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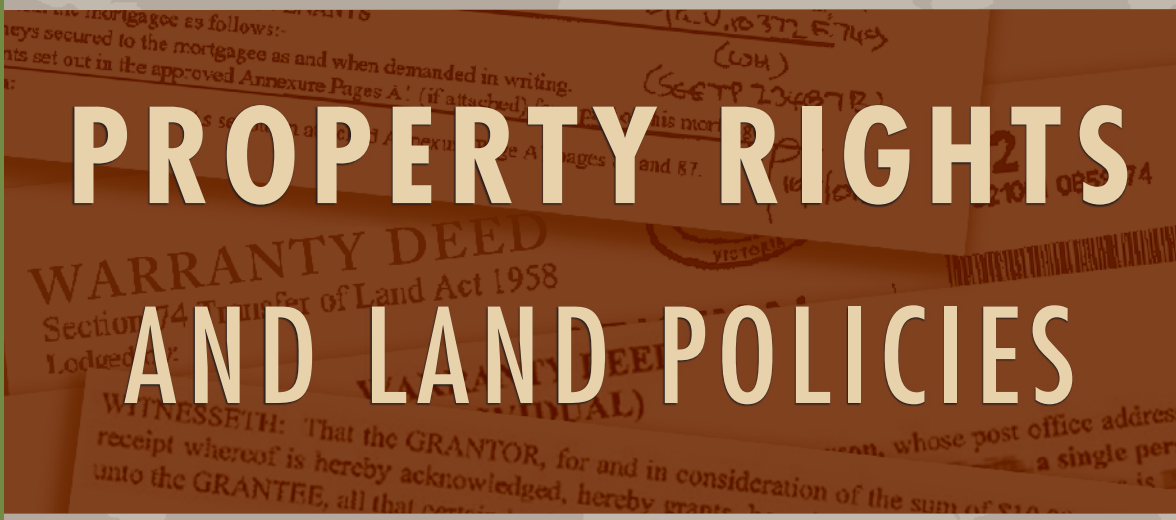

PROPERTY RIGHTS AND LAND POLICIES

Edited by Gregory K. Ingram and Yu-Hung Hong

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Private Conservation Easements: Balancing Private Initiative and the Public Interest

Gerald Korngold

The last quarter of the twentieth century was marked by a historic social movement embracing environmental protection and the preservation of natural habitats and species. While environmentalism in America has roots extending to at least the nineteenth century, it exploded as a popular phenomenon beginning with Earth Day in 1969. Today it is a pervasive ethos. To name a few examples, environmental values are reflected in legislation, regulation, and enforcement on the federal, state, and local levels; in the business models of corporations, both global and local, where they are typically expressed as "sustainability"; in the products marketed and consumed by Americans; in the education programs of our schools; and in many religious institutions, reflecting an ethical and moral orientation.

While government has played a vital role in defining and implementing environmental policy, the nonprofit sector has developed and executed significant and innovative environmental protection programs. These accomplishments go beyond the important role of nonprofits in education and advocacy for natural protection. Rather, nonprofits have acquired, managed, and otherwise utilized private property rights to achieve conservation goals.

The development and implementation of private conservation easements is a prime example of nonprofits' use of private property rights for environmental purposes. A conservation easement gives the nonprofit a perpetual property right that prevents the owner of the land subject to the easement from altering its current natural condition, thus protecting the present state of the land forever. The

conservation easement is private, or privately held, because a nonprofit, rather than a governmental entity, owns it.[1]

By using conservation easements, nonprofits can use market forces and the legal protections of property rights to achieve environmental goals. These private initiatives have some key public policy and legal advantages over governmental programs. They help to achieve conservation of the natural environment, which has become an important national value. They bring the efficiency of free market transactions without the costs of government coercion. They represent the free choice of the landowners, which should be respected absent a compelling governmental interest.

This chapter shows that private conservation easements provide a valuable property rights approach to land preservation and that they deserve continued recognition and validation. However, private conservation easements raise public policy and legal concerns relating to the significant tax subsidies accompanying them; the threat to democratic principles and quality decision making of having nonaccountable, nonrepresentative private organizations control local land use decisions; the absence of coordinated planning and public process as well as class issues in the creation of conservation easements; stewardship lapses by some nonprofits; and a potential lack of flexibility by nonprofits in dealing with emerging needs of the community (such as affordable housing and economic development) that might conflict with the conservation easement. The chapter examines these issues and shows how these concerns can be addressed so that private conservation easements can be an even more effective tool for achieving environmental protection through private property rights.

The chapter first describes conservation easements, their attributes, and existing data. It then examines the various life stages of a conservation easement—creation, stewardship, and potential modification and termination—to develop the competing public policy and legal perspectives as well as suggested solutions.

Conservation Easements: Attributes and Data

William H. Whyte (1959) popularized, if not coined, the phrase "conservation easement" in the late 1950s. Generally, conservation easements prevent the owner of the land burdened by the easement from changing the natural, ecological, open, or scenic attributes of the property.[2] Conservation easement documents

1. Government also can hold conservation easements. See DePalma (2008); *Sabine River Authority v. U.S.*, 745 F. Supp. 388 (E.D. Tex. 1990), affirmed, 951 F.2d 669 (5th Cir. 1993) (federal Department of the Interior, Fish and Wildlife Service); *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477 (2004) (city); Ohm (2000).

2. For a definition of a conservation easement, see Uniform Conservation Easement Act § 1(1).

often contain a general statement of such conservation goals and the agreement of the subject owner to not engage in actions that would violate this purpose (*Glass v. Commissioner*, 471 F.3d 698 [6th Cir. 2006]). Sophisticated conservation easement documents also include a list of specific proscribed activities, such as cutting timber, constructing additional buildings or roadways, disturbing the surface of the land, and displaying signs, among others (Anella and Wright 2004, 61–67). The instruments also may describe retained rights specifically negotiated by the burdened owner, such as the right to erect an additional residence (see *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 [2000]). Typically, conservation easements protecting scenic views and natural features do not give the public access to the subject property. Rather, the public benefit is said to be gained through the support of wildlife or the visual access that the public has from outside the property (26 *Code of Federal Regulations* section 1.1701-14[d][3][iii]).

Whyte and other early proponents of conservation easements extolled their benefits.[3] The problem was that the common law in virtually all American jurisdictions barred the creation of these interests. There were various legal impediments. For example, the law permitted nearby neighbors to own veto powers only over the development of a parcel of land (the common law prohibition of "in gross" restrictions), while supporters of conservation easements felt that the nonprofits should not have to own land close to the easement property and could be out-of-state organizations. There were questions at common law about the transferability of easements in gross, making it difficult for one nonprofit to assign a conservation easement to another. Additionally, the common law bias against perpetual restrictions on land ran counter to the prescribed model of unlimited duration for conservation easements.

Statutory validation—required as a separate enactment within each of the 50 states, as real property law is a state, not a federal, matter—was therefore necessary to implement the conservation easement vehicle. This legislative process culminated with the development of the Uniform Conservation Easement Act in 1981 and its subsequent adoption in over 20 states. The Uniform Act recognized perpetual conservation easements as valid property interests and specifically removed common law hurdles. The remaining states passed similar legislation over the last decades of the twentieth century. The result is that conservation easements are now recognized as valid, enforceable property interests.

Data on the number and acreage of conservation easements are limited. (This in and of itself raises a public policy concern, as discussed below.) Only fragmentary data can be teased out, but they reveal both significant absolute numbers of conservation easements and percentage growth. In 2005 the Land Trust Alliance reported that American local and state land trusts held conservation easements

3. For other early boosters, see Brenneman (1967) and Cunningham (1968). For a history of the land trust movement and its work on conservation easements, see Brewer (2003).

on over 6.2 million acres, a 148 percent increase from the 2000 figure of 2.5 million (Land Trust Alliance 2005a). The Nature Conservancy held over 2 million acres under conservation easement (in addition to acreage held by land trusts) in 2008 (Nature Conservancy 2008). Combined, these holdings approach the 9 million acre range, and they do not include the many conservation easements held by other nonprofits. Joan Youngman (2006) has provided a useful comparison to provide a sense of the magnitude of this land area: 9 million acres is roughly equivalent to the aggregated size of Rhode Island, Delaware, Connecticut, and Hawaii. Table 14.1 shows the not insignificant percentages of total land in a random sampling of states subject to conservation easement held by land trusts only, as of 2005.

The following sections examine conservation easements from a public policy and legal perspective, presenting the benefits and disadvantages of these interests and offering legislative and judicial proposals to address the public policy shortcomings. The chapter follows these issues over the various stages in the evolution of a conservation easement, from creation to the operational phase to the challenges of possible modification or termination. Conservation easements uniquely serve important public policy goals and deserve continued validation and enforcement by legislatures and courts. At the same time, however, some changes in the structure and process of conservation easements would better ensure a role for the public, a more efficient use of public resources, enhanced conservation results, and the injection of flexibility to respond to changing social, economic,

Table 14.1
Conservation Easement Acreage Held by Land Trusts in Sample States, 2005

State	Total Conservation Easement Acreage	Total Land Acreage Within State	Percentage of State Land Under Conservation Easement
Maine	1,492,279	22,646,400	6.58
Vermont	399,861	6,152,960	6.49
Maryland	191,330	7,940,480	2.40
New Hampshire	133,836	5,984,000	2.23
Virginia	365,335	27,375,360	1.33
Colorado	849,825	66,620,160	1.27
Massachusetts	61,569	6,755,200	0.91
New York	191,095	34,915,840	0.54
Arizona	35,645	72,958,720	0.04
Iowa	6,000	36,014,080	0.01

Source: Land Trust Alliance (2005a, chart 5); U.S. Census Bureau (2006, table E-1) (using a factor of 640 acres per square mile to convert area figures).

and technological needs. This can ensure that these important property rights will continue to serve both current and future generations.

Acquisition of Conservation Easements

Many of the benefits of conservation easements are manifest in the acquisition stage. First, their creation serves the growing conservation value in the United States. Over the past four decades, Americans' attitudes toward our lands and environment have undergone a major evolution. Land is now prized for its natural and historical features, not only for its full-development potential (Kuzmiak 1991). Conservation easements are an important preservation vehicle, useful in balancing development and conservation considerations.

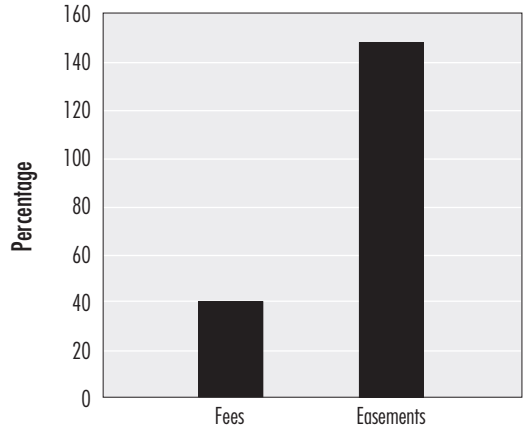
Moreover, private conservation easements are nongovernmental initiatives. Direct acquisition costs of conservation easements are borne by nonprofits, rather than by local, state, or federal government, although there may be tax subsidies, as discussed below (Byers and Ponte 2005, 9–10; Raymond 2007, 16–20). This relieves government from the burden of spending limited resources on conservation activities. Given other pressing needs, the pressures of special interests in the development sector, and the need to preserve the tax base, government may not be as willing to purchase and safeguard conservation easements as is a nonprofit that is free from such forces.

Third, the law's validation of private conservation easements creates efficiency advantages in land markets. The law has typically allowed parties to sell partial interests in land, such as leases, since those free market exchanges achieve an efficient allocation of limited (and nonrenewable) land resources. By allowing conservation easements, the nonprofit can purchase only the restriction and need not buy the right to occupy the property, which the burdened land owner is glad to retain. If we did not allow conservation easements, conservation organizations would have to purchase fee interests in land in order to conserve it, spending far more money than the cost of the easement, decreasing the reach of its conservation purchasing power, and needlessly forcing the landowner to sell complete (possessory) rights in the property. The cost of an easement in a property is far less than a fee (Coughlin and Plaut 1978). Given the cost-effectiveness of easements, it is not surprising that easement acquisition by nonprofits has increased at a far greater rate than fees, as seen in figure 14.1.

Additionally, state and local governments obtain fiscal benefits when a nonprofit acquires an easement rather than a fee. When a nonprofit holds a fee for conservation purposes, the entire fee value is exempt from property taxation. With an easement, the value for property taxation is reduced, but a taxable value remains, so the municipality still collects some tax revenue.[4]

4. For an example of a statute requiring reduced real property assessment because of the presence of a conservation easement, see Indiana Code § 32-23-5-8.

Figure 14.1
Increase in Acquisitions by Land Trusts, 2000–2005



Source: Land Trust Alliance (2005a, chart 5).

Fifth, while public land use regulation (zoning) provides an opportunity for more comprehensive conservation programs within a community and region, such regulation may come with significant costs. Zoning proposals often lead to bitter and divisive battles among landowners, winners, and losers and to expensive, and perhaps winning, challenges by disgruntled owners.[5] A consensual vehicle like a conservation easement avoids the ill will and legal challenges of a coerced regulation.

Finally, freedom of choice is an important part of ownership (Ely 1998, 17). If a landowner wishes to donate or sell a conservation easement, the law should uphold this preference, overriding it only in truly rare situations with compelling reasons.

CONCERNS

Despite the benefits of conservation easements, there are concerns. Although direct acquisition consideration is paid by the nonprofit, there may be a significant tax subsidy on the federal, state, and local levels. Section 170(h) of the Internal Revenue Code permits federal income tax deductions for conservation easements donated to qualified nonprofit organizations. These tax benefits do not apply if the easement is sold for fair market value consideration. The availability of tax benefits are referenced (some may say advertised or promoted) by nonprofits extolling or seeking conservation easement donations (see Nature Conservancy

5. On the topic of zoning in general, see Fischel (2001).

2008). In what has become a key driver for setting the duration of conservation easements, the Internal Revenue Code permits a deduction only if the easement is created in perpetuity. Without such a requirement, one might expect to see easements for a term of years or leases of conservation rights that prevent development for a limited term.

The federal tax subsidy is significant. In tax year 2003, federal income tax deductions for conservation and historic easements equaled $1.49 billion. Assuming that high-income taxpayers made the donations, the revenue loss to the Treasury would be roughly in the $600 million range. As shown in table 14.2, conservation easements were a much larger percentage of the total amount of deductions for noncash property donations in 2003 (4 percent) than of the number of donations (0.01 percent).

The average amount of a conservation easement donation is three times higher than the average amount of the next highest donation, as set out in table 14.3. This supports the inference that conservation easements provide tax benefits primarily for those in higher income brackets and with higher net worth.

Abuses in conservation easement deductions have also led to Treasury losses. Common areas of abuse are dubious appraisals and insider deals.[6] According to recent reports, the IRS has found that deductions on 96 of 108 Colorado conservation easements are sufficiently defective for back taxes to be owed by donors.[7] A conservation easement also lowers the valuation of the burdened property for estate tax purposes, reducing the estate and thus the tax liability (26 Code of Federal Regulations 25.2703-1[a][4]). This creates an additional federal Treasury loss.

Some states grant state income tax deductions for conservation easements, either by special provisions or by paralleling the federal structure. Colorado, for example, has gone even further, providing for a tax credit of 50 percent of the

Table 14.2
Individual Noncash Charitable Contributions for Easements, 2003

Type	Number of Donations	Percentage of Total Donations	Amount to Schedule A	Percentage of Total Deductions
All	14,273,171	100	$36,902,794,000	100
Easements	2,407	0.01	$1,491,924,000	4.0

Source: Wilson and Strudler (2006, figure A).

6. See U.S. Senate Finance Committee (2005) (on abuses) and Pension Protection Act of 2006, 29 U.S.C.A. § 1219 (recent regulation attempting to address appraisal problems).

7. See Migoya (2007) (182 cases still under investigation).

Table 14.3
Individual Noncash Charitable Contributions, 2003

Type of Contribution	Average Amount Per Donation
Easements	$619,727
Real estate	$201,112
Other investments	$158,903
Mutual funds	$43,889
Corporate stock	$34,279
Art and collectibles	$6,282
Clothing	$878
Household items	$808
Average amount, all donations (including those not shown)	$2,585

Not all types of noncash charitable contributions are shown.
Source: Wilson and Strudler (2006, figure A).

easement's value up to a maximum of $375,000. The Colorado credit is transferable for consideration to other taxpayers or tradable to the state for a refund if the state treasury has a surplus (see Colorado Statutes Annotated § 39-22-522). This has yielded an $85.1 million revenue loss in 2005, up from a modest $2.3 million in 2001 (*State Tax Notes* 2007). Widespread abuses have been cited in the Colorado program (Smith and Hubbard 2008).

Local and state property tax revenues are decreased by placing a conservation easement on a property. Assessments for property tax purposes must account for restrictions on the land. So when a conservation easement prevents development, the land's value is lowered and tax revenues are thus decreased.[8] This raises an important public policy concern, since the municipality is now faced with the choice of cutting services or increasing taxes on other residents (Anderson and King 2004). An individual's decision to place a conservation easement and maximize personal welfare can have a negative effect on the town's civic agenda and on other citizens.

In addition, the acquisition stage of conservation easements may not always further true conservation goals and may also frustrate the public land use process. Nonprofits have virtually unconstrained discretion in accepting donations

8. See *Gibson v. Gleason*, 20 A.D.3d 623, 798 N.Y.S.2d 541 9 (2005), upholding the decrease of valuation due to conservation easement. There are no good data supporting the suggestion that the conservation easement will increase the value of neighboring properties, offsetting the tax loss (Youngman 2006, 753).

of conservation easements and in purchasing them. Some conservation organizations may simply take any easements that come their way, often initiated by taxpayers seeking tax benefits, even though the easements do not advance a meaningful conservation agenda. Some national organizations have promulgated well-conceived best practices for nonprofit easement acquisition, but they are nonbinding.[9] Section 170(h) of the Internal Revenue Code does not clearly require a significant benefit in exchange for the deduction. For example, a deduction for an open space easement is given if the public has no more than a view of part of the property. The code and regulations fail to specify the extent of what the public must be able to see (for example, is a view of one of one hundred acres sufficient?) and how the view actually will benefit the public (26 Code of Federal Regulations § 1.170A-14[d][3], [4][ii][B]). Moreover, public access is not required, and is rarely granted, for the donor to receive a deduction for a conservation easement to protect habitat or preserve open space.

Nonprofits do not acquire conservation easements pursuant to a public land use plan. This conflicts with several important public policy goals. Without an overall plan, the result can be a checkerboard of easements that do not yield an effective, community-wide preservation plan. The whole might be less than the sum of the parts. This atomized approach conflicts with modern planning theory and practice, which favors broader community, regional, and cross-border solutions to land issues. At least one study reports that "local trusts specializing in providing open space do not consider the impact of their decisions on regional conservation benefits" (Albers and Ando 2003, 312).

Even high-functioning nonprofits with good acquisition practices are operating as private entities. They are not subject to the accountability of the electoral and regulatory processes that motivate and constrain public officials. Outsourcing local land use decisions—separating them from public, democratic governmental processes—raises serious concerns that will multiply as more conservation easements are acquired by private groups. The situation is exacerbated by the ability of geographically distant nonprofits, with less stake in the local community than the people living there, to hold conservation easements in gross and possibly hold key decision-making powers.

A recently reported controversy illustrates how a conservation easement might be acquired by a distant nonprofit in a manner that frustrates local concerns. The *San Francisco Chronicle* reported that the secretive Bohemian Club, comprising leaders in industry, government, and entertainment, sought to engage in logging on its 2,600-acre redwood grove in Northern California. To reduce its redwood holdings below 2,500 acres, which would allow the club to use a streamlined permit process for logging, the club offered to donate a conservation easement on 160 acres to the Rocky Mountain Elk Foundation of Missoula,

9. See Byers and Ponte (2005, 26–42) for an example of best practices.

Montana. Local protest was strong, with one local owner calling the proposed donation "at best . . . a cynical use of a conservation easement" (Kay 2008).

Spinning off conservation decisions to private organizations through private conservation easements may serve the goals of local public decision makers. If officials fear negative reactions about conservation decisions they make or fail to make from segments of the electorate or interest groups, delegation seems to be an attractive opportunity. The citizens deserve better.

The unrepresentative, undemocratic nature of private conservation acquisitions is heightened by the potential for class issues and elitism in conservation nonprofits. William H. Whyte (1959, 37), the so-called progenitor of conservation easements, warned of the "muted class and economic conflicts" inherent in these interests:

> Characteristically, the gentry have a strong bias for the "natural" countryside, and it is the preservation of this that the easement device promises. When they think of open space, they usually don't think of parks, or lakes for recreation, or the landscaping along superhighways; they think of farmland, streams and meadows, white fences, and barns.
>
> Conservation easements, which typically limit large tracts of land to a single private home, have the effect of private large-lot zoning that excludes denser, moderate-income housing.

These potential class inclinations are exacerbated if the board of directors making acquisition and other decisions is unrepresentative, parochial, homogenous, and self-perpetuating. This is too often the case with the composition and the governance pattern of nonprofits (Korngold 2005, 138–142), though increased diversity has been urged (Land Trust Alliance 2005b, standard 3B). People's rights to freely associate should be protected. That does not mean, though, that control over public land use policy should be delegated to the private associations.

A final problem arising in the acquisition stage of private conservation easements has been referred to earlier: the data on conservation easements are limited and difficult to extract. In all but a few states, no separate index or set of recording books for conservation easements exists. Thus, while a title searcher can and will find a conservation easement recorded against a specific property, there is no way to see and thus aggregate the total number of conservation easements that have been recorded throughout the county and state.

The absence of data is a significant public policy concern. Elected officials, planners, and citizens have no clear idea of the number of conservation easements, the total acreage, the identity of the nonprofit holders, the scope of the restrictions, and the pattern of easements created on and across the ground of the political subdivision and neighboring communities. It is difficult for government to assess environmental needs and to develop a public land use and conservation policy and plan without knowing even basic information about private

conservation easements in the community. Any possibility of leveraging public and private conservation assets requires transparency about the extent of holdings. Moreover, potential market players cannot get an overall view of existing conservation easements in the area.

SOLUTIONS

Adjustments to the legal rules related to the acquisition of private conservation easements can help to address the concerns that have been raised and, at the same time, make private conservation easements an even more effective vehicle. These adjustments will ensure better conservation results in return for the tax subsidies provided through the federal income tax deduction; help to encourage a greater role for the public land use process in the acquisition of private easements by adjusting the current incentive structure, with the additional benefit of mitigating potential class issues to an extent; and provide data for public decision makers and the market.

The key to achieving these advances is altering the tax subsidy of Internal Revenue Code section 170(h). Property owners should be free to do whatever they want with their property, including donating conservation easements to nonprofit organizations. This chapter does not propose infringing on this important freedom. The public, however, should not have to pay for the donations—indeed, encourage them—via tax incentives unless they provide significant and desired public benefits. Currently section 170(h) does not clearly require adequate public benefits from donors of open space and natural habitat easements in exchange for deductions, and it also frustrates public planning.

The code and regulations provide much detail on deductible open space and natural habitat easement, but the requirements do not clearly set a high enough bar for public benefit. An open space easement must only provide for "the scenic enjoyment of the general public." No specific amount of property must be viewable, and the regulations' definition of "scenic enjoyment" uses vague, pliable language (26 Code of Federal Regulations § 1.170A-14[d][4][ii]). Habitat easements are similarly defined in broad terms, and cases indicate that taxpayers sometimes have different views about what is ecologically significant than do the IRS and wildlife experts (*Glass v. Commissioner*). Whether the public is getting what it is paying for via the deductions for open space and habitat easements remains unclear.

In contrast, a deduction for the donation of an easement preserving historically important land areas or structures is available only if there is prior governmental process and approval of the easement (§ 170[h][4][A][iv]). Claimed historic land must be listed in the National Register, and a building must either be listed in the National Register or be part of a registered historic district and certified by the secretary of the interior as having historic significance (26 Code of Federal Regulations §§ 60.4, 67.4). The National Register process involves standards, administrative action, and public voice, and the Secretary of the Interior has promulgated standards for historic districts. Governmental decision

makers, the process, and articulated standards help to ensure that deductions are granted for historically significant properties only. The public gets a benefit in exchange for the tax subsidy, and the taxpayer is not making a unilateral decision about the scenic or ecological benefit of the conservation easement.

Therefore, the code should be amended to permit a federal tax deduction for an open space or habitat conservation easement only if there is prior local, state, or federal governmental certification that the easement provides a significant public conservation benefit. The certification would have to be consistent with a specific governmental conservation plan, and the governmental agency would have to approve the particular easement on the specific parcel. Although state and local government funds would not be paying for the federal tax deduction, state and local agencies would be expected to act responsibly in approving easements because an easement would mean a reduction in state and local property tax revenues and because of concern for local land policy. Currently preapprovals are not required for federal deductions, so it is hard to see how the federal tax subsidy would increase if there were an approval system.

There are clear benefits to this proposal. First, because only conservation easements bringing significant public benefit will be subsidized, public funds via federal deductions will be much better spent. The public will be getting value for its dollars. Second, by conditioning the deduction on governmental approval, donors will have an incentive to engage with the public land use process. Government involvement can bring the advantages of planning, process, coordination, and leverage of conservation activities.

While government involvement can bring great benefits, there will be some disadvantages. Transaction costs for donors (and government) may make some donors hesitate about embarking on the process, but the large benefits of the tax deductions are hoped to alleviate this concern. The potentially long delays could discourage potential contributors. This could be addressed by the passage of a statutory presumption of governmental approval within a certain period of time after submission of an application. The experience of Massachusetts, which requires state and local governmental approval for the validity (not just deductibility) of all conservation easements, is encouraging (Mass. Gen. Laws Ann. ch. 184, §§ 31–32). As shown in table 14.1, a significant percentage of Massachusetts land is under conservation easement despite the added requirement of governmental approval.

Property owners will continue to be free to donate conservation easements that do not meet the standards of a revised section 170(h). Though such conservation easements will raise concerns about public land use control, this may be a moot point. Given the past emphasis on tax deductions in acquisition of donations, it remains to be seen whether there will be many donations if there is no tax benefit.

The second major public policy concern—the lack of meaningful data about conservation easements—can be addressed if all states required and enforced the establishment of separate recording books for conservation easements within

county recorders offices.[10] These records could be maintained, along with other land records, in the offices of the recorders of deeds in the various counties in the state. The availability of the records would provide policy makers with the necessary information to develop a comprehensive conservation plan. It would also enhance the operations of conservation and the general market by providing information about ownership and the nature of restrictions. The costs of establishing separate recording books for future conservation easements should be minimal: recorders are already absorbing the cost of entering conservation easements into existing indexes and record books, and they would only have to instead enter the documents into separate registers (just as many recorders have separate registers for mortgage instruments). The minimal additional costs should be well worth it.

The Operational Phase

Strong stewardship of a conservation easement is essential to ensure that its value to the public is maintained and tax subsidies are not dissipated. Meaningful stewardship requires periodic inspections and monitoring of the burdened property, conversations with the property owner over present or incipient infringements on the easement, and legal action to enforce easement violations.

During the operational phase of conservation easements, nongovernmental ownership has benefits. The nonprofits, not the government, bear the expense of stewarding the easements. An adequately resourced, well-functioning, and effective nonprofit can do an excellent job, especially if the board and staff members and the volunteers are strongly committed to the conservation mission. Moreover, a dedicated nonprofit has the advantage of being free from political interest group pressures and able to raise philanthropic dollars to fund necessary stewardship.

CONCERNS

There are concerns with easement stewardship by some nonprofits. While many do a fine job, others fail to inspect, enforce, or even keep track of the easements they own (see Pidot 2005, 18–19; U.S. Senate Finance Committee 2005, part two, 2–4). Poorly funded, inadequately governed nonprofits often lack the financial and organizational capital to get the job done.

SOLUTIONS

Some steps may help to enhance nonprofit stewardship, but their effectiveness will have to be tested with longitudinal studies. The Land Trust Alliance has developed a voluntary program of accreditation for land trusts and detailed stan-

10. Only a few states have adopted such requirements. One that has is California. See Cal. Govt. Code Ann. § 27255(2).

dards and practices. It remains to be seen whether low-functioning nonprofits will enroll and succeed in this process and whether the standards are adequately drafted to get at the elusive governance issues that prove daunting for nonprofits. Moreover, this is a voluntary program; nonprofits can hold easements without certification. It is unclear whether donors substantially motivated by tax benefits will pay attention to certification.

The most effective answer may be through the power of the attorneys general of the various states to represent the public in the matter of charitable gifts, trusts, and organizations. An attorney general could bring an action to enforce a conservation easement when a nonprofit fails to do so. She could challenge the nonprofit's right to continue to hold the easement if the public interest is not being served.[11] She could also bring, or merely threaten, breach of fiduciary duty actions against board members of nonprofits that have not performed up to standards—a powerful incentive for board members to take notice and exercise their legal authority over operations.

Limited resources are a significant impediment to increased attorney general activity. Attorneys general are sworn to enforce a myriad of laws, many with more immediate impact on a large number of people than the enforcement of conservation easements. Conservation easement enforcement might go to the end of the line. One possible solution is the imposition of a special recording fee for conservation easements. The fees could be placed in a sequestered fund for employing and supporting state attorney general personnel in enforcing conservation easements.

Change and Flexibility

Change is inevitable. Over time there will be new advances and emerging challenges in economic and social circumstances, technology, politics, and the environment. In rare situations, some changes may raise questions about whether a specific conservation easement should be modified or even terminated to serve a greater public interest. For example, due to environmental changes or development in surrounding properties, an open space or habitat easement may no longer bring significant conservation benefits. Conservation biologists and ecologists are wondering how currently preserved lands will change with the climate. In the words of Healy Hamilton, director of the California Academy of Sciences, "[w]e have over a 100-year investment nationally in a large suite of protected areas that may no longer protect the ecosystems for which they were formed" (Dean 2008). Other public concerns, such as the need to build affordable housing or to spur economic development in a severely depressed area, may override conservation in rare circumstances in the future. How will privately held conservation easements stand up to these conflicting forces?

11. On the topic of attorneys general power, see Brody (1998).

BENEFITS

Recognizing conservation easement as a protected perpetual property right brings certain benefits when the environment is under pressure. Often development pressures have run roughshod over public land use regulation, compromising conservation goals, perhaps without thoughtful consideration of alternative development plans that would have been more environmentally friendly. Once an area has been developed, it is hard, if not impossible, to "unring the bell" and restore the land to its natural condition. A conservation easement in the hands of a nonprofit is a powerful, property-based restriction on development, free from the vagaries of the political process.

CONCERNS

The lack of flexibility in perpetual easements can present serious concerns in rare circumstances in which countervailing public needs require an adjustment to or perhaps even termination of a conservation easement. The law of conservation easements has decreased flexibility for several reasons.

First, conservation easements are not really easements; they are covenants in that they place negative restrictions on the burdened land (preventing changes in the natural features). This is not a matter of semantics. Easements are generally enforced by the courts without question and are viewed as valuable and valid property rights. Covenants, on the other hand, are traditionally viewed with distrust by the law. The courts have been concerned that restrictions on land reduce marketability by creating multiple ties that increase transaction costs when a sale or financing is sought. More important, the courts have questioned certain attempts in past generations to use covenants to impose their wishes on the autonomy of current owners of property. The policy lessons of covenant law apply to conservation easements, and calling them easements does not make the policy issue disappear.[12]

The perpetual nature of conservation easements presents a threat if an easement is rigidly enforced in the rare circumstances in which unusual public requirements call for flexibility. At a future time, land subject to a conservation easement may be the only viable locus for economic development in a depressed area, for the construction of low-income housing, or for some other pressing social need that we cannot imagine today. Because the conservation easement is privately held, the decision on its modification or termination will be made by the nonprofit, perhaps from a distance. Local citizens will not be able to work out the balance between conservation and other public necessities in a democratic, public, local land use process. Rather, a nonaccountable private organization will be making the decision.

Market forces will unlikely be sufficient to motivate nonprofits to be flexible. Conservation organizations are driven by conservation values and rarely, if ever, enter into market exchanges to sell or release their conservation easements. They

12. On the issue of covenants versus easements, see Korngold (2004).

may doubt their power to engage in such transactions under their governing documents, fear losing their nonprofit status if they do so, and need to assure potential donors that the organization can be trusted to adequately preserve property.

Inflexibility and nonprofit control over modification and termination decisions have serious public policy ramifications. Key local land decisions have been moved from the public arena to the private sector, violating essential principles of local democratic control. Class differences and elitist notions may influence the nonprofit's decision about the necessity of additional employment opportunities or affordable housing, not necessarily because of ill will but rather because of a limited worldview. Moreover, perpetual conservation easements, no matter how well meaning and how beneficial they are in the vast majority of cases, can in rare situations violate the autonomy of future generations. Land has played an essential role in American economic, social, and political life. It is a limited and nonrenewable resource. Future citizens should be grateful to today's nonprofits and owners for their conservation efforts, but the price must not be surrendering the ability of future generations to make important land use decisions based on future values, requirements, and trade-offs. The current generation must allow for adequate flexibility and not require perpetual fealty to conservation in all cases. Intergenerational responsibility requires a balance between conservation values, current citizens, and the autonomy of future generations.

SOLUTIONS

A number of steps can be taken to inject flexibility into conservation easements to help to achieve public policy goals. First, the holder of a conservation easement has the power to agree to consensual modifications and even termination of the interest.[13] Nonprofit board members may hesitate to modify or terminate conservation easements out of fear of breaching their fiduciary duty of obedience to the nonprofit's mission or of infringing on its tax-exempt status. Senator Charles Grassley is quoted as saying that "modifying these [conservation] easements is a huge no-no" (Black and Flynn 2005); such statements can chill the willingness of volunteer trustees to act. Nonprofit law needs to be clarified to provide that fealty to an overall mission of conservation in the public interest is not violated by compromises with respect to one parcel. Good directors insurance and opinion letters from lawyers would also embolden boards to accomplish the public interest.

Second, courts can be more aggressive in applying traditional covenant modification and termination doctrines to conservation easements. For example, they could use the rule prohibiting the enforcement of covenants violating public policy to strike the very rare conservation easement that interferes with overriding public values and goals. This doctrine has been applied in the past, for example, to permit the establishment of group homes for the disabled despite restrictions limiting occupancy to single families (Korngold 2004, § 10.02). A disadvantage

13. For advice to land trusts on this issue, see Land Trust Alliance (2007).

of using this rule is that when a covenant is struck for public policy, no compensation is paid to the covenant owner. Thus, a conservation organization would not receive funds to buy a replacement conservation easement. Unless the courts were creative and invented a theory that justified the rewarding of compensation, striking covenants for violations of public policy would not adequately accommodate important conservation values.

The doctrine of relative hardship allows courts to enforce a covenant by imposing monetary damages rather than the typical injunction (Korngold 2004, § 11.08). The doctrine is applied when the costs to the parties and the public from an injunction will be too great compared to the benefits that the injunction will bring. When a court applies the relative hardship doctrine, it is, in essence, requiring a forced buyout of the covenant, giving the covenant owner money but not enforcing the covenant as a property right. This doctrine, which is employed judiciously because it rearranges the agreement of the parties, could be applied in the rare case in which public needs are great and the conservation value of enforcement is comparatively low. The conservation organization would receive monetary damages and could reinvest in conservation easements on other properties. There is little case law setting out the measure of damages in relative hardship cases (see *Restatement of the Law of Property* 2000, § 8.3[1]; Korngold 2004, § 11.08). Governmental takings may serve as a model. As discussed below, courts have focused on the increase of value to the formerly burdened parcel when a gross servitude is terminated.

The Third Restatement of Property, a key reform agent in the field of servitudes, has recommended that the court should adjust the particular conservation purpose to allow continuance of an overall conservation purpose when conditions have changed so that the particular purpose of a conservation easement can no longer be accomplished (*Restatement of the Law of Property* 2000, § 7.11). This modification will take place pursuant to the doctrine of *cy pres*, which requires a judicial hearing and approval. Since the public is the true beneficiary of a charitable gift, the *cy pres* process ensures that the nonprofit is truly representing the public's interest in the modification proceeding.[14]

Cy pres provides procedural protections by requiring the state attorney general to represent the public's interest and substantive benefits by preventing valuable conservation easements from disappearing. The requirement of a *cy pres* proceeding for modifications may deter a nonprofit board from making the usual discretionary decisions that do not require formal modifications out of fear of liability or criticism.[15] This will likely decrease flexibility in conservation easement stewardship, something that is necessary for a viable relationship of easement and

14. On *cy pres* in conservation easements, see McLaughlin (2005).

15. Statutes, such as Maine's, that require prior judicial approval and participation of the attorney general before amendment of a conservation easement have similar positive effects and costs. 33 Maine Rev. Stat. Ann. § 477-A.

nonprofit with burdened owner over the perpetual term of the easement. The costs of legal representation in *cy pres* judicial proceedings will tax the limited resources of nonprofits, making them unwilling to engage in modifications necessary for the public interest and diverting key funds when they are forced to do so.

Third, the legislative power of eminent domain can provide a key way to eliminate conservation easements in the future when the public interest requires. Eminent domain has long been the tool by which government appropriates land from an individual, for compensation, to serve communal needs. It is an essential tool given the efficiency of communal infrastructure, changing land use needs over time, and the challenge of the monopoly-type power that holdouts wield. The U.S. Supreme Court in *Kelo v. City of New London*, 546 U.S. 469 (2005), held that eminent domain can be exercised under the Constitution for the purposes of economic development pursuant to a clearly conceived municipal plan. The plan in *Kelo* was necessary to revitalize the city's battered economy and involved some 90 acres. Pursuant to the redevelopment, offices, hotels, recreation areas, and public spaces were to be built. The Court held that this was a legitimate public use under the Constitution even though some of the property would end up in the hands of private developers. Under the Court's conceptualization, it would be possible to take a conservation easement by eminent domain as part of a necessary economic redevelopment. Compensation would be paid to the nonprofit, presumably to be reinvested (pursuant to the board's fiduciary obligation) in other conservation easements. *Kelo*'s lesson would allow flexibility for future generations with respect to easements while maintaining conservation values.

When a servitude in gross is taken by government, compensation must be determined. If commercial easements are taken, such as easements granting the right to erect and maintain billboards, income streams can be projected and discounted so the court can arrive at their value (see *State ex rel. Missouri Highways and Transportation Commission v. Muslet*, 213 S.W.3d 96 [Mo. App.] [2006]). With a conservation easement, the calculation is different because a negative rather than an affirmative interest is involved; value is harder to calculate because of the lack of a commercial income stream. When an appurtenant servitude is taken, the damages can be seen as the decrease of the value of the benefited parcel by comparing the value of that parcel with and without the servitude. With a negative in gross restrictions such as a conservation easement, the court may have to use a damages measure based on the difference in the value of the burdened property with and without the servitude (Korngold 2004, 475). As applied to conservation easements, that measure would capture the gain to the burdened owner by the release of easement. It would not measure the subjective value that the conservation organization attributed to the conservation easement that was lost by the taking. As the law prefers objective to subjective measures, this may be where matters are left.

Kelo ignited a storm of protest from commentators, state legislatures, and state courts. Many legislatures have passed laws barring takings for economic development. Courts have found that while such takings are permissible under the federal Constitution, state constitutional provisions bar eminent domain for

economic development. These judicial and legislative pronouncements are ill advised as a general matter, condemning future generations to the land use arrangements of the past. With respect to conservation easements, they prevent the flexibility needed to balance conservation values and future needs.

Conclusions

Private conservation easements serve important public policy values, achieving conservation of the natural environment through the use of property rights. The law should continue to recognize and validate these important interests. Private conservation easements, however, come with costs. They are created without overall land use planning and public participation. Stewardship may be inadequate. The easements and the nonprofits holding them may be insufficiently flexible to balance competing public needs. By addressing these concerns, we can create even more effective and valuable private conservation easements that will benefit future generations while respecting their autonomy in an ever-changing world.

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