

**D08. Smart Drafting to Reduce Cost;
Maximize Enforceability**

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Room 410

Session Faculty:

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SMART DRAFTING TO REDUCE COST; MAXIMIZE ENFORCEABILITY

I. Introduction

A. Pennsylvania Land Trust Association, Andy Loza, Executive Director, model documents project director, editor and contributing author, experienced with public policy and land trust concerns.

1. Model Documents with Commentaries and Guides available at Conservationtools.org
2. Additional information about PALTA and its activities available at Conserveland.org

B. Pat Pregmon, attorney and principal author of Pennsylvania Model Conservation Easement and Commentary, drafter of hundreds of conservation easements for both landowners and land trusts.

C. Jim Wyse, attorney and counsel for New Jersey Conservation Foundation and other land trusts, experienced with drafting, tax compliance and enforcement issues.

II. Drafting choices impact cost and enforceability

A. First principle of smart drafting is to communicate effectively what your readers (present and future) want and need to know.

B. Who are your readers – now and in the future? What do you want/need to communicate to them? What are they looking for?

1. Signing landowners
2. Subsequent landowners
3. Easement holders' representatives tasked with planning, documenting and administering the easement.
4. IRS staff
5. Attorneys representing landowners who have a dispute with easement holder.
6. Persons tasked with defending the easement (including insurers).
7. Persons adjudicating a dispute (judge, jury, arbitrator, mediator)

- C. Choices aimed at reducing costs of easement preparation, negotiation and administration. [First three groups of readers above.]
1. Readability; written for non-lawyers.
 2. Conservation Objectives focus attention on the Property; rules make sense because linked to Conservation Objectives.
 3. Protection areas allow standardized rules for area.
 4. Standardized rules decrease costs; costs of easement preparation focused more on easement plan, less on drafting.
 5. Commentary available online to inform and educate.
- D. Choices aimed at reducing likelihood of successful challenge. [Last 4 groups of readers above.]
1. Carefully defined terms, used consistently, minimize opportunities to exploit ambiguity.
 2. Structure and text must support easement holder's right to prevent activities inconsistent with conservation objectives (even when possibly ambiguous or not addressed in the document).

If an issue arises that is not addressed in the document who decides if it is permitted or not?	
Holder decides (PA Model)	<p>§1.02: Grant includes power to decide what is inconsistent with Conservation Objectives.</p> <p>§3.01, 4.01 etc. Each article starts with blanket negative followed by list of permitted.</p> <p><i>Result:</i> Everything not addressed is automatically prohibited</p>
List of Prohibited followed by list of Permitted.	<p>Some forms list prohibited; then list permitted. If not prohibited, inference is that permitted even if not specifically listed.</p>
Inference is that Owners decide unless document provides otherwise.	<p>Sample provision to allow easement holder discretion:</p> <p>Future evolution. 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</p>

	<p>Conservation Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future technologies and future evolution of the land and other natural resources and other future occurrences affecting the Purposes of this Conservation Easement or the Protected Property. Grantee, therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement or (b) alterations in existing uses or structures are consistent with the Purposes of this Conservation Easement.</p>
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III. Tipping the scales in favor of easement holder: increasing cost to owner; decreasing owners' probability of success

- A. Shift risk of ambiguity or conflicting provisions to landowner

If a situation arises that is subject to two interpretations due to ambiguous terms or conflicting provisions, whose interpretation prevails?

Common law rule	Ambiguities to be resolved in favor of the landowner.
Rule reversed by statute:	Two enabling statutes (Pennsylvania and West Virginia) mandate that conservation easements be liberally construed in favor of effecting their conservation purposes and the policy and purpose of the enabling statute.

32 Pa. Cons. Stat. S5052: conservation or preservation easements shall be liberally construed in favor of the grants therein to effect the purposes of those easements and the policy and purpose of the act.

California's act contains a direction for liberal construction:

Cal. Civ. Code §§815-816. “provisions of this chapter shall be liberally construed in order to effectuate the policy and purpose of §815.

Rule reversed in
easement
document: This grant of conservation easement and declaration of restrictive covenants is intended to be interpreted in favor of the interest of Holder in furthering the conservation purposes of the grant. This rule of interpretation prevails over any otherwise applicable rule to the contrary.

Any general rule of construction notwithstanding, this Conservation Easement shall be broadly construed in favor of the Conservation Easement to effect the conservation purposes of this Conservation Easement and the policy and purpose [the state conservation easement enabling act.] If any provision of this Conservation Easement is found to be ambiguous or conflicts with another, an interpretation consistent with the conservation purposes of this Conservation Easement shall govern.

PA Model §8.09(d)} This Grant is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation easement under the Conservation and Preservation Easements Act.

PA Model §8.09(e) This Grant is intended to be interpreted so as to convey to Holder all of the rights and privileges of a holder of a conservation servitude under the Restatement (Third) of the Law of Property: Servitudes.

B. Shift costs of dispute and litigation to Owners

Who bears costs and expenses of responding to an actual or threatened violation or resolving a dispute whether by court action resulting in final judgment, private arbitration or mediation, or mutual agreement to settle? What costs and expenses are included?

Common law rule	No rule re administration costs. No rule re enforcement costs (absent judgment) Allocation rule re litigation costs varies state to state. “British” rule is each pays own. “American” rule generally is loser pays all.
Costs allocated by statute	California, Hawaii and Rhode Island include identical provisions stating that a court may (but is not required to) award litigation costs and attorney fees to the “prevailing party”. Massachusetts statute allocates litigation costs and attorney fees to prevailing party (but only if easement violated).
Approach #1: Owners pay all costs (perhaps with exceptions)	<i>Terrafirma-favored Costs and Fee Recovery:</i> All reasonable fees and costs incurred by Grantee in administration including, without limitation, negotiation, mediation, settlement or suit of any dispute regarding this Conservation Easement, including without limitation, all fees, costs and expenses of investigation, dispute management, negotiation, mediation, settlement or suit and reasonable attorney’s, experts and consultants fees, staff time and any fees and costs of restoration, remediation or other damage correction necessitated by any such action shall be borne by Grantor; provided, however, that if Grantor ultimately prevails in full in a judicial enforcement action, each party shall bear its own costs [optional: unless Grantee is found by a final court of competent jurisdiction to have acted in bad faith]. If

Grantee prevails in part, then Grantor shall be responsible for all fees and costs of both parties as set forth above.

PA Model Easement

Owners must pay or reimburse, as the case may be, Holder's costs and expenses (including Losses, Litigation Expenses, allocated personnel costs, and reasonably incurred liabilities in connection with (a) enforcement (including exercise of remedies) under the terms of this Grant; (b) response to requests by Owners for Review, Waiver, or Amendment; and (c) compliance with requests for information, interpretation, or other action pertaining to the Grant if required by Applicable Law.

See Commentary to PA Model for discussion of exceptions and modifications. See Glossary (article 9) for definitions of Losses, Litigation Expenses and other initially capitalized terms.

Approach #2:
Prevailing party to pay

In the event of any action to enforce rights under this conservation easement, the prevailing party shall be entitled its recover its costs and expenses, including reasonable attorneys' fees, incurred in connection with such action.

Approach #3 (in addition to above)
Reduce or eliminate landowners' benefits of successful litigation

See PA Model §7.03. Compensation or restitution owing to Easement Holder in the event of court-ordered modification or termination.

IV. Pros and cons of "reasonableness"

A. Desirable perception of easement holder as rational, professional and fair vs. potential for incentivizing dispute.

Approaches to the duty, if any, to make reasonable decisions	
Approach #1	<p>Silence.</p> <p>In the absence of any standard, what standard will be implied?</p> <p>[Likely a standard of commercial reasonableness: what would an ordinary, prudent person decide in similar circumstances?]</p>
Approach #2	<p>Sole and arbitrary discretion of easement holder.</p> <p>What impression does it make with various reader groups?</p> <p>If holder gives a reason, then what standard applies to evaluate holder's reason?</p>
Approach #3	<p>Reasonableness standard based on consistency with conservation objectives</p> <p>PA Model: Holder's approval is not to be unreasonably withheld. It is not unreasonable for Holder to disapprove a proposal that may adversely affect resources described in Conservation Objectives or that is otherwise inconsistent with maintenance or attainment of Conservation Objectives.</p>

B. Reciprocal is not always reasonable

1. Request for reciprocity sounds reasonable but don't agree without first evaluating risks, availability of immunity or insurance coverage.

One-sided Indemnity	<p>The property is in the care, custody and control of the Owners. Owners should bear risks of ownership – not the easement holder.</p> <p><i>See Pennsylvania model easement §8.08 and Commentary.</i></p>
Reciprocal Indemnity	<p>Argument is “what if Holder's representative on the property causes damage or injury?” Rather than make indemnity</p>

	reciprocal, better approach is to exclude from indemnity property damage and personal injury caused by Holder and its employees and agents.
Public access Claims	When an affirmative easement for access is included in a conservation easement document, who is charged with installation, maintenance, duty to inspect, duty to warn of risks, close when dangerous conditions exist? Indemnity responsibility will follow risk allocation. Check liability insurance coverage. Consider whether immunity defense available under law.

V. Drafting reasonable but firm and enforceable violation and remedies provisions

- A. What remedies are available under applicable law – common law and statutory? What are the purposes of the document remedies – to confirm, expand, remind?

Right of Entry	Ten non-UCEA states (Arkansas, Florida, Maine, Massachusetts, Montana, New Jersey, New York, North Carolina, Ohio and Utah) expressly affirm that a holder has the right to enter the protected property, usually with the qualification that such entry be at a “reasonable time” and in a “reasonable manner”. Maine’s statute refers to a right of entry of both the holder and a third party with a right of enforcement. The Tennessee and New York statutes reference both entry and inspection and provide a right of entry regardless of whether such right is set forth in the easement instrument.
Inspections in the ordinary course (PA Model §6.02(b))	
Suspected violation (PA Model §6.02(a))	Ark. Code Ann. §15-20-409(c). “Conservation easements...shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. ME. Rev. Stat. Ann tit. 33 §477.5 “The instrument creating a conservation easement must provide in what manner and at what times representatives of the holder of a conservation easement or of any person having a 3rd

	<p>party right of enforcement shall be entitled to enter the land to assure compliance.</p> <p>Sample provision re: enforcement: Grantee may make periodic inspection of all or any portion of the Protected Property to determine compliance with this Conservation Easement. Grantee shall have the right of reasonable access to the Protected Property for inspection and enforcement purposes.</p>
<p>Equitable remedies PA Model §7.02(a) Injunctive relief</p> <p>PA Model §7.02(c) Self-help (a/k/a abatement)</p>	<p>Just over one-third of the easement enabling acts adopted by the states affirm that an easement holder can seek injunctive relief and damages.</p> <p>Common law rule generally applicable to any kind of easement allows holder to enforce by any appropriate remedy or combination of remedies, which may include injunction, compensatory damages, restitution and abatement.</p>
<p>Damage awards PA Model §7.02(b) Civil action</p>	<p>Some enabling statutes provide for damage awards as well as injunctive relief. California, Colorado and Hawaii specify that damage awards for violation of an easement may take into account loss of scenic value. Illinois has a unique provision that allows for punitive damages against a person who willfully violates a conservation easement on property he owns. Such damages are capped at the value of the land, although it is unclear whether this is the restricted value or the unrestricted value.</p> <p>Cal. Civil Code §815.7(c) "In assessing such damages there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic or environmental value to the real property subject to the easement."</p>
<p>Forfeiture (for breach of holder's covenants)</p>	<p>Remedy that responds to the concern "who will enforce the easement if Holder fails to do so?"</p>

§6.01(d)	
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B. Notice and Opportunity to cure

<p>PA Model §7.01 Violation</p> <p>(a) Notice (method of notice in §8.01)</p> <p>(b) Opportunity to cure (with conditions for extended cure)</p> <p>(c) No notice or cure if prompt action needed.</p> <p>§7.04 Remedies cumulative</p>	<p>Sample provision:</p> <p>In the event that a Grantee becomes aware of an event or circumstance of noncompliance with this Grant, Grantee shall give notice to Grantor of such event or circumstance of non-compliance via certified mail, return receipt requested, and demand corrective action by Grantor sufficient to abate such event or circumstance of noncompliance and restore the Protected Property to its previous condition. Failure by Grantor to cause discontinuance, abatement or such other corrective action as may be demanded within a reasonable time after receipt of notice and reasonable opportunity to take corrective action shall entitle Grantee to bring an action in a court of competent jurisdiction to enforce this Conservation Easement and to recover any damages arising from such noncompliance. The parties to this Grant specifically acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity or through administrative proceedings. Nothing in this enforcement section shall be construed as imposing a liability upon a prior owner of the Protected Property when the event or circumstance of noncompliance occurred after said prior owner's ownership or control of the Protected Property terminated.</p>
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C. Other protections in litigation

<p>PA Model §7.05 Waivers</p> <p>§7.06 No fault of owners</p> <p>§7.07 Multiple Owners – multiple lots and single lot §8.05(a)</p> <p>Documentation requirements</p> <p>§8.10 Entire agreement</p>	<p>Common law: sit on your rights long enough and lose them (laches).</p> <p>Induce the other party to believe you’ve accepted the situation and you’ll be stopped from claiming otherwise (estoppel)</p> <p>Sample provision: Nonwaiver. The failure or delay of the Grantee, for any reason whatsoever, to take any action required or contemplated hereunder or to discover a violation or initiate an action to enforce this Conservation Easement or any other action shall not constitute a waiver, laches or estoppel of its rights to do so later.</p>
<p>PA Model §8.02 Governing law</p> <p>§8.13 Jurisdiction; venue</p> <p>§8.09 Interpretation</p>	<p>Sample provision: Controlling law and interpretation. The interpretation and performance of this Easement shall be governed by the laws of the State of XXX. Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be broadly construed in favor of the Conservation Easement to effect the conservation purposes of this Conservation Easement and the policy and purpose of the XXX Conservation Easement Act at Title XXX, XXX Revised Statutes Annotated, Sections XXX through XXXX, inclusive, as amended. If any provision in this Conservation Easement is found to be ambiguous or conflicts with another, an interpretation consistent with the conservation purposes of this Conservation Easement shall govern.</p>

	<p>Sample provision:</p> <p>Economic hardship. In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. In addition, the unprofitability of conducting or implementing any or all of the uses permitted under the terms of this Conservation Easement shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. It is the intent of both Grantor and Grantee that any such economic changes shall not be deemed to be changed conditions or a change of circumstances justifying the judicial termination, extinguishment or amendment of this Conservation Easement.</p>
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