

“Easements” & Stormwater BMPs

*Perhaps more than you really wanted to know ...
but why you should know anyway.*

Green Solutions Stormwater Conference

September 2012

What is an “Easement”?

- “*Easement*” as catch-all term
- Interest In Real Property
- Recorded Legal Transaction/Document
- Enforceable Set of Rights and Obligations

Interest in Real Property

- Common Law Foundations
- Easement, Covenant or Servitude
- “Positive” v. “Negative” (or both)
- Appurtenant or In-Gross

Recorded Legal Transaction/Document

- Purpose
- Consideration
- Term (or “In Perpetuity”)
- Property Description
- Statutory Requirements (*if applicable*)
- Transfer or Termination
- Recorded

Enforceable Set of Rights & Obligations

- Uses and/or Restrictions
- Precise or Performance Based Standards
- Legal & Equitable Remedies
- Qualified Third Party Right of Enforcement
- Preservation of Other Ownership Rights
- Stewardship Responsibilities & Costs

Whats the Best Fit for Stormwater BMPs?

- “Traditional” Easement/Covenant/Servitude
- 2001 Conservation and Preservation Easements Act
- 2007 Uniform Environmental Covenants Act
- In other words, *not* a “landowner agreement”

Conservation & Preservation Easements Act

- Statutory Response to Common Law Vulnerabilities
- Purpose of Act Fits Objectives of Stormwater BMPs
- Allows for Government Holders
- Allows for Qualified Third Party Rights of Enforcement
- Allows Term of 25 Years or More

Section 6. Validity

A conservation or preservation easement is valid even though:

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch or concern real property;
- (7) there is no privity of estate or of contract; or
- (8) the holder is or becomes the owner in fee of the subject property.

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"Conservation easement." A nonpossessory interest of a holder in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which include, but are not limited to, retaining or protecting for the public and economic benefit the natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open space use; protecting, conserving or managing the use of natural resources; protecting wildlife; maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.

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Important to Remember

- Real Estate Transaction - Due Diligence, Baseline, Et Cetera
- Metes & Bounds Description
- Successive Holders or Third Party Enforcers Must Legally Consent
- Won't Prevent Court Modification or Termination, or Eminent Domain
- Notice of Coal Interests
- Subrogation

Resources

- Conservation & Preservation Easements Act
(32 P.S. §§ 5051 *et seq.*)
- PALTA Model Easement Documents --
conserveand.org/modelconservationeasements
conserveand.org/modeldocs