

QUESTIONS EVERY FARMER SHOULD ASK

ABOUT

AGRICULTURAL CONSERVATION

EASEMENTS

COMPILED BY:

FARM CREDIT FINANCIAL PARTNERS INC.
PO BOX 9062
SPRINGFIELD, MA 01102-9062

AND

ROLAND R. VOSBURGH, DIRECTOR
COLUMBIA COUNTY PLANNING DEPARTMENT
401 STATE STREET
HUDSON, NY 12534

ENDORSED BY:

COLUMBIA COUNTY
AGRICULTURE & FARMLAND PROTECTION BOARD
November 2002
Revised February 2007

Introduction

Agricultural conservation easements have recently become a popular tool in the farmland preservation movement. These legal instruments shift certain development rights for a parcel of land from the property owner to government or a not-for-profit land conservancy. The rights may be donated, leased or purchased, but the effect is the same in that the property owner voluntarily gives up the right to develop the parcel for either a set period or in perpetuity. The easement document spells out in some detail the purposes of the easement and restrictions and procedures that will apply to the property in the future. Any property owner considering voluntarily placing an agricultural conservation easement on their land should carefully investigate the requirements of this legal instrument and consider how it may impact future use and development of that land.

Financial Aspects

The Summer 2001 issue of Financial Partner magazine, a Farm Credit publication that is mailed to 18,000 Farm Credit customers and friends throughout the northeast United States included a cover story entitled, *“When forever is a long time: 8 questions to ask before you sell your development rights.”* The eight questions found in this article are reprinted below with permission.

When forever is a long time: *8 questions to ask before you sell your development rights.*

At one time or another, many Northeast farmers have contemplated the sale of development rights for their land. Perhaps they have even talked about this idea in a conversation with a neighbor over a cup of coffee, with family members over dinner, or with a financial adviser when mapping out the future.

But moving from “contemplating” the sale of development rights to actually “selling” them often means working through a long, complex process. Along the way, you will probably interact with state and county governments, private land trusts, attorneys and financial advisers. And you’ll learn about legal concepts such as “conservation easement,” “ag preservation,” “restricted land” and “perpetuity.”

In short, making the decision to sell – or not to sell – a farm’s development rights is not easy.

While it is clear that farmers love their land as much as they dislike the spread of condominiums and mini-malls across their rural landscape, the debate over

whether they should restrict the future use of their land is a lost less clear.

Bill Zweigbaum, a business consultant with First Pioneer Farm Credit in Claverack, N.Y., has worked with many ag business owners on development rights issues. Bill says, “The first and foremost reason why Rural America and agribusinesses sell development rights to their land is for the preservation of agriculture and the safekeeping of their scenic landscapes.”

Zweigbaum adds that it is also about individual farmers making personal, business, financial and tax management decisions that are right for their family *and* their livelihood. After all, it is a permanent decision that determines how a family can use its land now – and how future generations can use it decades ahead. After careful study, some farmers choose to sell their rights, while others decide it is not right for them.

To help you through this complex issue, this article offers eight important questions that every landowner should ask before making this decision.

1. Who will make the decision?

Every decision maker in your business needs to be 100 percent sure that the decision to sell – or not to sell – is the right one. Consensus is critical.

According to Tunis Sweetman, a dairy farmer in Warwick, N.Y. who sold his development rights in 1998, “this process can last two years or more. So be sure to bring in all family members who will be involved in the decision early. That way, you’ll have no surprises.”

2. Why do you want to sell?

Bill Zweigbaum advises that a rule of thumb to follow when contemplating any “business-changing” transaction is to keep you long-term goals in mind. “Be absolutely clear why you are selling your rights,” he says.

Here are some common reasons why landowners sell development rights:

- ◆ Money. Many landowners want an influx of cash to retire debt, diversify enterprises, purchase buildings and equipment or buy land to expand the farm operation or secure rented land.
- ◆ Family. Some family members want to farm and others don’t. Rather than sell the farm for its full market value and split the proceeds, some families sell development rights to provide equity for off-farm members while allowing on-farm members to continue to farm.

- ◆ Preservation. If you are considering relinquishing your development rights to keep your land forever green, also consider how the restriction will encumber future generations and, if you think your children’s children will feel the same as you do about the land.
- ◆ Retirement. Selling development rights can provide retirement income – with options. That is, your proceeds from the sale may afford you the luxury of reducing the price of some land to your children and gifting the remainder to them. Or it may allow you to sell the land at an affordable price to a young farmer who could never afford to buy the land at its market value.
- ◆ Increased value of unrestricted land. Some farmers retain a parcel of their best land, knowing that selling the development rights on land than abuts this parcel will increase its market value.

3. Do you understand the easement?

A conservation easement is a legally binding agreement between you (the seller) and the buyer (e.g., a governmental agency or private trust) restricting the future use of the land. When you finally sign on the dotted line, you are agreeing to restrict the future use of your property and its natural resources (i.e. farmland, woodland, water, wetlands, and or wildlife habitats) according to the terms of the agreement. You are also legally binding *all* future owners of the land to these same restrictions.

So take your time. Since an easement is a complicated, legal document, it’s a good idea to hire an attorney to protect your interests. Be absolutely clear about what is spelled out in the contract, including what uses of your land will be permitted and what uses will be prohibited. Negotiate terms that are important to you.

4. Should you keep some of the farm unrestricted?

Determine if you want to restrict your entire property or keep some parcels unrestricted to leave yourself options for future use. George Malia, an appraiser with First Pioneer Farm Credit in Enfield, Conn. and Riverhead, N.Y. and the former director of Connecticut’s farmland preservation program, says, “You may want to keep a parcel unrestricted so future generations can build their homes on the land. Or you may want to subdivide the parcel as approved building lots for sale when property values are higher. Or you may want land to fall back on for sale in the tough times.” George adds, “Of course, you will need to negotiate all terms with your buyer.”

5. How much cash will you have after taxes?

Liz Bayne, senior tax specialist with Yankee Farm Credit in White River

Junction, VT., advises farmers to look beyond their land's gross restricted value. "Think instead about the cash amount you will actually put in your pocket *after* paying taxes, legal fees, etc.," she says.

For example, if your land has been in your family for generations, you could be hit with a capital gains bill for up to 20 percent of the gain. Plus you may have state capital gains taxes and legal expenses and your lender may seek partial payment of your real estate loan since your collateral value is now reduced

Liz adds, "It's a smart idea to talk to your tax expert once you know the restricted value of your land. A tax expert will prepare an estimated tax return for you so you'll see the potential tax impact of the sale. The expert will also offer management ideas to help minimize the impact."

6. Are you operating profitably?

Loan officers absolutely shudder when they hear of landowners selling development rights to pay off mounting losses. Loan professionals don't like to see people trying to fix a problem at the expense of their most valuable asset. If a business is not profitable then selling its development rights might leave the landowner vulnerable. Subsequent events might force the landowner to sell the land at a lower value some day in the future. Instead, landowners should first fix the problems causing their losses. If they can't, then selling the farm at its greatest value may make more financial sense.

7. Can you manage this change comfortably?

Steve Weir, branch manager of First Pioneer's Riverhead, N.Y. office, says that agricultural landowners are expert real estate economists who know how to reap the best appreciation and value from their land. "When selling development rights," he says, "a landowner should be equally comfortable managing a different assets, such as cash, stocks or bonds."

Steve advises customers to give as much of their energy to managing new ventures as they did managing their real estate. "this is important to maintaining overall returns," he adds.

8. Will your new investment make more money for you?

Steve Weir also says that farmers should be confident that their new investments will be equal to or greater than the appreciation of the rights without the deal. "Spend time on this financial analysis," Steve advises. "It is the key to the sale of development rights."

For example, if you use your proceeds to invest in the stock market, be

reasonably certain that your money will appreciate at the same rate as your development rights would have.

Property and Business Management Aspects

In addition to financial considerations, farmers should assess the impact of agricultural conservation easements on their ability to manage their property and business in the future. Roland R. Vosburgh, Director of Planning for Columbia County has reviewed several examples of agricultural conservation easements used by land trusts and conservancies in the Hudson River Valley and recommends that farmers ask three additional questions.

1. Are your purposes consistent with those of the land conservancy as described in the agricultural conservation easement?

Not being on the same page with the land trust can result in unpleasant surprises in the future. Easements normally contain a purpose clause which identifies the goals and objectives of the land trust. A careful review of both the express and implied purposes of the agricultural conservation easement should be made to determine if they are consistent with your own goals and objectives for agricultural business management and for current and future land use and management. The land trust may or may not place the same level of priority or share the same objectives you have for your property and how it is used. Study these purposes carefully and think about how the language might impact your own plans and ideas about the use of your property. You should also carefully note the prohibited uses listed in the easement. For example, mining, which is a traditional supplemental business for many farms and one which does not necessarily preclude subsequent farming, following site reclamation, is typically prohibited.

2. Are you comfortable with the additional level of review and control over land use and management which the agricultural conservation easement creates?

Fundamentally, an agricultural conservation easement takes certain property rights away from you the landowner and introduces a third party (the land trust) into the oversight of your property. Remember that you already operate within a framework of control and oversight due to the numerous local, state, and federal rules and regulations with which you must comply in order to farm. Therefore, before you voluntarily invite, via the agricultural conservation easement, additional constraints and procedures over your farm's operation, it is important to understand the consequences.

While the agricultural conservation easement typically sets forth permitted uses, often these uses must first be reviewed and approved by the land trust.

Therefore, be prepared to comply with an additional set of procedures and restrictions not applicable to your neighbor who does not have his land “easement-restricted.” These can include having to meet statutory definitions of agriculture and bureaucratic interpretations of those definitions, possessing current conservation, forest management, and timber harvesting plans (all prepared by certified professionals), and requesting (and waiting for) written permission of the land trust for approved actions.

As a consequence, the cost to conduct your business will increase because of the agricultural conservation easement’s additional requirements to compile and submit information (in effect, an application) to the land trust and incur costs associated with delays in securing permission from the land trust.

3. Are you comfortable with the interpretive powers granted to the land trust and with the uncertainty surrounding future interpretation of the language of the agricultural conservation easement?

Probably the biggest unknown factor for the future will be the interpretation of the language of the agricultural conservation easement by the land trust staff. You should look carefully for any language in the easement which provides the land trust with discretionary interpretive powers. For example, search for words or phrases such as or similar to “*sufficient* information”, “*adverse* impact”, “*significant* erosion”, “for the *benefit* of the general public”, “*reasonable and customary* management”, “*to grantee’s reasonable satisfaction*”, “do not *materially interfere*”, and “proposed action is *consistent with the purposes of this conservation easement.*” Subjective terms, such as those listed above and similar examples, open the doors to a wide variety of interpretations. Even where the agricultural conservation easement sets forth what is known as a “hammer clause” to require the land trust to respond to land owner requests for permission within a set period of time, these time frames are often meaningless if the land trust has sole authority to determine when the land owner has provided “sufficient” information on which to base their decision.

There is simply no way to ensure that two parties have the identical understanding of the terms of an agricultural conservation easement. This is true whether one is referring to the original parties to the easement and to subsequent parties. You may have an excellent working relationship with the current land trust staff, but that level of trust and confidence may not be true with future land trust staff if they should happen to pursue their discretionary powers in more strict ways.

Conclusion

Agricultural conservation easements are viewed by many as a win-win proposition. Entering into such an arrangement affords the property owner a level of control that he doesn't have with statutory and regulatory requirements because it is a purely voluntary arrangement. However, because each farmer, their goals, and their property are unique, agricultural conservation easements may or may not be appropriate. The decision to enter into such an easement should happen only after thoughtful consideration of the ramifications of the easement restrictions on financial considerations and future use and management of the land.

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WHAT IS THE AFPB?

by Marian C. Dunbar, Chairperson, 4/4/01

The Agriculture and Farmland Protection Board (AFPB) acts as an advisory board to the County Board of Supervisors and the Agricultural Advisory Council of the New York State Department of Agriculture and Markets, as necessary. It serves as a landowner link to local government in advocating for farmland protection and influencing local policy decision-making on behalf of the agricultural community.

Since November 1993, the Columbia County Agriculture and Farmland Protection Board (CC AFPB) has assumed the role and responsibilities of the former county Agricultural District Advisory Committee (ADAC). Today, these duties include: agricultural district reviews, the assessing and approval of farmland protection plans, recommendations on the review of local government rules and regulations adversely affecting agricultural activities, reviewing Notice of Intent filings, promoting the County Right-to-Farm law, and the use of the property sale disclosure notices, and, upon agricultural landowner request, it reviews soil classifications of specific land areas in agricultural districts.

The 11-member board, as described by the Article, is appointed by the County Board of Supervisors Chairperson, according to NYS Agriculture and Markets Law - Art. 25AAA.

To date, the CC AFPB has reviewed and approved all ten agricultural districts in the 18 towns of the county containing roughly 250,000 acres. The fourth 8 year review for these Districts is currently in progress. Numerous applications from municipalities and land trusts to the NYS Department of Agriculture and Markets for EPA and bond act grant monies used for Purchase of Development Rights (PDR)/Pace programs have been endorsed.

Work on a County Plan has been on-going for many months with a DRAFT currently available for review at our web site on the Columbia County web site: www.columbiacountyny.com/ "CCAFPB". ###