Conservation Easements as Mitigation Measures: Tips for Public Agencies

With the continuing loss of open space and farmland to development, more and more agencies seek to mitigate these losses by requiring developers to preserve equivalent land on- or off-site. Conservation easements offer a flexible tool for achieving open space protection, and the courts have upheld easement requirements as legally adequate mitigation for farmland and open space conversions. Unlike other land preservation measures, conservation easements protect property forever while providing for third-party enforcement. Moreover, agencies can transfer primary responsibility for management and enforcement to outside experts by partnering with local land trusts. But to achieve these benefits, agencies must assure their mitigation measure includes adequate and detailed requirements. Otherwise, restrictions imposed by conservation easements can easily be ignored. We offer the following tips for how best to ensure this mitigation effectively compensates for the land lost.

Require Dedication in Perpetuity

Agencies should ensure that conservation easements “run with the land” so that protected property cannot be repurposed or developed by subsequent owners of the property. In addition, agencies should require that the property be protected by an easement dedicated in perpetuity as provided for in sections 815 to 816 of the Civil Code (authorizing conservation easements) or sections 51070 to 51097 of the Government Code (authorizing open space easements).

Accredited Land Trust Should Hold the Conservation Easement

Who holds the conservation easement is crucial to its long-term success. The easement holder will have the primary responsibilities for drafting the conservation agreement and enforcing its terms. Typically, easements are held by land trusts. But not all land trusts are created equal. It is critical to find a land trust that has the resources to effectively monitor and enforce the conservation easement and a track-record of good stewardship. The national Land Trust Alliance maintains a list of accredited land trusts, which can be found at its Accreditation Commission website. These are land trusts with a proven record of effective monitoring and enforcement. They should be considered for partnership whenever possible. If the agency does not choose the land trust at the time it
imposes mitigation, the measure should require that the conservation easement be held by a land trust accredited by the Land Trust Alliance, or subject to the agency’s approval.

**Require an Endowment as Part of the Mitigation**

Without adequate funding, there is little assurance that a conservation easement will serve its purpose. Agencies should require that developers establish an endowment to provide for monitoring, administration, enforcement, and all other services necessary to ensure that the conservation purposes of the easement are maintained in perpetuity. Land trusts traditionally require endowments, as do state and federal regulatory agencies that require mitigation (such as the United States Fish and Wildlife Service and State Department of Fish and Wildlife). The mitigation measure should require payment of an endowment, in an amount determined by the land trust to ensure it can continue to administer, monitor and enforce the conservation easement.

**Ensure Protected Land is Comparable to Developed Land**

In order to provide effective mitigation, agencies should require that the land protected by a conservation easement is comparable in quality and value to the land being lost to development. Whether the easement is on-site or off-site, it should represent a similar type of landscape, with a comparable character and conservation value, including comparable soil quality, habitat value, and water supply. If the protected property is not all contiguous, ensure it is still large enough to support viable farming operations or wildlife populations.

Agencies should consider a requirement that off-site easements be located within a certain proximity to the developed parcel, in order to more directly mitigate the impacts of development. On-site property set aside for mitigation should also be protected by a conservation easement to ensure it remains undeveloped forever and a land trust ensures adjoining or future landowners do not repurpose the property for their own use.

**Require Payment of Administrative Fees to Cover Costs**

To ensure the agency and land trust are reimbursed for all costs associated with the conservation easement, the mitigation measure should provide for reimbursement for all administrative costs reasonably necessary for the land trust and agency to acquire and hold the conservation easement. These costs would include the costs to establish an endowment, the land trust’s costs to evaluate the mitigation land and review, negotiate,
and accept the conservation easement, and the agency’s costs to review and approve the applicant’s proposed mitigation.

Consider Adding the Agency as a Third Party Beneficiary

If the agency wants to ensure enforcement of the conservation easement, require that the conservation easement name the agency as a third party beneficiary with the right to enforce all terms of the easement if the land trust does not.

For more information, contact SMW attorney Tamara S. Galanter.