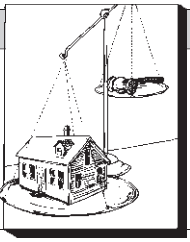
Protecting Land for Profit



by Darshan Brach

At first glance, protecting certain features of a piece of land from development may not seem to be in a developer's best interest. However, at closer look, a builder or developer might find it desirable and profitable to preserve certain portions or natural features of a parcel of land while developing the rest.

How can this be done? One option is the conservation restriction. With this legal device, a developer surrenders to a third party, generally a "holding organization," such as a government entity or a nonprofit organization, the right to change certain characteristics of a property. In this way, a conservation restriction can be used to preserve desirable features of a property or certain of its improvements.

Conservation restrictions are flexible. While a restriction surrenders certain development rights, the particular terms and specifications of the agreement can be molded to fit your needs and wishes. You retain all other rights, and can retain and/or transfer ownership of the property and use it in any way that does not interfere with the terms of the restriction. The public does not gain any rights to the land unless you give them such rights as part of the restriction.

Why Grant a Conservation Restriction?

Even if you are not a conservationist or preservationist, conservation restrictions can provide several advantages.

Aesthetics and marketability. Conservation restrictions allow you to preserve aesthetically or environmentally significant features that make a property desirable to potential buyers. Developers seeking to enhance a project's attractiveness may use a conservation restriction to preserve open space or recreational areas within a development or to control the quality of a development by restricting the number, size, placement, or design of buildings. Done properly, this can enhance the value of the individual lots.

A developer in Sanford, Maine, for instance, built a standard subdivision and another subdivision of the same size, that included open space. Although the houses were priced identically, the open space subdivision took only eight months to sell while the standard subdivision took 18 months. Additionally, the open space homes have appreciated in value more since they were sold.

Bargaining power with zoning officials and the public. Conservation restrictions can provide a key negotiating tool for developers faced with opposition from citizens concerned with preserving scenic views, open space, farmland, and other community values. Conservation restrictions can be used to secure an open space for a cluster development, or to restrict the number of units served by a road. These steps can alleviate town fears that development will require new infrastructure at the community's expense.

Tax deductions to owners. Conservation restrictions can offer attractive tax advantages. The restriction donor may be entitled to federal (and sometimes state) income tax deductions and lowered real estate property and estate taxes. Subject to certain qualification requirements, the donation of a restriction can also provide an immediate income tax deduction in the amount of the loss of property value attributable to the restriction. In addition, the appreciation or speculative value of the land on which the restriction is donated is removed form the landowner's tax liabilities.

To qualify as a tax-deductible donation, a restriction must a) be made to a qualified organization, b) be granted in perpetuity, and c) be granted exclusively for conservation purposes. Tax guidelines for historic and land conservation donations can be found in the Internal Revenue Code at Section 170(h) and the U.S. Treasury Regulations at Section 1.170A-14. Or call 800/424-1040 for information from the IRS. A lawyer or tax advisor can help you make the most of these tax benefits.

How a Conservation Restriction Works

Since conservation restrictions represent the sale or donation of a property right, securing one requires the same steps as are required for conveying real property. To create a conservation restriction, you, as donor, must normally take the following steps:

1) Decide which rights you wish to retain and which you wish to restrict. Remember that conservation restrictions are rarely granted for anything less than forever, since the tax benefits generally don't apply unless the restriction is granted in perpetuity. Obviously, you need to choose carefully the development rights you donate or sell.

2) Choose a recipient for the rights. Normally this is a government entity or a nonprofit organization qualified by statute to accept such devices. A variety of public agencies and private groups, such as land trusts and conservancies, accept and manage conservation restrictions.

3) Hire a lawyer to handle the conveyance work: a deed to the rights must be drafted, accepted by the recipient, and recorded in the land records. Applicable state laws must be thoroughly addressed. In some states, conveyances or easements are affected by common law provisions. For example, in Connecticut a statutory provision eliminates certain common law requirements that made the durability of a conservation easement questionable. Other state laws may address government acquisition of conservation restrictions and tax consequences.

Remember that once conveyed, conservation restrictions are nearly impossible to reverse. Before you commit yourself, be certain you don't convey a right you might later wish you had retained. Also, despite the tax and other advantages to such devices, deed restrictions generally decrease the value of a property by the value of the development and use rights given away, which means resale value of the undeveloped land may be lowered. These losses and disadvantages must be weighed carefully against any gains.

Nevertheless, the conservation restriction is a legal tool gaining in popularity and use – and for good reasons. As more and more precious parcels are swept up in conventional development, conservation restrictions offer an effect way to cooperate development with preservation objectives for posterity and profit. ■

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