Guide to the Conservation and Preservation Easements Act

Pennsylvania Act 29 of 2001

Conservation organizations can avoid many potential difficulties in conservation easement stewardship by ensuring that their conservation easement documents are drafted to conform with the Conservation and Preservation Easements Act.

Introduction

In the absence of specific legislative enactments, agreements affecting real estate are subject to court interpretation and enforcement in accordance with common law, the body of law resulting from centuries of court cases. Conservation easements are built from familiar legal components but, as a relatively recent innovation,[1] they are an awkward fit for the time-worn principles of common law.

The Conservation and Preservation Easements Act (the "Act"), passed by the Pennsylvania General Assembly and signed into law by Governor Tom Ridge on June 22, 2001, provides a simple, easy-to-implement path for avoiding the common law difficulties presented by conservation easements. It also stands as a strong policy statement of the Commonwealth of Pennsylvania in support of conservation easements.

For an easement holder to take advantage of the Conservation and Preservation Easements Act, the easement's granting document must conform with the Act's requirements. Many easements pre-dating the Act may already conform—no changes necessary. For an easement that doesn't conform, its granting document may be amended by the easement holder and the present landowners to bring it into conformance.

Conservation easements not conforming to the Act remain valid and enforceable under common law.

[1] The first known use of conservation easements in Pennsylvania occurred in the 1960s.

Advantages Over Common Law

The Conservation and Preservation Easements Act provides distinct advantages to a conservation easement prepared in conformance with the Act as compared to an easement relying solely on common law. Key advantages include the following:

- **Easement presumed valid.** The Act says that, as a matter of public policy in Pennsylvania, conservation easements conforming to the Act are valid, notwithstanding the ways they defy traditional categorization under common law.
- **Interpretation in favor of conservation.** The Act directs courts to construe language in a grant of conservation easement in favor of conservation (specifically, in favor of the purposes of the easement and the policy and purpose of the Act). This provides a distinct advantage over the common law rules, which are generally more likely to preference a less restrictive reading of restrictions on the use of land.
- **Enforceable only by certain persons.** The Act clarifies key matters as to who has the right to enforce a conservation easement.

The following subsections elaborate on these advantages.

Conservation Easements Presumed Valid

Conservation easements defy traditional common law categorization, leaving room for questions about validity and enforceability.

For example, under common law, negative easements and other forms of restrictions on land use were traditionally viewed as enforceable only by neighboring property owners. While Pennsylvania common law evolved beyond such strict limitations,[2] in the absence of clear statutory direction by the legislature, conservation easements (and other negative easements) remained vulnerable to unpredictable further development of common law.

The Pennsylvania General Assembly, in establishing the Act, bolstered the legal foundation for conservation easements in the Commonwealth:

- In §2 of the statute, "[t]he General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements...."; and
- The statute's §6, entitled "Validity," affirms that a conservation easement is valid even though it has certain characteristics that common law traditionally found to be problematic.

Interpretation in Favor of Conservation

Under common law principles, easements are interpreted by common law principles of contracts, and restrictive covenants are generally construed against the party seeking to enforce them. Because of the restrictive nature of conservation easements, these common law standards of review are more likely to resolve interpretation disputes in favor of the less restrictive reading, potentially at the expense of conservation. The Act recognizes the distinct public benefit value of conservation easements and offers a special standard of review to defend those outcomes in disputes over interpretation. Section 5(c)(2) of the Act supplants otherwise-applicable common law doctrine and directs the courts to interpret conservation easement language liberally in favor of the purposes of the easement and the policy and purpose of the Act.

Enforceable Only by Certain Persons

With the 1956 decision Appeal of J. C. Grille, Inc., the Pennsylvania Superior Court greatly expanded the universe of persons who could claim to be beneficiaries of a restrictive covenant. Anyone in the vicinity, whether or not owners of land adjoining the restricted property, and

[2] See Appeal of J. C. Grille, Inc., 124 A.2d 659, 181 (Pa. Super. Ct. 1956).

whether or not specifically identified as an intended beneficiary, could have rights of enforcement if a court finds that they are one of the class of persons intended to be benefitted by the restriction. For conservation easements under common law, this creates an administrative nightmare: each member of a poorly defined group of beneficiaries may challenge a holder's easement management decisions and changes agreed to by the easement holder and landowners.

Section 5(a) of the Act addresses this problem by narrowing the universe of those who may have standing to bring legal or equitable actions affecting a conservation easement to (quoting the Act directly):

1. An owner of the real property burdened by the easement.
2. A person that holds an estate in the real property burdened by the easement.
3. A person that has any interest or right in the real property burdened by the easement.
4. A holder of the easement.
5. A person having a third-party right of enforcement. (a qualified entity named in the easement).[3]
6. A person otherwise authorized by Federal or State law.[4]
7. The owner of a coal interest in property contiguous to the property burdened by the easement or of coal interests which have been severed from the ownership of the property burdened by the easement.

This list greatly limits those persons and entities entitled to appear in court to bring suit to enforce an easement. The Act denies court access to persons and entities not listed and who, under common law, might have sought redress that holders thought was motivated by narrow self-interest rather than the public good or was otherwise inappropriate.

For more information, *see* the WeConservePA guide *Who Has Standing? Conservation Easements in Pennsylvania Courts* as well as *Who May Get Involved in Conservation Easement Management Matters?*

Drafting Necessities Under the Act

Duration

Under the Act, conservation easements created after June 22, 2001, may not have a duration of less than 25 years (see §4(d)). This is generally not a problem since nearly all conservation easements are established for perpetuity.

Coal Notice

Section 9(d) of the Act requires a notice, signed by the grantor of the easement, that the conservation easement may impair future mining of workable coal seams within the property. The acknowledgment must be printed in *no less than 12-point type* and must be preceded by the word "Notice" in *no less than 24-point type*.

Example of Notice

The *Model Grant of Conservation Easement and Declaration of Covenants* published by WeConservePA addresses this requirement by including in the document's penultimate article the following provision:

[3] Since "third-party right of enforcement" is defined in §3 as a right provided *in the easement document* to an entity that is *qualified to be a holder* (e.g., a land trust or local government), few if any entities will have standing under this category.

[4] This vaguely described category likely includes the Pennsylvania attorney general and those whose exclusion would frustrate the application of other state or federal law.

Coal Rights Notice

The following notice is given to Owners solely for the purpose of compliance with the Conservation and Preservation Easements Act:

NOTICE: This Conservation Easement may impair the development of coal interests including workable coal seams or coal interests which have been severed from the Property.

The signing of the statement is accomplished with the grantors' signatures required at the end of the document.

Absence of Workable Coal Seams

The Model Grant includes the statutory notice as a matter of course. It may be omitted if no workable coal seam exists, but the better practice is to leave it in place. WeConservePA confirmed which counties contain areas with presently workable coal seams and which do not. However, it was unable to find an expert willing to state *with 100% certainty* that no workable coal will *ever* be found in a particular county. Thus, unless an expert can determine that no coal is present on a particular property, it would be wise to include the coal notice.

Notice Does Not Indicate Impairment

One should not infer from this mandatory notice that coal mining is in any way impaired by the conservation easement. The possibility of impairment will depend both on whether coal rights were previously granted to others—and thus supersede any easement restrictions—and if not, the specific restrictive covenants agreed to by the landowners and holder when drafting the grant of easement.

Easement Boundaries Must Be Clearly Delineated

Section 4(b) of the Act requires that a metes and bounds description of the portion of property subject to the easement be provided in the easement document "[e]xcept when referencing an easement's boundary using setback descriptions from existing deed boundaries or natural or artificial features, such as streams, rivers or railroad rights-of-way."

(For more information on easement boundary matters, *see* the WeConservePA guide *Delineating Conservation Easement Boundaries and Protection Areas*.)

Other Drafting Matters Touching on the Act

Referencing the Act

Rather than take the chance that an easement may inadvertently fail to comply with the act's requirements, a "saving" provision may be included in the granting document stating that the easement is constructed with the intention of conforming to the requirements for conservation easements under the act. For example, §8.09 "Guides to Interpretation" of the *Model Grant of Conservation Easement and Declaration of Covenants* contains the following text in subsection (d):

> This Grant is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation easement under the Conservation and Preservation Easements Act.

Providing Third-Party Rights of Enforcement

As discussed above, the Act limits the universe of persons with rights to enforce a conservation easement in court. Consequently, if the landowner and would-be easement holder want to ensure that another land trust or government entity has a right to enforce the easement, to assert rights as a backup holder, or to assert any rights at all affecting the easement, they must identify that entity as having those rights in the easement document.

Users of the Model Grant are instructed to name those entities, if any, in §1.08 of the model and to identify the specific nature of their rights in article 6 of the model.

Acceptance of Third-Party Right

(*See* §3 and §4(c) of the Act.)

Entities were and are sometimes named in a granting document as having enforcement rights or responsibilities without having been consulted in the matter. The Act protects entities from having undesired rights or duties foisted upon them without their knowledge or consent. They may elect to accept a right or duty to enforce by signing a written acceptance and recording it. The flip side is that, until they sign and record a written acceptance, they do not have rights of enforcement. Acceptance of enforcement rights may be part of the granting document or in a separate instrument.

Although the acceptance could be recorded at some future date, a good practice is to record the third-party's acceptance of the right to enforce from the outset as part of the grant of conservation easement. This way the easement holder and landowner know that the chosen third party has in fact accepted the responsibility and, if trouble should develop in the future, there will be one less hurdle for timely enforcement. Including the acceptance as part of the easement itself also simplifies future title work.

Limiting Organizations That May Accept Transfer

Grants of easement typically contain language allowing the holder to transfer the easement to an organization that is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code. Language could be appended to this provision to also require that the successor organization be qualified as a holder under the Conservation and Preservation Easements Act. (*See* §3 of the Act for the definition of *holder*.)

Section 6.01(b) of the Model Grant limits transfer of the easement to a "Qualified Organization," which is defined as meeting both the 170(h) and Conservation and Preservation Easements Act requirements.

Noting Consistency with Commonwealth Policy

Because the Act provides a strong public policy statement in support of conservation, easement drafters may choose to affirm an easement's role in advancing the policy of the Commonwealth by quoting the statement in the easement's baseline documentation or in the body of the grant:

> The Pennsylvania General Assembly, in enacting the Conservation and Preservation Easements Act, stated that it "recognizes the importance and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of this Commonwealth."

Doing so is not required by the Act or other law, but some may feel it to be useful for future interpretation or to explicitly address concerns of grantors seeking federal tax deductions.

Other Features of the Act

Charitable and Tax Status

Non-governmental easement holders must maintain both their Bureau of Charitable Organizations registration and their IRS 501(c)(3) tax status (see §3).

A typical easement drafting practice is to note a holder's 501(c)(3) tax status in the "background" or "whereas" section of an easement. As a reminder of the importance of maintaining charitable registration, language may be added stating that the holder "is registered with the Bureau of Charitable Organizations of the Pennsylvania Department of State."

Outside Activities Must Pose Substantial Threat

Section 5(b) of the Act prohibits bringing suit for activities occurring outside of conservation easement boundaries except where those activities "pose a substantial threat of direct, physically identifiable harm" within the eased area.

While it may appear self-evident that a conservation easement only imposes restrictions on the land it burdens, this provision limits any equitable right a holder may otherwise assert to block activities on adjacent lands. At the same time, it acknowledges that such rights may be available and necessary when neighboring activity poses a distinct threat.

Merger Doctrine Discontinued

Section 6 of the Act changes the common law rule that the lesser interest (the conservation easement) merges into the greater interest (fee simple ownership) when both interests are held by the same person. Thus, a conservation easement survives even if the easement holder becomes the owner of the property (for example, the holder later purchases the land from the landowner or the landowner donates the land to the holder by bequest).

Same as Other Easements

Section 4(a) of the Act states that:

> Except as otherwise provided in this act, a conservation or preservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.

Condemnation

The Act does not protect conservation easements from eminent domain; rather, it affirms the rights of government and other entities to exercise the power of eminent domain (*see* §5(d)).

The Act does, however, provide for compensation for the easement holder "in accordance with the applicable provisions of the conservation or preservation easement which specify a particular allocation of damages…" (*see* §5(d)(2) and §5(e)).

The Act also doesn't prevent purchase agreements in lieu of condemnation (*see* §5(e)).

Applicability of the Act

(*See* §7 of the Act.)

The Act applies to easements that comply with the Act and that are created after June 22, 2001, the date that Governor Ridge signed the legislation into law.

The Act also was crafted to apply to easements created before the Act if those easements comply with the Act and were recorded or, if not previously recorded, were recorded within 180 days of 6/22/2001. (See below for the judicial application of this provision.)

The Act does not alter, modify, or supersede "either the method of creating, or the rights, duties, powers or obligations appurtenant to agricultural conservation easements" under the state's Agricultural Area Security Law.

Case Law

In its Naylor decision,[5] the Commonwealth Court applied the Act retroactively to resolve questions of standing regarding a pre-2001 easement. However, in the same decision, it declined to apply the act's liberal construction standard retroactively, holding that doing so would have resulted in an unconstitutional impairment of contract. (*See* the WeConservePA guide *Conservation Easements in Court*.)

[5] Naylor v. Bd. of Supervisors of Charlestown Twp. & French & Pickering Creeks Conservation Trust, Inc., 247 A.3d 1182 (Table) (Pa. Commw. Ct. 2021)

Comparison to Other States

Each state's common and statutory law regarding conservation easements is unique. The differences can be quite substantial. The Land Trust Alliance publication *A Guided Tour of the Conservation Enabling Statutes* compares and contrasts the conservation easement enabling statutes enacted by states across the country and discusses the key issues addressed and not addressed by these statutes. First published in 2010, the report is updated occasionally to reflect changes in state laws (and is current at least through 2023).

Should Easements Predating Act Be Amended?

Easements that do not conform with the Act will continue to be interpreted under common law. Holders are best served to seek—when opportunity presents itself—to amend and restate easements predating the Act in order to bring easement documents up to modern form and ensure that the provisions of the Act can be used to their full advantage. Examples of opportunities include when:

- The present landowner are strong supporters of the holder and the conservation protections provided by the easement.
- The present landowners wish for changes to the restrictive covenants that the holder finds acceptable, especially if bundled into a full amendment and restatement into modern form. Such action might include tangible improvements in some of the restrictive covenants or expansion of the conservation objectives.

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