

## Conservation Easement v. Deed Restriction

**Q** Since we are a nonprofit with a permanent existence, is there any difference between our receiving a restriction on land by deed covenant and a restriction on land by conservation easement?

**A** Deed restrictions and conservation easements are essentially the same thing... legally binding restrictions on the use of land in the form of a written instrument that affects the title to the land and is generally recorded where deeds are recorded. The only significant difference is that the conservation easement, if written properly and granted to an eligible grantee, is entitled to many more protections of the law under most states' statutes. It is generally accorded greater deference by courts in the event of a dispute. Another major difference is that conservation easements that meet certain qualifications are eligible for income tax treatment as a charitable gift. Because of these added benefits, there is no reason why a qualified grantee should ever take a simple deed restriction.

Deed restrictions are a creature of "common law," the law we inherited from England, as interpreted by court decisions. Those decisions have resulted in some significant drawbacks for deed restrictions that the state conservation easement statutes were designed to eliminate. While it may differ from state to state, a deed restriction is not permanent unless it is "appurtenant" to nearby land. It must benefit that nearby land, and run with the title to both properties. Otherwise, it is enforceable only during the lifetime of the grantor. Neither is it assignable by the grantee—in other

words, a land trust cannot transfer a simple deed restriction to another land trust or public agency.

Another disadvantage to simple deed restrictions is that the case law of most states require the courts to resolve any ambiguity in the interpretation of a common law deed restriction in favor of the less restricted use. Moreover, deed restrictions can be terminated by a court based on economic hardship or impracticability, without regard to public benefit. None of these impediments are applied to properly written conservation easements. In fact, some state laws instruct courts not to consider financial hardship in evaluating whether to terminate or modify an easement for "changed circumstances." Even in the absence of such specific protection, courts are apt to give greater deference to conservation easements because of the public benefit they serve.

If a full-blown easement is unappealing to a landowner and he or she doesn't care about tax deductions, in many states it is possible to draft a very simple document that more resembles a deed restriction, but which meets the requirements of the easement statute, and therefore qualifies for all of its protections. In Maine, for instance, the following language added to short and simple deed restriction language will make it a permanent conservation easement, without even mentioning the easement statute.

*This covenant is for conservation purposes and shall run with and burden the premises in perpetuity, and The Land Trust, its successors and assigns, shall have the right to*

*enforce the same at law or in equity, and the right to enter the premises at a reasonable time and in a reasonable manner in order to monitor compliance herewith.*

This kind of clause can also be used to turn a deed restriction in a deed from the land trust to another organization or person into a conservation easement. In fact, with just a few more sentences, an abbreviated version of the boilerplate language required by the IRS for income and estate tax recognition can turn the otherwise qualified restriction into a qualified conservation contribution under the tax code. The assistance of experienced counsel is essential, of course.

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