

WETLANDS DEMYSTIFIED
Conservation Easements
By Paul Hennen

In our last installment we discussed vernal pools and their importance to certain wildlife species. These fragile and temporary wetlands (waterbodies) are difficult to locate, not always easily identified, and by definition vanish at some point during summer and then may reappear next spring if they managed to avoid an appointment with a bulldozer or some other land use enterprise. How can one protect these small, temporary, but yet important bodies of water? To take it a step farther, how about the larger wetlands and the more important watercourses our Town is blessed with? How can they be protected? As always, the bottom line is that unless the property owner is concerned or the developer cares there is little that can be done, even by a wetlands commission that will make much of a difference. Sadly, that is the reality of it. If no one cares or gets involved, the wetland will likely become compromised over time, and the creatures that depended on these unique habitats at best will suffer and decline, or they will simply perish altogether. There is a way, in spite of such indifference, that a valuable wetlands or watercourse, may be protected, at least to some degree, and that is by a legally binding agreement between the owner of the property and the Town or some other qualified organization not to conduct certain activities in the wetlands or surrounding buffer that may cause harm. That document, signed by the two parties and entered into the Town's land records, is known as a conservation easement agreement.

Easements of various kinds are not uncommon. There are easements that deal with right-of-way, agriculture easements, open space easements, development rights, access rights, etc. The list goes on. The conservation easement, in the context of this article, involves certain voluntary land use restrictions designed to protect important environmental resources. It is a legally binding agreement between the parties involved to restrict certain activities on a particular property. The easement may be for a specific period of time or be held in perpetuity. It is recorded in the Town land use records (property deeds) where it then becomes part of the public record. It is of interest here that only easements given in perpetuity qualify for a tax break.

Property rights, only one of the many rights that a property owner enjoys, are often described as a "bundle of sticks". According to David Wrinn and Janet Brooks, Assts. Attorney General, an easement is a "stick" in the bundle. The property owner may choose to give up that one stick to achieve some personal or financial goal. If the easement is a conservation easement, the property owner agrees to protect an important environmental resource, e.g., an important wetland or watercourse by giving certain

rights to the Town or in some cases to a non-profit land trust. In the bundle of sticks analogy the property owner retains all other rights to his or her land.

How does the Pomfret Inland Wetlands and Watercourses Commission (IWWC) get involved in this process? Connecticut law requires municipal wetlands commissions to preserve and protect wetlands and watercourses from “random, unnecessary, undesirable and unregulated uses, disturbances or destruction” and that doing so is in the public interest. Further, the law requires that in granting a wetlands permit commissions specify terms (conditions) of its permit approval so as to carry out this intent. The Connecticut Department of Environmental Protection (DEP) defines “management practices” as “ a practice, procedure, activity, structure or facility designed to prevent or minimize pollution or environmental damage to maintain or enhance existing environmental quality.” The definition goes on to list management practices that include “restrictions on land use or development”. According to the Attorney General’s Office (David Wrinn, *et al.*) this mandate “embraces” restrictions on land use or development within the context of a regulated activity. In other words, as a condition of permit approval, a municipal wetlands commission may require restrictions on a property designed to limit certain activities that could adversely affect a wetland or watercourse. Such a condition could be expressed in the form of a conservation easement agreement. What are some of these activities that might be restricted? Construction or the placing of buildings, roads, and signs within the easement or its buffers is one example. Dumping or excavating, the removal of trees or other vegetation, the use of vehicles, the housing or pasturing of farm animals are other good examples of what might be prohibited. The removal of easement boundary markers would also be prohibited and the property owner might be required to ensure their maintenance. But all is not set in concrete. Exceptions may be granted by the conservation easement holder (the Town usually) should it be shown that the exception was reasonable, and that it will not cause undo harm to a wetlands or watercourse. Examples might be the removal of dead trees and brush, pruning and landscaping, hunting, construction or repair of a septic system, etc. The bottom line is that exceptions may be necessary. In legal language the exceptions are to allow “the reasonable and quiet enjoyment of the Property by the Grantor [property owner(s)], and his or her heirs, successors and assigns without harming the purposes of the Conservation Easement Agreement”.

What if the property owner says, “I don’t want any restrictions on my property. It’s my land and I’ll do what I want to on it. Why should I have to protect some wetland?” Should the terms of a conservation easement agreement prove impossible to reach, after the Wetlands Commission imposed it as a condition of permit approval, then the wetlands permit could not be granted. Should a building permit be required for the project, it too would not be issued, since Town Ordinance requires a statement from the Wetlands Commission that it “has been satisfied with the plans and proposals of the proposed builder concerning wetland (sic), and that the Wetlands Commission has issued a permit for such construction”.

Take heart readers; your Wetlands Commission has no intention of slapping conservation easements on Pomfret's property owners without good cause. Our job is to protect the Town's wetlands and watercourses only. We are not in the open space business. That is the responsibility of the Pomfret Planning and Zoning Commission. As a Commission we are sensitive to the concept that a property owner should have the right to use and enjoy his or her land to the fullest extent feasible and that includes its wetlands and its watercourses and yes, farm animals too. Many property owners would consider themselves fortunate to have a stream or a pond, a vernal pool, or even a marsh or bog on their land. After all, we on the Commission are property owner too. But the Commission must also be sensitive to protecting the wetlands environment, its functions and especially its inhabitants that could not exist otherwise. The State legislature and the Courts have made clear that the primary function of the municipal IWWC is to protect these important landmarks. The task is to "forever guarantee to the people of the state, the safety of such natural resources for their benefit and for the benefit and enjoyment of generations yet unborn".

While it is said, "nothing is forever", the conservation easement agreement, if in perpetuity and recorded in the Town land records, and properly managed comes close. Are we taking away the rights of the property owner as some have suggested? Should the Wetlands Commission require a conservation easement as part of the permitting process, it is done so in agreement with the property owner. The landowner gets his or her wetlands permit and the Wetlands Commission has protected another important wetland or watercourse. The owner(s) still have the use of their property. It is a win, win situation. Are we thus "taking" one's property? I think not.

Our subject for the next issue of the *Pomfret Times* has not been determined at this time. We are working on a number of regulations updates and other matters and if all goes well we will certainly want to spend some time explaining those changes. At any rate, I hope you will stay tuned and let us know what you think.

Note: I wish to give credit to David H. Wrinn and Janet P. Brooks, Assts. Attorney General, State of Connecticut for their excellent and informative monograph titled: *Conservation Easements*, undated. I also thank Katarina Rutkowski, a fellow member of the Commission for her review and critique of this article.

