

EFFECTIVE LAND PRESERVATION URWA'S CONSERVATION EASEMENT PROGRAM

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I. Introduction

When preserving land we should always ask two questions:

What are we protecting land from? and What are we protecting land for?

The first of these two questions is perhaps the easiest to answer and for most of us working in New Jersey there is common perception that our existing land use control system is inadequate to protect all the values inherent in land. There is a growing realization that our current pattern and pace of growth is undermining the fundamental environmental basis of our economic activity and that this situation is not sustainable, even in the near term, say a 50 year time horizon.

One researcher has projected that New Jersey will be fully "built out" in approximately that time period. Projections of water allocations in the Raritan system indicate that, at current rates of growth the available developed surplus of water in the basin will be fully allocated in a similar time period. Water quality and air quality are constant concerns as is the loss of biodiversity, particularly among plants and animals and their ecological support systems that are perceived as having no "market value".

In addition, there is a feeling, particularly in suburban areas, that the loss of what I might term "general environmental amenity" is unacceptable. In this category I would include scenic quality, quiet, wildlife habitat and other aesthetic functions.

Finally, there is an overall feeling that the scale and pace of development is too large and too fast, leading to social and economic stresses in our communities. Land preservation is viewed as a remedy for many of these perceived problems.

While there are many techniques available to preserve land they boil down into several broad areas:

Preservation by Rule or Regulation

Zoning and environmental protection rules are the chief component of this approach. While they each have strengths, we would not be aggressively preserving land if these approaches had historically been successful. In fact, even a cursory review of existing zoning reveals that most of our communities are zoned for residential, industrial or commercial uses. We should not be surprised if this prophecy fulfills itself!

If we add the dimension of "sustainability", it is abundantly clear that these approaches will need constant attention and will need to be constantly altered to allow them to function over a much

longer time frame. Constant tending and resistance to short term decision making becomes wearisome and exhausts even the most dedicated preservationists.

Preservation By Full (Fee) Purchase

Buying the land is a common approach. Usually a public body such as local, county or state government purchases a property, preventing full scale development. The land acquired is often “asked” to justify the expenditure by providing recreational access and hosting a high degree of public use. These uses may ignore long term values or simply be inappropriate to a broad range of natural functions that are present or inherent in the land itself. Furthermore, changing demands for more intense uses or other public uses may place the “preserved” land at risk. One easy example is the completion of Interstate 78 through the Watchung Reservation in Union County.

Operation and maintenance of these lands is often not fully planned for and, under conditions of financial stress, governments often cut budgets and manpower necessary to operate public lands responsibly in the long run. Every park manager is familiar with the term “deferred maintenance”.

Preservation by Acquisition of a Partial Interest

The use of partial interest acquisitions, usually in the form of *conservation easements*, is a commonly used technique. Most often it appears that these interests are purchased. However they may be acquired by a so called bargain sale or donated outright. Primary benefits include reductions in public expenditures for purchase (more acres protected for less cost), reductions in operation and maintenance expense as compared to fee purchase and a flexible structure adaptable to the land itself and the desires of the landowner. On the downside, long term stewardship of these properties to protect their conservation values requires routine monitoring and enforcement in the event that an agreement is violated but also nurturing a “conservation relationship” with the landowner and future landowners.

All of these techniques are in use and other more esoteric methods are also in use. Selecting one or the other need not be exclusive of the others and clearly a mix of techniques is necessary given the current situation in this most densely populated state.

However, the choice to emphasize one approach over another should be made by considering several factors:

- What is the scale of the task?
- What is the organizational capacity of the group?
- What financial resources are available or can be reasonably expected to be available?
- What are the needs of the land?

- What is the political and economic climate like within the selected service area?

II. Organizational Background

The Upper Raritan Watershed Association is a private, non-profit (501(c)(3) conservation organization founded in 1959 to preserve and protect the watershed region drained by the North Branch of the Raritan River and its tributaries. The “service area” of the Association is thus defined by and limited to the boundaries of the watershed.

III. Watershed Characteristics.

Location:

The service area includes approximately 194 square miles of land located in Morris, Somerset and Hunterdon Counties in north central New Jersey. This land area is further divided into all or part of twenty- three municipalities.

Physiography, Geology and Soils:

The watershed lies in two physiographic provinces. The higher altitude northern section is in the Highlands. A small portion in the extreme north was glaciated in the last ice age and contains the Wisconsin terminal moraine. Overall, the bulk of the Highlands is un-glaciated and contains deep soils with good recharge characteristics. These soils overlie Precambrian crystalline rocks that are, in many locations, highly weathered and fractured. In these situations, recharge, storage and transmission of water are good. However, in some locations bedrock conditions are massive and un-fractured, leading to relatively poor aquifer conditions. The largest expanses of forests of better quality lie in the un-glaciated highlands.

At the southern end of the highlands in the Borough of Peapack-Gladstone a small area of limestone of Cambrian age is present. This formation is a prolific aquifer due to its extreme degree of weathering. It is overlain by soils weathered from the bedrock material that are only moderately permeable but are also excellent agricultural soils.

The topographically lower southern portion of the watershed lies in the Piedmont province. The underlying geology consists of red shale, siltstones and mudstones of Triassic age. In several locations basalt and diabase intrusions are present. Known as the “Newark Basin” or the “Brunswick Formation”, soils in this area are dominated by high percentages of fine clay particles and thus produce large amounts of run-off. This tendency has been aggravated by nearly 260 years of agricultural activity and recent suburban development. Vegetation in these areas consists largely of agricultural lands, reverting old fields and recent growth forests, some of poor quality.

Land Uses

The region contains substantial areas of undeveloped land, agricultural areas and small

population centers. However, suburban sprawl is a continuing problem throughout the region. Older suburban areas dominate the upstream headwaters and the lower reaches of the watershed along the I-78 corridor. Historically, sprawl has elaborated along the major road arteries. (I-78, I-287 and I-80, Rts. 22, 10, and 46, Rts. 206, and 24 and Rt. 517). Recent development (1986-2005) is not strongly associated with the arterial roads but rather is appearing throughout the region.

Most municipalities employ large lot single-family residential zoning (3-12 ac. per dwelling unit.). While beneficial in many ways, this zoning has led to a rapid increase in land consumption per capita. New development is, although “spacious” in nature, creating a sprawl pattern causing habitat fragmentation, destruction of the pre-existing cultural landscape, derangement of the natural (or pre-existing) hydrology as well as aquatic ecosystem impacts.

Agriculture, although viable in certain cases is under considerable pressure due to high land values. Raw (unsubdivided) land routinely sells in the \$30,000 to \$100,000 per acre. Approved lots often sell for considerably more. Agriculture is also implicated in water quality problems, contributing sediment, phosphorous, and fecal coliform to the rivers and streams.

Water Resources

Major streams include the North Branch of the Raritan, the Lamington (Black) River and Rockaway Creek. The region is covered by a dense network of first and second order tributaries (headwaters). Many of these streams are classified as Fresh Water 2, trout Production, “Category 1” (F.W.2, T.P. C1) streams by the New Jersey Department of Environmental Protection. Category 1 streams are to be protected from changes in water quality. These classifications are, in the main, old designations based on the presence of breeding trout populations of native brook trout or the introduced brown trout. These streams are naturally poor in nutrients, are cold (generally less than 70 degrees F and about 54 degree F during trout breeding season) and have high levels of dissolved oxygen. They are easily degraded by removal of vegetation, sediment and increases in run-off.

Streams in the Piedmont generally are classified as Fresh Water 2, Trout Maintenance (F.W. 2 T. M.) or Fresh Water 2 Non Trout (F.W. 2 N.T.). Although these streams do not receive the level of protection afforded C1 water, they are vital components of the potable water supply system, receiving the higher quality water from the upstream watershed and transmitting it toward the major water supply intake located on the main stem of the Raritan River at Bound Brook. This intake has access to waters flowing not only from the North Branch but also from the South Branch of the Raritan. The flows at the intake are supplemented from the two upstream reservoirs at Round Valley and Spruce Run.

There are no natural lakes present in the watershed. The largest impoundment is Ravine Lake

located in the southern highlands on the North Branch. Numerous constructed ponds exist throughout the watershed. Some were constructed as industrial water power sites and ice ponds and many were constructed for agricultural or ornamental purposes.

Wetlands are most plentiful in the valleys of the Highlands (the Black River meadows), at the origins of first order tributaries and in the lower riverine floodplains. Many streams have long reaches devoid of wetlands. Those that are present in these areas are of extreme importance to the preservation of water quality.

Floodplains are narrow and generally not well developed in the headwaters regions. Many highlands stream valleys are steep and narrow and the streams are bordered by steep slopes that, if disturbed, would have a disproportionate impact on the streams. In the Piedmont, floodplain width generally increases in a downstream direction with the largest floodplain areas present in lower North Branch and Lamington River drainages.

Ground water resources are highly variable throughout the watershed. The most prolific ground water aquifers are located in the extreme upstream area of the Lamington drainage. Here, glacial outwash (sands and gravels) overlies weathered limestone. The basement rock consists of relatively impermeable Precambrian formations. This aquifer is currently developed as a public water supply operated by the Morris County Municipal Utilities Authority (M.C.M.U.A) and is currently permitted to withdraw up to 82 million gallons per month. Elsewhere, the Precambrian geology of the Highlands generally provides adequate water for residential development but is highly variable in yield. Likewise, the Triassic formations underlying the Piedmont are generally adequate for residential uses but and limited in some areas by geologic structure.

IV. History of URWA's Conservation Easement Program

The Association had entered the land preservation area with the gifts of several properties in fee in the late 1970's. Several properties, including Fairview Farm, a 150 acre parcel located in the Piedmont, had been acquired by gift. During this period, land preservation was not viewed as a main part of the Association's program.

However, by the early 1990's, following the building boom of the late 1980's, the Board and staff began to be concerned that land conversion was not only destroying the quality of the watershed region but was beginning to irretrievably impact the natural resources of the region to an unacceptable level. These perceptions were caused in part by the work load being addressed in site plan review and comment and partly by new visions of the watershed made available by the development of a G.I.S. system at the Association. At one point, a total of 2400 units of residential development and 13 million square feet of office space were under review. Extensive state developed G.I.S. data began to be available in 1986-87. These data allowed growth to be plotted spatially and quantified watershed wide. Most disturbing was the pattern of development

that sprawled throughout the watershed, seemingly heedless of natural resource values. These observations reinforced the fact that local planning and zoning were not going to result in effective natural resources preservation and that traditional advocacy to improve planning and zoning, if relied upon exclusively, was too slow and cumbersome a process.

In late 1992, the Board hired a local attorney of considerable stature to conduct a feasibility study to determine if the community had enough confidence in URWA's abilities to support a conservation easement program and to help the Board define the scope and nature of the program. The study consisted of a series of interviews with area landowners and key local decision makers. The results were tabulated and presented in a report to the Board. There was overwhelming support for land preservation and universal agreement that something should be done quickly. Conservation easements were seen as desirable mechanism as opposed to fee acquisition, due primarily to:

- Their flexible nature
- The “bang for the buck”
- The fact that they would allow land to remain in private hands
- The private (non-governmental) nature of the approach
- The financial incentives for donation
- The conservation ethic of the area landowners

The report was presented to the board (and invited members of the community) at a public program. The presentation was well received.

Following the public program several efforts were entered into. First, a “Land Committee” was formed at the Board level. This group was composed of conservation minded trustees, several of whom had had previous experience with conservation easement donations themselves. Others were selected for their legal and business expertise while others were selected for their contacts within the community.

The Committee then set about two important tasks; the preparation of “Guidelines” to steer easement acquisition and the development of a “Draft Conservation Easement” to be used as a basis for negotiations with landowners. Press and publicity were generated to “advertise” the new program direction.

Our first easement came in 1993. It is significant to note that the landowner had been considering land preservation as early as 1963, a 30 year gestation period. In hindsight, this observation highlighted the need for an effective land preservation program to be present in the community for a protracted period of time. The land preserved, about 40 acres of managed woodlands in extraordinary condition, met several of our “Guidelines”. During this time the subject of

endowment funds was not addressed and it seemed to the Board that asking a landowner who had just agreed to donate the bulk of their value in land for an additional cash contribution was just too aggressive.

The development of specific easement language has always been governed by three balancing factors:

The Needs of the Land:

This process involves developing an understanding of the “conservation values” present on the tract, and to some degree, in the immediate surroundings. The G.I.S. system was of great help in this area, allowing rapid depiction and quantification of environmental factors present on the property. These data, along with field generated observations, formed the basis for drafting the important “Whereas” provisions in each easement and the “base line data” establishing the conditions on the property at the time of preservation. Because no two tracts of land are alike in their conservation values, this task was approached as a custom process. As many of the reasons to protect the land as possible are usually included thus establishing the legitimacy of the easement and providing guidance to the landowner and the Association in the future.

Our “Guidelines” strongly favor the protection of water resources, including stream corridors, steep slopes adjoining streams and water, floodplains, wetlands, other water bodies and groundwater recharge. Other desired features include wildlife habitat, especially for threatened and endangered species, scenic value and location issues. For example, an easement property that would complete a pattern of preserved lands would receive a higher priority than one that was “free standing”. However, at the beginning of the program this was not an important consideration since there was little or no pattern to complete.

The Desires of the Landowner:

Because conservation easements are by their nature flexible instruments, the desires (or needs) of the landowner can be accommodated to a substantial degree. Certain limits are imposed by Internal Revenue Service rules that must be followed if the substantial tax advantages are to be achieved. Similar limitations are provided by the state enabling statute.

Most donors have taken advantage of the tax provisions but generally, financial benefit has not, until recently, been the primary motivator. For land in the region, this can be a very important benefit. In simple terms, the value of the gift (as determined by a “before” and “after” appraisal) is deductible from the federal income tax over a period of 6 years, provided the deduction does not exceed 30% of the donor’s adjusted gross income in any one year. Rather than financial advantage, a sincere desire to protect the land from publicly permitted development was seen as

the driving force. One donor, who conveyed an easement valued at nearly \$3M , decided not to avail herself of the federal income tax deduction.

Most donors were not willing to grant public access. It is important to note that access is not a requirement for a qualifying income tax deduction. Many of our donors are elderly and are also concerned with estate tax issues. Donating a conservation easement can materially reduce the estate tax due at death by reducing the current value to better match the basis value. Simply put, estate tax is calculated on the difference between the current value and the basis value. This may be a matter of extreme concern to owners of highly appreciated land, typically those who have owned the land for a long time. In one case, the current value of the property was above \$3M while the basis was \$250,000. Exclusive of allowable exemptions, the estate tax in this case, would have been calculated at 60% of the difference between these two values.

Most donors are also concerned about retaining their farmland assessments. Thus, enough agricultural activity needs to be allowed as a “reserved right” to continue under the farmland assessment rules. Since agricultural practices can have a profound impact on environmental quality, reserved agricultural rights are usually qualified by requiring agricultural BMPs.

Many easements also contain substantial areas of forest. Forestry activities are treated in a manner similar to agricultural practices. A forest management plan is generally required. In some cases “no touch” provisions have been employed, particularly with regard to forested wetlands and extraordinary woodlands. Generally, however, conditioned agriculture and forestry are included in the “reserved rights” under the direction of the landowner.

Partial development can also be accommodated, provided that substantial conservation value remains. Existing development is generally excluded from the easement area, although in some cases different restrictions, primarily limitations on use (residential/agricultural) and impervious coverage (3% of the entire tract) are applied. New development has also been accommodated and treated in considerable detail. Both “floating site” and “specific site” provisions have been employed. Because of possible conflict with other conservation values, especially scenic values, “specific sites” are preferred. Any reserved right to develop should only permit development well below that permitted by the zoning. For example, in a 10 acre residential zone one primary dwelling and one accessory dwelling have been allowed on a tract of 88 acres.

Other typical reserved rights include the right to exclude the general public, manage and control sport hunting, conduct equestrian activities, post the property, install and maintain agricultural fencing and in one case to construct a tree house for children.

In sum, the flexible nature of easements has been an important asset in satisfying landowner desires for the intelligent use of preserved property in the future.

The Needs of the Association

The needs of the Association are also extensively considered in the drafting of easement language. Some of these needs include the protection, to the maximum extent practicable, of all the conservation values present on the tract and in particular the protection of water resources, including groundwater recharge.

Prohibited activities typically include prohibiting further subdivision, disturbance of water courses, soil disturbance, mining, removal of vegetation, planting of exotic, invasive species, erection of structures (broadly defined), and installation of impervious surfaces. Dumping and the release of toxic or hazardous material are usually specifically prohibited. The installation of underground fuel tanks is usually prohibited.

Importantly, monitoring and enforcement are considered at the drafting stage. Clarity concerning the location of the easement is provided by a metes and bounds description. Monumenting is not usually required. However, in cases where easements occupy only a portion of a property or include exception areas, G.P.S. boundary definitions are highly desirable.

The subject of monitoring and possible enforcement needs are crucial concerns. Recent events have heightened the need to put aside funds for these purposes. Our current policy is to suggest an additional contribution of 1-2% of the easement value or \$5,000, whichever is greater. These funds are accounted for separately in the "Land Endowment Account".

To date, the Association has acquired 29 conservation easements ranging in size from 2.74 acres to 122 acres.

V. Review Process

Prior to review, a conflict of interest review is conducted. Recusal of specific Board members is sometimes required. Conflicts at the level of the law firms involved are also identified. A conflict resolution letter is sometimes employed. Recently the Association has begun to use a different law firm for easement review due to the frequent conflicts deemed to exist between area landowners and the Association's attorney of record.

Primary contact is usually made through the staff. The Executive Director and the Land Preservation Specialist have traditionally been the initial contacts. Currently, the function is being provided by the Director of Advocacy and Public Policy.

The staff and the Land Committee work closely with each other during the review process. The Land Committee is actively involved in review of all easements and often participates in the negotiation process through attorneys and staff. Once agreement is reached between the

Committee and the donor, a recommendation to approve is made to the Board of Trustees. A resolution is presented to the Board and acceptance is voted on. No easement that has completed the process to this level has been turned down by the Board. However, several easements have been declined at the staff and committee levels.

VI. Recording and Recordkeeping

Following acceptance by the Board, the easement is signed and recorded at the county hall of records. Since easements are perpetual agreements that “run with the land” it is vital that the easement be recorded and attached to the deed. Files on each easement are kept, including base line documentation, the easement itself, correspondence produced during negotiations, maps and aerial photographs.

VII. Monitoring and Enforcement

Although monitoring and enforcement have long been requirements of conservation easements, recent concerns have heightened the need to improve these practices within the private land trust community. URWA monitors its easements annually. Following a review of the easement document and mapping, initial landowner contacts are made. Field visits are made by staff. Owners or their representatives are invited to accompany the monitoring personnel. The easement is observed and photographed. Photos are filed and a “Field Notes” document produced. Finally, the owner is notified of the results of the inspection, noting conformance with the easement, any possible violations and, importantly, opportunities to improve the conservation of natural resources.

This step is viewed as very important in that preserving land in itself merely prevents conditions from being made worse. However, an actively engaged conservation minded owner can be an important positive asset in improving environmental quality.

Our 2005 easement monitoring revealed no violations on any of the conservation easements held by the Association. However, in numerous instances activities taking place on adjoining properties, on public roadways or in the upstream watershed were having negative impacts on the conservation values present. Since the easement agreements govern only the subject properties, remedies for these challenges will need to be pursued by other program areas. In URWA’s case this effort should be centered in the Advocacy part of the program structure in close cooperation with the Land Preservation program. Other endemic problems encountered included invasive, exotic plant species that were present on virtually every easement and excessive deer browse, restricting forest regeneration.

VIII. Emerging Issues

Tax Incentives:

After a major effort directed at preventing a substantial roll back in tax incentives for donation of

conservation easements, legislation is emerging that would materially enhance the tax advantages of private conservation donations. Some of these advantages, currently passed by the U.S. Senate include allowing deductions to be carried forward for up to fifteen years as opposed to the current six year period and raising the deductible amount to 50 % of the annual adjusted gross income. The deductible amount is also proposed to be increased to 100% if the donor is a farmer or rancher receiving at least 51% of annual income from farming or ranching. Currently, a lobbying effort is underway in the House of Representatives to include these provisions.

Concerns with Appraisals

Federal concerns with fraudulent or misleading appraisals will probably result in additional rules and penalties on appraisers who submit incorrect or misleading information.

Monitoring and Enforcement

Federal concerns with the lack of monitoring (Land Trust Alliance figures indicate that about 51% of conservation easements held by private land trusts are monitored annually) are being addressed by voluntary adoption of Standards and Practices and a voluntary accreditation program among land trusts. Land trusts will be challenged to fund and manage increasing demands for recordkeeping and monitoring programs. Concerns in this area may “spill over” into the public sector. Municipalities and other levels of government hold numerous conservation easements often extracted during the development process to protect the public interest. Early indications are that monitoring and enforcement of these easements is far less developed than the situation that exists with private land trusts.

Endowment Funds and Enforcement

How to demonstrate the financial “where with all” to enforce conservation easements is a challenge that must be met.

Government Purchase Funding

As government funding continues to be made available, charitable donative intent may be reduced. Additionally, the degree of activity allowed on farmland easements in New Jersey may not qualify for income tax deductions in the event of a bargain sale.

Transfer of Easement Properties

The sale of properties containing conservation easements will continue to increase as the original donors leave the region or pass away. This process will require education of new, possibly not conservation minded, owners to the terms and conditions of the conservation easements. Some routine sustainable process to assure continuity will need to be developed.

IX. Summary and Conclusions

URWA's conservation easement program, inaugurated in 1993, has been effective in preserving land in the North Branch watershed complementing public land preservation activities. Additional lands have been preserved that would not have been available to government preservation programs.

The bulk of the conservation easements have been acquired by donation, driven primarily with a sincere concern over the future of family lands. However, tax advantages have been widely used by donors.

The Association generally does not "pass through" conservation easements and views stewardship and the development of conservation relationships with landowners as important aspects of its conservation easement program.

The Association's focus is presently on water related features, including groundwater recharge areas but acquisition guidelines are directed at a broad array of concerns affecting the watershed.

The Association has a process to evaluate, review, accept and manage conservation easements, assisted by G.I.S. technology.

Concerns with monitoring and enforcement are growing and URWA will need to commit additional resources to these efforts if its programs are to continue to expand. Adopting and instituting the Land Trust Alliance's Standards and Practices and participation in and completion of the voluntary accreditation program will occupy substantial time in the coming year or more.

As conservation easement properties continue to change hands, educating new owners will be an important task.

The incidence of easement violation was non-existent in 2005. However, as more easements change hand, violations may increase in frequency.