Protecting and Caring For Land You Love Conservation Easements and Land Management May 14, 2025 - Pierson Library, Shelburne

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BUNDLE OF RIGHTS

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The BUNDLE OF RIGHTS refers to all of the legal rights associated with the ownership of property. These rights include the right to possess, dispose, use, encumber and quiet enjoyment.

Think of the bundle of rights as a "bundle of sticks". Each stick represents a different legal right. The more sticks an owner possesses,

the more rights they have to the property.

RIGHT OF POSSESSION

The owner exclusively owns the property. The owner can opt to share their right of possession to the property with another person(s) or other legal entity.

RIGHT TO DISPOSE

The owner has the right to sell or transfer all or part of the property.

RIGHT TO USE

The owner can use the property in any legal manner.

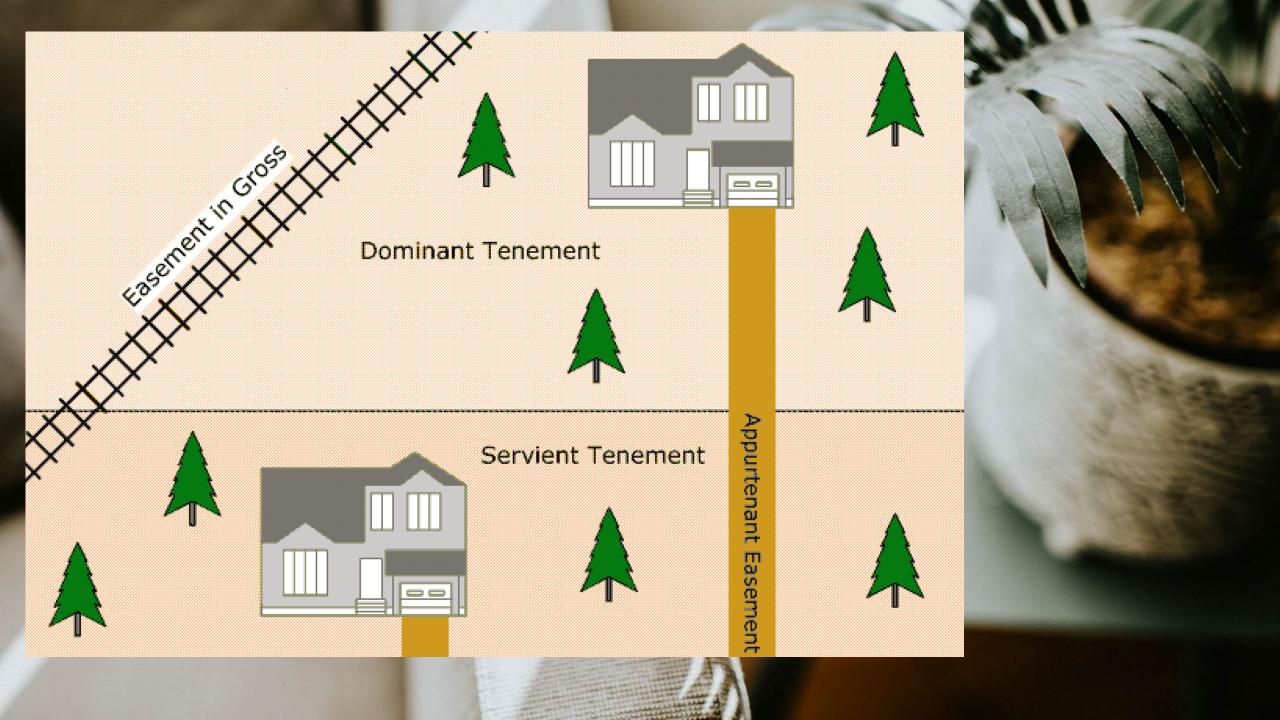
RIGHT TO ENCUMBER

The owner may place a lien on the property. For example, the owner can take out a mortgage on the property.

RIGHT OF QUIET ENJOYMENT

The owner can possess and use the property in peace, without outside disturbances.

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Types of Easements

An **easement** gives the holder of the easement the **right to use or enter the property of another** for a specific purpose. An easement can be created by express agreement or acquired by prescription (continuous use for a statutory period).

An **appurtenant easement benefits and burdens two adjacent parcels of land**. The parcel that benefits from the easement is called the dominant estate or tenement, and the parcel that is subject to the easement is called the servient estate or tenement.

An easement in gross is a type of easement that benefits and burdens a person or an entity, rather than a parcel of land. For example, a utility or railroad easement.

A negative easement is a type of easement that restricts the owner of the servient estate from doing something on their property that would affect the holder of the easement. For example, a homeowner may have a negative easement that prevents their neighbor from building a structure that would block their view or sunlight.

A restrictive <u>covenant</u> is an agreement between a property owner and others that places limitations on how the property is to be used.

A "conservation easement" is both a negative easement and a covenant.

Elements of a Grant of Conservation Easement and Development Rights

The conservation easement and restrictions hereby conveyed to Grantee consist of <u>covenants on the part of</u> <u>Grantors to do or refrain from doing, severally and collectively, the various acts set forth below</u>. It is hereby acknowledged that these covenants shall constitute a servitude upon the land and run with the land. Grantee accepts such covenants in order to achieve the Purposes

Restricted Uses of Protected Property.

- 1. No residential, commercial, industrial, or mining activities
- 2. No rights-of-way, easements of ingress or egress, driveways, roads, utility lines, other easements, or other use restrictions
- 3. There shall be no signs, billboards, or outdoor advertising of any kind erected or displayed
- 4. The placement, collection, or storage of trash, human waste, or any other unsightly or offensive material on the Protected Property shall not be permitted
- 5. The Protected Property shall not be subdivided or conveyed in separate parcels
- 6. No use shall be made of the Protected Property, and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purposes of this Grant

Permitted Uses of the Protected Property.

- 1. Used for educational, forestry, recreation, and open land purposes only
- 2. Right to harvest firewood for use on the Protected Property
- 3. Right to perform other forest management activities and to harvest timber and other wood products in accordance with a Forestry Plan
- 4. Right to construct, use, maintain, repair and replace a gravel or otherwise unpaved residential roadway as well as for said customary residential utilities

Issue of Public Access depends on the type of property.

Grant of Development Rights

The development rights hereby conveyed to Grantee shall include all development rights, *including xxx (x) units of density which have been allocated to the Protected Property, except those specifically reserved by Grantors herein and those reasonably required to carry out the permitted uses of the Protected Property as herein described. The development rights hereby conveyed are rights and interests in real property.*

Need To Know What Restrictions Of The Property Already Exist

Physical Elements: wetlands, steep slopes, other undevelopable areas

Existing Deed Restrictions: existing negative easements and covenants

Land Use Restrictions: zoning, Act 250

Permit conditions: open space agreements, subdivision restrictions.

Current Use restrictions

Often the land is already restricted in its use and the Grant of the Conservation Easement or Covenants is not a very significant change in the value of the property in terms of a before and after appraisal.

Usually the conveyance of development rights creates the difference in value before and after the Grant.

To determine the current status of the property and the value of the conveyed property rights, the landowner will need to engage

---an attorney to determine the existing restrictions on the land, to assist with any preliminary development plans and to negotiate the terms of the Grant

--<mark>an engineer</mark> or land planner to prepare preliminary development plan and to determine wastewater capabilities

--<mark>a MAI appraiser</mark> to value the property before and after the Grant.

--<mark>an Accountant</mark> or tax advisor

AMENDING AND TERMINATING AN EASEMENT

A conservation easement is perpetual.

It is a contract with the easement grantor, land trust members, funding sources and the public.

As a charitable organization, chartered under state law, and as a federally tax-exempt nonprofit entity, a land trust has legal and ethical responsibilities to ensure perpetual protection of its easements.

However, there is an occasional need to amend an easement based on the inability to predict all of the circumstances that may arise in the future.

Considerations:

Vermont statutes enabling Conservation Easements do not provide any mechanism for amendments, In 2015 the Legislature considered legislation to allow for such amendments, but it did not pass.

Vermont courts have not determined specific guidelines for conservation easement amendments. However, they have discussed interpreting ambiguous language, explaining, "[t]he character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement." <u>Barrett v. Kunz</u>, 158 Vt. 15, 19, (1992) The Court emphasizes honoring the intent of the original parties. <u>Rowe v. Lavanway</u>, 904 A.2d 78, 82 (Vt. 2006) Therefore, while changes in ownership of the property may increase the desire to amend an easement, the original intent of the parties is something to consider when determining whether to allow easement amendments.

Courts may look to the doctrine of "**cy pres**", a legal principle applied in the context of charitable trusts. It allows a court to amend the terms of a charitable trust to ensure that the trust's purpose can still be achieved when the original objective becomes press unlawful, impracticable, impossible to achieve, or wasteful. 14A VSA 413.

Vermont Courts may look to criteria established by the Vermont Housing and Conservation Board, a major funder of conservation efforts, for guidance. VHCB has published guidelines for major and minor amendments.

IRS. IRS Form 990, the annual report filed by tax-exempt organizations, requires land trusts to provide detailed information about their easements and any amendments (called modifications on the form), transfers, sales, releases, extinguishments or terminations, including a concise explanation of the modification and the reason for it.

Federal tax law prohibits tax-exempt nonprofit organizations from disposing of their assets in ways that create impermissible private benefit or private inurement. This prohibition means that a land trust cannot participate in an amendment that conveys either a net financial gain to any private party unless that amount is insubstantial or a necessary incidence of accomplishing a greater public benefit.

Land Trust Standards and Practices provide guidance to land trusts in regard to amendments.