

Guide to the Conservation and Preservation Easements Act

Act 29 of 2001 enacted June 22, 2001

Summary

Until now Pennsylvania's land trusts have had to rely on "common law" when enforcing their conservation easements. Common law is based on centuries of court decisions rather than on laws passed by legislative bodies. Different decisions from local courts have created a body of law that is not consistent throughout Pennsylvania regarding the rights, duties and powers related to these easements. Furthermore, Pennsylvania common law does not assume that conservation easements are valid. An easement is essentially "presumed guilty until proven innocent". This has resulted in unnecessary legal expenses being incurred to defend against challenges to conservation easements.

The *Conservation and Preservation Easements Act* changes this. At its heart, the Act says that, as a matter of public policy in Pennsylvania, ***conservation easements conforming to this law are valid***. Furthermore, where there is ambiguity in an easement restriction, the Act directs the courts to interpret the restriction consistent with the purposes of the easement and the Act rather than favoring a conservation-unfriendly view of the restriction language.

The Act does not prevent someone from challenging a conservation easement provision or an action taken by a land trust—anyone can sue anyone for practically anything. Nor does it eliminate the need for a land trust to defend its position. However, it does reduce land trust financial and legal exposure as well as uncertainty in enforcement.

In short, the *Conservation and Preservation Easements Act*:

1. Reduces the legal costs associated with establishing the validity of a conservation easement;
2. Narrows the bases for challenging a conservation easement in court; and
3. Eliminates a variety of ambiguities in easement law and creates a number of standards as covered in the following sections.

This guide is no substitute for legal and other professional counsel. Land trusts should engage legal counsel when undertaking conservation easement projects.

Items to Watch Out for When Drafting Easements Under the Act

Notice of coal interests §9(d)

A conservation easement affecting real property containing workable coal seams or from which a coal interest has been severed must include a statement that the easement may impair the development of the coal interest. The statement must be signed by the grantor of the easement, must be printed in no less than 12-point type, and must be preceded by the word “Notice” in no less than 24-point type.

Possible language to use in the easement is as follows:

The following notice is given to and accepted by [Grantor] for the purpose and with the intention of compliance with the requirements of the Conservation and Preservation Easements Act. Nothing herein shall imply the presence or absence of workable coal seams or the severance of coal interests from the [property].
{in 12 point type}

Notice {in 24 point type}

This Conservation Easement may impair the development of coal interests, including workable coal seams or coal interests which have been severed from the [property]. {in 12 point type}

By: _____ Date: _____
Grantor signature

When there is any uncertainty as to whether a property contains a coal seam—workable now or in the future—or whether a coal interest has been severed, it would be prudent to include the coal notice.

The Pennsylvania Land Trust Association has confirmed which counties contain areas with presently workable coal seams and which do not. However, it has been unable to find an expert willing to state *with 100% certainty* that no workable coal will *ever* be found in a particular county. Hence, unless an expert can determine that no coal is present on a particular property, it would be wise to include the coal notice.

Easement boundaries must be clearly delineated §4(b)

Except when referencing an easement’s boundary using setback descriptions from existing deed boundaries or natural or artificial features, such as streams, rivers or railroad rights-of-way, a metes and bounds description of the portion of property subject to the easement must be provided in the easement document.

Public benefit

To buttress the case that a conservation easement yields a significant public benefit, the following language could be inserted into the easement’s preamble:

Whereas, the Pennsylvania General Assembly, in enacting the Conservation and Preservation Easements Act, has recognized the importance and significant public and economic benefit of conservation easements [in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of the Commonwealth].

Reference to the Act

To head off a potential challenge on some ambiguity in the construction of the easement, language could be included in the easement instrument stating that the easement:

is constructed with the intention of conforming with the requirements for conservation easements under the Pennsylvania Conservation and Preservation Easements Act, Act 29 of 2001, and as amended thereafter.

Third-party right of enforcement

§3 and §4(c)

An easement may be written to grant an entity the right to enforce any of the easement's terms. The entity itself must be qualified to be a "holder" of conservation easements under the Act (e.g., a governmental body or a charitable conservation organization). To actually have the right to enforce, the entity must sign a written acceptance and record the acceptance. This could be accomplished as part of the easement or in a separate instrument.

Although the acceptance could be recorded at some future date, a good practice would be to record the third-party's acceptance of the right to enforce from the outset as part of the easement instrument. This way the land trust and landowner know that the chosen third-party has in fact accepted the responsibility, and if trouble should develop in the future, there will be one less hurdle for timely enforcement. Including the acceptance as part of the easement itself simplifies future title work.

Organizations qualified to accept transfer

Easements typically contain language allowing the land trust to transfer the easement to an organization that is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code. Language could be appended to this provision to also require that the successor organization be qualified as a "holder" under the *Conservation and Preservation Easements Act*. (See §3 for the definition of *holder*.)

Duration §4(d)

Conservation easements created after 6/22/2001 cannot have a duration of less than 25 years (not generally a problem since most are written for perpetuity).

Non-governmental easement holders must maintain their Bureau of Charitable Organizations registration and their IRS 501(c)(3) tax status. It has been a typical practice to note a holder's 501(c)(3) tax status in a "whereas" clause of the easement. As a reminder of the importance of also maintaining charitable registration, language might be appended to the whereas clause stating that the holder "is registered with the Bureau of Charitable Organizations of the Pennsylvania Department of State".

Standing in Court §5(a) and §5(b)

The Act defines who has standing to bring legal or equitable actions affecting a conservation easement:

- An owner of the real property burdened by the easement.
- A person that has any interest or right or holds an estate in the real property.
- A holder of the easement (e.g., the land trust).
- A person having a third-party right of enforcement (a qualified entity named in the easement).
- A person otherwise authorized by Federal or State law.
- The owner of a coal interest: (1) in property contiguous to the eased property; or (2) which has been severed from the ownership of the property.

This list clearly identifies those persons and entities entitled to appear in court to bring suit against land trusts to enforce an easement in accordance with their perceptions of what is correct. The Act denies court access to persons and entities not listed and who in the past sought redress through litigation that land trusts thought was inappropriate or overly zealous.

The Act prohibits bringing suit for activities occurring outside of conservation easement boundaries except where those activities "pose a substantial threat of direct, physically identifiable harm" within the eased area.

What Easements Are Covered? §7

The Act applies to easements created after 6/22/2001, the date that Governor Ridge signed the legislation into law, that comply with the Act.

The Act also applies to easements created before the Act if those easements are in compliance with the Act and were recorded or, if not previously recorded, will be recorded within 180 days of 6/22/2001.

The Act does not alter, modify or supersede either the method of creating, or the rights, duties, powers or obligations appurtenant to agricultural conservation easements under the state's Agricultural Land Preservation Program and Agricultural Area Security Law.

Other Items of Note

Merger doctrine discontinued §6

Easements will remain valid even if the easement holder becomes the fee owner of the property.

Condemnation §5(d) and §5(e)

The Act does not change existing eminent domain law.

Should Existing Easements Be Amended to Comply?

Land trusts may want to consider amending their existing easements as necessary to come under the Act. Easements that do not comply with the Act will continue to be interpreted under common law.

Whether to amend existing easements depends on a number of factors. A land trust could reasonably choose to amend all, none or some of its easements, depending on the circumstances:

- Would the present landowner be willing to enter into a new agreement?
- Will opening up for a new agreement cause the landowner to push for amendments to elements of the easement that the land trust does not wish to change?
- Are there elements of the easement that the land trust desires amended that could be accomplished at the same time as the Act 29 compliance amendments?

A land trust might choose to pursue amendments to its easements slowly over time as opportunity presents itself.

The Act may be viewed online or printed at the following state website where it is referenced as House Bill 975, PN 2294:

www.legis.state.pa.us/WU01/LI/BI/ALL/2001/0/HB0975.HTM

This guide was prepared by Andrew M. Loza, Executive Director of the Pennsylvania Land Trust Association (PALTA).

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