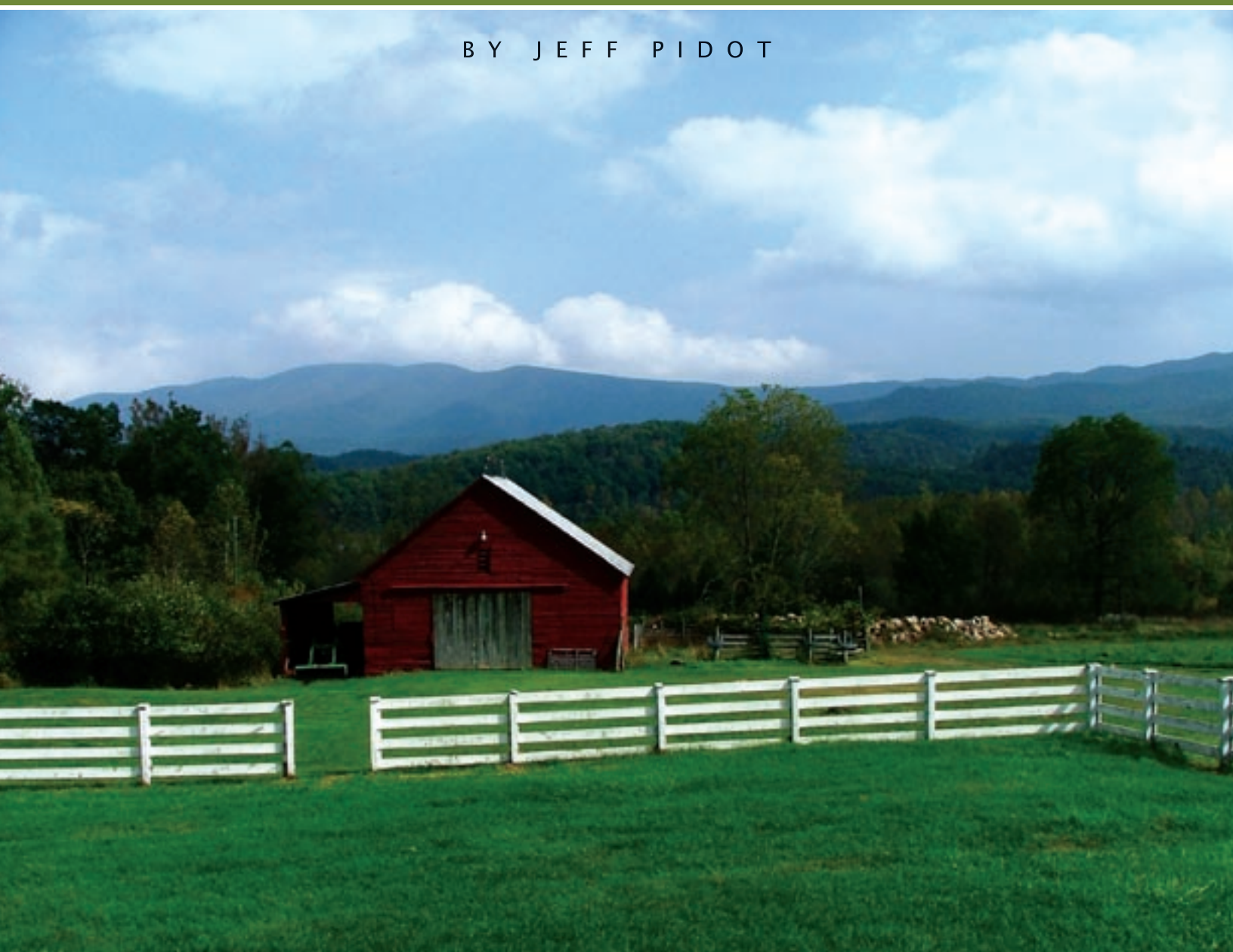




Reinventing Conservation Easements

A Critical Examination and Ideas for Reform

BY JEFF PIDOT



Reinventing Conservation Easements

A Critical Examination and Ideas for Reform

This report is one in a series of policy focus reports published by the Lincoln Institute of Land Policy to address timely public policy issues relating to land use, land markets, and property taxation. Each report is designed to bridge the gap between theory and practice by combining research findings, case studies, and contributions from scholars in a variety of academic disciplines, and from professional practitioners, local officials, and citizens in diverse communities.

In February 2005 the Lincoln Institute held a symposium with the following participants to discuss and debate perspectives on conservation easement issues and reforms:

- **John Bernstein**, Director of Conservation Programs, Land Trust Alliance
- **Greg Bialecki**, Partner, Piper Rudnick
- **John Echeverria**, Executive Director, Georgetown Environmental Law & Policy Institute
- **Robert Ellickson**, Professor, Yale Law School
- **Charles Fausold**, State Extension Specialist, Cornell University
- **William Fischel**, Professor, Economics Department, Dartmouth College
- **Daniel Halperin**, Professor, Harvard Law School
- **Jean Hocker**, President, Conservation Service Company and President Emeritus, Land Trust Alliance
- **Gerald Korngold**, Dean and Professor, Case Western Reserve University School of Law
- **Joel Lerner**, former Director, Division of Conservation Services, Massachusetts Executive Office of Environmental Affairs
- **Julia Mahoney**, Professor, University of Virginia School of Law
- **Nancy McLaughlin**, Professor, University of Utah S.J. Quinney College of Law
- **Mary Nichols**, Director, UCLA Institute of the Environment and former California Secretary of Resources
- **Jym St. Pierre**, Maine Director, RESTORE: The North Woods

Lincoln Institute staff and fellows who participated in the symposium:

Lisa Cloutier, Department Administrator; **Richard Dye**, Visiting Fellow and Professor, Lake Forest College; **Richard England**, Visiting Fellow and Professor, University of New Hampshire; **Ann LeRoy**, Senior Editor; **Jane Malme**, Fellow; **Semida Munteanu**, Department Assistant; **Jeff Pidot**, Visiting Fellow and this report's author; **Daniel Schwab**, Research Assistant; and **Joan Youngman**, Senior Fellow.

The illustrative cases in this report are drawn from the author's experience and from his analysis of many types of conservation easements, carried out while he was a Visiting Fellow at the Lincoln Institute of Land Policy.

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Executive Summary

No recent happening in land conservation rivals the rapid deployment from coast to coast of conservation easements. Beyond tax and other public subsidies, a driving force fueling this phenomenon is the perception that conservation easements are a win-win strategy in land protection, by which willing landowners work with private land trusts or government agencies to provide lasting protection of the landscape. Conservation easements are welcomed as achieving land conservation goals without regulation, without adversity, and often, it is thought, without government.

This report asks: Are the increasing numbers of unsupervised land trusts and conservation easements throughout the nation good for our (and their) future, and, if not, what kinds of reforms should be considered to create a greater degree of confidence in this popular conservation instrument? The thesis is that conservation easements are a valuable land protection tool, complementing regulation, land acquisition, and tax policies, but that the laws and conventions governing easements require reforms to ensure and sustain their public benefits.

The report begins with a primer on conservation easements, their policy context, public character, and history. It then describes specific issues concerning conservation easements and evaluates ways to resolve them, including reforms of federal and state laws.

While this report advances the view that such reforms are needed, it is intended to stimulate critical thinking and provide an array of perspectives rather than to dictate particular solutions. The underlying premise is that conservation easements should be evaluated and governed in the context of conservation-easement time, which is not the present but the long-term future. Otherwise, we may simply leave to future generations a legal chaos involving many thousands of conservation easements whose terms, holders, and locations may be difficult to determine, and whose public benefits ultimately could be lost.

Key Conservation Easement Issues and Reforms

- Issue:* Variable quality in conservation easement design
Reform: Greater standardization in high-quality conservation easement terms
- Issue:* Lack of a publicly accessible system for conservation easement tracking
Reform: A mandatory public registry of conservation easements in each state
- Issue:* Lack of transparency and determination of public benefits in easement formation
Reform: A public process for stricter scrutiny of each easement's public benefits
- Issue:* Failure by many easement holders to undertake appropriate stewardship duties
Reform: Legally mandatory stewardship responsibilities for easement holders
- Issue:* Lack of clear standards for easement termination, amendment, and backup support
Reform: A clear process for termination, amendment, and third-party enforcement
- Issue:* Lack of clear valuation and other taxation standards for conservation easements
Reform: Tighter tax and other standards that underpin the public investment in each easement
- Issue:* Failure to consider implications of easements on land acquisition and regulation
Reform: Holistic policies to consider the proper role of each of these conservation tools
- Issue:* Failure to consider issues of equity and environmental justice in easement programs
Reform: Policies to assure that public subsidies compensate for these effects



Introduction

The continued success of land trusts depends both on public confidence in and support for the conservation efforts of these organizations, and on building conservation programs that stand the test of time. It is every land trust's responsibility to uphold this public trust and to ensure the permanence of its conservation efforts.

Land Trust Alliance,
*Land Trust Standards
and Practices* (2004)

The whole process is going to fall apart unless we solve these problems.

Senior official of a
major land trust



THE POLICY CONTEXT

A quarter of a century ago, when few people had even heard of a conservation easement, Daniel Halperin, then deputy assistant secretary at the U.S. Treasury and today a professor at Harvard Law School, testified before Congress to express concerns about pending legislation that would grant income tax deductions to landowners donating conservation easements that are not publicly supervised (U.S. Congress 1979; 1980). His testimony addressed a number of problems and uncertainties about conservation easements that still exist today:

- difficulty in determining whether conservation easements provide public benefits commensurate with the public subsidy conferred by their tax deductibility;

- difficulty in appraising the value of conservation easements, and the parallel difficulty for the Internal Revenue Service (IRS) in evaluating whether these appraisals are fair;
- uncertainty about the holder's resolve and resources to monitor and enforce conservation easements permanently, which might affect their benefits in the future; and
- imprecision of the legal concept and purpose of conservation easements.

Halperin advocated public involvement in publicly subsidized conservation easements and warned that some of these easements might not conserve anything of public value. He discussed potential abuses of conservation easements that might yield greater benefits

to landowners than to the public. In sum, he questioned whether conservation easements, as legally governed even to this day, ultimately would deliver on their promise of meaningful and enduring land conservation. In the end, despite Halperin's cautionary remarks, Congress decided to allow permanent easement donations as an exception to the rule that tax deductibility is not permitted for charitable gifts of future interests in property.

While Halperin foretold many problems that have become realities, that does not mean that conservation easements are bad public policy. This report's thesis is that in a properly designed system conservation easements provide a useful land protection tool. A well-crafted easement may be worth the public subsidy conferred by its tax deductibility or purchase price, if it meaningfully protects property having public benefit, provides robust land protection that cannot be accomplished through regulation, and is held by an entity with the resolve, durability, and resources to permanently monitor and enforce it.

However, few places in this nation have laws or conventions by which the benefits of conservation easements are scrutinized and secured from a public perspective. As this report is being published, change is in the air. Yet, many issues regarding conservation easements will continue to require vigilant examination and efforts at reform.

THE PUBLIC STAKE

Conservation easements are usually private transactions between a landowner and a land trust, so why should the public, and its government at all levels, have an interest in them if the government is not the easement holder? The principal reason is that state and federal laws enable and subsidize conservation easements to advance the public

Definitions

A conservation easement typically consists of permanently enforceable rights held by a land trust or government agency by which a landowner promises to use property only in ways permitted by the easement. The landowner retains ownership and may convey it like any other property, subject to the easement's restrictions. A recent innovation in property law, conservation easements have been made possible by enabling legislation in virtually every state.

There are three federal tax incentives that encourage the donation of a conservation easement: an income tax deduction based on the easement's appraised value; exclusion of the easement's value from the property for estate tax purposes; and an additional estate tax exclusion of up to 40 percent of the value of the land encumbered by the easement. Limited-term easements are possible, but do not receive federal tax benefits and are rarely utilized.

A working landscape conservation easement seeks to protect the land's open space and certain natural values while allowing continued forestry, ranching, or farming uses. It restricts other uses that are incompatible with these objectives.

An **exacted conservation easement** is imposed as a permit condition by a regulatory agency in mitigation of environmental damage caused by a development.

A land trust is a private, nonprofit corporation that qualifies as tax exempt and is able to receive tax-deductible donations, with land conservation being part of its mission. Land trusts range greatly in size and sophistication, from all-volunteer, community-based organizations with insignificant financial resources, to large, well-financed organizations that work at a regional, national, or international level. The largest land trust in the world is The Nature Conservancy (TNC). With active chapters in every state, TNC owns thousands of properties and more than 1,600 conservation easements.

The **Land Trust Alliance** (LTA) is a national, nonprofit membership organization that promotes voluntary standards and practices for its member land trusts. It provides networking resources and assistance to most of the nation's 1,500 local and regional land trusts. LTA was founded following a 1981 conference at the Lincoln Institute.

It's very important for us to keep in mind that the value inherent in a conservation easement, whether it's purchased or donated, belongs to the public and should continue to be used for public conservation purposes.

Nancy McLaughlin

Because the creation of conservation easements is largely tax-driven, it's not clear that the right lands are being conserved.

Robert Ellickson

interest. Virtually every conservation easement involves a significant public subsidy. The public should care about whether its money is being spent efficiently for something of long-term public benefit.

The public subsidy may be direct, as when increasing numbers of easements are purchased with public funds, sometimes involving many millions of dollars. Or, the public subsidy may be indirect, as when donors of conservation easements benefit from federal income tax deductions and often reduced estate and other taxes. Under the laws of some states, donors also may receive significant state income tax credits and deductions as well as reductions in estate and real property taxes.

Why should conservation easements be subject to closer scrutiny than other charitable donations? First, the public has an important interest in land use decisions that affect the future of its landscape. Second, unlike other charitable donations of property or money, conservation easements deliver little of public benefit in the present; they are promises to be kept for the indefinite future. Conservation easements therefore provide no public benefit if these future

promises are not kept. Fulfilling these promises requires both easement provisions that permanently protect land with important public conservation values and easement holders that have the long-term capacity and resolve to monitor and enforce them permanently. In other words, Congress is unlikely to have provided significant tax incentives for conservation easement donations if it did not believe that these future commitments would be kept.

Beyond its financial investment, the public's stake in conservation easements constitutes a charitable trust which transcends that of the private parties to the transaction because the public is the intended beneficiary of every conservation easement. Stated another way, the easement holder acts as an agent for and owes a fiduciary duty to the public. When an easement provides public access to property, such as for passive recreation or scenic enjoyment, the public has an added stake in the easement's long-term security.

The public also has an interest in exacted conservation easements given in mitigation of environmental harm caused by a development project. Further, just as communities



have an interest in where development will occur, there is a public stake in where land will be preserved. Finally, the public has an enduring interest in the legal status and stability of real estate interests. There is no less a public interest in the durable, legal meaning of conservation easements than in that of title to private or public property generally.

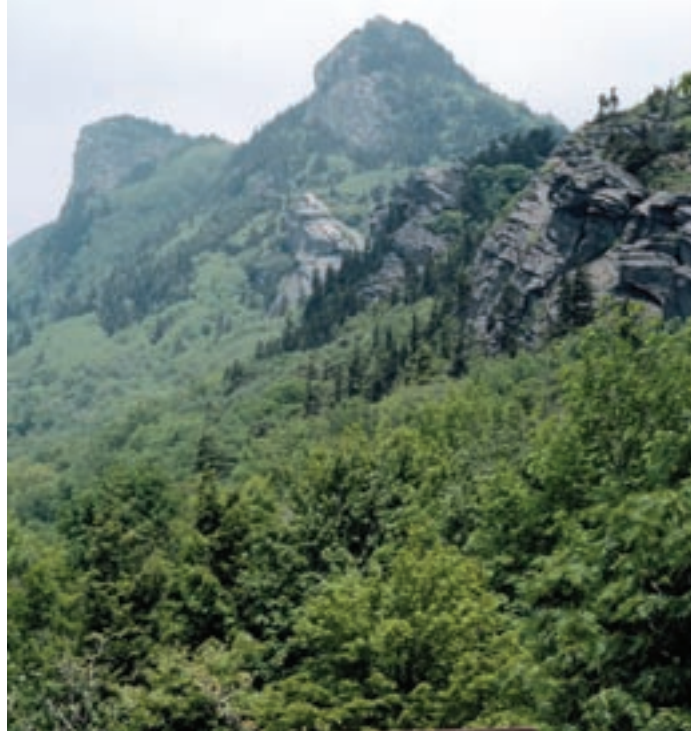
Thus, the public has a legitimate interest that conservation easements meet certain standards and that the easement holder (or another responsible entity) will forever monitor and enforce them as specified in each easement's terms.

A BRIEF HISTORY AND RECENT TRENDS

Conservation easements are a recent innovation in real estate law enabled by statute in virtually every state. They are property interests severed from the underlying ownership of the property, comprising promises to use the property only in ways permitted by the easement's terms. Typically they are granted to and enforceable by a land trust or government entity.

Conservation easements constitute a revolutionary departure from common law principles of real estate law, which generally prohibit permanent restrictions on land use that do not benefit the owner of a nearby property. These principles reflected the judiciary's belief that future landowners should not be bound perpetually by the "dead hand" of a prior owner's wishes in a private transaction. Because conservation easements are dedicated to a public purpose, state legislatures have deemed it appropriate for such easements to be permanent.

The forebears of today's conservation easements are property interests acquired by the federal government during the 1930s to protect scenic landscapes along portions



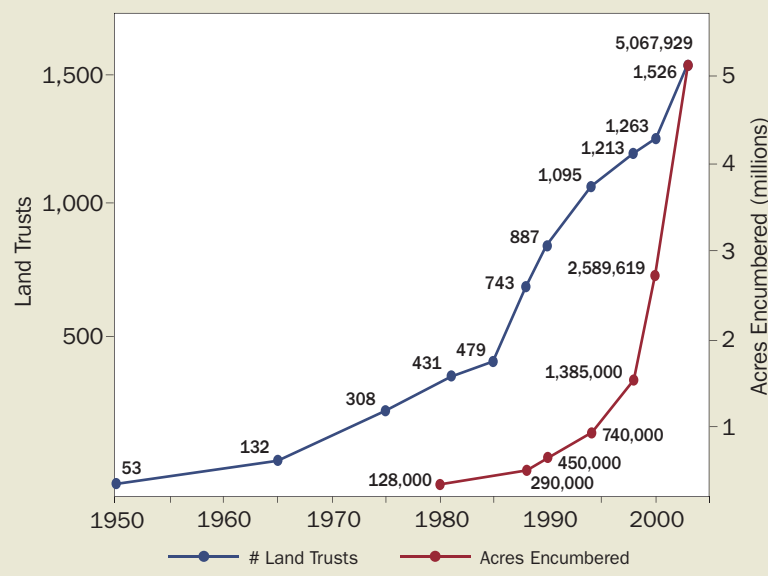
of the Blue Ridge Parkway in Virginia. The modern concept of conservation easements was envisioned by William Whyte: "What we're really after is conservation of things we value, and thus I have been trying the term 'conservation easement' [which] has a certain unifying value: it does not rest the case on one single benefit—as does 'scenic easement,' but on the whole constellation of benefits—drainage, air pollution, soil conservation, historic significance, control of sprawl, and the like" (Whyte 1959).

Until the late twentieth century, there were only a few land trusts, and they held a relatively small number of conservation easements. The numbers of both land trusts and easements began to increase significantly in the early 1980s after Congress enacted permanent tax subsidies for conservation easement donations and the National Conference of Commissioners on Uniform State Laws (with representatives appointed by each state to recommend uniform laws to state legislatures) drafted the Uniform Conservation Easement Act (UCEA). Many states later enacted laws based on different versions of the UCEA.

Conservation easements have had more success than anyone would have predicted 25 years ago. Their impact extends beyond conservation alone, and it is appropriate to consider their role in land use planning, development decisions, and tax policy.

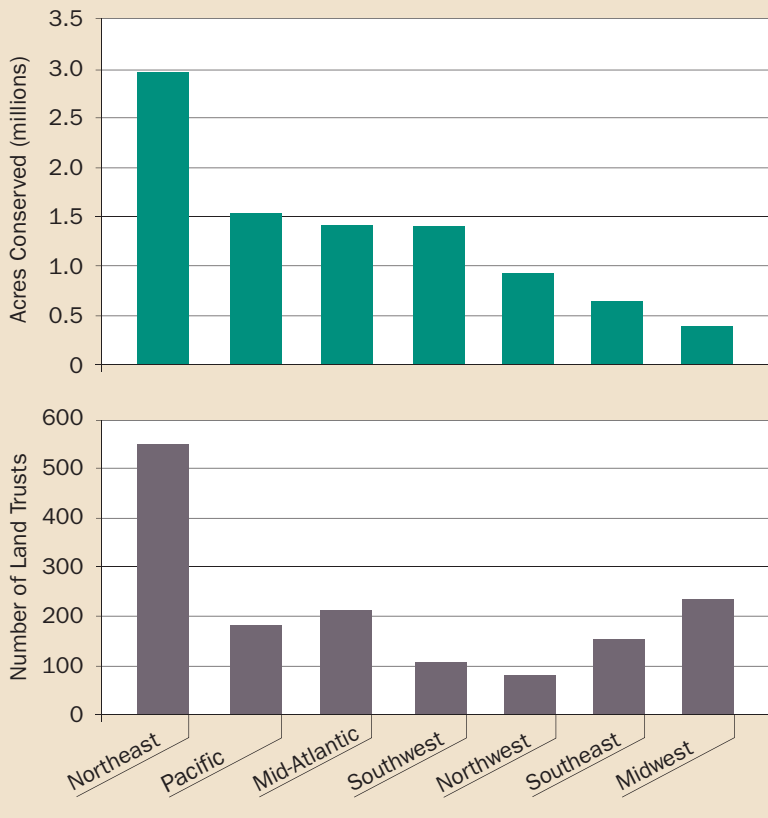
Joan Youngman

FIGURE 1
Growth in Number of Land Trusts and Acres Encumbered, 1950–2003



Source: Nancy McLaughlin, based on Land Trust Alliance data

FIGURE 2
Acres Conserved and Number of Land Trusts by Region, 2003



Source: Adapted from Land Trust Alliance, National Land Trust Census (<http://www.lta.org/census/index.shtml>)

During the five years from 1998 to 2003, the Land Trust Alliance (2004c) estimates that the number of local and regional land trusts increased from 1,200 to more than 1,500; the number of conservation easements held by these land trusts increased from 7,400 to nearly 18,000; and the land areas covered by these easements increased from 1.4 million acres to more than 5 million acres (see Figure 1).

National organizations, such as The Nature Conservancy and the American Farmland Trust, hold additional thousands of conservation easements. Untold thousands more are held by federal, state, and local governments. In estimating these numbers, perhaps the most astonishing point is that there is no publicly accessible data showing how many conservation easements exist or where they are located.

Although the majority of land trusts were established only during the past 15 years, they have become a big business. Today there is at least one active land trust in every state, while several states, led by California, Massachusetts, New York, and Maine, have more than 100 each. Land trusts historically were concentrated in the Northeast and the West, but today they are increasing more rapidly in other regions (see Figure 2).

Land trusts and government agencies often spotlight their growing portfolios of conservation easements and the acreage covered without equivalent regard for the quality of their easements or of the particular lands they protect (see Figure 3). It is reasonable to question whether easement holders are too focused on opportunistic acquisitions without adequate regard to future costs. Since conservation easements create long-term and costly stewardship responsibilities for their holders, short-term thinking can lead to long-term trouble.

Conservation easements are almost infinitely variable. Calling something a conser-

vation easement may reveal nothing about the protections it affords or even its legal terms. Many conservation easement advocates extol the virtues of this nearly unbounded flexibility, since it allows the parties to the easement to tailor each document to their mutual interests. However, the increasing variability and number of easements will result in untold future difficulties for both easement holders and landowners in understanding, implementing, monitoring, and enforcing the legal rights and responsibilities they have assumed. Because conservation easements today are often heavily negotiated and nuanced, these tasks can challenge even experienced legal experts.

Determining the value of conservation easements raises three problems:

1. The often subjective and selective judgments that easement appraisers can make under the current, minimally regulated system;
2. The subtle (or not) pressure that landowners seeking the largest possible deductions

and other tax subsidies may place on these appraisers; and

3. The uncertainty of the public cost-benefit calculus of each easement, which is rarely considered because there is no forum in which to do so.

The IRS has begun to scrutinize easement appraisals more closely. While this effort may respond to obvious abuses, it does not address the central problem, which is the imprecision of laws governing conservation easements and their appraisals.

While conservation easements are intended to be permanent land restrictions for the public's benefit, few states have provisions for conservation easement registration, holder accreditation, legal structure, public transparency and accountability, determination of public benefit, termination, amendment, or backup enforcement. The enormous growth in the numbers of easements and land trusts in recent years makes these issues an urgent concern.

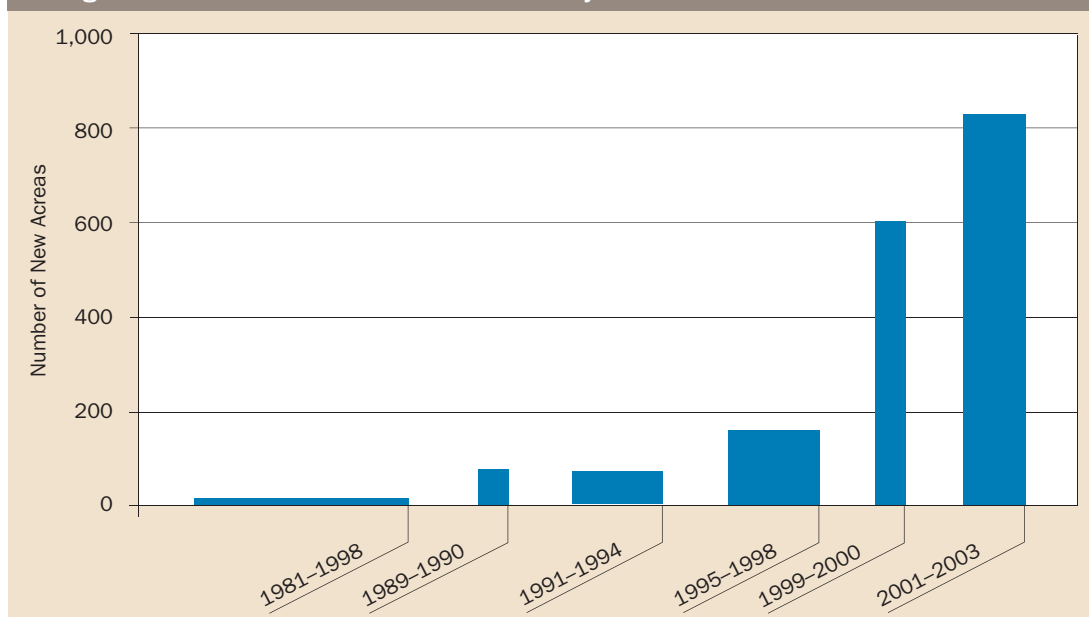
I have great skepticism about assumptions that have fueled enthusiasm for conservation easements. In the rhetoric, there are vague assertions that some lands are special and deserve eternal protection. I think this is an unsatisfactory way to analyze their benefits.

Julia Mahoney

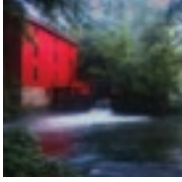
In my experience with land trusts and government agencies, I've sometimes seen an acres mentality, where the focus is on acquiring easements. Far less consideration is given to the holder's ability to monitor and enforce them over the long term.

Nancy McLaughlin

FIGURE 3
Average Number of New Acres Encumbered Annually



Source: Nancy McLaughlin, based on Land Trust Alliance data



Selected Issues and Potential Reforms

Design & Uniformity

Selected Issues and Potential Reforms

This section discusses specific, current issues concerning conservation easements and possible reforms to achieve greater predictability and stability in their design and stewardship. Following are some suggested approaches to reform, listed in order of potential impact:

- changes to federal tax laws;
- greater legal oversight of conservation easements and their holders, spearheaded by changes in the Uniform Conservation Easement Act;
- changes in conservation easement enabling laws on a state-by-state basis;
- consolidation and networking among land trusts;
- greater supervision of conservation easements and their holders by funding sources;
- voluntary self-regulation spearheaded by a national organization such as the Land Trust Alliance; and
- voluntary self-regulation chosen by each member of the conservation easement community.



THE ISSUES

In the context of property law, conservation easements are at the same state of infancy as the fee simple deed when land was first conveyed by the King of England. Early deeds using various formulations presented courts with the task of parsing the legal meaning of these terms. After many years, standardized legal terminology emerged to denote a finite set of property interests, and these terms have been further distilled by statutory deed forms enacted in many states.

After just a few decades, the variability in conservation easement terminology and standards is large and growing. A study by the Bay Area Open Space Council (1999) showed that roughly half of the

conservation easement holders surveyed did not use a model easement, including many government holders.

It is often stated that each conservation easement should be unique and negotiated to address the parties' particular specifications. "There is such a wide disparity of views on how to approach the drafting of these provisions—resulting mostly from the diverse objectives people bring to the negotiation process—that there is little in the way of real substantive guidance to pass on" (Byers and Ponte 2005, 287). Indeed, the framers of the Uniform Conservation Easement Act intended to provide a loose legal framework with latitude for the parties to arrange their relationships as they saw fit. However, these laws were written at a time when no one could

have envisioned the subsequent explosion and variability of conservation easements.

By all accounts, conservation easements have become increasingly dense and intricate instruments. Sometimes the most difficult conservation easements to negotiate, and the ones that result in the most complex terms, are those purchased from landowners for their full, appraised value. Unlike conservation-minded landowners who donate an easement, sellers of easements may be motivated by purely economic concerns to drive the hardest bargain to maximize price and minimize the rights being surrendered. As a consequence, some purchased conservation easements may be more compromised than those that are donated.

By comparison, the public acquisition of highway easements may involve bargaining over price, but the government does not negotiate the easement's standardized rights and terms. While some would contend that these are different situations, the question, when a conservation easement is being purchased with public money, is whether they should be treated in the same way.

Relatively few court cases have tested or interpreted conservation easements. Sometimes easement violations are settled without reported court decisions in a manner disadvantageous to the easement holder. The scarcity of such decisions to date is due more to the novelty of conservation easements than to the strength and clarity of their design. More legal disagreements inevitably will occur in the future as new successions of landowners acquire lands encumbered by easements.

A recent survey of land trusts found two of the greatest concerns about the future of conservation easements to be their variable quality and potential failure to survive (Land Trust Alliance 2005a). Similarly, a study of working forest easements, many of them financed by the federal Forest Legacy

Program, found little uniformity even within a particular holder's easement portfolio (Block et al. 2004). This study concluded that an individualized approach to easement terms leads to difficulties in monitoring and compliance. A Congressional study of the Forest Legacy Program noted the same problem (U.S. House of Representatives 2002).

POTENTIAL REFORMS

Interpretation, monitoring, and enforcement of conservation easements would be simplified and made more consistent and efficient by using standardized language for the different types of protections that they afford. Tightening the relationship between conservation easement purposes and restrictions would help minimize opportunities for future disagreements about the easement's intent. Purpose clauses in conservation easements are not window dressing; they will be relied upon by future generations to deal with unforeseen land uses

As a state official in a proconservation administration, I found it hard to work with dozens of small, local land trusts to help them achieve their goals, because of the lack of any common standards and practices.

Mary Nichols



and events; and they will be important in determining the outcome of efforts to defend, enforce, or terminate easements.

The words in a conservation easement document should have precise meaning to both current and future landowners and holders. There is no reason for a conservation easement's basic terminology to be variable, even though the substantive terms of a farmland easement necessarily differ from one designed to protect wildlife habitat. If conservation easements are to withstand the tests of time, they should be as simple and standardized as possible. Calling something a conservation easement should have meaning; every term should not be subject to negotiation.

In this sense, conservation easements may be analogous to mortgages, which must be prepared on standard forms in order to be acceptable and transferable to those who were not parties to the original transaction. Succeeding generations of easement holders and owners of encumbered property also should be able to understand and apply the

language of the easements they inherit and must enforce when the original parties are replaced.

There is growing recognition among experienced practitioners that the basic provisions of conservation easements should be more uniform. However, efforts to develop uniform terms will not succeed, and indeed so far have yielded little, if the conservation easement community fails to adhere to them.

The IRS, acting at the national level, and each state could encourage compliance by adopting a model conservation easement form whose essential terms should not be varied without good cause. A less universal approach would be for funding sources to require greater standardization of the easements they finance and to insist on the highest quality terms.

For example, the Land for Maine's Future Program, which distributes bond monies for land conservation projects, has adopted guidelines for conservation easements that it finances (Land for Maine's Future Board 2002). Departures from these guidelines

It's a no-brainer. I don't know if we can simplify them, but at least the boilerplate language and essential terms in conservation easements should be standardized.

Jym St. Pierre



are supposed to be noted and explained precisely so they can be scrutinized by public officials and lawyers. Nonetheless, even under this system internal and external pressures have made it difficult to achieve consistency in easement terminology.

The Vermont Housing and Conservation Board, which has financed more than \$100 million in conservation projects, also has developed an easement form that cannot be altered without good reason if public financing is solicited. The Vermont Land Trust (VLT), which is involved in most conservation easements in that state, also generally insists on using its standard easement forms for projects to which it is a party.

Massachusetts has one of the earliest enabling laws in the nation, and requires both state and local government review and approval of conservation easements. The state's Executive Office of Environmental Affairs has easement guidelines, criteria, and forms that must be used in the absence of demonstrated reason otherwise (Massachusetts EOE 1991). To be legally durable, conservation easements held by land trusts or local governments in Massachusetts must be reviewed and approved by the state's Secretary of Environmental Affairs and found to have discernible public benefit.

Similarly, all agricultural easements must be approved by the state's Commissioner of Food and Agriculture, while all historic preservation restrictions must be approved by its Historic Preservation Commission. Easements held by land trusts also must obtain approval of the local government where the land is situated. For an easement to be terminated in whole or in part, all of these same approvals are required.

This system of public conservation easement review and approval assists the land trust community by providing comments and recommendations from an agency with considerable statewide experience. Land



trusts in the state also benefit from agency support in negotiating with landowners who may want to depart from the standard terms.

While the state approval system in Massachusetts wins nearly universal praise from the land trust community there, some report mixed views about the requirement of local government approval, fearing that parochial politics can influence the review and approval process. Other Massachusetts land trust officials look favorably on the local review process because it ensures community involvement and consistency with local land use plans.

Other states may see government review of conservation easements as politically unacceptable. However, lest one believe that such a system deters conservation easements, Massachusetts has reviewed and approved an estimated 3,000 easements under its system, and many have benefited from public review. While its system has room for improvement, the Massachusetts model is a starting point for other states to consider.

Assuming we continue to offer tax incentives to conservation easement donors, the IRS can play an important role by requiring standardized language in every tax-deductible easement, because without that there's no guarantee the public's considerable investment will be protected.

Nancy McLaughlin



Selected Issues and Potential Reforms

Tracking Conservation Easements

THE ISSUES

Over time information about the existence of a specific conservation easement or set of easements may be lost or forgotten, even by the parties to the easement. Although easements are recorded in the local registry of

deeds with all other interests in real estate, most states do not have a separate conservation easement registry or accessible system to determine their locations, holders, or restrictions. Government and land trust holders often have difficulty keeping track of their own easement portfolios. A report by the Bay Area Open Space Council (1999), for example, showed that nearly one-third of the land trusts surveyed did not have a

systematic list of their own easements. As easement acquisition continues to accelerate, this problem will grow.

The public benefits of conservation easements depend on ready public access to appropriate documentation over the long term. Records at the local deed registry are sufficient to put future owners of easement-encumbered property on notice, but are ineffective for keeping public track of easements. Many states require periodic rerecording of each easement in the registry for it to remain effective. If the holder neglects to do this, the legal status of the easement may be jeopardized.

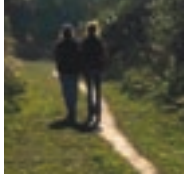
POTENTIAL REFORMS

Every state should have an easily accessible, legally mandated conservation easement registry that does not require periodic re-recording. This would enable long-term tracking and scrutiny, which is especially important if the easement holder ceases to exist or fails to perform its responsibilities. Such a public registry might include other types of conservation land holdings of governments and land trusts, to enable better planning for future acquisitions and to integrate computerized mapping of all conservation lands.

Currently, a few states have some form of conservation easement registration, but most are inadequate. For instance, New York's program is not enforced and most land trusts do not abide by it, while California's registration statute, enacted in 2002, applies only prospectively. The Massachusetts model, while imperfect, may come closest to the ideal. Since all conservation easements must be approved by a state agency, a paper registry has existed since that state's easement enabling law was enacted in the 1960s, and the state now employs a geographic information system (GIS) and other computer technologies to map easements and other conservation lands.

Conservation easement experts agree about the desirability of this measure, but some question how it will be funded. A state registry could be underwritten by a modest filing fee. The most elementary system might require conservation easements, together with standardized maps, to be recorded and indexed separately in the registry of deeds, potentially at no additional cost.





Selected Issues and Potential Reforms

Public Benefit, Accountability, and Transparency



The land trust community should shed the viewpoint that its acquisitions have no relationship to the government or public at large. We need to cooperate with government when we take easements, consult master plans, and make better judgments about whether they're publicly valuable.

John Bernstein

THE ISSUES

Since conservation easements involve a public investment and charitable trust, the public should have a role in their formation.

As Daniel Halperin foretold a quarter of a century ago, the absence of opportunity for public involvement may raise questions whether an easement's public benefit is commensurate with its subsidy.

This concern has been the focus of media reports as well as Congressional and IRS investigations. However, even if the IRS adopts more rigorous conservation easement appraisal standards, as has been suggested, it will not necessarily be in a good position to decide whether each easement confers a

public benefit. Stricter standards for that determination may be required as well.

Because land trusts are private corporations, the terms of their conservation easements are the product of private negotiations with landowners; the public usually has no voice in easement terms, locations, or purported public benefits. Even when the government finances conservation easements, negotiation of their terms is often secret, with little opportunity for public comment before the die is cast. Often there is pressure to finalize the easement, sometimes without sufficient internal review and reflection, so "the deal" can be publicized.

Exacerbating this lack of transparency, many publicly financed easements are

I think bluntness is needed concerning the public benefits that conservation easements generate. They vary enormously, both in terms of magnitude and distribution.

Julia Mahoney

Public transparency is important. When conservation easement deals are made, the public often has no opportunity to see what's going into them. Even when there has been a direct infusion of public money, there often is no meaningful opportunity for public input. The quality of many easements would improve if there were.

Jym St. Pierre

There is a lack of transparency and a particular concern about the identity and actions of easement holders who purport to act in the public interest. What kind of accountability do they have to the public?

Gerald Korngold



brokered by organizations that privately negotiate terms with the landowner and then sell the easement to the government as a *fait accompli*. In these cases, public money is spent and public resources are committed to forever enforce the easement without meaningful opportunity for public involvement. While this closeted approach may make the deals more efficient, one may question whether the public is well served by it.

Public access is often considered an important public benefit associated with conservation easements, but federal tax laws do not require access, nor do many federal programs that finance conservation ease-

ment acquisition, such as the Forest Legacy Program. Conservation easements without public access still may serve the public interest where they protect wildlife habitat, viewsheds, or farmlands. Some argue that limiting development, even on land with no conservation value, provides beneficial open space for future generations, while others assert that any protected land should possess discernible conservation benefits. Publicly subsidized conservation easements without access for visitors to enjoy the natural values of the property may have little public benefit unless there is some other demonstrable conservation purpose.

A Controversial Conservation Easement

One of the most expensive and controversial conservation easements to date, covering thousands of acres of rangeland in the West, was purchased with public money. However, it provides no public access to most of the acreage covered; it is held by a private land trust; it prevents public review of conservation plans and monitoring reports for the property; it provides the government no direct enforcement rights; and it reserves to the landowner rights to engage in limited residential and commercial development. If regulatory authorities do not permit such development, the landowner is able to pursue other development options.



Even where conservation easements do provide public access, this right is meaningful only if the public is informed about the easement’s existence and location. While imposing reasonable restrictions on public access is appropriate, easement holders often cite concerns about insufficient resources to accommodate the public as a reason to justify their failure to inform the public of its access rights. This failure may significantly diminish the benefits of a publicly subsidized easement.

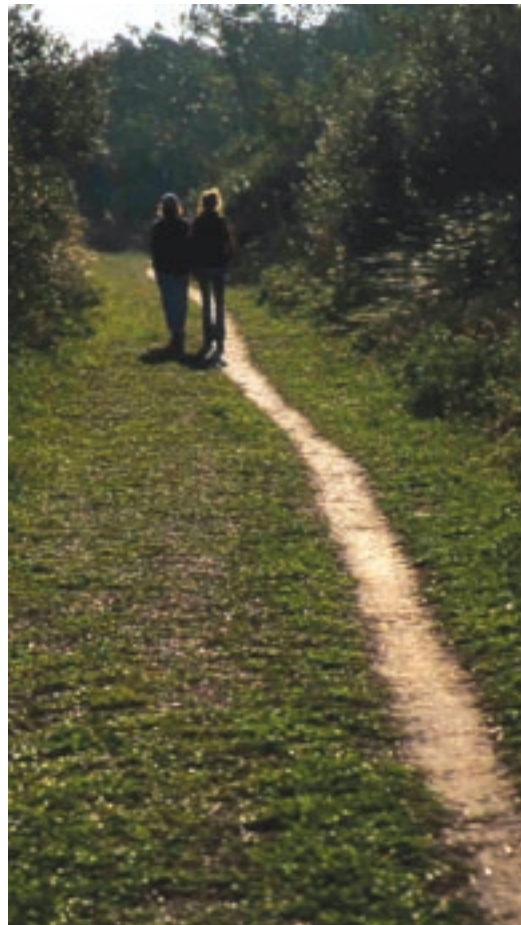
Most conservation easements are driven by ad hoc forces and opportunities. Their acquisition is not integrated into public planning processes, and may result in scattered “green sprawl.” Easement donors using tax incentives and even some government-financed easement programs do not utilize strategic planning to target lands most worthy of conservation. While federal tax laws require donation of “open space” easements to pursue a government conservation policy, even this broad requirement does not apply to many easements. A small number of states require that local officials review any proposed easement, but only Massachusetts requires approval of an easement’s public benefits at both state and local government levels.

All conservation easements reserve to the landowner certain uses of the property, but these retained uses should be consistent with the easement’s conservation purposes. In most states there is no system to ensure that this happens. For example, some working landscape easements have been proposed, and a few executed, that suggest a primary purpose to continue natural resource extractive uses. Critics describe these easements, which typically are purchased, as creating financial opportunities for landowners who, with assistance from brokers, use them to obtain a quick investment return without restricting the property’s traditional eco-

nomic uses. This criticism is rarely leveled at farmland easements in communities where farms are a part of the landscape and culture. The controversy is more common with working forest easements, particularly where the easement imposes few restrictions on forestry practices or fails to provide public access for recreation.

POTENTIAL REFORMS

Given the public interest in and subsidy of conservation easements, there should be a process for public input into their design, location, and benefits. While a recent Congressional report proposes significant restrictions on the tax deductibility of donated easements, this proposal does not address the problems of ascertaining and ensuring



If you’re going to rely on a review process to show that there is a significant public benefit, place that requirement in the tax law.

Daniel Halperin

Another party I’d like to bring to the table when conservation easements are created is the local government. It’s not clear whether the town will receive a net benefit.

William Fischel

Working Forest Easements

CASE 1

A family partnership sold to a forestry foundation a large conservation easement covering hundreds of thousands of acres. The easement prohibits nonforestry development, but does not restrict continuation of the traditional use of these lands as working forest. The fully appraised price of \$37 per acre was commensurate with the limited development value of the remote lands involved. The easement allows division of the property into hundreds of separately owned parcels, which could dramatically increase the holder's stewardship responsibilities.

Although announced as a purely private transaction, the purchase involved not only tax-subsidized, charitable donations, but, as fundraising efforts were waning, millions of dollars in government grants. The government has no explicit right to enforce the easement, which provides no public access to the property. For these reasons, while this easement enjoyed significant political and financial support, it was controversial among those who saw it as offering insufficient public benefit and diverting too much publicly subsidized funding from other conservation projects.

CASE 2

Another large working forest easement was to be sold to a state by a landowner investor group. As with many such easements, the purchase was to be financed by the federal Forest Legacy Program together with state and private dollars. Because of the multiplicity of parties and conflicting agendas in the lengthy negotiation process, the terms of the easement became complex and compromised. The landowner refused to allow the state the right to approve or make public its forest management plans. The easement also reserved to the landowner the right to terminate public access should the legislature amend laws that provide landowners immunity from liability to members of the public.

The state attorney general's office warned that under these terms public access (a key right in this transaction from the state's perspective) would be jeopardized since, with the passage of time, all laws are subject to amendment, and the easement's terms should not deter the legislature from doing so. Because the parties could not reach agreement on these and other terms, this easement was ultimately sold to a private land trust, financed not by the government directly but by tax-subsidized donations.



the public benefit of each easement (U.S. Congress Joint Committee 2005).

Numerous land trust representatives interviewed for this report agree that a public review process is appropriate. The Massachusetts model of requiring public review and approval at both state and local levels best suits this need on an individualized basis, while also insulating easements from later questioning by the IRS about their public benefits.

In states where the Massachusetts system is not viable, more informal models can achieve public transparency and allow an airing of issues concerning public benefits of proposed easements and their locations. The simplest way to enable public participation would be to require that proposed conservation easements be transmitted to a public agency and posted online for public comment. The parties to the easement and other interested observers would be informed of the comments received. This process would not constitute public approval of the easement, but it would expose concerns about the easement's terms and give the

parties an opportunity to consider them.

Further, every easement holder should adopt a strategic plan, incorporating public input and conforming to publicly adopted land use plans, for the types and locations of properties appropriate for conservation easements. An effective land trust accreditation process could help alleviate public concerns that conservation easements lack public benefit.

Some believe that any publicly transparent process will discourage the establishment of new conservation easements, but there is no evidence to support this assertion. Of course, any public review system involves transaction costs, at least in terms of a modest amount of time invested in public review and approval. However, the successful experience in Massachusetts, which receives high marks from the land trust community there, is evidence that a process that is both publicly transparent and regulated can have benefits that far outweigh its costs. One may question the public benefit of conservation easements that cannot withstand this kind of public scrutiny.

In meeting the Massachusetts guidelines, if the proponent says the easement's purpose is to preserve a scenic amenity he must demonstrate that the property is scenic, and we use a scenic landscape inventory that's authoritative on the subject.

Joel Lerner

Land trusts would be much better off if they got rid of the acreage mentality and became more choosy about which lands deserve protection.

Julia Mahoney

Farmland Easements

Conservation easements on farmland, usually purchased with government funds, present unique challenges. The easement's purpose is to prevent conversion to nonagricultural activities, but it cannot generally require that agriculture be practiced forever. Difficulties may be encountered in identifying appropriate future agricultural uses without allowing agricultural enterprises (such as industrial-scale feed lots and processing plants) that would defeat the rural and open space values to be preserved.

Farmland easements often allow one or more residential buildings for farm employees, but the terms must be carefully structured. These easements also may contain complicated rights of first refusal or other provisions to enable the easement funder to recapture its investment should the property later be sold for more than its value in producing agricultural goods (e.g., as an estate).





Selected Issues and Potential Reforms Holder Stewardship and Institutional Capacity

Bond issue money to the government feels like free money. It's easy to buy easements. What's well nigh impossible is to come up with the money for management.

Mary Nichols

THE ISSUES

The real work with conservation easements begins after the signature ink is dry. Even the best written easements are only as good as the holder's resolve and capacity over the long term to monitor, enforce, and defend them. Many land trusts are newly created, underfunded, and in a weak position to commit to this kind of permanent stewardship.

The Land Trust Alliance (2005a) conducted a survey of land trust representatives that showed more than 80 percent of respondents considered it likely that some of their holdings will not continue to be protected in

100 years, while only 8 percent considered this unlikely. Respondents indicated that the top threats to conservation durability are that their land trust would be unable to steward or uphold their easements or would simply cease to exist. Even more recently, a Senate Finance Committee investigation found serious issues with conservation easement monitoring and enforcement (U.S. Senate Finance Committee 2005a; 2005b).

A holder's ability to enforce a conservation easement can be compromised if its terms do not incorporate baseline documentation, periodic monitoring reports, a program to maintain landowner relationships, and the resources and resolve to deal with potential easement violations and legal responses. Maintaining good landowner relations is one of the most effective means of achieving conservation easement compliance, but this task can be daunting, especially when rapid landowner turnover occurs in a large portfolio of easements.

Conservation easement monitoring may be especially costly where the property is large, remote, or subject to future subdivision, thus multiplying the number of landowners and the difficulty of monitoring efforts. The mathematical result over a century is dramatic if a property is split in two every ten years. An extreme example is the nation's largest conservation easement (760,000 acres), which allows divisions into 1,000-acre lots. If realized, this would create a monumental stewardship and landowner relationship problem for the easement holder.

Some holders set aside money for easement stewardship, and prepare and implement monitoring protocols. But, as acknowledged by the 2005 Senate Finance Committee report, there are no requirements to do so,



and many holders make no such attempt. “Failure to enforce these restrictions increases the risk that easement-restricted property will not be conserved in perpetuity or that the actual conservation benefits will be less than what was claimed when the amount of the resulting charitable contribution was calculated” (U.S. Senate Finance Committee 2005a, 9).

To their holders, conservation easements should be considered liabilities rather than assets. They have no marketable value, but do impose long-term stewardship costs. This essential monitoring work has none of the fundraising or political glamour associated with easement acquisition. Government agencies are particularly hard-pressed to find the needed funds for stewardship when other public services are being cut. Officials of one state, for example, report significant pressure to purchase easements even when monitoring budgets have been cut to zero.

The Land Trust Alliance is working to change this culture. Conservation easement monitoring and stewardship are discussed regularly at the annual Land Trust Rally. However, LTA’s message—do not accept a conservation easement if you are not prepared, financially and otherwise, to permanently monitor, defend, and enforce it—is difficult for many holders to accept and implement.

Legal enforcement and defense of conservation easements, when necessary, is even more costly than monitoring. One expert has predicted a “tidal wave” of lawsuits in the future. The Nature Conservancy’s Conservation Easement Working Group (2004) wrote: “Enforcement should never be the costly consequence of ineffective monitoring.” Legally enforcing or defending just one conservation easement can cost well into six figures, and even a modest portfolio of easements is likely to incur enforcement



expenses. If future landowners lack the conservation mindedness of the original easement donor, or if the easement’s neighborhood becomes more valuable for development, well-financed landowners may challenge or violate the easement, especially if the holder lacks the resources for a legal defense.

Even the Nature Conservancy reports that many of its regional chapters lack sufficient funds for enforcement and other stewardship needs (The Nature Conservancy 2004). The 2005 Senate Finance Committee report also expresses concern about that organization’s past failures to adequately monitor and enforce some of its easements.

While the IRS requires holders of donated easements to commit to enforce them, the holder is not required to have funds set aside to do so and the IRS lacks the capacity to determine whether easements are being monitored and enforced. In short, there are no meaningful requirements that holders meet financial, monitoring, enforcement, or other standards before accepting the responsibilities of a conservation easement.

The difficulty is that there’s no market discipline here.

Gerald Korngold



An accreditation program for easement holders has to be mandatory, not voluntary. That will, and I think should, slow the pace of conservation easements in this country by weeding out the weak and abusive transactions.

Nancy McLaughlin

POTENTIAL REFORMS

As suggested recently by the Senate Finance Committee (2005a; 2005b), these issues could be resolved by legal requirements that impose minimum standards for conservation easement holders, including monitoring, enforcing, and defending easements, as well as routine recordkeeping, backup enforcement, overall track record, and financial resources. The report recommends that holders be required to meet these standards by threatening the tax-exempt status of a noncompliant land trust, and even penalizing those officers and directors who fail to live up to the standards.

Holders that cannot meet high-quality standards should still be able to hold conservation easements, provided that there is a backup holder that meets them and commits to easement monitoring and enforcement if the primary holder fails to do so. Since easement monitoring has been shown to be a significant problem for government holders, similar stewardship standards should be expected of them (Bay Area Open Space Council 1999).

The LTA's *Land Trust Standards and Practices* (2004b) calls on land trusts to fund stewardship responsibilities adequately, to maintain baseline and monitoring records,

to cultivate good landowner relationships, and to undertake enforcement when violations occur. In its Background Report, LTA (2004a) acknowledges that not all land trusts have the capacity to take on these responsibilities; some should instead partner with another qualified holder. Vermont and Maryland, for instance, have statewide organizations that cohold or provide backup enforcement of many easements.

While LTA opposes mandatory holder accreditation, it is devising a voluntary system to respond to these issues. However, as long as this system is voluntary, there will be land trusts that do not live up to it. On the other hand, if LTA's system is sufficiently rigorous, compliance could be imposed by either the IRS or state laws as a prerequisite for holders.

The Vermont model of statewide monitoring and stewardship responsibilities is exemplary. The state agency that finances easement acquisitions imposes strict stewardship standards and provides funding to help meet those requirements. The Vermont Land Trust (VLT), which holds most of the state's easements, annually monitors each of them—an achievement to which all holders should aspire. VLT also works with smaller land trusts to provide enforcement backup. According to VLT President Darby Bradley, “No land trust should be willing to accept the perpetual responsibility of monitoring and enforcing an easement unless it can clearly establish what the public benefit is.”

A meaningful accreditation and oversight system could respond to holder failure to implement adequate monitoring and enforcement. Massachusetts land trusts are working to create a network for conservation easement enforcement and defense, motivated by their increasing awareness that inadequate legal defense of one conservation easement will create a precedent that will haunt the entire easement community.

However, the viability and effectiveness of enforcement networks depends on uniform quality of easement design and standardized stewardship practices among all holders.

Those involved in funding or donating conservation easements have an important, though often neglected, role in ensuring that holders have the capacity to monitor and enforce their easements, or to require a backup holder. Layering of backup easement enforcers and networks may be one way to solve this problem. An additional solution would be a clear legal mandate for state attorneys

general to enforce conservation easements as charitable trusts when all else fails.

In sum, before a conservation easement is created, all involved parties should ensure that the holder is financially and otherwise prepared to undertake its stewardship responsibilities. The most efficient approach would be for the IRS to require that tax-deductible easements be held by organizations that meet rigorous, uniform standards. State laws also should require that holders are ready, willing, and able to meet their monitoring and enforcement responsibilities.

I think the time for mandatory accreditation of easement holders has come. Not every land trust should hold easements, but those that do should be held to account. Community-based organizations can play many important roles that do not involve holding easements.

Jean Hocker

LTA is organizing an accreditation program for land trusts. We'd rather not have it be mandatory for tax deductions because it's emotionally fraught as it is. We need to recognize that it will take time for 1,500 land trusts to qualify for accreditation.

John Bernstein

A Conservation Easement Success Story

An historic property in New England, featuring 160 acres of woods, together with a 200-year-old homestead on adjoining land, had been owned by one family since the original King's grant. For years the family permitted the public to hike the property's miles of trails, and in 1990 donated a conservation easement covering the woods to a then newly formed land trust. The easement protects the property from any future development or timber harvesting and secures public access to the trails, in perpetuity. The family and the land trust agreed that there should be a backup easement holder to ensure that it would be enforceable if the new land trust ceased to exist, and The Nature Conservancy agreed to act in that capacity.

With support from the family, the town's conservation commission and a devoted group of volunteers maintain the trails on the property. The easement is monitored annually by the land trust and daily by the many visitors who hike its trails. The land trust now holds more than 40 properties and conservation easements. The easement donor, now deceased, established a family foundation to own and care for the woods and homestead. Today this protected property, while remaining in private ownership, is among the community's greatest treasures, enjoyed by thousands of visitors every year.





Selected Issues and Potential Reforms Termination, Amendment, and Backup Support

The permanence of conservation easements is a false goal, because it's simply not possible—in a physical sense, in a legal sense, in a sociological sense—that today's easements are going to endure. The land trust is not going to last, social policies are going to change, or legal and political mechanisms are going to evolve to change easements.

John Echeverria

THE ISSUES

Despite their long-term and usually perpetual character, conservation easements are amenable to change in accordance with prevailing public needs, for example if an easement designed to protect habitat for a species can no longer achieve that purpose. Easement donors and holders believe that procedures for amendment or termination should be rigorous, but under the laws of most states these procedures are not well established and are often uncertain.

The Uniform Conservation Easement Act (UCEA) is ambiguous on these issues, appearing to leave them to laws applicable to other types of easements. Yet the UCEA does not purport to affect other legal principles, and thus leaves open the possibility for application of charitable trust rules under state law. Since conservation easements involve substantial public interest and investment, easement termination, or any amendment that diminishes public benefit, should address more than the immediate interests of the private parties to the easement. All stakeholders should be involved, including the land trust, the landowner, the easement donor, the public (e.g., through the participation of the state attorney general), and perhaps others as well.

Conservation easement termination in some states requires a court order determining whether a change of conditions justifies termination in the public interest. In Massachusetts conservation easement termination, in whole or in part, requires state and local government approval and a local hearing. Yet, under the laws of most states the standards and procedures for easement termination and amendment are unclear and



Monument Mountain, Great Barrington, Massachusetts, a property of The Trustees of Reservations, was established in 1899.

potentially inconsistent with the public interest and the charitable character of a conservation easement.

What happens when the holder of a conservation easement ceases to exist? Since most land trusts have been created recently by small groups of local citizens, some of these land trusts may be unsustainable over the long term. The recent Land Trust Alliance survey reveals that many land trust supporters see their organization's durability as one

of their greatest concerns (Land Trust Alliance 2005a).

If a land trust concludes its affairs responsibly, it will assign its conservation easements to another qualified holder. However, unlike outright land ownership, which is an asset to the owner, conservation easements are liabilities that impose long-term costs without having marketable, economic value. This reality may make it difficult for a holder to find another qualified entity willing to take over its easements in a timely manner. What happens then? While legal theories abound, the truth is that in most states no one knows.

Conservation easements also may be abandoned through the inattention of the holder, whether because of limited resources, a change in priorities and attitudes, or a lack of institutional memory. Depending on state law, it is possible for a conservation easement to be forfeited legally if the holder fails to enforce it; acquires the fee ownership in the property; fails to prevent the property's foreclosure due to the owner's nonpayment of taxes; or, in states having marketable title acts that require periodic rerecording of an encumbrance, fails to do so.

Who steps into the breach to enforce and defend conservation easements in these situations? This question presents three problems: first, stepping in means the expenditure of money; second, in the absence of a public registry no one may know that the easement exists or that it has been abandoned; and third, in many states it is legally unclear who may enforce a conservation easement beyond the parties to it. Under traditional principles of common law, persons who are not parties to private easements, including even neighbors of the property, lack standing to seek enforcement.

Under many state laws, attorneys general are empowered to enforce charitable trusts, which should include conservation easements, but there are problems here as well. First,

many state conservation easement laws fail to address this issue or do so ambiguously, and in a few states the laws may be read to abdicate the attorney general's enforcement authority. Second, for the attorney general to become involved there must be a system for publicly tracking conservation easements. Third, even if a conservation easement is abandoned, the attorney general may decide that enforcing an easement is not a priority if the public had no involvement in its creation. Despite these obstacles, the public stake in conservation easements requires legal security against the holder's failure.

POTENTIAL REFORMS

The IRS should mandate and every state should enact procedures for termination and amendment of conservation easements, as well as for identification of parties that can enforce conservation easements if the holder ceases

Should the current generation determine land use in perpetuity?

Joan Youngman



I would like to see attorneys general have the right to enforce. But that should be the last resort because you don't want easement holders to say 'We don't have to worry about enforcement; somebody else does that.'

Jean Hocker

But how much capacity do state attorneys general have to play the role we're imagining here?

I like the idea that, if the easement is creating a local or regional public good, the beneficiaries of that good ought to have the right to protect and enforce the easement. You can't rely on the attorney general to do everything.

Richard England

to exist or otherwise fails in its responsibilities. Marketable title acts that require periodic easement rerecording, as well as legal doctrines that might extinguish an easement if its holder later acquires the fee interest, should be made expressly inapplicable to conservation easements. Since there is a public subsidy and a charitable trust attached to conservation easements, the state attorney general or another public authority should be involved in all easement terminations, as well as any amendments that reduce easement protection.

Conservation easements are intended to benefit all of the public, so consideration also should be given to allowing any benefited citizen to enforce them. Regardless of the process, every state should develop clear legal procedures to protect the public interest in conservation easements.

Another mechanism to the same end would require a public agency or statewide organization to serve as coholder or backup enforcer of all conservation easements in the state. This approach could have the



Conservation Easement Terminations

CASE 1

Town officials authorized releasing rights in a conservation easement conveyed by predecessors of the current owner, in order to allow the property's development by the new owner. Alerted to the situation, the state attorney general interceded, asserting that the easement constituted a public charitable trust. Although the state's law was unclear on the issue, the attorney general argued that the easement's termination required approval from that office or in a court proceeding in which the attorney general might be an adversary. In view of this, the town reversed its decision and the easement was protected.

CASE 2

In the same state, without knowledge of the state attorney general, a city released a portion of a wetlands conservation easement in order to allow a development that would increase the city's tax base. Its lawyer advised the city that it had the right to release the easement without permission from others. As in many states, the applicable conservation easement statute does not provide a clear process for termination or amendment.



added benefit of involving that organization in reviewing easements to ensure they provide public benefit. The Maryland Environmental Trust, represented by the state's attorney general, holds or coholds many conservation easements in that state. Likewise, the Vermont Land Trust holds or coholds most conservation easements there, while Vermont's Housing and Conservation Board requires that it cohold easements that it finances. Under Virginia law, when a conservation easement holder ceases to exist, the easement defaults to a state agency. Because there is no preapproval of these easements, the agency may obtain by default an easement that has insufficient public value or legally compromised terms.

If the public expects the state to take over when a land trust defaults in its enforcement responsibilities, this process should be explicit in the law. This situation also illustrates the need for public supervision and registration of conservation easements from the outset. Easement donors, land trusts, funders, and the public share an interest in ensuring that easements are not lost through holder inattention or abandonment. Accordingly, they should require backup holders, espe-

cially when the primary holder lacks financial strength and a long-term track record.

Laws also should set clear standards for conservation easement termination and amendment. If conservation easements are to withstand the tests of time, there must be a definite process for revising their terms to meet unforeseeable contingencies or new circumstances.

An amendment that does not undermine the easement's conservation purposes may be agreed to by the easement's parties, but changes that compromise these purposes should require at least the approval of the state attorney general, as representative of the public interest, and may require a court proceeding. Easement termination also should be guided by clear procedures, and should be implemented in a court proceeding to which the attorney general is a party. IRS rules should require that it receive notice of easement termination if a tax deduction has been taken for its donation, with the notice specifying how the proceeds will be applied.

A conservation easement should be able to be significantly modified or terminated

We're pursuing a backup network for conservation easement enforcement in Massachusetts. Land trusts are pooling resources to enforce easements in cases that could be precedential to the easement community. But, if we're going to pool, we have to have everybody agree to common standards and monitoring.

Greg Bialecki



only if it no longer benefits the public, regardless of the economic benefit to the landowner of extinguishing the easement. If the easement's value (the worth of the development rights that it restricts) rises between the time of its donation and its termination, the increase should belong to the easement holder, which owns these rights on

behalf of the public (N. McLaughlin 2005). Allowing the landowner the benefit of the easement's increased value may create incentives to extinguish easements. State statutes and IRS regulations should be clarified to prescribe the principles and procedures for easement termination and amendment.





Selected Issues and Potential Reforms

Appraisal and Taxation



As a tax lawyer and administrator, I thought many people would take huge tax deductions for donating conservation easements having little or no value. You can say that valuation of tax deductions in those cases should be zero or close to it, and correct appraisals would have that result. But I'm skeptical about that, as I said in my 1980 testimony to Congress.

Daniel Halperin

Conservation easements can involve tax scams. This problem is not readily remedied.

Robert Ellickson

THE ISSUES

As predicted by Daniel Halperin 25 years ago and affirmed by the 2005 Senate Finance Committee report, valuation is one of the thorniest aspects of conservation easements. Appraisal is required whether the easement is purchased (when setting the price) or donated (when determining the donor's deduction and other tax subsidies).

Legal standards for conservation easement appraisal practices were enacted at a time when no one could foresee the current number and complexity of easements or their appraisals. These standards have never been made precise, leading to widespread variability. While tax laws require that an easement have a publicly beneficial conservation purpose, the criteria for meeting this

test are subjective. Under federal tax law, permissible purposes for tax-deductible easements are: (1) outdoor recreation or education of the public; (2) protection of a relatively natural habitat of fish or wildlife; (3) open space for public scenic enjoyment or pursuant to a government conservation policy; or (4) protection of an historically important structure. The second of these tests is the least restrictive, and therefore is often used for donated conservation easements.

Why should conservation easements be held to higher standards than other tax-deductible donations, which the law leaves largely unsupervised? The difference is that conservation easements are promises about future uses of land purporting to have significant conservation value and public

I see this country moving in a direction where we have diminishing ability to raise revenue for public purposes because we want to give tax breaks and subsidies to get people to do good things while we shy away from taxing bad things.

Richard England

benefit. While a typical charitable donation involves the transfer of money or tangible property in the present, a conservation easement is intangible and has value only if the easement's promises, though appraised in the present, are realized in the future.

Unlike appraisals involving purely private transactions, conservation easement appraisals generate public concerns about whether the appraisal that determines the public subsidy is fair. These concerns are heightened because appraisals of donated easements are contracted and paid for by the landowner, who understandably wants the highest possible valuation to maximize potential tax benefits. In such cases there is no party negotiating on the other side of the table, since the donee has little interest in, and may never examine, the landowner's appraisal. Thus, there is no willing buyer and seller setting the valuation.

While IRS regulations favor conservation easement appraisals based on valuations of comparable easements, this technique is usually unavailing for three reasons: (1) it is difficult to identify similar, easement-encumbered lands; (2) few easement appraisals are public information; and (3) donated easement valuations are not negotiated between willing buyers and sellers.

Consequently, conservation easement appraisals almost always utilize the "before and after" method, by which the property's value as encumbered by the easement is subtracted from its unencumbered value. This method is often subjective and lacks rigorous standards. The "before" value is based on the property's "highest and best use," meaning the most profitable use to which the property could be put without the easement's restrictions.

Appraisals based on theoretical subdivision and maximum development may produce the greatest deduction, but have little relationship to the property's value

in the real marketplace under current zoning regulations.

Likewise, the "after" component of easement valuation may be subjective when there are few comparable properties with similar restrictions. Conservation easement appraisal is particularly challenging in remote areas with little development potential and for working landscape easements where the property may continue to be used for traditional natural resource industries such as forestry or agriculture.

These uncertainties are compounded if zoning or other ordinances already restrict development. An appraiser might speculate about zoning being changed or permits issued to accommodate future development, or may ask regulatory agencies to estimate the chances of zoning changes to allow different development scenarios. While the law is unclear as to the legitimacy of this practice, one may question whether these speculations are reliable, particularly when millions of dollars may be at stake.

Consider also the difficulties of conservation easement valuation when the landowner withholds from the easement selected portions of the property most likely to be the focus of future development, particularly on remote land that has limited development potential. In certain markets such an easement might actually add value to the donor's property. Nearby property owned by the easement donor also may be enhanced in value, and IRS regulations require the appraiser to take this enhancement into account.

The complexity of conservation easement documents creates another appraisal problem. Difficult-to-decipher terminology and lack of uniformity can have large potential impacts on the property's future economic value. "Even the IRS, though it does require certain provisions, does not require any particular language. . . . Drafters of [conser-

vation easements] develop their own individual styles” (Byers and Ponte 2005, 286).

Because each of these uncertainties affects the others, small changes in assumptions can yield large differences in appraised values. Conservation easement appraisals are described by some in the business as part art and part science, with appraisal results varying with the appraiser’s expertise and chosen methodology. Since the IRS recently has threatened to penalize those involved in abusive appraisal practices, it is necessary to reexamine these subjective tests and consider reforms resulting in more rigorous appraisal methodologies and public benefit standards.

Certain state programs provide even greater tax incentives for conservation easement donations. For example, Virginia offers easement donors extremely attractive income tax credits equal to 50 percent of the easement’s value and allows the donor to sell these credits to another taxpayer for whom the credits would generate greater financial benefit (J. McLaughlin 2004). By June 2005, these tax credits totaled more than \$200 million during the program’s first five years, with developers and other business interests often being the beneficiaries. Under similar legislation in Colorado it is possible for tax credits to exceed the landowner’s tax liability, resulting in payment by the state treasury to the landowner. Remarkably, it is possible for landowners in selected states and situations to use all available tax subsidies to actually profit from donating conservation easements.

Not surprisingly, these states have experienced vast increases in the number of subsidized conservation easements, even though there is no systematic public review of these easements. One must ask whether these subsidization programs, especially under the currently unsupervised system, are an efficient use of limited public funds for land conservation.

POTENTIAL REFORMS

More rigorous standards are needed for conservation easement appraisal practices, to provide guidance to appraisers and landowners alike. Additional tax standards might include placing greater weight on public access in the absence of other significant conservation values; abolishing tax deductions for donations of “backyard” and historic building facade easements; and banning appraisals based on the prospect of zoning or other regulatory changes. In addition, the IRS should establish an

Appraisers’ speculation about whether zoning or other regulations are going to be changed in the future is a serious problem. The tax deduction should be based on the assumption that they will not change.

Daniel Halperin



The IRS should consider mandating use of a report that requires the appraiser to address important issues (such as enhancement of other properties) and specifies when certain controversial valuation methods (such as subdivision development analysis) may be used. Land trusts ought to be accountable, not for the accuracy of the appraisal, but for at least reviewing it to ensure its reasonableness.

Nancy McLaughlin

The key piece of information that is not publicly available is the amount of tax subsidy. It would be very useful for scholars, journalists, and the political process if appraisals were made public.

Robert Ellickson



expert advisory panel to review conservation easements, as it does for appraisals of donated artwork. For large donations, the IRS should also require an independent review appraisal.

Until there is greater standardization of easements, appraisers also must scrutinize each easement's terms, sometimes with the assistance of a lawyer, to evaluate legal nuances that may have significant impacts on easement restrictions, and therefore on valuation. For their part, land trusts should insist on reviewing appraisals of easement donations and refuse to accept easements whose appraised value is clearly unrealistic. While a land trust need not police appraisals, one that accepts a donated conservation easement knowing that the appraisal is unreasonable might fairly be viewed as participating in a tax fraud.

A recent Congressional report has recom-

mended significantly restricting deductibility of conservation easement donations by eliminating deductions entirely for residential properties and reducing the deductibility of qualified easements to one-third of the appraised value (U.S. Congress Joint Committee 2005). As of this writing in July 2005, it remains to be seen if this proposal or variations of it will be enacted, and if so, whether it will resolve these issues in a meaningful way.

Appraisals of donated easements, which determine the public subsidy in the easement, would benefit from being made public, subject to safeguards to protect proprietary information. Even if nothing else were changed in the laws affecting easement appraisals, subjecting them to public scrutiny would have a significant effect in curtailing abuses, since appraisers would know that their work would be subject to public and

peer review. Further, a public record of conservation easement appraisals would result in better appraisals in the future, since appraisers would know about past appraisals relevant to similar donations.

Making easement appraisals public, like making the easement process itself more transparent and accountable, is criticized by those who fear this will discourage landowners from donating easements. While this might be true for some donors, the question is, what other reforms would solve these widely acknowledged appraisal problems as efficiently and effectively? What do scrupulous landowners and appraisers have to fear if transactions are more transparent?

The additional tax incentive schemes in states such as Virginia and Colorado also should be questioned. Are these subsidies worth their substantial public costs, especially when the easements they encourage are not supervised by the public? These programs have the capacity to skew the marketplace, so that conservation easement donation becomes a financial benefit to the landowner yet a liability to the easement holder as well as to the government.

Backyard Easements

CASE 1

A financial benefactor of a land trust offered to donate a conservation easement on several acres that were part of his residential property. The landowner suggested that, if this easement were accepted by the land trust, he would consider a second easement covering nearby shorefront. Because of its financial relationship with the landowner and the lure of a more attractive, future easement on the shorefront, the land trust board tentatively approved the project. Although the state in which this land is located has no public process for conservation easement review or approval, the land trust's lawyer, when asked to prepare the easement, questioned its public benefit. In view of these concerns, the land trust decided not to proceed with the easement as contemplated.

CASE 2

In a wealthy suburban area, a landowner donated a conservation easement covering two acres of his backyard. While the property had considerable development value if sold separately from the existing residence, it had no other significant conservation values and was not visible to the public. This state also has no system of conservation easement review or determination of public benefit. The land trust accepted the easement, and the donor took a tax deduction.





Selected Issues and Potential Reforms

Impacts on Land Regulation, Acquisition, and Taxation Policies

Conservation easements are a scattershot approach. As the land trust movement becomes the dominant paradigm, its inability to deal with the holdout, to be able to bring everyone to the table, to be able to organize a democratic process that forces a majority decision on the recalcitrant landowner, becomes a fundamental weakness.

John Echeverria

Easements go beyond what regulation can do. I don't see the one driving out the other. They should be complementary tools.

Jean Hocker

THE ISSUES

The increasing focus on land protection through conservation easements may negatively affect the government's role in regulating private lands, acquiring public lands, and employing land taxation policies. Critics of conservation easements believe they are an expensive, haphazard, and untested approach to achieve land protection that could be more uniformly and inexpensively attained by regulation. Critics also believe conservation easements siphon off both public and charitable money that otherwise would go into acquiring outright ownership of selected lands with known conservation values.

On the other hand, many conservation easement supporters do not oppose land use regulation, public land acquisition, or current use land taxation policies. They believe that easements provide an additional, not a substitute, tool to support land conservation. Others favor easements because they believe public sentiment today favors them over regulation or public land acquisition. Most adherents believe that conservation easements, even if imperfect and untested, are better than an alternative of uncontrolled development and sprawl.

Whatever their merits, conservation easements that duplicate existing regulations raise serious questions about their public benefits, as well as their appraised value. When government chooses to finance conservation easement acquisitions, landowners may come to insist on being paid for conservation measures that government could have accomplished through regulation. The Endangered Species Act affords an illustration. If government buys conservation easements to protect habitat for endangered

species, then government will be, and already has been, challenged to explain why it can also impose its regulatory power to accomplish the same ends without payment.

The rightful role of conservation easements is likewise often confused with that of public land ownership. Conservation easements have increased at an astonishing pace at the same time that public land acquisition has slowed. While there are distinctions between the purposes of each land conservation tool, the trend toward easements apparently has had a negative effect on outright public acquisitions of park and preserve lands. Indeed, some government land conservation policies explicitly prefer conservation easements over public land acquisition.

Easement proponents contend that the cost of acquiring a conservation easement on any given parcel is always less than the cost of acquiring outright ownership, but that is only part of the necessary analysis. Another consideration is whether there may be more public benefit in acquiring a park in a more populated, accessible area than spending the same amount of money on easements covering larger, more remote lands where the public will make little use of the property and may not even know its location.

In making such comparisons, the cost analysis of a conservation easement should not be limited to its up-front price or tax subsidy. An easement's real cost must be calculated over the long term to pay for monitoring, enforcement, and defense, which when litigated can add extraordinary expenses. When the up-front cost of an easement approaches that of outright acquisition, the easement may become more expensive because it represents a perpetual liability with future costs to the holder.

Many states have enacted current use taxation programs to encourage retention of farm, forest, ranch, and open space lands by taxing these properties at a lower rate than if they were available for development. These programs sometimes include penalties if the land is later developed, and they should be included in the toolbox of land conservation options.

Some financial incentives favoring conservation easements can produce outcomes that might not be in the public interest. For example, the federal Forest Legacy Program, originally intended to acquire federal forest lands of national significance, has been transformed into grants to states to buy working forest easements, which may in some cases limit public access but not environmental damage.

POTENTIAL REFORMS

Conservation easements are an appropriate tool to conserve publicly important lands that cannot be protected by available regulatory and land taxation measures, and whose public values and uses do not justify outright public ownership. These tools all have legitimate roles and should be viewed by policy makers as complements rather than substitutes.

It is important to consider the most efficient use of each tool in different situations. When the objective is active public recreational use or wilderness preservation, public ownership is the logical choice. Conservation easements are preferable when permanent conservation and public benefits can be provided under private ownership. Similarly, if the goal is shorter-term conservation, it may be achieved through the political process of regulation and/or land taxation policies.



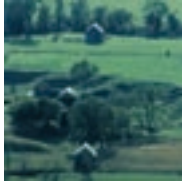
I see a strong synergy between conservation easements and regulation. Easements are inadequate as a sole method of land preservation, but when they're supplemented with a system of regulation, they work extremely well.

John Bernstein

If conservation easements are to supplement rather than replace regulation and land acquisition, we don't have a thoughtful system in place to make those selections.

Jym St. Pierre

Each of these tools takes a toll on the public treasury, some more than others. In selecting the right tool, policy makers need to consider how limited funds can best be spent. The opportunity costs of publicly funding conservation easements should be weighed carefully against other measures that may yield public benefits more efficiently. Conservation easements that protect areas already regulated or taxed for current uses should be subject to special scrutiny regarding their public benefits. The Massachusetts model is one example of a public review and approval process to prevent duplication of land protection already accomplished by other programs.



Selected Issues and Potential Reforms

Equity and Environmental Justice Issues

For many conservation easements, there are not just winners but losers. It's no secret that many of the values promoted in conservation easements are dear to the hearts of the affluent. That doesn't make them evil, but it puts into question whether everything land trusts do is in the public interest.

Julia Mahoney

THE ISSUES

Donated conservation easements are often located in affluent communities, where wealthy donors can take maximum advantage of tax incentives. Few such opportunities are available in urban or low-income communities. Further, many conservation easement holders do not inform the public about their holdings, even when public access is one of the benefits provided. Thus, unless an easement provides significant ecosystem protection, those living outside the immediate community may not know about it or benefit from it.

While many conservation easements and associated public subsidies benefit the afflu-

ent and their communities, some easements may have negative impacts on affordable housing, or may push development into environmentally or socially inappropriate areas.

Equity issues posed by conservation easements may extend to other forms of charitable giving. For example, donors to land trusts tend to be in upper tax brackets and are able to donate appreciated securities, both of which enable them to receive larger tax benefits than those with lower incomes. However, many conservation easements have the added dimension of permanently benefiting relatively wealthy communities, although they are subsidized by everyone.





Conservation easements can offer community residents many benefits: scenic or recreational amenities, increased property values, and reduced public service costs. But these local decisions have larger implications for the whole region.

Joan Youngman

POTENTIAL REFORMS

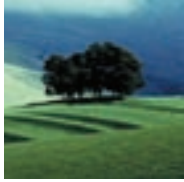
Attempts to scrutinize more closely the public benefits of conservation easements should place them within a larger context of land policy, including the goal of improving environmental amenities and access to open space in low-income neighborhoods. One way to encourage more conservation easements in diverse communities is to provide incentives for less affluent donors, such as allowing them to take tax credits rather than deductions for conservation easement donation. This would tend to equalize incentives among donors of different income levels and might cause easements to be considered in a broader range of communities.

However, directly addressing the equity issue may also require additional public supervision in evaluating easement benefits and assigning greater incentives for land conservation that will benefit low-income communities. The Vermont program, which

balances public funding for conservation easements with funding for affordable housing, comes closest to this ideal.

In many places increases in funding for conservation easements appear to have displaced dedication of money for acquisition of park lands that may benefit more people of diverse income levels. One way to “spread the wealth” would be to divert some amount of conservation easement subsidies to public park acquisitions in more populated, mixed-income areas.

The lack of data on the amount of public subsidies committed to conservation easements is a problem for policy makers who must determine whether that sum, large as it must be, could be better spent on a combination of easements and public land acquisitions. Supporters of conservation easements have shown little interest in scrutinizing their opportunity costs and effects on different population segments. The time has come to begin that process of scrutiny.



Conclusions

We need to do more than just shave around the edges in addressing conservation easement problems.

John Echeverria

I hope that the Land Trust Alliance, The Nature Conservancy, the Trust for Public Land, the Lincoln Institute and other leaders will take an activist role in developing needed reforms, some of which should not be voluntary but legally required, because good intentions are not good enough.

Jym St. Pierre



This is an uneasy time for the conservation easement community. Because of alleged abuses widely reported by the news media, both Congress and the IRS are investigating conservation easement and appraisal practices. Congressional proposals emerged in 2005 to substantially reduce tax incentives for conservation easement donations. The time is right to explore conservation easement reforms to avoid jeopardizing their benefits and positive land use effects.

Many conservation easement issues derive from the laws and regulations that govern them. These laws were created at a time when few could have anticipated the explosive and unsupervised growth of easements. To find solutions to these problems, we should reform these laws and regulations

with the participation of land trusts, governments, and landowners. As described in this report, reforms in both federal and state laws should respond to

- deficiencies in conservation easement design;
- lack of uniformity in easement terms;
- lack of publicly accessible recordkeeping;
- lack of public transparency and input in easement creation;
- lack of public accountability in determining public benefits;
- concerns about the institutional capacity of easement holders;
- ambiguities in appraisal and other tax standards that determine public subsidies;
- uncertainties about processes of easement termination, amendment, and backup enforcement;
- effects on public land acquisition, regulation, and other programs; and
- issues related to environmental justice and equity.

Many in the land trust community support, in some cases enthusiastically, a greater degree of legal supervision of conservation easements. The most wide-ranging and far-reaching approach to legal reform would be to create more rigorous IRS standards for donated conservation easements, the quality of their appraisals, and the efficacy of their holders, to ensure that their public subsidy results in true public benefits. A second and complementary approach would be for the National Conference of Commissioners of Uniform State Laws, which drafted the Uniform Conservation Easement Act in 1981, to consider the issues presented here that went unresolved in its earlier work (National Conference 1979; 1980; 1981). A third

approach would be for each state to consider appropriate amendments to its conservation easement enabling legislation. A fourth would be for conservation easement funders and donors to pay closer attention to the results of their charity. Finally, all conservation easement holders, in concert and individually, owe a duty to their donors and the public to secure the promises of their conservation easements in perpetuity.

When considering conservation easement reforms, unreasonable transaction costs should be avoided. The goal is to fashion efficient reforms that balance public subsidies for conservation easements, their opportunity costs, and their potential effects on government regulatory, land acquisition, and taxation programs.

How dire is the future of conservation easements? Each of the problems reported here will have its day, and some already have. When evaluating the effectiveness of conservation easements under the current legal structure, the jury will be out for decades, but we should be sufficiently concerned

about an adverse verdict to resolve these issues now.

If conservation easements are to serve future generations as promised to the public that subsidizes them, they must achieve three essential goals.

1. The process by which conservation easements are created, appraised, and enforced must be rigorous, publicly transparent, and accountable.
2. Conservation easements must be designed to create meaningful and durable public benefits.
3. Landowners and land trusts must fulfill their responsibilities to implement, monitor, enforce, and uphold easements in the future to secure their public benefits.

There are many approaches to resolving the issues presented by conservation easements, but doing nothing is not one of them. To design the most appropriate reforms, we must first acknowledge the problems. If we are to take action to ensure the future of conservation easements, the time to do so will never be better, nor easier, than now.

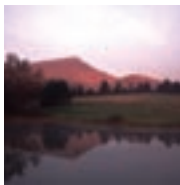
We're at a point when we'd better fix these problems or someone else will do it for us. However, we need to be careful lest some of our solutions turn out to be tomorrow's problems.

Jean Hocker

It took years for the laws governing conservation easements to be developed and enacted by the states. These problems need to be addressed much more quickly than that. We can't afford to sit and stew before confronting these issues with real change.

Nancy McLaughlin





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ONLINE RESOURCES

National Organizations

American Farmland Trust: www.farmland.org

Land Trust Alliance: www.lta.org

Land Trust Jump Station:
<http://www.possibility.com/LandTrust/Jump.html>

National Land Trust List Serve: landtrust-l@listserv.indiana.edu

Private Landowner Network:
www.privatelandownernetwork.org

The Conservation Fund: www.conservationfund.org

The Nature Conservancy: www.nature.org

The Trust for Public Land: www.tpl.org

Statewide Networks and Land Trusts

California – Bay Area Open Space Council:
www.openspacecouncil.org

Colorado Coalition of Land Trusts: www.cclt.org

Maine Land Trust Network: www.mltm.org

Maryland Environmental Trust, Land Conservation Center: www.conservemd.org

Massachusetts Land Trust Coalition:
www.massland.org

Montana Land Reliance: www.mtlandreliance.org

Conservation Trust for North Carolina:
www.ctnc.org

South Carolina Land Trust Network:
www.dnr.state.sc.us/lwc/scltn

Vermont Land Trust: www.vlt.org

Land Trust of Virginia: www.landtrustva.org

Virginia Outdoors Foundation:
www.virginiaoutdoorsfoundation.org

Individual land trusts with their own Web pages may be located on the Land Trust Alliance site at www.lta.org

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About the Author

Jeff Pidot was a Visiting Fellow at the Lincoln Institute of Land Policy from fall 2004 to summer 2005, researching, writing, and speaking about conservation easement issues and reforms. During this period he was on leave from his work as Chief of the Natural Resources Division of the Maine Attorney General's Office, a position he has held since 1990. He has been an active participant in the land trust movement in Maine and has a wealth of experience with conservation easements in both his professional and volunteer work.

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L LINCOLN INSTITUTE
OF LAND POLICY

113 Brattle Street
Cambridge, MA 02138-3400 USA

Phone: 617-661-3016 x127 or
800-LAND-USE (800-526-3873)

Fax: 617-661-7235 or
800-LAND-944 (800-526-3944)

E-mail: help@lincolninist.edu

Web: www.lincolninist.edu



Key Conservation Easement Issues and Reforms

ISSUES

- Variable quality in conservation easement design
- Lack of a publicly accessible system for conservation easement tracking
- Lack of transparency and determination of public benefit in easement formation
- Failure by many easement holders to undertake appropriate stewardship duties
- Lack of clear standards for easement termination, amendment, and backup support
- Lack of clear valuation and other taxation standards for conservation easements
- Failure to consider implications of easements on land acquisition and regulation
- Failure to consider issues of equity and environmental justice in easement programs

REFORMS

- Greater standardization in high-quality conservation easement terms
- A mandatory public registry of conservation easements in each state
- A public process for stricter scrutiny of each easement's public benefits
- Legally mandatory stewardship responsibilities for easement holders
- A clear process for termination, amendment, and third-party enforcement
- Tighter tax and other standards that underpin the public investment in each easement
- Holistic policies to consider the proper role of each of these conservation tools
- Policies to assure that public subsidies compensate for these effects