

# Conservation Easements and Their Ability to Incorporate Agricultural Production

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**T**he use of conservation easements to preserve land for agricultural purposes has expanded in recent years, permanently protecting more than 3.4 million acres of land with nearly 18,500 easements as of 2022. See Lori Sallet, *State Purchase of Agricultural Conservation Easement Programs Permanently Protect over 3.4 Million Acres as of January 2022*, Am. Farmland Trust (Nov. 18, 2022). Conservation easements that incorporate agricultural uses can be a valuable tool to preserve land use for both personal and societal goals. Goals such as (1) ensuring land remains a generational asset; (2) maintaining rural communities; (3) decreasing barriers to entry into the agricultural sector while promoting individual, as opposed to corporate, land ownership; and (4) protecting local food sources underscore the versatility a conservation easement for agricultural purposes can achieve.

## The Elements of a Conservation Easement

Conservation easements developed from common law but have since expanded so that each state recognizes them with enabling statutes. Nearly half of the states have adopted in whole or in part the Uniform Conservation Easement Act (UCEA). As each state has a distinct enabling statute, this article will use the UCEA as a model for the typical components of a conservation easement. The UCEA defines “conservation easement” as a “nonpossessory 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,” where the “holder” is a “governmental body empowered to hold an interest in real property . . . ; or a charitable corporation, association,

or trust.” UCEA § 1(1)–(2) (1981, as amended 2007). The following five elements are typically required by states that have adopted the UCEA to create a conservation easement: (1) an interest in real property created by a recorded instrument; (2) a qualified interest holder; (3) a conservation purpose of such interest; (4) a duration of time for such interest—presumed to be perpetual unless the easement states otherwise; and (5) a property interest that cannot impair the prior interest owner’s property rights when the easement is established unless those owners join in the easement or consent to it, i.e., the easement is subject to any existing recorded encumbrances.

Land protected by a conservation easement can be sold, bequeathed, or transferred at any time—it is not an outright restriction on the conveyance of the land. Public land access is not required. The land also remains subject to property taxes, contrary to a common misconception. The holder has the right to access the land and confirm the easement is implemented consistent with its purpose. With an agricultural conservation easement (ACE), the landowner reserves certain property rights to use the land for production, processing, and marketing of agricultural crops, which can include “traditional” domestic livestock, rangeland, grassland, and pastureland. An ACE is meant to be flexible and drafted according to the needs of each individual landowner. Accordingly, the landowner, as the grantor, can retain any (or none) of the following rights: sand and gravel removal; fence maintenance, operation, and expansion; road construction; utility installation; range management and livestock production; water resource enhancement and development; agrichemical and biological application; forest management and timber harvest; recreational use; river access; agri-tourism; and even limited property development such as home or outbuilding construction.

Of course, the property owner’s motivations also play a significant role in the creation of a conservation easement. A

primary motivation is often tax considerations. The federal tax code allows donated land “exclusively for conservation purposes” to be claimed as a charitable donation, which can create a significant federal income tax deduction for the appraised loss in value. Heidi S. Glance & Kylie J. Crandall, *Conservation Easements, in Environmental Aspects of Real Estate and Commercial Transactions* 663, 665 (Kevin R. Murray ed., 2021). Such donations can be made either as a complete gift or as a “bargain-sale,” where the landowner sells the conservation easement in exchange for an amount less than the fair market value of land. *Id.* at 666. Under the Internal Revenue Code (IRC), a landowner can claim a donation if it satisfies the following requirements: The gift must be made with a donative intent; it must be a “qualified real property interest” (26 U.S.C. § 170(h)(2)); it must be made to a “qualified organization” such as a governmental unit or a publicly supported charitable organization (*id.* § 170(h)(1)(B); Treas. Reg § 1.170A-14(c)(1)(i), (ii), (iii), or (iv)); it must be made exclusively for a “conservation purpose” (26 U.S.C. § 170(h)(1), (4); Treas. Reg. § 1.170A-14(e)(1)); and, finally, it must be protected in perpetuity. Treas. Reg § 1.170A-14(c), (e), (g). As an illustration, if the property’s assessed value was worth \$500,000 prior to the donation and only \$200,000 after it was placed in a conservation easement due to the loss of future development value, the landowner could claim a \$300,000 donation. The financial implications of such a deduction can be a significant motivation for many landowners in creating a conservation easement.

In recent years, the IRS has taken an interest in reviewing conservation easements for their validity. There have been a number of publicized tax abuse and fraud cases that have led to an increase in IRS challenges of conservation easements meeting all requirements. For example, in *Belk v. Commissioner*, a landowner was not entitled to a tax deduction because their conservation easement failed the perpetuity requirement, even though the property could not be developed, because the landowner retained the right to change what property was subject to the easement. 774 F.3d 221 (4th Cir. 2014). Likewise, in *TOT Property Holdings, LLC v. Commissioner of Internal Revenue*, a landowner was not entitled to a tax deduction because their conservation easement failed the perpetuity requirement as the landowner was not entitled, as was regulatorily required, to a proportionate share of proceeds in the event it was sold. 1 F.4th 1354 (11th Cir. 2021). To date, the majority of IRS scrutiny has not focused on ACEs. However, there are considerations from these cases for landowner-grantors that could limit a conservation easements’ tax benefits. See Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 *Ecology L.Q.* 627, 658 (2017); see also *Conservation Easement Audit Technique Guide*, Internal Revenue Serv. (Jan. 21, 2021).

There are also state tax incentives in certain states that offer some form of tax credit to landowners for conservation easements. Currently, 14 states and territories have adopted programs that provide such financial incentives that may include opportunity for immediate income generation. For example, some states provide that if a landowner donates land to a conservation easement but does not owe enough tax to use the full credit, the landowner can sell the remaining credit to

another taxpayer. This is called a “transferable tax credit.” See *Income Tax Incentives for Land Conservation*, Land Trust All. (Sept. 27, 2022). Others of the 14 states instead offer credits up to a certain value of the protected farmland. *Id.*

Another motivation for the landowner is often monetary consideration from the easement holder. An example of this is the aforementioned “bargain sale,” where the landowner sells a conservation easement in consideration for a less-than-fair-market value of the property subject to the easement.

Some landowners are driven by neither financial tax incentives nor compensation, but instead by a personal connection and commitment to the property or “place attachment.” This is one of the most common motivations for many landowners, while financial reasons are one of the lowest. James R. Farmer et al., *Motivations Influencing the Adoption of Conservation Easements* 25 *Conservation Biology* 827, 831 (2011). One such example is the Patterson farm of nearly 700 acres, located in the fastest-growing county in Nebraska just outside of an expanding metropolitan area. The Pattersons placed their property in an agricultural conservation easement to ensure it remained undeveloped and could continue to be used for crops such as corn and soybeans, along with its unique hickory woods, spring-fed creeks, scenic vistas, and Native American historical sites. Many landowners in situations similar to the Pattersons are primarily motivated to permanently preserve their property for reasons other than financial benefits. Interview with Nebraska Land Trust Stewardship Dir., Jacob Alishouse (Apr. 15, 2024).

## The Implications of Agricultural Conservation Easements

Agricultural production is a legitimate, statutorily recognized reason to create a conservation easement that can affect society in numerous, distinct ways. One primary impact is that it allows land to generate an infusion of income while remaining in a family as a generational asset. See Phelps, *supra*, at 635. Farmers are often “land-rich and cash-poor” due to the fact that their land is their most significant asset. ACEs take the difference between the land’s value as a working farm and its value if it were to be developed property: The owner is compensated the difference between these two by the holder if the easement is sold. The landowner then has a new income source to maintain the property and to keep the farm operational. This flexibility allows the landowner to invest in new machinery or equipment, pay off outstanding debts, or invest in new capital improvements. When in need of cash, landowners can utilize a conservation easement instead of an outright sale or by relying on traditional bank-financed loans, which often require land as collateral. By implementing an ACE, a farmer or rancher can forgo a line of credit and receive not only a federal tax deduction but potentially a partial payment from the holder as well; this monetization can be greater than the market value of the farm and thus can be quite significant. Perhaps the most important aspect of a conservation easement’s use for this purpose is that it does not change the farm or ranch land’s use. Effectively, the land functions the same way it always has, only now it must be used for agricultural purposes in perpetuity.

An ACE also can help to maintain rural communities by limiting development of property for nonagricultural uses like industrial or commercial. When a landowner places their land in an ACE, they commit the land's use for farm or ranch land. Preserving these uses contributes to the rural community's economy and overall way of life by protecting the community from commercial development. The maintenance of the status quo of such communities is important to the overall economy of the nation. For example, rural areas are key to the nation's food supply, as they are where the majority of all farms that grow food—either for direct human consumption or for livestock consumption—are located. Indeed, more than half of the entire U.S. land base (52%) is used for agricultural production. *Land Use, Land Value & Tenure*, U.S. Dep't of Agric. Econ. Rsch. Initiative (Sept. 8, 2023); see also Olugbenga Ajilore, *The Path to Rural Resilience in America*, Ctr. for Am. Progress (Sept. 21, 2020).

Another benefit of an ACE is the preservation of individual land ownership, helping overcome the significant barriers to entry into the agricultural sector as farms and ranches are increasingly owned by large commercial companies. One of the most significant barriers to entry is in the initial capital cost of the farmland and its associated machinery, equipment, and/or livestock or crops. ACEs are a way to allow new farmers to enter this space as the cost of land is significantly decreased. See Phelps, *supra*, at 634; Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. Ill. U. L. Rev. 657, 660 (1999). Because conservation easements reduce the land's value from market rate, as they limit the land's value to its agricultural rate as a working farm, individuals can purchase ACE-encumbered farmland at a discount. This discount is beneficial to new farmers who can take advantage of such a below-market valuation to gain access to farmland.

An ACE also protects local food sources. There is a growing trend of community initiatives to offer fresh, local food and, likewise, create agricultural opportunities. Hamilton, *supra*, at 666. The increase of “farm-to-table” restaurants and farmer's markets throughout the country illustrates this growing trend. See Cinnamon Jonzer, *The History of the Farm to Table Movement*, Restaurant Insider (June 18, 2022). The responding communities' interest and the recent proliferation of these types of restaurants and marketplaces in both rural and urban areas demonstrate how ACEs can contribute to and support local food sources. As land is placed in an ACE and farmed for local produce or livestock, it promotes a community's access to fresh and healthy food on a seasonal basis.

Yet for all their benefits, ACEs are less common than traditional conservation easements. Conservation easements are typically thought to be intended to preserve scenic vistas or important ecological values, not a functioning farm. However, as conservation easements continue to gain traction, those specific to protecting agricultural uses are becoming generally more popular. Since the year 2000, conservation purposes of recorded easements have increased to an average of 7.8

purposes, compared with only 5.4 purposes before 2000, and those created after 2000 were more likely to have specific purposes to protect agricultural land uses like forestry, grazing, or farming. See Jessica Owley & Adena Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Land Uses*, 51 Land Use Pol'y 76, 80 (2016); see also *Agricultural Land Easements*, U.S. Dep't of Agric. Nat. Res. Conservation Serv. (2024).

ACEs also can have disadvantages. The balance between competing priorities such as economic and noneconomic motivations, autonomy and control of land ownership, enforcement, and perception are recurring issues. Although property ownership is retained, it can be challenging for grantor landowners to abide by standards imposed by the holder, as the holder must visit and evaluate the property to ensure the ACE is adequately maintained. However, if the landowner entered the easement agreement with an understanding of its parameters and an expectation of the holder's authority, it understands the need for and can anticipate oversight. Moreover, the easement can be drafted so that the grantor retains discretion for daily operation of the property.

Conservation easements also can be overly rigid, with outdated, fixed language that may not account for unknowns such as renewable energy wind turbines, cellphone towers, or neighboring property developments. However, they can be amended to avoid being too strict or limiting, or to update outdated language. Per the UCEA, an easement can be amended “in the same manner as other easements”; that is, with the consent of both the landowner and the holder. UCEA § 2(a). An amendment also must not detrimentally impact the underlying conservation purpose of the easement. As the use of conservation easements continues to be more common, recurring issues such as rigidity can be adequately addressed.

## Continued Expansion of ACEs

As indicated by their increased usage, conservation easements are gaining popularity and expanding beyond traditional scenic and ecological purposes to protect farms, ranches, and grasslands. Further expansion into the mainstream and regular use by landowners, however, will require greater understanding, comfortability, and ease of use, which can be achieved through continued education of the landowner. Specifically, they must be educated on the many ACE benefits: They are a feasible option to preserve working lands, protect and promote existing agricultural uses, and simultaneously generate an alternative funding source. Only then can landowners objectively weigh the many benefits of ACEs against their perpetual nature. Those individual choices collectively have the potential to positively affect agriculture from coast to coast. 🌿

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