

New York State Department of Agriculture and Markets**GUIDANCE DOCUMENT SERIES
FARMLAND PROTECTION IMPLEMENTATION GRANT PROGRAM****Title Commitment and Curatives for Conservation Easements****GD # 5**

Overview

A commitment for title insurance is one of the documents that NYSDAM requires in order to review Conservation Easement projects prior to disbursement of funds. The commitment for title insurance is the first step in securing a title insurance policy. It includes how much coverage is being requested, a description of the Property being insured, and a list of those title encumbrances that are being excluded from coverage. Easement holders should carefully review the title commitment to make sure that there are no prior encumbrances on the title that could significantly diminish or impair the conservation values of the Property that the Conservation Easement is designed to protect. Given the purpose of the State's Agricultural and Farmland Protection Program, particular attention will focus on any encumbrances that may unreasonably restrict or diminish the agricultural viability of a Farm Operation. NYSDAM's Counsel's Office will also review the policy to ensure that the state's funding will not be jeopardized by title matters.

Elements of a Title Commitment

The title insurance commitment should be an ALTA (American Land Title Association) Owners Policy provided by a title insurance company. The commitment should insure the easement holder and should reference that the proposed policy is to insure an "easement interest in real property as defined by Article 49, Title 3 of the Environmental Conservation Law."

The owner of the Property as revealed by the title search must be the proposed grantor of the Conservation Easement and must have proper authority to convey the easement. Corporate owners must have resolutions authorizing the conveyance and minors or individual owners deemed incompetent must have duly appointed guardians.

The amount of the title policy shall be no less than the amount being provided by NYSDAM, but preferably equivalent to the fair market value of the Conservation Easement as determined by an appraiser. The premium for the insurance policy is based on the policy amount and is determined by the Title Insurance Rate Service Association (TIRSA) Rate Manual. The premium can be determined by using several different rate calculators available on the internet provided by a number of different title insurance companies.

Schedule A of the title commitment should be the exact legal description of the Property to be covered by the Conservation Easement. Beginning with Conservation Easements funded in May 2006, this description must be the legal description of the Property prepared by a New York State Licensed surveyor and should not simply be a description prepared by the title insurance company based on the deed records. For projects funded prior to May 2006, the Property should be described based on a survey if one exists, or in a clear legal description of all of the land to be

covered by the Conservation Easement. In all cases, the legal description used in the title should be the same as that used in the Conservation Easement and the purchase and sales contract.

The title company will read the survey and examine the map and legal descriptions and will except any problem areas identified by the survey from coverage. Any encroachments, rights of way or other issues identified on the survey should be carefully reviewed by the holder of the Conservation Easement and remedied before closing.

Schedule B of the title commitment lists the matters that need to be addressed prior to closing and those matters that will be excepted from coverage. Legible copies of all of the documents listed in schedule B must be provided to NYSDAM.

Title Review Process

Title insurance provides coverage for future claims or future losses due to title defects which are created prior to the acquisition of the Conservation Easement. The first step in the process is the "title search" in which a title abstractor conducts a thorough search of the public records for those documents associated with the Property.

The title insurance company examines those recorded documents to determine if there are any rights or claims that may have an impact upon the title to the Property. The title search may reveal the existence of recorded defects, liens or encumbrances upon the title such as unpaid taxes, unsatisfied mortgages, judgments and tax liens against the current or past owners, easements, restrictions and court actions. These recorded defects, liens and encumbrances are reported as exceptions to coverage listed in the Schedule B of the Commitment for Title Insurance. Once listed, these matters can be:

- accepted (such as simple utility easements),
- resolved (such as obtaining a mortgage subordination from a bank), or
- omitted prior to the closing of the transaction (such as obtaining a release of and oil and gas lease from a petroleum company).

Prior encumbrances on the title can affect both the legality of the proposed Conservation Easement as well as the use of the land. The easement holder should carefully review both the legal and the land use impacts of the issues found in the title search.

Land Use Issues

The easement holder should carefully review the Schedule B with their attorney to decide how they will handle all exceptions listed. Some listed exceptions may have a significant negative impact on the agricultural viability of the Property and should be resolved prior to closing. Prior conveyances including the right to extract sand and gravel, oil and gas leases, and other conveyances affecting the surface and use of the land may have a significant negative impact on the agricultural viability of the Farm Operation and may directly conflict with the purpose of the Conservation Easement. For example, a prior conveyance that allows an individual to remove and sell topsoil would be unacceptable to NYSDAM and would need to be resolved prior to closing. However, many title exceptions such as simple utility easements that allow utility

companies to place poles and electric wires along a public road would likely have no impact on the agricultural use of the Property and could simply be accepted as an exception.

It is in the best interest of the easement holder to do this review of listed exceptions as some may also pose stewardship challenges in the future. For example, rights of way across farmland are often poorly defined and may allow for a paved driveway across farm fields. This could be in violation of the Conservation Easement depending upon where the right of way falls.

Legal Issues

Issues such as mortgages, rights of first refusal and unpaid taxes are legal matters that need to be addressed prior to acquiring the Conservation Easement. NYSDAM's Counsel's Office will also review the title and will need a copy of the title commitment along with a legible copy of all the documents listed as exceptions in Schedule B.

In addition, a title curative letter that addresses objectionable title matters that must be resolved prior to closing must be submitted with the title. All communication regarding the title must come from a municipal attorney or the project manager if that responsibility has been delegated through a written agreement between the project manager and municipal contractor. The title curative letter should explain how title matters will be cured prior to closing and should include a copy of proposed documents required to cure the defects. For example, if there is a mortgage that will be paid off at closing using a portion of the Conservation Easement proceeds, this should be set forth in the letter. If the mortgage is to be subordinated, a copy of the proposed subordination agreement should be included with the title information submitted to NYSDAM. In some cases, NYSDAM may request additional information from the project manager to determine if exceptions will have a negative impact on farm viability.

Exceptions in Need of Review

While it is impossible to anticipate what will be identified during the title search, the following is a list of routine exceptions to title coverage. Easement holders should carefully review all exceptions with their attorney to determine whether or not the prior encumbrances on the Property will interfere with the agricultural use or viability of the farm. NYSDAM Counsel's Office will review the specifics of the title to determine potential impact on farm viability and the legality of the Conservation Easement, but in general, will evaluate the following encumbrances as set forth below.

Electric and Telephone Easements

These pre-existing rights generally do not interfere with the agricultural viability of the Farm Operation. However, these easements should be carefully read to ensure that each does not grant future rights that could limit agricultural practices allowed by the landowner or have a negative impact on agricultural viability, such as the right to build a five-acre substation. In such a case, the most appropriate curative for this exception may be to exclude the five acres from the easement.

Water and Sewer Easements

It is essential that an onsite visit be conducted to investigate as to whether rights granted under water and sewer easements have already been exercised or if reserved rights remain to install

pipelines and roadways for access to such infrastructure. If they allow for future disturbance of the soil, the extent of potential disturbance and implications for farm management should be investigated to determine the impact on farm viability.

Water Rights

Limited rights of use or access to water are generally compatible with farmland conservation. However, a conveyance of all water rights on the Property to an adjoining landowner may diminish the agricultural value of the Property so much that NYSDAM may decide not to fund the Conservation Easement on the farm.

Oil and Gas Leases and Pipelines

In some areas of the state, it is common to find an old oil and gas lease that has expired by its own terms where it can be documented that no oil or gas was ever produced on the Property. In those cases, such a lease can be addressed by obtaining a release from the company holding the lease or by having the landowner sign an affidavit stating that no oil and gas related activity took place during the terms of the lease. In all cases, as per the NYSDAM model Conservation Easement, oil and gas rights must be limited and localized in impact, affecting no more than two acres of the Property at one time.

Existing oil and gas leases that are still active can be addressed as listed below in descending order of preference. Any of these options would be satisfactory to NYSDAM provided the specific language/provision of the selected option as it appears in the Conservation Easement or title curative is also acceptable to NYSDAM:

1. Release the oil/gas lease from the Property that is to be encumbered with the proposed Conservation Easement or release the surface rights related to the oil/gas lease on the Property that is to be encumbered with the proposed Conservation Easement;
2. Subordinate the oil/gas lease to the proposed Conservation Easement;
3. Amend the oil/gas lease to designate the allowable specific site(s) for any well and all associated appliances **and then exclude that portion** (or whole tax parcel) from the proposed Conservation Easement;
4. Amended the oil/gas lease to incorporate stipulations to address these specific issues (**and then retain the entire farm** within the proposed Conservation Easement) and perhaps address other issues depending upon the specific provisions or language of the oil and gas lease:
 - maximum extent of area that will be associated with each well site and associated appliances,
 - whether or not the access road may be paved (i.e., will the access road become an impervious surface?), and
 - site remediation must address topsoil quality as well as ground surface contours;
5. Incorporate the following stipulations into the proposed Conservation Easement:
 - require the landowner to notify NYSDAM when the location of each well site is to be determined (and give NYSDAM an opportunity to participate in an onsite meeting to determine said location),

- require the landowner to notify the local Soil & Water Conservation District (SWCD) and NYSDAM prior to when a well site is to be reclaimed and restored to agricultural land (and give NYSDAM an opportunity to participate in an onsite meeting to review the proposed reclamation), and
- require that the completed reclamation must be acceptable to the local SWCD and/or NYSDAM – if not acceptable, **the landowner shall be responsible to restore** the site to a condition acceptable to the local SWCD and/or NYSDAM.

Energy and Communications Leases

It is becoming more common to see long-term leases or easements granted to companies to operate wind turbines or place cellular towers on farms across the state. These leases will be treated in much the same way as oil and gas leases. The use of farms for wind energy or communication installations will be found acceptable if they are compatible with the Purpose of the Conservation Easement, subordinate to the agricultural use of the Property and located in a manner that minimizes the impact to prime or statewide important soils.

Mineral Rights

Surface minerals such as sand and gravel are often leased to construction companies to extract material for commercial use. These surface mines can make the Property unfit for agriculture and must be excluded, released or otherwise accounted for in the Conservation Easement prior to closing on the Conservation Easement. With approval of NYSDAM, the area subject to the lease may be permitted to be excluded from the conservation project. Mineral rights can be found compatible with the Conservation Easement if they are (a) limited and localized in impact, affecting no more than two acres of the Property at one time; (b) compatible with the Purpose of this Easement; (c) reasonably necessary and exclusively for the Farm Operation; and (d) the impact to the prime and statewide important soils is minimized.

Right of First Refusals

These rights must be released or made subordinate to the Conservation Easement.

Life Estates

These rights must be released or made subordinate to the Conservation Easement.

Mortgages and Uniform Commercial Code filings (UCCs) Indexed against real property

These rights must be discharged or made subordinate to the Conservation Easement.

Other Exceptions

Other prior encumbrances such as private covenants that prohibit construction of all buildings, including agricultural structures, will be reviewed on a case-by-case basis, but will need to be terminated or subordinated if they will unreasonably restrict or diminish the agricultural viability of the Farm Operation.

Conclusion

The careful review of the title to Property will avoid potential conflicts in the future and will ensure that the agricultural viability of the Property is not diminished by title defects.

Title Checklist

- Does the title curative letter from the local municipal contractor or project manager address all exceptions of concern listed in Schedule B?
- Does the title curative letter include proposed curatives such as subordination agreements and releases?
- Does the packet include legible copies of all documents listed in Schedule B?
- Is Schedule A the legal description completed by the surveyor? (*for awards made in May 2006 and thereafter*)
- Is the legal description used for the title identical to that used for the Conservation Easement and purchase and sales contract?
- Is the title commitment for an Owners Policy in an amount not less than NYSDAM's contribution toward the project?
- Is title vested in the proposed Grantor of the easement (i.e., landowner)?
- Does the title commitment reference that the proposed policy is to insure a "Conservation Easement interest in real property as defined by Article 49, Title 3 of the Environmental Conservation Law"?

Samples online: Title Curative Letter
 Subordination Agreement
 Boundary Line Agreement

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