

APPENDIX B

Fee Simple v. Conservation Easement Acquisitions NTCOG Water Quality Greenprint - Training Workshops

Lake Arlington Watershed and Lewisville Lake East Watershed
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Presenter Talking Points

The session outline is chronological and follows the natural progression of project / project management steps.

Disclaimer: The presenter(s) are not offering legal or tax advice, nor should the audience act in reliance upon the representations by the presenter(s).

I. WHAT IS . . .

A Fee Simple Acquisition?:

- It's "buying the bundle of sticks" – all the seller's interests and rights in land.
- Improvements included
- All that is in the title

A Conservation Easement?:

- An Agreement between a landowner and a public agency, or conservation non profit organization,
- Limits future uses of the property
- Establishes a process for enforcing limitations
- PACE (Purchase of Agricultural Conservation Easements), PDR (purchase of development rights) and CE are effectively the same animal - a.k.a. "less-than-fee" acquisition

II. GENERAL OPPORTUNITIES AND CONSTRAINTS OF FEE SIMPLE v. CE's:

Why and when to use . . .

Fee Simple?:

- Seller no longer wishes to retain any ownership or interest in the land
- Only way the Seller will sell
- Public agency wants complete management rights and/or 100% ownership
 - Usually for public access issues
 - Rarely does a CE grant access to the public
- Value difference between fee and CE is nominal
- Subject property cannot support the "mixed use" of a CE and underlying fee ownership (i.e., conflict between retained use and habitat, trails, etc.)

A Conservation Easement:

- Think CE when you see one of these situations:
 - Buffer to existing public land
 - Wildlife habitat, not requiring intensive mgmt or public access

- Watershed protection for drinking water, surface water retention
- Scenic viewsheds
- Working landscapes, land needs to stay in private ownership
- Political opposition to increased public lands (mgmt) or loss of tax revenue
- LO doesn't want to sell fee

Advantages of . . .

Fee Simple Acquisition:

- Less to negotiate (no CE restrictions, management, baseline)
- No enforcement issues
- Fewer parties at the table
- Relative clarity on what's being acquired
- Conventional appraisal process and methodology
- Sale at less than FMV, or donation of land value, may offer tax benefits on highly-appreciated properties to offset capital gains
- May diminish or avoid gift tax / estate tax that may be difficult/impossible for heirs (see current tax law)

Conservation Easement Acquisition:

- Greater Flexibility –
 - Dealing with landowners who do not want to sell their property.
 - Purchasing a conservation easement may be the only way to counter the objection to a fee simple sale.
 - CE can be designed to protect specific portions of a property or distinct resources.
 - Seller can retain ownership and significant control.
 - Ability to control future uses, stay on the land and get compensation can be potent negotiating material.
 - “Having their cake and eating it too.”
- Tax Advantages –
 - Donated easements, or bargain sales, may offer income tax benefits.
 - Encumbering real estate with a CE can also reduce property taxes, but this result varies by state and sometimes by municipality.
 - Flexibility and tax advantages can be an enticing combination that convinces the landowner to donate a higher percentage of the fair market value of the CE.
- Longer option periods and terms –
 - Landowners who are staying on the property don't generally need quick closings.
 - When a solution including a CE helps the seller achieve a multitude of goals it is easier to obtain a long-term option.
 - CE sellers generally have few viable alternatives.

Issue Areas- Challenges presented by Fee Simple / CE acquisitions

- Challenges must inform project management strategy and steps
- Go in with eyes open

Fee Simple:

- Constrained time frames / threats of loss of resource
- Seller's value expectations / demands
- Incompatible former uses / remediation problems
- Public agency / NGO management costs
- Liabilities / “attractive nuisances”

Conservation Easements:

- CE's are complex documents that create a unique set of relationships
 - More extensive negotiation is necessary to complete a CE transaction than is required for fee transactions.
 - There may be an additional entity involved, if funder and easement holder are different.
 - You must obtain full buy-in from the seller and the buyer on all details, in advance of the closing.
 - You are fully involved in the future stewardship issues because they are elements of the easement document. Because the CE document commits the seller and buyer to future actions, prohibitions and expenditures, this negotiation has proven to be extremely complex and time-consuming for many of the successful transactions.
 - As a result of the future relationship between takeout entity and landowner, direct negotiations between them are often required.
Solution: A selection of document templates and more organizational experience may help reduce the difficulties presented in the negotiations. Partnerships with more experienced non-profits, such as well-established land trusts, are valuable.
- Perpetuity is a long time –
 - CE's contrast with fee transactions in that you are taking responsibility for developing a permanent land protection solution, as opposed to a document that needs to only lead to a successful conveyance to a public agency.
 - You must be vigilant in order to create strong, lasting CE's that are appropriate for the property and the participants. The document is the operating instructions for an arrangement intended to last forever.
Solution: Collaborations with experienced land management entities and associations with reliable, specialized legal counsel, possibly on a retainer basis. Skilled practitioners can help you identify and address all currently foreseeable issues.
- Different areas of expertise required –
 - Negotiating and drafting quality conservation easements demands highly specialized knowledge.
 - Foresters, ecologists, wildlife biologists and agronomists have all been recruited for assistance with various projects.
 - Appraisals of CE's require unique expertise that is sometimes hard to obtain.
Solution: NGO's that are actively engaged in less-than-fee work are creating networks of skilled consultants and finding funders to assist with the attendant increase in project costs. You may need to hire individuals from these professions if CE volume increases greatly.
- Managing risk related to CE market value –
 - Once separated from the fee, CE's arguably have no market value.
 - The appraisal of the underlying fee and CE value is paramount. A defensible appraisal by an appraiser skilled in CE valuations is important when government oversight is especially critical of appraisal technique and assumptions.
 - Your risk is also increased because there is no private market fallback strategy for selling development restrictions.
- It takes more time – The forgoing factors often add up to lengthy multi-party negotiations with a difficult completion process.
 - Less-than-fee transactions produce more issues to confront and more parties to satisfy, as compared to fee title transactions.
 - Some CE projects require fee purchases and a subsequent sale of the CE and remainder interests separately, effectively turning one project into two.
 - A less-than-fee project will generally require greater staff resources than a fee transaction.

Solution: Project selection, design and budgeting need to consider the implications of CE investments.

III. PROJECT DESIGN CONSIDERATIONS

What's the right course for this project?

- Some major issues to consider at the outset:
 - What is the need for public access or high level of on-site management, ecological restoration?
 - Appropriateness of private management and control (CE model)
 - Surrounding land use compatibility
 - Risk of third party mineral rights
 - Which path best achieves the conservation goals of the project?
 - Sufficient time, money and skill available to undertake the project?

Preparing to negotiate / structure the deal – Determining the needs and desires of the stakeholders

Fee Simple:

- Up to four parties:
 - Landowner
 - NGO
 - Funding Source
 - “Takeout Agency”
- Needs of / Working with the Takeout Agency:
 - Criteria
 - Priority
 - Process / Timeline
 - Advocacy
- Securing Funding:
 - Applicability of project to funding source
 - Competition for dollars
 - Process / Timeline (especially if multiple sources of funding)
 - Advocacy for project
 - Need for lobbying, timing of appropriations?
- Working with the Landowner
 - Willingness to sell
 - The right decision makers involved?
 - Value expectations (ie understands appraisal process, which uses comparable methodology as adjusted by factors)
 - Financial needs? (ie ability to use tax benefits and estate tax assistance?)
 - Timing needs?
 - Time horizon sufficient (realistic) for funding? (18-24 mos)
 - Walk the land, be familiar with features

Conservation Easement:

- Up to five parties:
 - Landowner
 - Funding source
 - *Land trust / easement holder (different from fee)*
 - *Environmental community/advocates (may be different from fee)*
 - NGO
- Working with the land trust / easement holder:
 - Land protection goals
 - Enforcement capacity
 - Template document
 - Monitoring endowment needs
 - Criteria and selection process
 - Ability to conduct baseline inventory?
 - Timing
 - Appraisal considerations
 - Who negotiates on their behalf, decision makers
 - Preparation of management plan?
- Working with the funder
 - Goals of program?
 - Specific requirements e.g. documents, language
 - Process to obtain / review appraisal?
 - Need for lobbying, timing of appropriations?
 - Approval of entity(ies) qualified to hold CE?
 - Approval of management plan?
- Working with the landowner
 - Vision and desire for protection?
 - Long-term uses and activities?
 - Reserved rights desired? Is there a reasonable balance?
 - Ability to use tax benefits and estate tax assistance?
 - Financial needs?
 - Understanding of highest/best value and potential CE valuation, before and after
 - Decision makers involved?
 - Manager, different from owner?
 - Time horizon sufficient (realistic) for CE negotiation? (9 - 12 mos)
 - Walk the land, be familiar with features
 - Willingness to manage with environmental sensitivity?
- Working with the Community/Advocates (stakeholders)
 - Public access and use needs?
 - Confidence about future management and oversight
 - Sufficient conservation outcome for funds invested
 - Comfort with landowner stewardship
 - Inclusion in decisions