INSIDE

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IN FUTURE ISSUES

Farm program payments exempt as "public assistance benefits"

In *In re Wilson*, No. C03-3079, 2004 WL 161343 (N.D. Iowa Jan. 27, 2004) the United States District Court for the Northern District of Iowa held in a matter of first impression that farm program payments received by Chapter 7 debtors were "public assistance benefits" under Iowa law and therefore exempt.

Debtors Bruce and Janet Wilson filed a Chapter 7 bankruptcy petition and claimed that their farm program payments were exempt under Iowa Code section 627.6(8)(a), a statute that exempts from bankruptcy proceedings "any property that constitutes '[a] social security benefit, unemployment compensation, or any public assistance.'" *In re Wilson*, 2004 WL 161343, at *1. The bankruptcy trustee objected to the debtors' claimed exemption, arguing that farm program payments did not qualify for exemption under section 627.6(8)(a). *See id.* The United States Bankruptcy Court for the Northern District of Iowa held that farm program payments were not exempt under section 627.6(8)(a) as "public assistance benefits." *Id.* at *2. *See In re Wilson*, 296 B.R. 810 (Bankr. N.D. Iowa 2003).

The debtors appealed the bankruptcy court's decision to the United States District Court for the Northern District of Iowa. *See id.*

The debtors argued that the farm program payments they received are "public assistance benefits" under section 627.6(8)(a) for several reasons. *See id.* They asserted that the phrase "public assistance benefit" should be interpreted broadly and that farm program payments should be viewed in a manner similar to that of earned-income credits (EIC), which are viewed under Iowa law as "public assistance benefits" under section 627.6(8)(a). *See id.* at *3. *See also In re Longstreet*, 246 B.R. 611 (Bankr. S.D. Iowa 2000) (holding that an EIC is exempt as a "public assistance benefit"). The debtors also argued that the bankruptcy court "applied an ambiguous test to determine if the Farm Bill was appropriately tailored to assisting needy individuals" when it relied on the Farm Bill's requirement that a farmer not have an adjusted gross income in excess of $2.5 million in order to be eligible for farm program payments. *Id.* (citation omitted).

The trustee's main argument was that the debtors improperly relied on *Longstreet* because the purpose of farm program payments is entirely different from that of EICs. *See id.* In *Longstreet* the bankruptcy court held that "EICs were public assistance benefits ... [since] the 'class of persons that Congress intended to benefit by creating the 'Earned Income Credit' Program of 1975 is composed entirely of low income families.'" *Id.* (citation omitted). More specifically, the trustee asserted that "'[t]he primary purpose of the [Farm Bill] is not to provide economic relief to a class composed entirely of low income families ... [but] to benefit a broad range of individuals and businesses who operate (sic) a commercial enterprise of all sizes in the American economy." *Id.* It further asserted that because the farm program payment eligibility requirements are not based on low income, poverty, or disability, the payments cannot be properly classified as "public assistance benefits." *Id.*

Because the phrase "any public assistance benefit" is not defined in the Iowa Code, the district court adopted the definition of the phrase set forth in *Longstreet*: "'government aid to the needy, blind, aged, or disabled persons and to dependent children.'" *Id.* at *8 (quoting *Longstreet*, 246 B.R. at 614). *See also id.* (stating that "where a ... phrase is not statutorily defined[,] the principles of statutory construction allow the presiding court to look to interpretations given to the terminology in prior court decisions."). After examining several statements made by members of Congress during debate over the 2002 Farm Bill and statements made by President George W. Bush about the purpose of the Farm Bill, the court stated that:

> [i]t is clear ... that when the Farm Bill was enacted, the intent of Congress, at least in part, was to provide a financial "safety net" for farmers from fluctuating commodity prices, to preserve the lifestyle of family farmers and their communities, and to protect small, disadvantaged farmers from impoverishment during times of depressed market prices.

Id. at *11-12.

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The court stated that contrary to the trustee's view that a debtor may only exempt "'[a] social security benefit, unemployment compensation and [federal earned-income credits],'" the Iowa legislature intended "to exempt payments under all types of programs having the same underlying purpose, *regardless of the vehicle chosen to implement the program*. Obviously, domestic commodity programs ... implement a different *vehicle* than federal tax credits like EICs, but this does not disqualify ... [them] from exempt status." *Id.* at *13 (citation omitted). *See also id.* (explaining that because the debtors are not blind, aged, disabled, or dependent children, the only question is whether the debtors' farm program payments constitute "government aid to the needy."). The court added that:

> [i]n the case of the EIC, the federal government determined that a class of low income families with qualifying children in the home were "needy." Likewise, in enacting Farm Bill payments Congress sought to benefit a class which in Congress' view was in need of federal assistance–that class being composed entirely of farmers producing certain commodities .... [I]t is clear that the underlying purposes of both EIC and Farm Bill payments are the same–both federal programs seek to assist those who are historically disadvantaged a/k/a "needy."

Id.

– Harrison S. Pittman, National AgLaw Center Reearch Fellow, Fayetteville, AR

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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[3], 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 for guidance, 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. And of course, 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. Another emerging issue is whether on-farm composting of materials generated elsewhere is permissible under current definitions of agricultural operations in some states.
- *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. And the availability of water will certainly impact the type and intensity of agriculture in the future.

Inherent limits of conservation easements

In addition to the basic organizational capacity questions that the holder (and 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 resource conservation tool.

Probably the most fundamental tension in an agricultural easement is the trade-off between economics and the environment. While those of us who work in the field of agricultural and farmland conservation believe that the two are not necessarily 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, water quality, wildlife, or scenic view. Very restrictive agricultural easements will prove more difficult to monitor and enforce over the long haul because of this fundamental tension. And ultimately, that will distract all parties from the ongoing larger issues of how to manage and use the agricultural lands in this country.

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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. The better approach is to accept the limitations of easements as a land management tool, and to either rely more on short-term management agreements, or to simply recognize that outright ownership is required for 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. The challenge with agricultural easements is not only to draft them to allow and encourage agriculture, 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 – and if these easements 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 if necessary. In general, these easements are farmer- and rancher-oriented, 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[4] and provide capital for reinvestment in the farm or ranch business.[5]

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

[1] *See generally*, Gustanski and Squires, *Protecting the Land: Conservation Easements, Past, Present and Future*, Island Press, 2000.

[2] The AFT easement purpose clause states: "The primary purpose of this Easement is to enable the Property to remain in agricultural use by preserving and protecting its agricultural soils and agricultural viability and productivity. No activity which shall significantly impair the actual or potential agricultural use of the property shall be permitted. The agricultural soils and agricultural viability and productivity of the Property are collectively referred to herein as the "agricultural conservation values of the Property.

[3] 26 CFR Section 1.170A-14(g)(6).

[4] For a more detailed discussion of conservation options in estate planning, see Cosgrove and Freedgood, *Your Land is Your Legacy*, 3rd ed., American Farmland Trust, 2003.

[5] *See*, Cosgrove and Ferguson, *From the Field: What Farmers Have to Say About Vermont's Farmland Conservation Program*, American Farmland Trust, 2000.

Online Monsanto seed trait stewardship course

Representatives from Monsanto recently contacted the AALA to promote its new online biotechnology related course. This 2-hour on-line course is available free of charge on the Monsanto website. The course is titled Seed Trait Stewardship and it is "designed to convey information pertaining to Insect Resistance Management (IRM), grain stewardship, seed piracy prevention, and product licensing." It was not prepared for attorneys, but for dealers, licensees, farm consultants, academic advisors, extension agents, farm bureau, and related agricultural professionals. The course consists of three lessons, Insect Resistance Management (IRM), Patented Seed, and Grower Agreements. While the course is not designed to provide an unbiased look at the issues presented, it does provide some interesting information from Monsanto's perspective. In order to view the course, the following computer capabilities are necessary: Acrobat Reader 5.0 or higher, Windows Media Player 6.0 or higher and Macromedia Flash Player 6 or higher. The course is best viewed in 800 x 600, or above, screen resolution. Video Clips are best viewed with a broadband connection or higher. To view the course, go to http://www.sites.monsanto.com/monsanto/us_ag/layout/stewardship/default.asp.

–Susan A. Schneider, President, AALA

Introduction to Interim AALA Executive Director

On May 1, 2004, Robert Achenback assumed the role of interim executive Director. Bob has over tweny-two years of experience in agricultural law. He serves as editor, researcher, and writer for Dr. Neil Harl's Agricultural Law treatise. In 1989, he and Dr. Harl founded the Agricultural Law Press, and since that time, Bob has operated the business. In addition to the publications produced, in 1998, the Press also began sponsoring multi-day seminars in agricultural law in several states. Bob has been responsible for the planning and organization of those seminars.

One of the many skills that Bob brings is experience with the business use of technology. In operating the Press and in editing the Agricultural Law treatise he used computer technology and software to improve services, streamline operations and reduce costs. Bob has proficiency in Macintosh and Windows computers and many types of software, including Photoshop, Pagemaker, Microsoft Word, Adobe Acrobat, and Filemaker. Bob hopes to apply his skills to the benefit of the AALA, providing the technical means to accomplish our professional goals.

Bob describes the role of the AALA executive as providing "continuity and consistency of effort in all aspects of the AALA mission as interpreted by the Officers, Board of Directors, and committees." He states that while the executive director is not the leader of the organization, "the executive director should initiate proposals for improvement of AALA methods, publications and conferences, ever seeking to explore alternatives and raise issues for consideration by the AALA leaders and membership. The executive director's efforts should result in not only cost savings, but also in the increase of membership and revenues of the association wherever possible."

If you have suggestions for Bob or just wish to welcome him, please contact him at RobertA@aglaw-assn.org.

Drafting conservation easements for agriculture©

By Judy Anderson and Jerry Cosgrove

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, the last quarter of the 20th century witnessed a new threat to agriculture–unchecked suburban and other non-farm development in and around our urban centers. According to the National Resources Inventory (NRI) data from the United States Department of Agriculture, during the 1990's, the U.S. lost over 1 million acres of farmland each year, 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 on the west coast, 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's. Several Northeastern states soon followed and a growing number of states and local municipalities are establishing purchase programs. More recently, some states, like New Jersey and Pennsylvania, have significantly increased the amount of funding for their programs, and the Federal Farm and Ranchland Protection program received an enormous increase in funding in the 2002 Farm Bill to over $100 million per year. 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.

This article will examine the fundamental premises underlying agricultural easements and will discuss key drafting issues that reflect those premises and objectives. Some of the key drafting issues will include the easement purpose, construction of agricultural buildings and structures, construction of residential and farm worker dwellings, agricultural practices, subdivision, and rural enterprises.

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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 differences 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. 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 the inevitable trade-off between economics and the environment. For farmers and ranchers who make their living from the land, economics comes first 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 what agricultural easements are all about.

And lastly, there is an inevitable push and pull between an easement that provides 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 beyond the breaking point 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

We sometimes overlook the fact that in almost all states, a conservation easement is 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. And the former is a legal reminder about limitations of conservation easements generally–they impose restrictions on uses like non-farm development and subdivision and not affirmative obligations to continue farming or ranching. 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.[1]

What do they look like?

As was observed earlier, many 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 values as with the agricultural resources.

Over time, it appears that agricultural easements from the public and private sector are merging toward middle ground on issues like the purpose or purposes of the easement, structures, dwellings, subdivision, agricultural practices, and rural enterprises. Some land trusts, like the Columbia Land Conservancy and Scenic Hudson in the Hudson River Valley of New York have actually created new template agricultural conservation easements 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. Of course, 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 American Farmland Trust's stan-

dard easement, include agricultural viability in the purpose clause to recognize the economic link in the working lands equation.[2] Other purpose clauses focus exclusively on the conservation of productive agricultural land and leave the obvious connection to agricultural viability implicit rather than explicit.

Other purpose clauses create a hierarchy of purposes with agriculture as the primary purpose and other stated purposes, including scenic or natural feature, 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 even 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 somehow compatible and reconcilable. While in some circumstances this is certainly true, many other cases 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 Section 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.

Definition of agriculture and farming practices

Agricultural easement drafters 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 generally 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-inclusive 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 has recently decided to use a consistent set of guidelines to help them make determinations about the definition of agriculture in their easement. And 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 are some times 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 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

One of the most critical and potentially contentious issues is the amount of flexibility farmers and ranchers will have to add or alter agricultural structures, including 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 agricultural purchase of development rights 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 get 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 require advance permission only for any construction outside the designated building area. In such easements, the landowner can 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 as they are in the Pennsylvania farmland protection program. Recently the Natural Resources Conservation Service (NRCS administers the federal program) proposed guidelines 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

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have the potential of limiting future agricultural uses and create the potential for extensive erosion. For perspective, this proposed guideline would limit impervious surfaces to a total of five acres on a 250-acre farm.

The proposed 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.

It is critical for agricultural easement drafters 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 by necessity 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 vary in their treatment of residential structures that are not necessarily 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 future non-farm employee residences on the property. Limiting land fragmentation is probably one of the most important functions of an agricultural easement, and is probably the restriction that will be truly enforceable over the long term. Consequently, the location of these future houses is very important and should factor in wind dispersal, of noise, chemicals, dust, and smell, in addition to land fragmentation.

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

• Omit non-worker house sites from the easement. Survey out the future house sites, usually on a two- to three-acre lot that is large enough to support a septic system and a replacement system. Easement monitoring can be simplified with a clear delineation that no residential dwellings (other than farm employee housing) are permitted on the property.

• Include house sites within the easement, therefore ensuring that any 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 "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 have a negative impact on the property's agricultural viability.

Under the last scenario, agricultural 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 issue 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. For example, an agricultural producer may decide to focus on producing a niche product (like vegetables, herbs, flowers, or small fruits) on the fifteen acres of prime soils on the farm, and no longer wish to own and 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.

In any case, farm support housing (housing and/or apartments for farm employees and family housing) should not be 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.

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 more acute in areas where agricultural resources are more marginal and prospects for future viability of agriculture are 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.

• Allow rural businesses to operate within the farm-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.

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 as well.

In addition to personal recreation use, however, are the 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 or 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 or prohibited.

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 whether there will be a negative impact on the agricultural resources.

Approvals

Some agricultural easements require the landowner to obtain prior approval for agricultural improvements and such permitted uses as farm stands, bunk silos, machine sheds, and livestock barns. 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, most 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 30 to 60 days).

When permission for construction of agricultural improvements is required, easements should have language that requires 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 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 views. Obviously, one way to address these additional resource protection issues is to include them explicitly in the purpose clause and create a dual or multi-purpose easement. 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 outline 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 a 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 (vegetative buffer, soil disturbance, filter strip, habitat management, scenic vista); what is the primary purpose of the easement, easement program and easement holder (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 handle from a stewardship perspective (complex easements increase stewardship and enforcement obligations dramatically)? And lastly, are there other programs or approaches that are available to address particular resource management issues? In other words, is an agricultural easement the proper tool to protect wetlands or wildlife habitat or a scenic view?

Some of the typical use restrictions in resource protection areas range from limits on large structures and impervious surface areas to no buildings or structures to limited cultivation to no cultivation to active management for a particular resource management purpose (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.

• *Affordability* – Because one of the rationales for agricultural easements is that they 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 in every agricultural easement purchase transaction in order to ensure affordable resale values of agricultural land. And the Vermont farmland protection program is considering the development of 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.

• *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, an amendment clause serves as an important "safety valve" or adjustment mechanism for both the landowner and the holder down the road.

• *Extinguishment of development rights* – Unless specifically desired as part of a transfer of development rights or development rights "bank," any nonagricultural development rights 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 future development potential from the land (thus justifying the very large amounts of funds often used to purchase those "rights").

• *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 section 170(h) does not come directly into play. And 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 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.

• *Termination/extinguishment* – As with other conservation easements, the issue of termination by the parties (subject to court approval) or extinguishment by virtue of

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Interim Executive Director contact information

Effective May 1, 2004, Robert Achenbach assumed the duties of Interim Executive Director of the AALA. Our new office information is as follows:

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