

PREFACE

Attorneys working on conservation easement projects have long enjoyed access to a wide variety of excellent resources on the topic. First and foremost, the Treasury Regulations, although dated since their adoption in 1980, are extensive and informative, and leaders in the field have consistently provided an overview of the regulations and related Tax Court rulings.¹ The Land Trust Alliance, a nonprofit organization founded in 1982 dedicated to facilitating land conservation, has also contributed immensely to the resources available to attorneys, most notably through the publication of *The Conservation Easement Handbook*.² First published in 1988, the *Handbook* has served as the primary resource for land trust personnel and attorneys confronting conservation easement projects over the two-plus decades it has been in existence. Equipped with sample language from the *Handbook*, attorneys have focused in on permitted and prohibited use clauses, conservation purpose statements, inspection provisions, and dispute resolution provisions as key areas for input and negotiation. Concededly, these areas merit strong consideration and may have the greatest impact on the landowner over the life of the easement. Attorneys turning to the *Handbook* for guidance and focusing on these areas during the easement transaction process will often end up with a document that imperfectly meets the needs of their clients, especially in routine transactions.

This approach may appear to be sufficient, and may be forced on the conservation attorney to some extent when he or she is negotiating with a land trust that is only comfortable using its own form documents. Conservation attorneys should be aware, however, that the level

1. See, e.g., STEPHEN SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS (Land Trust Alliance 2002).

2. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK (2d ed., Land Trust Alliance 2005) (hereinafter *The Conservation Easement Handbook*).

of complexity involved in these transactions requires a deeper understanding of the statutory, regulatory, and common-law principles at play in conservation easement transactions, and a working knowledge of how to go about utilizing the available resources in this complex field. Various principles of real property law and tax law, in particular, are important for conservation attorneys to understand in order to competently advise clients interested in easement donation or sale. The stated goal of the *Handbook* is to assist in “managing a successful conservation easement program,” which reveals its intended audience to be lay land trust staff persons rather than attorneys. Thankfully, the *Handbook* is supplemented by more comprehensive works, prepared by attorneys and academics, covering different aspects of conservation easement law in great detail. Court decisions have also aided greatly in interpreting the not-always-clear directions found in the regulations and in IRS publications. A substantial number of these works and cases are now available online, many as a result of the creation of the Land Trust Alliance’s helpful online “Learning Center.”

Practitioners faced with the rigors of an everyday law practice can hardly be expected to familiarize themselves with the whole swath of available materials, however, and it is difficult to find the relevant material among the larger whole. In light of this difficulty, *Conservation Easements: Tax and Real Estate Planning for Landowners and Advisors* seeks to add to the field of conservation easement material by offering a place for attorneys to start when the *Handbook* is not enough. It seeks to buttress the practical framework presented by the *Handbook* through inclusion of tips learned from decades of actual conservation easement practice, to provide a theoretical framework to assist attorneys in understanding the context in which conservation easements are placed, and to direct attorneys to the right resources for further study when length does not permit a fuller explanation. To our knowledge, there has yet to be a publication directed at attorneys that attempts to address a broad scope of conservation easement law, offering an overview of salient points with a focus on assisting practitioners who are unfamiliar with conservation easements, as well as more experienced attorneys looking for specific guidance. This work aims to be a first-stop resource that addresses a wide variety of topics that may arise relating to conservation easements from a legal perspective, to both supplement and move beyond the *Handbook*.

The introduction that follows this preface discusses the common-law principles applicable to conservation easements, and attempts to note where these principles are firmly accepted and where they are still unsettled. The body of the text begins with an introduction to the legal framework of conservation easements. Chapter One addresses the statutorily allowed conservation purposes required for tax deductibility in an attempt to paint a picture of the basic scope of possible activities and requirements of conservation easements, and makes recommendations on drafting the strongest possible conservation purpose clauses in easement documents. Chapter Two addresses the counterpart to these purposes—permitted activities that are inconsistent with conservation purposes to some degree—and explains when limited development, mineral extraction, and other activities may be allowable on easement-encumbered land.

Chapter Three examines the tax consequences associated with conservation easements. This chapter outlines the additional characteristics that an easement must possess in order to qualify for the deductions enabled by the tax code, beginning with consideration of the federal tax incentives offered to easements that do qualify and explaining how tax deductions impact various tax attributes, such as income taxes, estate taxes, and the tax basis of easement-encumbered property. Chapter Four delves further into easement valuation and appraisal issues, explaining how different parts of the valuation process are conducted, the boundaries imposed on appraisals by the tax law, and recent developments surrounding easement appraisals.

Chapter Five discusses several unrelated problems that may arise under tax law both during easement formation and over the life of the easement. These include prohibitions against private benefit and private inurement applicable to charitable organizations, problems with donative intent, and problems created by state statutes. Chapter Six outlines the possible participants in the conservation easement transaction, such as individuals, estates and corporations in the role of grantor, and land trusts and governmental entities in the role of grantee. The chapter attempts to aid the conservation attorney in selecting the right grantee as partner in the conservation easement and in understanding the different implications of various methods of land ownership.

Chapter Seven discusses concerns arising over the life of the easement, such as amendment, modification, termination, and changed

conditions in the future. Also discussed are consequences of easement violation and enforcement. Chapter Eight deals with concerns arising after formation, focusing on unforeseeable possibilities such as the condemnation of all or part of encumbered land, sudden extinguishment on account of merger or other legal doctrines, and environmental cleanup costs.

Chapter Nine discusses available funding sources for conservation actions. It discusses applicable federal and state programs that may provide funding for easement acquisition or conservation activities, and other financial incentives, such as those created by markets for greenhouse gas “offsets.”

The materials conclude with an appendix consisting of four conservation easements in actual use, along with a recap of practical drafting tips and some helpful IRS materials. We would like to thank the ABA, our colleagues in the conservation easement field, and our families for their assistance and support.