



Practical Pointers Series

DRAFTING CONSERVATION EASEMENTS TO ADAPT TO CLIMATE CHANGE

Flexible conservation easement drafting means that your land trust anticipates likely areas of change and drafts to address them. For climate change in particular, some areas to draft for flexibility that you might consider are species type and distribution, proximity to water, soil types, contaminants, current and future probable climate temperatures, human population, land uses, management and education possibilities. Most of the following drafting points are equally applicable to conservation easements generally as well as those designed to adapt to climate change. For examples of climate change clauses, see the companion to this Practical Pointer: “Climate Change and Conservation Easement Clause Examples” <http://learningcenter.lta.org>.

1. **Identify the conservation values** that warrant protection, recognizing that some may change over time with climate pressures. Determine what it will take to conserve those values over time. **Be clear about the purposes of the easement** and directly link easement restrictions to the easement purposes and to protection of the conservation values.
2. **Have comprehensive and detailed, project-specific background information.** Especially if a restriction or a reserved right is unusual, include recitals or background information to support and explain it. Ensure that the reader (perhaps the judge in an enforcement action) understands the details and what makes them important.
3. **An easement must be flexible enough to respond to change**, such as species composition and uncertainty of the effects of change, while still protecting the identified conservation values. An easement reflects a partnership between landowner and land trust to preserve conservation values forever, so **discuss the need for flexibility with the easement grantor**; negotiate and draft for holder flexibility to adapt the conservation easement to changing conditions over time, while continuing to protect the land’s conservation values in perpetuity. Consider what flexibility successor landowners will need to respond to climate change especially for working land. Distinguish restrictions that will be strictly applied from those that have flexibility in interpretation.
4. **Predict and address possible points of friction** when possible to avoid challenges from future owners that the easement is too restrictive or out-of-date with changed circumstances. Do not assume that environmental and social conditions and resource needs that exist at the time the conservation easement is negotiated and executed will exist in the future.
5. **Strive for clarity** in what an easement prohibits and what it permits, what approvals an owner must seek before undertaking certain activities and what notice the owner must provide to the holder under certain situations. Clarity and lack of ambiguity make it easier for a landowner to understand and accept easement terms and for a land trust to monitor and enforce them.
6. **Define specific terms.** Review the draft easement for terms that should be defined (in the easement or by reference to a different source); review the document again to locate and correct defined terms that are used inconsistently with their definitions.
7. **Performance standards** may be appropriate in some circumstances and easier to uphold because they offer a flexible goal, rather than a rigid standard. They may also help avoid technical violations that may not actually adversely affect protected conservation values.

8. **Combine prescriptive and performance standards** so that easement goals are more likely to be met during climate change as technology and scientific understanding emerge. Consider if some reserved rights should float based on changing best practices in agriculture, forestry or land management. If so, define criteria in the easement and provide for change over time in conformity with a recognized source of rules (and backup for that source), coupled with land trust approval of a management plan.

9. **Consider including discretionary approval or consent provisions and specify amendment criteria and procedures.** The objective is to prevent easement obsolescence, guide amendment decisions, meet unforeseen circumstances and adapt to changing conservation practices, evolving science and shifting environmental, climate, economic and cultural circumstances while protecting conservation values.

10. **Consider whether easement requirements that look to law should be fixed to current law.** If so, attach a copy of the law as an exhibit because it may be very hard to prove in 50 years what a particular local jurisdiction's zoning law was, for example, was in 2009.

11. **Don't restrict unnecessarily**, especially as to inconsequential details, and keep in mind the fundamental purposes of the easement in drafting the restrictions. Remember that conservation easements are limited interests in land that work best to prevent activities harmful to conservation values rather than to prescribe affirmative land management activities. If rigorous restrictions strip substantially all economic value from the land, include strong explanatory recitals so that all the parties understand the rationale for the restriction.

12. **Recognize that land may change.** Landscape features, such as shorelines and river channels, as well as ecological conditions, may change over time with temperature, water and other influences. Flexible management plans and zone boundaries may help.

13. **Provide for easement termination or modification** contrary to its stated purposes only in accordance with all state and federal laws, court approval and **full proportional compensation of the easement holder**, to be used for similar conservation purposes.

RESOURCES

The Science of Climate Change and Conservation Easements, 2009, Stanford Conservation Climate Change Drafting Committee, available at The Learning Center <http://learningcenter.lta.org>.

Conservation Easement Drafting and Documentation, 2008, by Jane Ellen Hamilton (The Land Trust Alliance) <http://learningcenter.lta.org>.

The Conservation Easement Handbook, 2005, by Elizabeth Byers and Karin Marchetti Ponte (The Trust for Public Land and the Land Trust Alliance).

Internal Revenue Code §170(h) — www.irs.gov/taxpros/index.html

Treasury Regulations §1.170A-14 — www.access.gpo.gov/nara/cfr/waisidx_03/26cfr1v3_03.html

Conservation Defense Clearinghouse at <http://clearinghouse.lta.org> digital library of materials to assist attorneys and conservation practitioners with conservation-related legal issues.

The Learning Center is the Alliance's online searchable library with publications, sample documents and other material. The Learning Center contains a complete guide for implementing *Land Trust Standards and Practices*, including explanations, links and sample documents. <http://learningcenter.lta.org>.

DISCLAIMER

These pointers are provided with the understanding that the Land Trust Alliance is not engaged in rendering legal or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought. These pointers prepared by the Stanford Conservation Climate Change Drafting Committee are adapted in part from The Land Trust Alliance curriculum *Conservation Easement Drafting and Documentation*.