stipulations, from a Florida Division of State Lands Deed of Conservation Easement, are outlined below.

Rights Granted to the Grantee

These are examples of rights that may be conveyed to the grantee (the entity that receives the conservation easement):

1. the right to preserve and protect the conservation values of the property;
2. the right to enter the property at reasonable times in order to monitor compliance with the agreement;
3. the right to prevent any activity on or use of the property that is not consistent with the purpose or provisions of the easement and to require the restoration of areas or features of the property that may be damaged by inconsistent activity or use at the grantor's cost;
4. the right of first refusal to purchase the property in fee if the grantor proposes to sell the property to a third party other than a lineal descendant, and the right to purchase the property from the estate or trust of the grantor (void if easement is a charitable donation for no consideration);
5. the right to be indemnified by grantor for any and all liability, loss, damage, expense, judgment, or claim arising out of any negligence, willful action, or activity resulting from the grantor's use of the property or use of the property by the grantor's agents, guests, lessees, or invitees.

Prohibited Uses

Activities on or use of the property not consistent with the purpose of the easement are prohibited under a conservation easement agreement. The following are some examples of activities that may be prohibited in a conservation easement agreement:

1. no soil, trash, liquid or solid waste, hazardous materials, or pollutants defined by federal or Florida law shall be dumped or placed on the property;
2. activities or uses that will be detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat conservation;

3. activities or uses detrimental to the structural integrity or physical appearance of any portions of the property having historical, archaeological, or cultural significance;
 4. planting of invasive plants listed by the Florida Exotic Pest Plant Council, and the grantor shall control invasive plants on the property;
 5. commercial or industrial activity or ingress or egress across or upon the property in conjunction with commercial or industrial activity that is not consistent with the purpose of the easement, except as may be required for the exercise of the grantor's reserved rights;
 6. new construction that is not consistent with the purpose of the easement;
 7. creation of new roads or jeep trails;
 8. no more intense agricultural use of the property than currently exists on the property, if any, and no conversion of non-agricultural areas to agricultural use;
 9. activities that adversely impact threatened or endangered species;
 10. any subdivision of the land.
6. the right to use, maintain, repair, and reconstruct, but not relocate or enlarge, all existing structures, fences, roads, ponds, drainage ditches, and other facilities on the property.

Tax Implications of Conservation Easements

Many factors influence the decision of landowners to consider encumbering development and other rights of property ownership through a conservation easement. Among those are economic and tax implications of either selling or donating conservation easements. Some tax benefits depend upon whether an easement is donated or sold, and some do not. Tax implications generally fall into one of five broad categories: income taxes (federal and state), estate taxes (federal and state), and property taxes. Since Florida has neither a state income tax nor a state inheritance tax, we will not explore their implications here as they vary widely from state to state and cannot be generalized.

In general, a landowner who sells a conservation easement to a qualifying organization will have to report proceeds from the sale as either ordinary or capital gains income for tax purposes. Landowners who choose to donate an easement may receive federal income tax and additional federal estate tax benefits. Tax benefits are only allowed for "qualifying conservation contributions" as defined by the Internal Revenue Code (IRC) Section 170(h).

Donations can also only be made to qualifying conservation organizations. The Internal Revenue Service keeps a list of those organizations. They generally include federal and state natural resource management agencies such as one of the five Water Management Districts in Florida, and IRC Section 501(c)3 nonprofit, tax-exempt land trusts. A more complete list of qualifying organizations for Florida residents can be found on the Land Trust Alliance website (<https://landtrustalliance.org>).

Federal Income Tax Benefits

The enhanced easement tax incentive was enhanced and made permanent in 2015. Gifts of all or part of a qualified conservation easement provide an annual charitable income tax deduction. Fifty percent of the donor's adjusted gross income can be claimed, with a 15-year carry forward. For example, the fair market value of a landowner's donated conservation easement is \$500,000, and the terms of the easement assure that the land will remain available for agriculture use. The landowner's adjusted gross income is \$80,000.00. The charitable deduction for the year of the

Grantor's Reserved Rights

Some or all of these rights are reserved to the grantor and the grantor's representatives, heirs, successors, and assigns:

1. the right to observe, maintain, photograph, fish, hunt, introduce and stock native fish or wildlife on the property, to use the property for non-commercial hiking, camping, and horseback riding in compliance with federal, state, and local laws concerning such activities;
2. the right to conduct prescribed burning on the property provided that the grantor obtain and comply with the appropriate authorization from the regulatory agency having jurisdiction over this activity;
3. the right to harvest timber or other forest products in accordance with an approved forest management plan;
4. the right to mortgage the property;
5. the right to contest tax appraisals, assessments, taxes, and other charges on the property;

transfer is \$40,000 (50% of \$80,000). This leaves \$460,000 (\$500,000–\$40,000) to carry over for the next 15 years.

Income tax provisions are subject to change. For the latest information see the Land Trust Alliance website at <https://landtrustalliance.org>.

Property Tax Benefits

Florida House Bill 7157 went into effect in January 2010 under 196.26 and 193.501, Florida Statutes (F.S.). This law provides property tax exemption for real property dedicated in perpetuity for conservation purposes (form DR-418C) and a current use tax assessment of land used for conservation (form DR-482C). Section 196.26(2), F.S. states that: “Land that is dedicated in perpetuity for conservation purposes and that is used exclusively for conservation purposes is exempt from ad valorem taxation.” According to the statute, land that is “dedicated in perpetuity” is “land encumbered by an irrevocable, perpetual conservation easement.” See the full language of this provision in the Florida Statutes at: http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0100-0199/0196/Sections/0196.26.html.

Landowners who meet the criteria for this property tax benefit should apply with the Florida Department of Revenue through their property tax appraiser’s office. A complete online listing of property appraisers by county is at <https://floridarevenue.com/property/Pages/LocalOfficials.aspx>. Keep in mind that if your property is already receiving favorable tax treatment via an agricultural assessment (or other “current valuation”), a conservation assessment outside of that associated with a perpetual conservation easement may or may not further reduce the property tax. An agricultural assessment is an agricultural production-oriented classification. Land not already in an agricultural classification or some other tax-favorable classification may benefit from a conservation assessment depending upon the post-easement fair market value, the types of encumbrances specified in the conservation easement, future land use options, and other considerations.

Federal Estate Tax Benefits

Federal estate taxes may be significantly reduced through either selling or donating a conservation easement. Additional tax benefits may accrue if the easement is donated. The most direct benefit results from reductions in fair market value and thus the value of the gross estate and the ultimate estate tax burden.

Heirs can exclude 40% of the value of land under a conservation easement from estate taxes. Section 2031(c) of the Internal Revenue Code provides an estate tax exclusion of up to 40% of the encumbered value of land protected by a “qualified conservation easement.” This exclusion is capped at \$500,000. The cap is lower if the easement reduced the land’s value by less than 30% at the time it was donated. To qualify, the easement must serve one or more of the conservation purposes recognized in Section 170(h) of the tax code. The easement must limit commercial recreational use and it cannot qualify solely for the purpose of historic preservation. Only members of the original easement donor’s family, including spouses and descendants, can claim this exclusion.

Recent changes in the tax code have put the vast majority of landowners out of reach of the estate tax. The 2017 Tax Cut and Jobs Act raised the size of estates exempt from estate tax to \$10 million, indexed for inflation. The indexing means the exemption increases each year. In 2019, the first \$11.4 million of a person’s estate is not taxed (\$22.8 million for a married couple). Unless the legislation is extended, exemption levels will revert back to an earlier level of \$5 million per person in 2026.

All tax laws are subject to change. The Land Trust Alliance website is a good place to keep up to date on the latest tax information associated with conservation easements: <https://landtrustalliance.org>.

Participating Organizations

What organizations will purchase a conservation easement? The major state agencies involved with perpetual conservation easements in Florida are the Department of Environmental Protection (DEP) and Water Management Districts. These agencies are particularly interested in buying easements, usually in large blocks, in order to protect watersheds.

Typically, conservation easements are donated to charitable nonprofit land trusts. However, occasionally these organizations may purchase easements for subsequent resale to a government agency, or as an effective leveraging tool to protect more land for less money because fee ownership, possession, and many other rights remain with the landowner. A listing of some of these conservation organizations can be found on the Land Trust Alliance website (<https://landtrustalliance.org>).

Concluding Remarks

Since a conservation easement should be customized to meet specific objectives for you and the conservation entity, the agreement should contain some flexibility to allow for desired future uses. Try to anticipate future uses that you or your heirs may want to allow on the property that are consistent with the conservation objectives for the property. For example, John Landowner currently has no plans to harvest or plant pines on his land, but he or his heirs may want to allow those types of activities in the future and this activity is consistent with the conservation objectives for the property. A conservation easement is forever, so it is important to consider as many desired future uses as possible before finalizing the agreement.

It is also essential that the landowner carefully review the implications of the easement with legal and financial advisors before the final agreement. Also, bear in mind that your property will be subject to periodic visits (usually one scheduled visit per year) by the conservation organization to verify compliance with the agreement.

The following are some important questions to answer before entering a conservation easement agreement:

- What resources do you and the conservation entity want to protect on your property?
- What activities do you and the conservation entity want to prohibit on your land now and in the future?
- What activities do you want continued on your land?
- Are you willing to convey the rights as required in the agreement?
- What other activities, in addition to those taking place currently, might you or your heirs want to do in the future, which are compatible with your and the easement grantee's conservation objectives?

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