

# Step-by-Step Conservation Easement Process

## DETAILED BREAKDOWN OF STEPS REQUIRED TO COMPLETE A CONSERVATION EASEMENT

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Placing a conservation easement on your property affords the opportunity of significant tax incentives. However, if the easement process is not carried out properly you may not have the opportunity of enjoying said tax incentives. This document has been formulated to assist the donor with understanding the entire conservation easement process from beginning to end. It shall be noted that the actual steps involved in your conservation easement may vary due to your particular situation.

This document has been broken down into the following 4 general areas in order to make for a more organized document:

- Preliminary Analysis and Due Diligence (PA) – These are the preliminary steps that are performed to ensure that the proposed area for conservation easement meets Internal Revenue Service requirements for donation and provides the tax incentive necessary to proceed.
- Analysis Of Site Specific Constraints (SC) – These steps are a site specific analysis of the property in order to determine the “Highest and Best Use” of the property which assists in forming the maximum conservation value of the eased area.
- Conservation Easement (CE) – These steps incorporate the actual drafting of the conservation easement document and associated negotiation required with the donee to finalize the conservation easement.
- Final Steps (FS) – These steps incorporate the actual appraisal of the unencumbered property and eased land in order to justify your income tax deduction as well as the final documentation necessary to finalize the conservation easement process.

More detailed steps are as follows:

### PRELIMINARY ANALYSIS AND DUE DILIGENCE

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The preliminary analysis sets the stage for a successful conservation easement. Preliminary analysis includes:

#### PA.1) TITLE SEARCH OF SUBJECT PROPERTY

Our firm performs a title search of the property at Town Hall. This includes visiting the Town Clerk’s office and researching all maps and deeds (including any encumbrances already on the property that may inhibit its development potential) relative to the subject property. Our title searcher also examines all maps and deeds of neighboring properties in order to take into consideration any potential conflicts. Per the Internal Revenue Service requirements, our firm must take into consideration adjacent or nearby properties under common ownership of the subject parcel. As such, our title searcher will research these properties at the same time. Our firm also examines any existing mortgages on the property to determine if a subordination of the mortgage will be required.

#### PA.2) DETERMINE IF MORTGAGE SUBORDINATION IS REQUIRED

During the title search, it is determined if mortgages exist on the subject property. If a mortgage exists, you will be required to obtain a “mortgage subordination.” A “mortgage



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subordination” means that the lender must agree that if the property is ever foreclosed on, it must be sold subject to or “subordinated” to the terms of the conservation easement.

### **PA.3) EXAMINE OTHER TOWN HALL RECORDS**

Our firm researches other Town departments, including but not limited to, the Public Works Department, Planning Department, Zoning Department, Building Department and Inland Wetlands and Watercourses Commission regarding the subject property and other properties under common ownership. This research gives us an insight into site constraints that came to light during the permitting process for other projects on the subject property.

### **PA.4) PRELIMINARY DETERMINATION OF EASEMENT AREA**

At this point, our land planner walks the property in its entirety with the potential donor. By utilizing the research from Town Hall it is confirmed that the areas examined in the field for protection by the donor can indeed be encumbered by a conservation easement. One of our land planners will walk the land with the donor in order to provide guidance relative to the subject land’s potential for easement as well as its development potential. Preliminarily, we take into consideration the following:

#### **a. DOES LAND SERVE A “CONSERVATION PURPOSE”?**

Our land planner examine the unique features of the property and ensure that said features meet the Internal Revenue Service requirements of having a, “conservation purpose.”<sup>1</sup> This will be later confirmed by a detailed examination from a certified ecologist or similar expert.

#### **b. WILL UNENCUMBERED AREA LEAVE ENOUGH ROOM FOR FUTURE ACTIVITIES OF EXISTING OWNER?**

Our land planner sits down with the donor and their associated family to determine potential future improvements that they may anticipate for the subject property. This could include providing building lots for children or grandchildren, adding recreational amenities such as a pool, barn or riding ring.

#### **c. WILL UNENCUMBERED AREA LEAVE ENOUGH ROOM FOR ACTIVITIES OF FUTURE OWNER?**

Our firm partners with local realtors to determine what future improvements would be desirable to a potential purchaser of the subject property. Working with our staff of experts, it is confirmed that sufficient unencumbered area is retained for said activities so the potential future value of the property is not diminished.

#### **d. WHAT RIGHTS WOULD DONOR LIKE TO RETAIN ON EASED AREA?**

By placing a conservation easement on your property, it does not necessarily mean that you are giving up all rights associated with the eased area. Many times you can retain existing wood roads and trails and utilize the eased area for

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<sup>1</sup> See Fact Sheets entitled, “Summary of Internal Revenue Code, Section 170(h),” “Interpretation of ‘Conservation Purpose’” and “Interpretation of ‘Exclusively for Conservation Purpose’” for additional information.



agricultural purposes (i.e. – placement of a barn for the raising of animals, haying of a field, etc.) so long as it serves a “conservation purpose” and the donee does not object.

#### **PA.5) PRELIMINARY HIGHEST AND BEST USE ANALYSIS**

Our firm prepares a preliminary “Highest and Best Use” analysis of the eased area. Our staff of surveyors construct a compilation map of the property based on the title search. This map is combined with 10 foot contours based on United States Geological Surveys (USGS), soils based on the Natural Resources Conservation Services (NRCS) mapping and any floodplains based on Flood Insurance Rate Maps (FIRM) prepared by the Federal Emergency Management Agency (FEMA). From this data a base map is constructed that is then handed over to the engineering department. The engineers then determine the preliminary maximum development potential which is typically a subdivision. A more detailed analysis is then performed later. This “Highest and Best Use” map is then utilized as part of the preliminary tax analysis.

#### **PA.6) PRELIMINARY TAX ANALYSIS**

Our firm works with a “qualified appraiser”<sup>2</sup> and local tax experts to perform a preliminary analysis of the “before” and “after” value of your property in order to determine your preliminary deduction amount.

#### **PA.7) IDENTIFY POTENTIAL LAND TRUST OR GOVERNMENTAL AGENCY (AKA DONEE)**

Our firm works with you to determine local land trusts and governmental agencies that are defined as a “qualified organization”<sup>3</sup> per Internal Revenue Service Guidelines. Our land planner meets with your preferred donee to preliminarily confirm their interest in the proposed easement. At this time the organization provides a “Letter of Determination” which confirms their ability to accept your easement.

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<sup>2</sup> See Fact Sheet entitled, “Guidance Regarding Appraisal / Appraiser Requirements” for additional information.

<sup>3</sup> See Fact Sheet entitled, “Summary of Internal Revenue Code, Section 170(h)” for additional information.



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## ANALYSIS OF SITE SPECIFIC CONSTRAINTS

The site specific analysis builds on the “PRELIMINARY ANALYSIS” and confirms the preliminary assumptions that were made. This includes:

### **SC.1) WETLANDS ANALYSIS**

Our soil scientist examines the property from a wetlands perspective in order to determine how the presence of wetlands and watercourses may inhibit or prohibit potential future activities outside of the eased area. At this time, adjustments may be made to the eased area to ensure that the donor’s future improvements may be made without consequence.

### **SC.2) ANALYSIS OF SOILS FOR SEPTIC SUITABILITY**

Our soil scientist examines the soils outside of the eased area to ensure that all future activities could be implemented. Furthermore, examination of the soils within the eased area will be performed in order to determine the maximum development potential of the eased area. This will include the excavation and observation of what are known as “test pits” as well as performing “percolation tests” in accordance with the State of Connecticut Public Health Code and any local sanitary ordinances that may exist.

### **SC.3) ANALYSIS OF TOPOGRAPHY**

Some Towns require the analysis of “steep slopes” as part of the development analysis. For instance, some towns do not allow the construction of structures on “steep slopes,” others do not allow “steep slopes” to be counted as part of the lot area. As such, our staff of surveyors will determine the constraints relative to “steep slopes” and ensure that you are not adversely impacted.

### **SC.4) ECOLOGICAL BASELINE DOCUMENTATION REPORT**

Utilizing the knowledge formed to date of the property as well as a field inspection, an environmental professional (i.e. – ecologist) formally inventories and documents the “conservation purpose” of the eased area confirming its need for protection. The Report provides guidance to the donee of how to protect the property in perpetuity. The donor and donee must sign an acknowledgement form confirming that the report accurately reflects the condition of the land at the time of filing.

### **SC.5) FINALIZE BASE MAP**

Utilizing the title search, existing base map data and site specific constraints, a final base map is developed. Typically, this is in the form of a Class A-2 survey performed by one of our licensed land surveyors. This map will form the basis of the final conservation easement map. It is also utilized in determining the “highest and best use” analysis.

### **SC.6) FINAL HIGHEST AND BEST USE ANALYSIS**

Our firm then finalizes the “Highest and Best Use” analysis utilizing the site specific base map. As you may recall in Step PA.5 the “Highest and Best Use” analysis demonstrates to the appraiser the maximum development potential of the land from a valuation perspective. This analysis is a combination of work from certified professionals in our office including but not limited to licensed civil engineers, professional engineers, soil



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scientists and land planners. During the “Highest and Best Use” analysis the following is considered at a minimum:

**a. LOCAL SUBDIVISION REGULATIONS**

Subdivision Regulations provide guidance relative to things such as road length, maximum number of lots along a dead end road, open space requirements, etc. As such, we take all of the pertinent requirements into account as part of our analysis.

**b. LOCAL ZONING REGULATIONS**

Zoning Regulations provide guidance relative to lot size requirements which may exclude wetlands areas, steep slopes, floodplains etc. They also influence the frontage and layout of the lots. Some Zoning Regulations have specific floodplain restrictions, others may have aquifer protection areas, ridgeline view sheds, river overlay zones, etc. that influence the maximum development potential of a piece of property. All of these restrictions are taken into consideration as part of our analysis.

**c. LOCAL INLAND WETLANDS AND WATERCOURSES REGULATIONS**

Each Towns Inland Wetlands and Watercourses Regulations typically has specific requirements relative to activities within wetlands and watercourses as well as regulated areas which are adjacent to the wetlands resource. As per most Wetlands Regulations, our hypothetical development scenario attempts to avoid direct wetlands and watercourses disturbance and minimize any disturbances in the regulated areas.

**d. CONNECTICUT PUBLIC HEALTH CODE**

The State of Connecticut Public Health Code provides requirements relative to the construction of a sanitary subsurface disposal system (aka septic system) on a site. We take this Code into consideration and provide field verification of soils on an eased area until we develop a consistent soil profile which demonstrates that each hypothetical building lot can support a sanitary subsurface disposal system.

**e. LOCAL TOWN ORDINANCES**

We also provide a cursory review of any Town Ordinances. Some Towns have driveway ordinances that set regulations relative to the length, grade and location of driveways. Other Towns such as New Milford and Sherman have Sanitary Ordinances that are more restrictive than the Connecticut Public Health Code. All of these restrictions are analyzed in order to ensure the feasibility of a potential subdivision on the eased area.

**f. CONSTRUCTABILITY OF PUBLIC ROAD (IF APPLICABLE)**

Our team of engineers also examines the constructability of public roads on larger parcels of land in order to increase the maximum development potential.



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This includes making sure that a public road with associated right of way and drainage system could be feasibly constructed on the property.

**g. CONSTRUCTABILITY OF HOUSE, DRIVE, SEPTIC AND WELL ON EACH LOT**

An analysis of each hypothetical building lot is also completed which ensures that each lot has suitable area for the construction of a house, well, driveway and associated septic and that each item meets all pertinent Regulations.

**SC.7) DETAILED PROPERTY MAP**

Our staff of surveyors then prepares a detailed property map which shows all of the existing encumbrances and structures on the property as well as the proposed conservation easement area. This map is typically prepared to a Class A-2 standard and certified by our licensed land surveyor. This map protects all parties in that the donor is certain of what area they are giving up the rights to and the donee is aware of the specific area that they are required to monitor. It also ensures that there are no encroachments in the eased area that both parties may not have been aware of (i.e. – neighbor's shed is on donors property and in eased area.)



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## CONSERVATION EASEMENT

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The drafting and filing of the conservation easement itself needs to be carefully constructed to ensure that the long term interests of the donor and donee are protected. Our land planner works hand in hand with your legal counsel to ensure a successful document. Typically this part of the process includes:

### **CE.1) DRAFT CONSERVATION EASEMENT LANGUAGE**

The conservation easement language is the actual written document which is filed at the Town Clerk and informs the Internal Revenue Service, donor, donee and the public how the eased area is preserved and why it is worthy of preservation. Typically, a complete conservation easement includes the following:

#### **h. WHEREAS CLAUSES**

The “Whereas Clauses” point out all of the possible “conservation purposes” associated with the eased area and why the property is significant. For instance, the clauses may refer to the properties consistency with local Plans of Conservation and Development, governmental policies regarding conservation and most importantly how the easement meets the “conservation purpose” of the Internal Revenue Service guidelines. The “Whereas Clauses” also specifically reference any supporting documentation such as the Ecological Baseline Report.

#### **i. PURPOSE OF THE EASEMENT**

The next section of the easement states clearly the purpose of the easement (i.e. – to remain in perpetuity in its natural and undisturbed state and to prevent any use of the eased area which would impair the properties conservation purpose.

#### **j. PERMITTED ACTIVITIES**

This section of the easement clearly states the permitted activities of the donor in the eased area. Permitted activities could include the right to remove dead, diseased or invasive trees and shrubs, the right to construct and maintain walking trails, the right to install fencing, the right to continue agricultural uses including construction of outbuildings.

#### **k. PROHIBITED ACTIVITIES**

This section states what activities are prohibited in the easement area. Typical prohibitions include any use for residential purposes, excavation, filling, removal of trees, use of fertilizers or pesticides, dumping, pollution, operation of motorized vehicles, etc.

#### **l. ENFORCEMENT RIGHTS**

This section clearly establishes the enforcement rights of the donee should the terms of the conservation easement be violated.

#### **m. MAP REFERENCE**

This section refers to the specific conservation easement map (s) which will be filed concurrent with the conservation easement itself. The map will provide a reference for all parties as to the detailed and specific boundaries of the



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conservation easement. The map may also include specific areas within the eased area in order to clarify permitted activities such as farming or forestry.

#### **CE.2) LETTER OF ENFORCEABILITY**

In order to protect the interest of the donor, it is recommended that a letter be prepared by legal counsel confirming that the easement terms are enforceable.

#### **CE.3) NEGOTIATE EASEMENT TERMS WITH DONEE**

At this point the draft easement language is shared with the donee. Typically, the donee will request modifications to the language and there is usually a “negotiation period” during which the donor and donee determine the final easement language that is acceptable to both parties.

#### **CE.4) BOARD RESOLUTION OF EASEMENT ACCEPTANCE**

Once the terms of the easement are agreed to by all parties, the donee formally votes to accept the conservation easement and associated documents. The donee will provide a formal letter stating acceptance of the easement as well as the party who is authorized to execute all documents on behalf of the donee. At this point the following occurs:

##### **a. CONTRIBUTION TO STEWARDSHIP FUND**

Each land trust or governmental agency typically has a “stewardship fund.” This fund covers the costs associated with the annual monitoring of the conservation easement and possible enforcement costs associated with protecting the easement terms in the future. This contribution can be considered the donors “insurance policy” to ensure the long term protection of the conservation easement.

##### **b. EASEMENT IS SIGNED BY DONOR AND DONEE**

The actual conservation easement is signed by both parties as well as witnesses.

##### **c. BASELINE DOCUMENTATION REPORT IS SIGNED**

The Baseline Documentation Report that was prepared by the ecologist is signed by both parties in order to confirm that the Report is accurate and that the recommendations made have been considered along with associated plans for implementation.

##### **d. FILING OF DOCUMENTS**

The conservation easement and associated maps are filed with the Town Clerk to formally execute the conservation easement. If a mortgage subordination was required, it shall be filed at this time.

## FINAL STEPS

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The final steps of a conservation easement can sometimes get lost in the shuffle as the formal conservation easement document has already been filed. Our firm follows each of these steps to completion until the final project binder is in your hands:

### **FS.1) CONSERVATION EASEMENT APPRAISAL**

Our firm works with only the best “qualified appraisers”<sup>4</sup> in the area to ensure that the conservation easement value<sup>5</sup> determined is fully defensible before the Internal Revenue Service. The appraiser examines the “before” value of the property, that is the value of the property prior to execution of the conservation easement taking into account the properties maximum development potential or “Highest and Best Use.” This fair market value needs to take into consideration the cost associated with improvements that would need to be installed as a part of the development, the length of the approval process, developer’s profit, the amount of time it would take to sell the building lots if they were to be developed and the associated time value of money. The appraiser then determines the “after” value of the property, which is the value of the property after the easement has encumbered a portion of the property and reduced its maximum development potential or “Highest and Best Use.” The difference in value between the “before” and “after” scenario represents the conservation easement value.

### **FS.2) OBTAIN COMPLETED INTERNAL REVENUE SERVICE FORM 8283**

In 2006, the Internal Revenue Service revised Form 8283 which is basically a summary of the conservation easement appraisal. Our firm works with the appraiser, donor, donee and donor’s accountant to ensure that the form is properly filled out.

### **FS.3) PERMANENT DELINEATION OF EASEMENT BOUNDARIES**

At this time, our field crew permanently delineates the boundary of the conservation easement. Some donees require the placement of iron pins while others require placards to be placed at certain intervals. We then walk the land with the donor and donee so that everyone fully understands the boundaries of the conservation easement area.

### **FS.4) IMPLEMENTATION OF LONG TERM MANAGEMENT PLAN**

This includes the implementation activities required as part of the conservation easement such as forestry management, removal of invasive species, securing farmer to maintain agricultural land, etc.

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<sup>4</sup> See Fact Sheet entitled, “Guidance Regarding Appraisal / Appraiser Requirements,” for additional information.

<sup>5</sup> See Fact Sheet entitled, “Determination of Conservation Easement Value,” for additional information.



## **FS.5) DELIVERY OF PROJECT BINDER**

The final step to complete the conservation easement process is delivery of the project binder to the client. This binder includes copies of all applicable forms, documents, maps, agreements, etc. that is neatly organized for the future use of the donor.

Although the entire process may be overwhelming, our firm can handle the entire process from start to finish and provide all of the coordination that is required between the various parties involved. This allows our clients to fully enjoy the benefit of the conservation easement while we are hard at work to ensure that your interests are fully protected.

To learn more about the conservation easement process, contact Arthur H. Howland & Associates, P.C. at (860) 354-9346 and ask for Paul Szymanski. You can also visit us on the web at <http://ahhowland.com>.

*Arthur H. Howland & Associates, P.C., specializes in assisting donors step-by-step with the conservation easement process offering a full array of civil engineering, land surveying, land planning, soil science and consulting services.*

*One should always consult their attorney or accountant for legal or tax advice.*



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