

# ***Drafting Conservation Easements for Agriculture***

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## **Introduction**

Over the past 50 years, agriculture and the rural landscape have changed dramatically. Numerous farms and ranches have gone out of business while others have expanded, consolidated, diversified or changed enterprises entirely in order to survive. At the same time that agriculture was undergoing this rapid change, we have witnessed a new threat to agriculture — unchecked suburban and other non farm development in and around our urban centers. According to the findings of *Farms Under Threat: The State of America's Farmland* by American Farmland Trust (AFT), between 1992 and 2012, almost 30 million acres of agricultural land were irreversibly lost to development, much of it the prime and unique soils best suited to agricultural production.

In response, many states and local governments, primarily in the northeast and west coast, have developed farmland protection programs utilizing deed restrictions much like conservation easements. In fact, the concept of purchase of development rights (PDR) was pioneered in Suffolk County on Long Island in the mid-1970's and pre-dated most conservation easement statutes around the country including New York State. Several Northeastern states soon followed and a growing number of states and local municipalities have established purchase programs. As a result, many of the agricultural easements currently used are found in state, county or township purchase of agricultural easement (PACE) or PDR programs.

In addition, a number of conservation organizations have been created that focus explicitly, and in some cases, exclusively, on farm and ranch land. These include American Farmland Trust, founded in 1980, the Marin Agricultural Land Trust in California, the Agricultural Stewardship Association in New York's Hudson Valley, the Colorado Cattlemen's Agricultural Land Trust, the Connecticut Farmland Trust, the Maine Farmland Trust, the New York Agricultural Land Trust and the Texas Agricultural Land Trust to name a few.

This article examines the fundamental premises underlying agricultural easements and will discuss key drafting issues that reflect those premises and objectives. Some of the key drafting issues include the easement purpose, construction of agricultural buildings and improvements, construction of residential and farm worker dwellings, agricultural practices, subdivision and rural enterprises, and emerging issues, such as affordability, climate change and renewable energy.

## **Context**

The broad-based support for “working landscapes” masks some fundamental and differing perspectives involving the issue — differences that create tensions that surface inevitably as we draft agricultural conservation easements.

One of the most basic involves the notion of “preservation” in contrast to “conservation”. There is nothing more unrealistic to farmers and ranchers than the prospect of preserving the landscape status quo “as is”. Agriculture is a human activity that has altered the landscape for tens of thousands of

years, and for farmers and ranchers, the more dynamic and adaptable term, “conservation”, usually better fits their perception of what agricultural easements should be about.

Another basic tension is how to balance inevitable trade-off between economics and the environmental attributes of the property. For farmers and ranchers who make their living from the land, economic decisions are a critical factor because it means short-term survival and long-term viability. For others, the other environmental resources like soil, water quality or wildlife habitat will take precedence. Finding a balance that is workable and sustainable is the skill of drafting well constructed and durable agricultural easements that will withstand the test of time.

Those involved in farm and ranchland conservation recognize that there is an inevitable need to balance flexibility to the landowner and certainty to the holder. For farmers and ranchers who have witnessed incredible change in agriculture in their lifetimes, it stretches credibility to think that we can draft an easement that will last unless it is flexible and can be adapted to future change.

## **Agricultural Conservation Easements**

### **What are they?**

We sometimes overlook the fact that in almost all states, conservation easements are a product of a specific state law that creates them - and provides for a special set of rules for their interpretation and enforcement.

It is important to understand that conservation easements are negative covenants generally created by state law. The latter fact is critical because it is state law, and not the Internal Revenue Code, that will govern easements interpretation and enforcement into the future. And this is a legal reminder about limitations of conservation easements generally—they impose restrictions on uses like non-farm development and subdivision and do not usually contain affirmative obligations to continue farming or ranching. However, it should be noted that some land trusts and public programs are adding affirmative obligations to their agricultural easements such as affirmative farming covenants. In general, the conservation easement statutes enacted in most states eliminate all of the common law defenses to these “easements in gross” and provide legislative sanction for the conservation purposes that they are intended to protect.<sup>1</sup>

### **What do they look like?**

The majority of the first agricultural easements evolved from publicly funded PACE or PDR programs and tended to be fairly short, simple and deferential to most agricultural uses and structures. By contrast, many land trusts tended to draft more complex, detailed easements in part because the easements were donated and needed to comply with the requirements of Section 170(h) of the IRC and its accompanying regulations in order for taxpayers to receive a charitable deduction, and in part because land trusts and other conservation organizations were as concerned with other conservation attributes as with the agricultural resources. Additionally, many public programs are structured so that landowners can make use of “bargain sales” and the IRC requirements come into play in order for the sellers to utilize the tax deduction for the “bargain” component of the transaction.

Over time, it appears that agricultural easements from the public and private sector are merging toward middle ground on issues like the purpose(s) of the easement, structures, dwellings, subdivision, agricultural practices and rural enterprises. Some land trusts, like the Agricultural Stewardship

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<sup>1</sup> See generally, Gustanski and Squires, *Protecting the Land: Conservation Easements, Past, Present and Future*, Island Press, 2000.

Association (ASA), the Columbia Land Conservancy and Scenic Hudson in the Hudson River Valley of New York have created agricultural conservation easement templates because the traditional scenic/open space easement does not allow enough long-term flexibility for agricultural enterprises and market adaptations necessary to sustain the working landscape. That said, for federal income tax deduction purposes, IRS requirements must be satisfied, but it has been noted on more than one occasion that the IRS has a three-year statute of limitations. Landowners and easement holders will be living with the easement for much longer.

## **Key drafting issues**

### *Purpose*

Any easement's purpose clause becomes its "touchstone" for future readers. A clear statement of purpose should provide a standard for future interpretation. Over time, through easement monitoring and discussions with the present (and future) landowners, the easement language will be revisited by both the holder and the landowner to determine whether future use continues to be consistent with its stated purpose as set forth in the purpose clause.

Not surprisingly then, agricultural easements will state clearly that working agriculture is the primary purpose. Some, including the ASA's standard easement, include agricultural viability in the purpose clause to recognize the economic link in the working lands equation.<sup>2</sup> Other purposes clauses focus exclusively on the conservation of productive agricultural land and leave the inherent connection to agricultural viability implicit rather than explicit.

Purpose clauses can also be written to create a hierarchy of purposes with agriculture as the primary purpose and other stated purposes, including scenic or natural features, as secondary. These easements explicitly recognize and reference other important attributes of agricultural land, but acknowledge the potential for tension and even conflict between multiple conservation purposes.

Still other easements have dual, or sometimes multiple purposes without any explicit mechanism to reconcile potential tensions or conflicts. The dual-purpose easement used in the New York City Watershed by the Watershed Agricultural Council in its easement program utilizes performance standards relating to the form, location and density of development and adherence to an approved whole farm conservation plan to address this tension. However, many other easements, drafted to comply with the Internal Revenue Code requirements in Section 170(h), will use a "shotgun" approach that lists "open space", "natural", "scenic" and "agricultural" values of the property as multiple purposes. This approach presumes that all of the above values are some how compatible and reconcilable. While in some circumstances this is certainly true, many other situations point to potential for conflict between these values as agriculture evolves in a new century. Interestingly, many of the easements with single purpose agricultural protection clauses are found in state or local purchase programs, programs that evolved unaffected by 170(h) until the growth of the land trust movement in the 1980's and 1990's.

Regardless, the purpose clause will serve as an important indicator about how commercial agriculture and the business of farming and ranching are likely to fare under future interpretation of the various easement clauses that follow in the conservation easement document.

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<sup>2</sup> The ASA easement purpose clause states: "The Primary Purpose of this Easement is to conserve viable agricultural land and soil resources by preventing uses of the Property that will significantly impair or interfere with the Property's agricultural and forestry viability and productive capacity."

### *Definition of Agriculture and Farming Practices*

Agricultural easements frequently strive to define current and anticipated agricultural practices to avoid confusion about whether a current or future farming practice is permitted. From a farmer's or rancher's perspective, this issue of what is agriculture, or more importantly, who decides what is agriculture, can conjure nightmare scenarios of a "fixed" definition of agriculture into the future, or worse, a subjective or arbitrary determination by the easement holder.

As a result, agricultural easements usually attempt to define "agriculture" in broad terms that presume an evolving definition of agriculture and changes over time. Generally structured in a clause separate from the Purpose Clause, an Agricultural Definition section can vary from including a broad and non-exclusive list of permitted uses to stating a definition of agriculture as determined by state law that will be modified over time to reflect changes in agriculture. The Vermont Land Trust utilizes a consistent set of guidelines to help them make determinations about the definition of agriculture in their easement. They expect to periodically revisit the guidelines to ensure that the guidelines reflect the changes in agriculture that will inevitably occur over time.

Similarly, agricultural easements usually incorporate standards that define acceptable agricultural practices in ways that the agricultural community trusts. These standards are by their nature flexible; they are often defined within state or federal programs (such as the Natural Resources Conservation Service or local soil and water conservation districts) that are updated periodically to reflect changes in agricultural best management practices ("BMP's"). By utilizing state-defined or federal standards, the easement holder may avoid difficult discussions with farmers or ranchers about "who best knows" how to farm.

Agricultural easements may also be silent about standards for farming practices, relying on other on-going farm/conservation management programs such as NRCS's "Conservation Plans". Incorporating detailed land management requirements into agricultural easements, such as requiring organic production, also has serious ramifications for the long-term stewardship obligations of the holder and need to be considered carefully. As with other specific easement clauses, each holder will need to decide whether it has the knowledge and resources over the long term to evaluate and enforce any specific farming practices or standards. Local NRCS and soil and water conservation district offices can serve as technical advisors about conservation plans and how they might be incorporated into an agricultural easement.

### *Agricultural Structures*

During our discussions with farmers and ranchers about agricultural easements, we have found that one of the most critical and potentially contentious issues is the amount of flexibility they will have to add or alter agricultural structures, including greenhouses and crop covers, feedlots and barnyards. Across the country, agricultural easements recognize the necessity of providing maximum flexibility for agricultural buildings (and in most jurisdictions, local governments do as well).

The most common easement language allows farmers to construct, modify or demolish any farm building necessary to the farm operation without prior permission from the easement holder. This approach, followed in most of the purchase of agricultural easement (PACE) or PDR programs, acknowledges that the farmer or rancher knows what is most important for his or her agricultural operation and needs to act accordingly. It also highlights the importance of the purpose clause and the definition of agriculture since each will affect what is actually an "as of right" structure.

However, as land trusts have become more involved in farmland protection, and as existing farmland protection programs attempt to address multiple conservation values as well as agricultural resources,

other techniques are being utilized. Some farmland protection programs, and many land trusts, require some kind of prior permission for construction of agricultural structures. Others blend “as-of-right” construction within a large building envelope (where the majority of agricultural structures and housing will be located in the future) and only require advance permission for any construction outside the designated building area. In such easements, the landowner can generally build, enlarge, modify or demolish any agricultural structure within the building envelope without permission. Farm structures outside of the building envelope would be allowed if they meet performance standards set forth in the easement. (For example, the holder will grant permission if the structure does not unnecessarily impact important soil resources.)

Another approach establishes a threshold at which construction of agricultural structures of a certain size outside of the building envelope is permitted if they are necessary for the agricultural enterprise and are consistent with the purpose of the easement; prior approval is required for larger buildings under this approach. Surface coverage limits (usually as a percentage of the total easement acreage), while less common, may also be used. The Natural Resources Conservation Service (NRCS administers the federal program, now known as the Agricultural Land Easements, or ALE) has issued rules for impervious surface limits (including residential buildings, agricultural buildings and other paved areas like feedlots and barnyards) of two percent because it concluded that extensive impervious surfaces have the potential of limiting future agricultural uses and create the potential for extensive erosion.<sup>3</sup> For perspective, this guideline would limit impervious surfaces to a total of 5 acres on a 250-acre farm.

The NRCS guideline highlights the point that restrictions on buildings and other impervious surfaces will have a significant impact on farmland protection programs because they will affect whether agricultural landowners will participate in the first place; and they will affect what acreage is included, or not, in the proposed easement.

We believe that it is critical for those drafting agricultural easements and program managers to work with their agricultural community to evaluate the best way to allow for construction necessary for current and future agricultural enterprises so that agricultural easements are not viewed as overly restrictive “straightjackets” for future farmers and ranchers as well as evaluate their long term organizational capacity as easement holders.

### *Residential Structures*

While agricultural easements allow for farm employees housing necessary to conduct the agricultural operations (as determined by the farmer or rancher and in accordance with local zoning), they can vary in their treatment of residential structures that are not specifically designated for farm workers (such as the principal farm house).

Agricultural easements attempt to minimize land fragmentation and future farmer/neighbor conflicts by allowing only a few subdividable future non-farm employee residences on the property. Limiting land fragmentation is probably one of the most important functions of an agricultural easement, and probably the restriction that will be most clearly enforceable over the long term. Consequently, the location of these future building envelopes or subdividable parcels is very important and should factor in wind dispersal, of noise, chemicals, dust and smell, in addition to land fragmentation and provide for future flexibility to accommodate future diversity of farming enterprises.

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<sup>3</sup> However, NRCS has also issued waivers and will allow impervious surfaces up to 10% on a case-by-case basis. Notwithstanding the waivers, several state programs have strongly objected to this requirement because they disagree with its premise and believe that it unduly restricts agricultural business management decisions.

Based on our review of agricultural easements there are three basic approaches to residential structures:

- Omit subdividable, non-worker, house sites from the easement. To do so, these future house sites, usually on a two to three acre lot that is large enough to support a septic system and a replacement system, is surveyed out and excluded from the easement. Easement monitoring is therefore simplified with a clear delineation that no residential dwellings (other than farm owned employee housing) are permitted on the property.
- Include house sites within the easement, therefore ensuring that any additional non-residential uses would be prohibited.
- Create building envelopes large enough to allow for the residential structure and the establishment of a substantial farm operation with supporting buildings and structures – or expansion of an existing farmstead – on an as-of-right basis. Under this approach, the easement provides for a variety of uses within the building envelope (or “Farmstead”/ “Acceptable Development Area”), including housing for the farmer, farm-based enterprises, non-farm enterprises, and housing for farm employees and /or family members as long they do not negative impact the property’s agricultural viability.<sup>4</sup>

Under the last scenario, farm worker housing and related structures constructed outside of the building envelope generally require prior permission. The appropriate size of these building envelopes will vary based on the region’s agricultural activities; however, designating building envelopes that are too small will likely restrict future farming enterprises and undermine support for easements within the agricultural community and create pressure to amend easements in order to “loosen” an overly restrictive easement.

### *Subdivision*

While provisions that govern subdivision of protected agricultural land vary, the primary rationale underlying this particular restriction focuses on reducing the potential for land fragmentation that would render agricultural land unusable for a commercial agricultural enterprise.

An agricultural easement may create a performance standard that allows subdivision if it does not harm the property’s long-term agricultural viability or limit the size of the subdivision, based on the amount of land generally considered a viable farming unit, or limit the total number of permitted subdivisions. One factor is critical: what is deemed a viable farming unit today may be very different in the future. Requiring farms to remain in large acreages and/or to retain the traditional farmstead may create a long-term property tax burden that is unsupportable when profit margins are slim or nonexistent. Such a requirement might force a farmer or rancher to sell the entire operation as one large unit, rather than being able to divest unneeded acreage and retain an appropriate amount of acreage for their agricultural enterprise. Ironically, it is possible that the only buyer that could afford to own the parcel would be a non-farm owner (or one with significant nonfarm income or other assets).

As farming practices and economics evolve, it is not unreasonable to expect a landowner to focus his or her efforts on a portion of the farm that supports their financial and personal resources. For example, an agricultural producer may decide to focus on producing a niche product (like vegetables, herbs, flowers or small fruits) on the 15 acres of prime soils on the farm, and no longer wish to own and

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<sup>4</sup> It should be noted that rental of these structures can be important farm income and can resolve vacancy challenges when the farm enterprise shifts and no longer needs the housing for farm labor. In addition, seasonal housing may evolve into eldercare housing as farmowners age. If the housing stock is not subdividable, and if it is controlled within a building envelope, it balances the likelihood of speculative housing and interfering with the farm business.

maintain (including paying the taxes) the other 200 acres of less productive pasture and woodlot on the farm. From an economic perspective, requiring 100 acres as minimum subdivision acreage may well force the sale of the entire farm unnecessarily.<sup>5</sup> Easement holders therefore grapple with reducing non-farm land fragmentation while allowing for economic viability. Additional organizational capacity will be required to build and support future landowners with each subdivision, therefore requiring consideration from an easement management perspective as well.

Farm support housing (housing and/or apartments for farm employees and family housing) are not allowed to be subdivided as separate, stand-alone, residential properties unless those units are designated as “non-worker” house sites up front in the easement (and valued as such if the easement is purchased or if a tax deduction is sought by the landowner).<sup>6</sup>

### *Rural Enterprises*

Increasingly, agricultural easements recognize the importance of allowing diversification of the agricultural operation and/or other business enterprises in order to generate enough income to support the family standard of living or subsidize the agricultural operation if it is not profitable. The need for provisions that allow rural enterprises is likely to increase as agricultural conditions and markets change, as well as where it is currently more uncertain. While there are numerous twists to the rural enterprise clause, there are at least two basic approaches:

- Allow the rural enterprise as long as it is a subordinate business to the agricultural operation. This might entail part-time or off-season businesses such as bed and breakfasts, machinery repair or woodworking. These are often restricted within a building envelope.
- Allow rural businesses to operate within a farmstead or rural enterprise building envelope. Such businesses may be directly related or completely unrelated to the production, processing or sale of farm products, and may include home offices, computer repair, day care, etc. These uses may require prior permission from the easement holder to ensure that the agricultural purposes and intent of the easement are not negatively impacted. Preventing subdivision of the building envelope controls potential land fragmentation and reduces the likelihood of non-farm management conflicts.

### *Recreational Uses*

Almost all agricultural easements provide for continued recreational use by the grantor including traditional rural recreational activities like hunting, fishing, trapping, snowmobiling, skiing, hiking and camping. In most cases, the landowner retains the right to use the property for such recreational activities as well as allow others to do so.

In addition to personal recreation use however, there are issues of commercial recreational activities (hunting and fishing leases, campgrounds, fee-based skiing and snowmobiling trail use) and permanent structures for recreational use (personal or commercial). Most agricultural easements significantly restrict the construction of large permanent recreational structures outside the approved building envelopes, whether the “use” is personal or commercial. Large camps, extensive playing fields, airstrips or golf courses could have a potentially significant impact on the agricultural resources of a particular farm or ranch and are usually either restricted in placement, duration, or scale; excluded from the easement property; or simply prohibited.

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<sup>5</sup> Some easements prohibit subdivision entirely, including many under the NRCS ALE program. Others only permit subdivision for agricultural purposes.

<sup>6</sup> Restrictions on farmworker housing (limiting it only to farmworkers) also raises some challenging stewardship and enforcement issues.

Commercial recreational use, separate and apart from any structures that might be built, raises the issue more akin to rural enterprises – is it the use per se, or the associated structures and their location that would negatively impact the agricultural resources? Just as rural enterprises provide a potential source of diversified income (in fact, commercial recreation may be more accurately characterized as one of the possible rural enterprises), the opportunity to benefit financially from commercial recreational opportunities like hunting and fishing leases, dude ranches and working farm vacations as well as snowmobiling, skiing, horseback riding, hiking and mountain biking trails may be critically important to the future viability of a farming or ranching operation. The question really comes down to: what, if any, negative impact will there be on the agricultural resources?

### *Approvals*

Some agricultural easements require the landowner to obtain prior approval for significant agricultural improvements and such permitted uses as farm stands, bunk silos, machine sheds and livestock barns, particularly if the easement is drafted primarily with soil resources in mind. Not surprisingly, farmers and ranchers prefer minimal approval requirements to allow them to respond to changing markets, new technology, opportunities for construction cost-share assistance and costs of materials. When permission is required, many easements establish a default time period after which, if the holder does not respond in writing to the landowner's request, permission is deemed granted. This allows the farmer or rancher the security of knowing that he or she will be able to make decisions and take action within a reasonable length of time (often 60 days).

When permission for construction of agricultural improvements is required, easements should include language that clarifies on what grounds permission would be granted in support of the purpose statement as well as requiring the holder to state why it is denying permission and to provide the landowner with examples of possible remedies. In many cases, the criteria, and burden of proof, are clearly set forth in the easement – usually based on whether the proposed improvement would unnecessarily harm the property's agricultural resources or agricultural productivity.

If prior approval is required by the easement, the holder should recognize the significant stewardship burden it is undertaking (as well as imposing on the landowner), and establish protocol to identify the decision-maker (board or staff) and a consistent and transparent process for handling requests (written requests, type of information needed, etc.). Timeliness of response and consistency of outcome will be critically important to making the approval process work. Just as with issues concerning farming practices, each holder will need to decide whether it has the knowledge and resources over the long term to evaluate and render decisions on requests that require prior approval, especially those requests involving agricultural improvements or subdivision for agricultural purposes.

### *Resource Protection Issues*

Increasingly, easement holders are protecting other natural resources in agricultural easements, including wetlands, steep slopes, stream corridors, habitat areas and scenic view sheds. One strategy to address these additional resource protection issues is to include them explicitly in the purpose clause and create a dual or multi-purpose easement, often with a related hierarchy of preference or importance. Because the other natural resources issues are usually only relevant to, or located on, a part of the entire property that is protected, many easement drafters will create specific "resource protection areas" that identify the particular resource at issue (a stream buffer or wetland area) spatially on a property map and impose additional use restrictions that will protect that resource (in some cases restricting or prohibiting agricultural use of an resource protection area entirely). Within each "use" area, the easement needs to be clear about whether agricultural uses are allowed and if so, under what conditions or limitations.

Some of the basic issues that need to be addressed up front include: what are the resource protection concerns and how might they evolve over time (vegetative buffer, soil disturbance, filter strip, habitat management, scenic vista); what is the primary purpose of the easement, easement program and easement holder and how does it relate to farming and ranching (agriculture, wildlife habitat, watershed protection, scenic views); what will the agricultural community support (comfort level with additional use restrictions in certain areas); and what can the easement holder manage from an easement stewardship perspective (complex easements can dramatically increase organizational capacity needs for ongoing communications and engagement with landowners, and enforcement obligations). And lastly, are there other programs or approaches that are available to address particular resource management issues that therefore would not need to be addressed within the easement? In other words, is an agricultural easement the proper tool to protect wetlands or wildlife habitat or a scenic view?<sup>7</sup>

Typical use restrictions in resource protection areas range from limits on large structures and impervious surface areas to prohibiting agricultural buildings, or curtailing cultivation (or prohibiting it) for the purpose of active management for a particular non-agricultural resource (like maintenance of grass buffer strips or annual mowing of grassland bird habitat or burning for prairie grasses.)

### *Other Issues*

While not an exhaustive list, the following issues frequently are on the table when drafting agricultural easements, and in most cases, should be addressed explicitly up front in the negotiating/drafting process.

- *Amendment* – Amendment clauses are included as a matter of course in agricultural easements. Notwithstanding the time and care spent on drafting flexible easements that encourage agricultural use, a properly drafted amendment clause serves as an important “safety valve” or adjustment mechanism for both the landowner and the holder down the road. A growing number of land trusts now provide for future amendments in accordance with an established organizational amendment policy.
- *Extinguishment of Development Rights* – Unless specifically desired as part of a transfer of development rights or development rights “bank”, any nonagricultural development rights that are not reserved, or deemed incompatible with the overall easement goals, are usually explicitly extinguished to avoid their unanticipated “use” in the future for density averaging or density bonus purposes. Such a clause also serves to reinforce the fact that, in most cases, farmland development rights agreements, or agricultural easements remove the majority of future residential development potential from the land (a restriction that is therefore valued when appraising the purchase of those development rights and justifying the funds used to purchase those “rights” or afford a potential federal or state tax deduction.)
- *Mining* – For donated easements, mining can prove to be a challenging issue. Read literally, and construed strictly, Section 170(h) appears to prohibit any surface mining at all. However, most agricultural easement drafters have interpreted the regulations to allow very limited extraction of materials like stone, shale, sand and gravel for on-site use. For purchase programs, this is less of an issue because 170(h) does not come directly into play unless there is a “bargain sale”. For very cautious drafters, active gravel or sand pits are simply excluded from the easement entirely. Subject to the site impact mitigation requirements set forth in the

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<sup>7</sup> Overlay easements or additional restrictions may also be utilized to protect a particularly critical resource like riparian corridors, wetlands or scenic viewsheds.

Treasury Regulations, subsurface mining is allowed. Given the number of existing subsurface gas and oil leases on agricultural land as well as future income opportunities for agricultural landowners, the Treasury Regulations take a very practical approach on this issue. However, with the growth in hydraulic fracturing techniques (“fracking”), the potential surface impact of fracking sites as well as water quality concerns have drawn heightened scrutiny about whether this type of subsurface mineral extraction can be sufficiently minimized or mitigated to meet the IRS regulatory standards.

- *Termination/Extinguishment* – As with other conservation easements, the issue of termination by the parties (subject to court approval) or extinguishment by virtue of the exercise of eminent domain, is routinely addressed in agricultural easements, and usually in a similar fashion. Just as the Treasury Regulations articulate a standard based on the traditional property law doctrine of changed conditions<sup>8</sup>, most agricultural easements utilize a similar standard that requires a showing that the purpose (agricultural use) is impracticable and/or impossible (and not merely inconvenient.) However, with single purpose agricultural easements, the concern has been raised that it might be easier to extinguish the easement than if it had multiple or secondary purposes included. Without any precedent to guide us, it would certainly appear that such single purpose easements would be simpler, though not necessarily any easier, to terminate because of their singular focus.
- *Waste* – These clauses need to be carefully considered because common “catch-all” waste clauses can create headaches for farmers and ranchers from the outset. For example, if old farm equipment is considered prohibited “waste” or “junk”, any required clean-up could be cost prohibitive for a cash-strapped farmer or rancher. From an agricultural resource perspective, the question needs to be asked about whether such a restriction is even necessary. Many agricultural easements will draw a distinction between “waste” that is generated on the farm or ranch and other waste in order to avoid creation of new or expanded dumping or waste disposal areas on the property.
- *Water Rights* – While critical to the future viability of many operations in the western part of the United States in particular, it is an issue that should be considered in the context of its relationship to the agricultural resources and productivity. In some areas, this issue may be more important to the future of the farm or ranch than any threat of development or land fragmentation. The availability of ground water, as well as evolving precipitation patterns impacting surface water, will certainly impact the type and intensity of agriculture in the future.

### *Emerging Issues*

Easement drafting continues to evolve as new issues emerge and need to be addressed. Some newer drafting concepts relate to issues like land affordability, climate change, and allowing the dynamic nature of agriculture and its relationship with other economic, environmental and social issues to evolve and be responsive to changing needs and farming practices.

- *Affirmative Farming Requirements* – While most agricultural easements do not impose an affirmative farming requirement, there is increasing interest in how best to protect the public or philanthropic investment in farmland conservation in cases where the land may not be used for agricultural purposes (or is not in a cycle of fallow to productive for agricultural viability) or is under utilized to some degree. Natural area management associated with farm or ranchland, as well as flood mitigation and stream management, is likely to change in light of climate change

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<sup>8</sup> 26 CFR Section 1.170A-14(g)(6).

and these issues will need to be factored into agricultural easements to allow the land to adapt to changing circumstances and community needs. This potentially raises complex drafting and stewardship issues, especially in the context of a permanent deed restriction for the landowner and corresponding stewardship obligation on the part of the easement holder.

- *Affordability* – Because one of the rationales for agricultural easements is that they may help make farm and ranchland more affordable, the “estate” value issue is generating increasing attention. Restricted values that exceed the agricultural value will undermine the affordability of protected farms and ranches and make it increasingly difficult for the next generation of farmers and ranchers to own their land. The Massachusetts state farmland protection program (Agricultural Preservation Restriction --“APR” as it is known) now includes an option to purchase at agricultural value (“OPAV”) in every agricultural easement purchase transaction in order to help ensure affordable resale values of agricultural land. The Vermont farmland protection program is now requiring a similar agreement for use in its program.

Thus far, Massachusetts has not actually had to exercise its option, but its terms have served to deter “estate sales” and have facilitated transfers of protected land to commercial farmers. In the Hudson Valley of New York, several land trusts (including the Agricultural Stewardship Association, the Columbia Land Conservancy and Scenic Hudson, are utilizing a Preemptive Purchase Right (PPR) that would function similar to an OPAV in an effort to restrict estate sales and maintain the agricultural value of the conserved farm. Equity Trust, a nonprofit based in Amherst, Massachusetts has initiated a Farm Affordability Program in New York’s Hudson Valley that seeks to address both access and affordability issues, building on prior work in New England and New York. And recently, New York State passed the “Working Farm Protection Act” which helps address farmland access and affordability by making provisions such as the PPR permanently eligible for funding through the State’s Farmland Protection Implementation Grants (FPIG) program.<sup>9</sup>

- *Climate Change* - Inevitably climate change will impact agriculture in significant ways. Extreme weather events including flooding, drought, wildlife fires and periods of heavy snow, will increase costs of production as well as facility maintenance. Energy costs are also likely to rise for animal agriculture for heating, cooling, and water management. Pests, molds, and invasive plant species are also expected to increase in many parts of the country, requiring new approaches to managing both livestock and crops.<sup>10</sup> Present agricultural operations and farming practices may become impractical, very costly, or impossible thereby testing the flexibility and foresight of present easement provisions to allow agriculture to evolve both from a business and a production perspective.
- *Renewable Energy* – As climate change increasing impacts agriculture, and efforts continue to promote and expand renewable energy sources on farms and ranches such as wind, solar, geothermal and methane digesters, there will be increasing discussion and debate about the rationales for either restricting or encouraging renewable energy capacity on farms – both for on farm use and for transmission to the wider electric grid. Some organizations, such as Tug Hill Tomorrow Land Trust, are exploring ways to integrate generation of renewable energy and drafting easements to allow for greater production within building envelopes, siting standards and/or square footage allowances. For many, the question becomes how much is too much and on what basis is that determined in an effort to conserve the soil base yet also allow for

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<sup>9</sup> The State had already made PPR eligible for funding administratively in its recent Round 16 Request for Proposals.

<sup>10</sup> See research and references at Cornell Climate Change; <http://climatechange.cornell.edu/>

conserved agricultural lands to play a role in mitigating climate change in addition to sustainability of the enterprise.

- *Soil Health and Nutrient management* - Given extreme weather, including drought, increased temperatures, and sudden and heavy rains, there is a growing likelihood that soil health generally, and nutrient management in particular, will continue to be a challenge for the agricultural community, as well as easement drafters. Depending on the organizational capacity of the easement holder, as well as the community's expectations, easements may or may not dictate stricter requirements for nutrient management as part of a supporting farm plan referenced by the easement. Soil enhancements, such as composting off-site materials on the farm for sale or incorporation, as well as bio-char and other soil management strategies will need to be reviewed to ensure flexibility for both the property itself as well as related enterprises to advance soil health and potential for carbon sequestration within the community.

### **Inherent Limits of Conservation Easements**

In addition to the basic organizational capacity questions that the easement holder (as well as landowner and his or her advisors) should ask, many of the drafting issues relate to the nature of agricultural easements, the tensions inherent in "working" landscapes, and the limits of conservation easements generally as a natural resource conservation tool.

One of the most fundamental tensions in drafting an agricultural easement is the trade-off between the economics of farming and ranching and the environmental attributes that are part of, or could be impacted by, the property. While those of us who work in the field of agricultural and farm/ranchland conservation believe that the two are not mutually exclusive, we must be realistic and recognize that in many instances there will be some environmental impact from the working landscape of farms and ranches; and that farms and ranches will not survive without some type of economic return.

The tendency of some holders to dictate complex size and location requirements and use limitations for the construction of agricultural structures and agricultural operations serves only to reinforce this point. In fact, many of the drafting "tensions" in the agricultural easements result from the fact that the landowner and holder are often asking different questions about the impact of a particular paragraph or clause. Landowners are usually concerned with the impact on the agricultural business and the future economic viability of the farm or ranch; and holders are concerned about the impact of the structure or activity on the soils, or water quality, or wildlife or scenic view. We believe that very restrictive agricultural easements will jeopardize an agricultural enterprise's ability to adapt to changing circumstances. It will also prove more difficult to monitor and enforce over the long haul because of this fundamental tension. Ultimately this could erode the functionality of farm and ranchland protection which would in turn distract us from the ongoing larger issues of how we manage and use our agricultural lands in this country.

The second major tension in agricultural easements relates to the level of management restrictions or requirements that are integrated into the easement itself. It is nearly impossible to separate land use from land management because the latter can strongly impact whether the former is perceived as "good" or "bad". Most agricultural easements incorporate some kind of management requirement in the form of general "best management practices" or "conservation plan", but do not require much detail in terms of what that would really mean in practice. Critics of this approach desire a higher level of accountability and/or performance standard to ensure that the best management practices or conservation plan is really meeting its objectives. The challenge with agricultural easements as the tool to achieve this result is that they are designed to be "perpetual" and somewhat cumbersome (by design) to amend or modify. We believe the better approach is to accept the limitations of easements

as a land management tool, and to either rely more short-term management agreements clarifying mutually agreed upon goals set forth in the easement and then tailored to the current farming/ranching practices, or to simply recognize that outright ownership by the conservation entity is required for certain highly complex and restrictive management practices to achieve the desired management and protection of some kinds of natural resources.

Conservation easements, agricultural or otherwise, will only deliver on the promise of perpetuity if the holders of these easements can monitor and enforce them over time—and if the landowner community continues to support them as a viable and desirable tool in landownership and land stewardship. The challenge with agricultural easements is not only to draft them to allow and encourage agriculture over generations, but to monitor and enforce them in similar fashion.

## **Conclusion**

We have found that there are no better advocates for agricultural land conservation than the farmers and ranchers who are living, and working, with agricultural easements. Easements that are drafted to protect soil resources, allow for the evolution of agriculture as an economic enterprise and diversify and allow for other ways to generate income as necessary are central in maintaining a the long-term viability of agriculture on conserved land. In general, these easements are farmer and rancher oriented and are written with the knowledge that farmers and ranchers, perhaps more than any other group of landowners, must make countless decisions on a daily basis about how they work the land and respond to the tight economics of agriculture and unpredictable weather.

In addition to conservation, agricultural easements, especially purchase programs, can help resolve difficult estate planning issues<sup>11</sup> and provide capital for reinvestment in the farm or ranch business.

Change is inevitable in agriculture; and agricultural easements must be drafted to accommodate those changes. Otherwise, we run the risk of making agricultural easements irrelevant in the 21st century.

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<sup>11</sup> For a more detailed discussion of conservation options in estate planning, see Cosgrove and Freedgood, *Your Land is Your Legacy*, 5th ed., American Farmland Trust, 2008.

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