



What is a conservation easement?

A conservation easement is defined as:

A non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

Unif. Conservation Easement Act § 1(1). What does that mean though? In layman's terms, that simply means the land owner is restricting the future use and development of the property in ways that benefit the environment.

A conservation easement is often confused with a "conservation use assessment of agricultural property," in which real property can be placed in through the local county tax assessor and results in lower ad valorem taxes on that tract for the period prescribed (usually ten years). During that period if the property ceases to be used as agricultural property, back taxes will be due as well as penalties, but the property can still be developed or used as the land owner wishes.

While a conservation use assessment for agricultural property in some ways similar to a conservation easement, the main difference is that placing a property in a conservation easement restricts the owner's use of the property in perpetuity. After placing a property into a conservation easement it can never be developed, except in designated outparcels agreed on between the land owner and holder of the easement and only then as set out in the conservation agreement. As described below, this restriction of the use of the real property in turn affects the value. Why then, would an owner restrict his or her use of the real property?

The primary reason is due to the environmental benefits a conservation easement provides. As an inducement for landowners to place a conservation easement on their property, the Internal Revenue Code allows a charitable income-tax deduction for a "qualified conservation contribution". Some states, including Georgia, offer state deductions and credits for owners placing easements on their real property. In order to determine the amount of any tax benefit that may be available, a value has to be placed on the conservation easement. This is determined by valuing the real property before and after placing it into a conservation easement. The difference in values represents the value of the conservation easement. This can be seen in the example below:

Example 1:

Appraised Land Value, highest and best use:	\$2,000,000.00
Appraised Land Value, with conservation easement:	\$200,000.00
Value of conservation easement:	\$1,800,000.00

Determining the value of the tax deduction or credit to owners and whether it is applicable is determined on a case by case basis.

In some situations, the landowner may wish to syndicate the conservation easement. This means title and ownership to the property will be placed (if it has not been already) in an appropriate corporate entity, normally a LLC, whereby third-parties can invest and purchase an interest in the entity. By purchasing this interest, the investor often can gain the ability to claim a portion of the deduction derived from the conservation easement.

Example 2:

As an example of syndication, please refer to the figures in Example 1. If ten individuals decide to invest in a company that owns the property in Example 1, and each of those individuals owns an equal share of the company, each investor owns \$180,000.00 of the conservation easement value, and may accordingly claim any federal or state tax benefits that may exist with respect to that value.

Due to the large tax benefits that can often be involved with conservation easements, the risk of audit by the IRS or the appropriate state department of revenue is increased significantly. Due to this risk, landowners often choose to create an audit reserve from the funds realized in syndicating the easement. While the IRS has traditionally chosen to scrutinize the value assigned to the conservation easement in an audit, in recent years the IRS has gone further and argued against the applicability of the property being placed in a conservation easement. As a result, the landowner must realize there is a spectrum of possible outcomes that could occur. This spectrum goes from no audit occurring all the way to a complete disallowance of any deductions or credits. An audit could likewise settle somewhere in the middle where the value assigned to the easement is decreased in some manner. There are even situations where penalties can be assessed for substantial valuation misstatements. Based on these risks, landowners are instructed to seek their own independent legal and tax advice apart from the services provided by our firm regarding the placement of a conservation easement on their property.

When determining to encumber real property with a conservation easement, there can be a number of different individuals involved. Depending on the specific facts and characteristics of the real property in question, the process can vary from being very straightforward to very complex in nature. Therefore, a conservation easement can necessitate the need of individuals with specialized knowledge in different areas. A brief summary of the nature of the work performed by each person and his specific responsibilities are set out below.

1. Appraiser – Values the real property at its highest and best use before and after the placement of the conservation easement. Must be available for defense of the appraised conservation easement in the event of audit, which the landowner and potential investors are advised is highly likely. Usually paid a flat fee in advance by the landowner or manager for the appraisal work.

Disclaimer: Landowners are responsible for reviewing all appraisals created in connection with the conservation easement as well as the valuations made in them. Neither our law firm nor the accountants retained in connection with the conservation easement make any warranties or representations as to the validity of appraisals. In the event of syndication, investors in the company may rely on the fact that the original landowners have reviewed and accepted the appraisal submitted in connection with placing a conservation easement on the property.

2. Surveyor – It may be necessary to employ a surveyor to determine the boundaries of the property being placed in the conservation easement or any outparcels not to be affected by the easement. Usually paid a flat fee in advance.
3. Site-plan engineer – It may be necessary to employ an engineer to advise the landowner as to potential and alternative ways to develop the real property. Usually paid a flat fee in advance.
4. Manager – Consult and assist the landowner in placing the real property into a conservation easement. Advise, negotiate and contract with third-parties on behalf of the landowner in connection with the easement and syndication (if necessary), including but not limited to appraisers, site-plan consultants and engineers, accountants, lenders of the Company, if any, attorneys of the Company, broker-dealers, and potential investors. Usually paid a flat fee from the proceeds of the Offering for work regarding the placement of the conservation easement on the property. If continues to manage the property after the easement, may be paid annually, but may vary on circumstances.
5. Landowner/Company – Has many different roles. Must assist the attorneys, manager (if one), and land trust by providing details of the property and ownership of the company (if in existence). Must determine and possibly negotiate the location of the easement and the extent of the restrictions applied to the real property via the easement. Has a duty to review the appraisal and all documents involved with the conservation easement for accuracy. In the event the landowner wishes to “syndicate”, a Private Placement Memorandum (“PPM”) may need to be drafted to distribute to potential investors. The PPM outlines the details of the sale of interest in the entity (the “Offering”), such as the price of buying an interest, the history of the company and the real property, how proceeds realized from the investors are to be used. The landowner is charged with supplying the manager and attorney with this information to draft the PPM. The landowner must review the PPM’s contents and other corporate documents for accuracy, as investors are relying on the representations made by the landowner. Depending on the circumstances, the initial principals of the company may be paid a sum certain for the redemption of their interest from the proceeds of the Offering.
6. Broker-dealer – Employed by the landowner in connection with an Offering to solicit investors to purchase an interest in the company owning the real property. Usually paid a commission based on the purchase price paid by investors to gain ownership.
7. Attorney (Facilitating the placement of the easement and Offering if made) – Advises the landowner on the pros and cons of placing the property into a conservation easement. If syndicated, the attorney may advise and organize the company and draft necessary corporate documents and minutes. The attorney is also responsible for drafting the PPM distributed to potential investors. The attorney drafts and reviews numerous other documents involved with the easement. The attorney further works with the land trust to ensure the placement of the conservation easement is properly done. Reviews characteristics of investors to ensure they qualify under existing securities law. Normally paid a flat fee from the proceeds of the Offering.

8. Attorney (Title/Filing) – Performs title examination on the real property to determine existing liens and other encumbrances that might invalidate the placement of a conservation easement on the property. May assist with the actual filing of the easement in the county in question. Usually paid a flat fee from the proceeds of the Offering.
9. Escrow Agent – Receives monies paid by investors purchasing interests in the company owning the real property. Said funds are held until the real property is deemed eligible for a conservation easement and all other requirements of the PPM and the Offering have been satisfied, then the escrow agent disburses said funds in accordance with the PPM. Usually paid a flat fee from the proceeds of the Offering.
10. Accountants (Company) – Advise and provide accounting services to the landowner as to the tax benefits and consequences involved with placing a conservation easement on the real property. Analyzes ownership of real property and its owners to determine whether it would qualify for tax benefits. Informs landowner risk inherent in transaction and risk of audit. Reviews financial characteristics of investors to ensure they qualify under existing tax law. Usually paid a flat fee from the proceeds of the Offering.
11. Accountants and attorneys (Investors) – Individual investors are advised to seek advice from their own legal and tax advisers concerning conservation easements and the tax benefits and consequences involved with purchasing an interest in a company placing a conservation easement on the real property. Individual investors bear this cost.
12. Land Trust/Non-profit Holding and Enforcing Easement – The party being granted the conservation easement. Responsible for preparing and sometimes recording the baseline documentation and other related conservation easement documentation. Charged with supervising and enforcing the specific easement rights in place on the real property in question. Paid a flat fee in advance for baseline work and review of the property, then paid donation toward the endowment or stewardship for future monitoring by land trust (normally based off the appraisal of the property).

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This summary does not constitute an offer to buy or sell securities. Such offers may only be made to qualified accredited investors via confidential Private Placement Memorandum (PPM). Investments should be considered highly speculative and before investing, investors must read and understand the PPM and the objectives, risks and costs involved with this type of investment. Securities offered through SANDLAPPER Securities, LLC (member FINRA/SIPC).

Internal Revenue Code, Section 170(h)

QUALIFIED CONSERVATION CONTRIBUTIONS, AS AMENDED

This Act became law on December 17, 1980 (Public Law 96-541, 26 U.S.C. 170(h) and has been amended three times.

Qualified conservation contribution	Section 170(h)
26 U.S.C. 170(h)(1), In general	(1) For purposes of subsection (f)(3)(B)(iii), the term “ qualified conservation contribution ” means a contribution— <ul style="list-style-type: none">(A) of a qualified real property interest,(B) to a qualified organization,(C) exclusively for conservation purposes.
26 U.S.C. 170(h)(2), Qualified real property interest	(2) For purposes of this subsection, the term “ qualified real property interest ” means any of the following interests in real property: <ul style="list-style-type: none">(A) the entire interest of the donor other than a qualified mineral interest,(B) a remainder interest, and(C) a restriction (granted in perpetuity) on the use which may be made of the real property.
26 U.S.C. 170(h)(3), Qualified organization	(3) For the purposes of paragraph (1), the term “ qualified organization ” means an organization which— <ul style="list-style-type: none">(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or(B) is described in section 501(c)(3) and—<ul style="list-style-type: none">(i) meets the requirements of section 509(a)(2), or(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.
26 U.S.C. 170(h)(4), Conservation purpose defined, in general	(4)(A) For purposes of this subsection, the term “ conservation purposes ” means— <ul style="list-style-type: none">(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,(iii) the preservation of open space (including farmland and forest land) where such preservation is—<ul style="list-style-type: none">(I) for the scenic enjoyment of the general public, or

Internal Revenue Code, Section 170(h)

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of a historically important land area or a certified historic structure.

Certified historic structure

(B) For purposes of subparagraph (A)(iv), the term “**certified historic structure**” means any building, structure, or land area which—

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in Section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary [of the Treasury] as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on due date (including extensions) for filing the transferor’s return under this chapter for the taxable year in which the transfer is made.

26 U.S.C. 170(h)(5), Exclusively for conservation purposes

(5) For purposes of this subsection—

(A) A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

Conservation purpose must be protected

(B)(i) Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

No surface mining permitted

(ii) With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

Special rule

26 U.S.C. 170(h)(6), Qualified mineral interest

(6) For purposes of this subsection, the term “**qualified mineral interest**” means—

(A) subsurface oil, gas, or other minerals, and

(B) the right to access to such minerals.