

Conservation Easements: Windfall or Straitjacket?

BY JAMES D. TIMMONS AND LARA DANIEL

A CONSERVATION EASEMENT CREATES A NON-POSSESSORY interest in land. In granting or donating a conservation easement, a landowner normally transfers certain property rights to a nonprofit conservation organization or government agency. People who create conservation easements on their land often do so because they wish to ensure long-term conservation of land, which they value and which contains important natural features. This type of easement is a tool for preventing intensification of land use on property having important natural, agricultural, scenic or historic value. The landowner retains legal title to the property but agrees to forgo certain uses, such as residential or commercial development.

There are several good financial reasons for entering into conservation easements. Landowners are often paid substantial amounts of money for the conservation easement. Additionally, if a conservation easement is granted in perpetuity, the landowner is entitled to claim a deduction on his or her federal income taxes. Furthermore, since the conservation easement lowers the value of the property, it also lowers the value of the landowner's estate and, ultimately, the estate tax burden as well as the property tax burden.

In reality, conservation easements are more like restrictive covenants than easements. A grantor who enters into a conservation easement agrees to dedicate the portion of his or her property encumbered by the easement to a specified use (or non-use, as the case may be) or agrees to adhere to specified practices thereon . . . in perpetuity. Perpetuity is a long time, so a landowner who enters into such an agreement not only signs away his right to

change the use of the land, but also gives away the rights of any future owner to change the use of the land.

This paper will define conservation easements and comment on the rationale for their use. We will also provide a summary of the various types of conservation easements and survey how widely they are being used. Additionally, and most importantly, the legal aspects and tax implications of their use will be analyzed. Our intent is to provide landowners a framework for evaluating the prudence of encumbering their land with conservation easements.

INTRODUCTION

Urban sprawl is consuming millions of acres of open space, farms and forest land to development each year in the United States. There is, however, a growing effort to combat the loss of so much green space. Rather than see local rural space, rugged outdoor areas or wetlands or other environmentally sensitive areas gobbled up by strip malls or subdivisions, many private land owners are increasingly preserving their land. One of the tools being

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Conservation Easements: Windfall or Straitjacket?

used extensively to save the land is the conservation easement. Conservation easements are a legal tool designed to extinguish most or all of the development potential of land in the interest of conservation.

For a landowner, the decision to sell or donate a conservation easement is a momentous action that should not be made lightly or quickly. Placing restrictive covenants on a property will not only have consequences for the current landowner, but will also have long-lasting effects on all future owners of the property. Negotiated voluntarily with a nonprofit or public land-trust agency or government entity, conservation easements restrict the use of a particular parcel; the landowner can continue using the land after the easement is purchased, but the land will be restricted as to subdivision or development. Land in easements can be bought or sold, but the restrictions remain in perpetuity.

The decision to sell or donate conservation easements, then, depends on many factors, including the landowner's willingness to forego the profitable option of selling the land for urban development in return for more modest economic gains and other benefits. The idea is often appealing to farm families who want to continue a farming operation over future generations, but need cash that would otherwise only be available by selling the land. There are also those who wish to protect the natural character of land from any future development. In either case, while current cash or tax advantages provide immediate benefits to the present landowner, future generations and

owners carry the costs in terms of restrictions and limited land development opportunities.

This paper will provide additional information about the growing number of conservation easements being used to save green space from urban sprawl. We will document not only the number of easements, but also the regions of the country where they are most widely used. It will be seen that a major incentive for allowing one's land to be "preserved" relates to new tax law that provides several possible tax breaks. There will also be a discussion of land appraisal issues, which have complicated the conservation easement process. Finally, there are many legal issues that must be, or should be, considered when one is contemplating the use of conservation easements.

PRIVATE LAND CONSERVATION IN THE UNITED STATES — THE 2005 NATIONAL LAND TRUST CENSUS REPORT

The National Land Trust Census, conducted every five years by the Land Trust Alliance, an umbrella organization for land conservation groups, says private land under protective trusts and easements now totals 37 million acres, a 54 percent increase from the last count in 2000.¹ This includes both land protected by local and state land trusts and by the largest national land conservation groups. Between 2000 and 2005, conservation of private land averaged 2.6 million acres a year. This acreage would equal approximately half the land mass of New Jersey. The average annual number of acres of land protected during this five-year period exceeds the 2.2 million acres

Chart 1

Acres Conserved by Local and State Land Trusts by Method of Conservation (2000 and 2005)

	Acres Owned by Land Trusts	Acres under Easement by Land Trusts	Acres Acquired and Reconveyed and Conserved by Other Means	Total Acres Conserved
2000	1,219,632	2,514,545	2,322,447	6,056,624
2005	1,703,212	6,245,969	3,940,928	11,890,109
Increase (acres)	483,580	3,731,424	1,618,481	5,833,485
% Increase	40%	148%	70%	96%

For the period ended December 31, 2005, Chart 1 compares the total acres conserved by three mechanisms: acres owned in fee by the land trust, acres protected by conservation easement and acres conserved by other means.

Chart 2

Number of Land Trusts and Acres Protected by
Local and State Land Trusts as of December 31, 2005

	No. of Land Trusts	Acres owned	Acres under Easement	Acres Acquired and Reconverted and Conserved by Other Means	Total Acres
AK	7	1,057	4,854	37,251	43,162
AL	7	4,940	48,428	43,526	96,894
AR	2	1,018	2,320	884	4,222
AZ	21	1,129	35,645	69,790	106,564
CA	198	304,393	427,411	1,000,667	1,732,471
CO	38	4,822	849,825	104,677	959,324
CT	128	50,349	24,164	21,094	95,607
DC	4	1	3	-	4
DE	5	21,273	2,394	79,042	103,159
FL	36	9,653	37,458	39,610	86,721
GA	24	5,303	87,643	10,110	103,056
HI	14	289	212	43	544
IA	8	12,396	6,000	69,265	87,661
ID	12	4,127	29,987	24,792	58,906
IL	35	7,708	7,532	49,080	64,320
IN	27	11,743	5,648	3,200	20,591
KS	7	184	4,583	1,000	5,767
KY	10	1,721	5,026	4,682	11,429
LA	4	257	24,042	543	24,842
MA	161	118,240	61,569	104,518	284,327
MD	58	5,334	191,330	17,136	213,800
ME	85	84,274	1,492,279	141,104	1,717,657
MI	44	33,024	54,762	17,633	105,419
MN	5	2,171	24,500	7,108	33,779
MO	19	10,302	9,460	2,672	22,434
MS	6	782	48,423	5,183	54,388
MT	15	8,793	714,993	224,427	948,213
NC	32	23,199	112,874	92,451	228,524
ND	-	-	-	965	965
NE	5	17,338	12,916	4,403	34,657
NH	35	79,719	133,836	50,078	263,633
NJ	43	55,331	11,832	145,858	213,021
NM	9	402,735	142,072	29,677	574,484
NV	5	490	-	14,148	14,638
NY	90	168,259	191,095	264,887	624,241
OH	44	11,379	35,262	4,061	50,702
OK	3	5,263	3,507	384	9,154
OR	20	7,440	50,627	16,535	74,602
PA	95	35,432	139,309	265,916	440,657
RI	47	15,378	7,863	1,482	24,723
SC	24	7,673	98,349	70,439	176,461
SD	2	280	10,769	9,484	20,533
TN	21	12,988	21,075	131,765	165,828
TX	32	28,597	131,520	83,246	243,363
UT	6	2,242	34,418	39,985	76,645
VA	32	12,135	365,355	284,812	662,302
VT	35	69,204	399,681	107,848	576,733
WA	36	22,889	43,701	153,395	219,985
WI	54	18,121	33,903	25,934	77,958
WV	8	726	16,156	8,397	25,279
WY	5	661	49,358	55,741	105,760
Totals	1,663	1,703,212	6,245,969	3,940,928	11,890,109

Conservation Easements: Windfall or Straitjacket?

that the Department of Agriculture has estimated is converted annually into “developed land.”

Most of the preserved land was saved through the use of conservation easements, legal pacts between landowners and trusts, or governmental agencies that permanently limit the land’s use. The Land Trust Alliance says easements have risen 148 percent since the last National Land Trust Census Report in 2000.² (Refer to Chart 1 on page 8 for the data.) It is all part of a huge new boom in conservation of private lands in which landowners voluntarily give up rights to develop their land — often in return for tax breaks, but also in many cases to save rugged landscapes or farmland they love.

Little known just two decades ago, land trusts are now one of the fastest growing, and seemingly, most successful conservation movements in U.S. history. Key findings from the 2005 National Land Trust Census are as follows:

- From 1995 to 2000, an average of 337,037 acres per year of private land was conserved by local and state land trusts. During the 2000–2005 period, the pace soared to 1,166,697 acres per year. In all, 11.9 million acres have been conserved by these groups through 2005. (Refer to Chart 2 on page 9 for data.)
- The fastest-growing region in America, in both the number of acres preserved and the number of land trusts, is the west. The southeast is the second fastest growing region. The northeast added the most acreage, nearly tripling the acres held under easement in the past five years. (See Charts 3 and 4 on pages 11 and 12.)
- These states have the most acres conserved—California, Maine, Colorado, Montana, Virginia, New York, Vermont, New Mexico, Pennsylvania and Massachusetts.
- The primary type of land being protected is natural areas and wildlife habitat (39 percent), followed by open space (38 percent) and water resources, mostly wetlands (26 percent).

THE NATURE OF CONSERVATION EASEMENTS

Owning property entitles owners to exercise certain rights over their land. The gift or sale of a conservation easement involves giving up some of these rights, such as

the right to develop the land, in order to protect the conservation values of the land. Each conservation easement is unique. While the terms of a conservation easement are explicit and legally binding, they are also negotiable so that the needs of the landowner, the conservation agency and the land itself are accommodated. Sometimes the restrictions totally prohibit construction or any type of development, but this is often not the case. Even the most restrictive easements typically permit landowners to continue such traditional uses of the land as farming and ranching. Through the agreement, the landowner retains title to the property and the right to restrict access.

Conservation easements can take many forms, including:

- a limitation on the property’s use,
- a limitation on the number of building sites on an undeveloped real estate parcel,
- a prohibition against depleting the land’s natural resources, such as timber, and
- a prohibition against fishing or hunting.

Conservation easements must be entered into between the owner of the real estate and a qualified organization. A qualified organization is one committed to conservation purposes with the resources to enforce the easement. Treasury regulations identify four classes of organizations which qualify as “qualified organizations.”³

- 1) A governmental unit described as a state, a possession of the United States or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made exclusively for public purposes;
- 2) An organization described as one that normally receives a substantial part of its support from a governmental unit or from direct or indirect contributions from the general public;
- 3) A charitable organization described in I.R.C. (section) 501(c)(3) — i.e. tax-exempt, that meets the public support test of (section) 509(a)(2); or
- 4) A charitable organization described in section 501(c)(3) that meets the requirements of that section and is controlled by an organization described in paragraphs (c)(1)(i), (ii) or (iii) of this section.

Chart 3

Total Acres Protected by Local and State Land Trusts,
Increase in Acreage, and Percentage Change (2000 and 2005)

REGION/STATE	TOTAL ACRES PROTECTED			
	2005	2000	INCREASE	% CHANGE
Mid-Atlantic				
DC	4	3	1	38%
DE	103,159	102,041	1,118	1%
MD	213,800	141,673	72,127	51%
NJ	213,021	138,628	74,393	54%
PA	440,659	336,788	103,871	31%
VA	662,302	204,660	457,642	224%
WV	25,279	58,321*	-33,042	N/A
	1,658,224	982,114	676,110	69%
Midwest				
IA	87,661	65,212	22,449	34%
IL	64,321	45,683	18,638	41%
IN	20,591	9,754	10,837	111%
KS	5,767	2,451	3,316	135%
MI	105,419	71,156	34,263	48%
MN	33,779	16,788	16,991	101%
MO	22,434	9,347	13,088	140%
ND	695	758	207	27%
NE	34,657	16,772	17,885	107%
OH	50,702	20,255	30,447	150%
SD	20,533	9,625	10,908	113%
WI	77,958	25,262	52,696	209%
	524,787	293,062	231,725	79%
Northeast				
CT	95,607	70,879	24,728	35%
MA	284,327	216,001	68,326	32%
ME	1,717,656	136,712	1,580,944	1156%
NH	263,633	193,563	70,070	36%
NY	624,241	571,519	52,722	9%
RI	24,723	16,770	7,953	47%
VT	576,733	444,770	131,963	30%
	3,586,920	1,650,214	1,936,706	117%

*An organization based in WV works in several states but reported all acres saved only under WV for 2000.

Chart 4
**Total Acres Protected by Local and State Land Trusts,
 Increase in Acreage, and Percentage Change (2000 and 2005)**

REGION/STATE	TOTAL ACRES PROTECTED			
	2005	2000	INCREASE	% CHANGE
Northwest				
AK	43,161	28,939	14,222	49%
ID	58,906	36,532	22,374	61%
MT	948,213	505,659	442,554	888%
OR	74,602	24,572	50,031	204%
WA	219,985	41,728	178,258	427%
WY	405,760	40,759	65,001	159%
	1450627	678,188	772,439	114%
Pacific				
CA	1,732,471	1,250,509	481,962	39%
HI	544	8	536	6700%
NV	14,638	12,225	2,413	20%
	1,747,653	1,262,742	484,911	38%
Southeast				
AL	96,894	29,916	66,978	224%
AR	4,222	1,496	2,726	182%
FL	86,720	63,460	23,260	37%
GA	103,057	36,901	66,156	179%
KY	11,429	4,012	7,417	185%
LA	24,842	13,645	11,197	82%
MS	54,388	4,405	49,983	1135%
NC	228,524	102,226	126,298	124%
SC	176,461	97,381	79,080	81%
TN	165,828	43,804	122,024	279%
	952,365	397,247	555,118	140%
Southwest				
AZ	106,564	38,175	68,389	179%
CO	959,324	338,650	620,674	183%
NM	574,484	268,923	305,561	114%
OK	9,154	5,151	4,003	78%
TX	243,363	85,675	157,688	184%
UT	76,645	56,483	20,163	36%
	1,969,534	793,055	5,833,486	148%
Totals 2005	11,890,110	6,056,624	5,833,486	96%

Conservation Easements: Windfall or Straitjacket?

A conservation easement is created like any other permanent interest in land, by having both parties agree to and sign a contract, which is recorded in the land records. It should be remembered that most easements “run with the land,” binding the original owner and, more importantly, all subsequent owners to the easement’s restrictions. The landowner who enters into such an agreement not only signs away his or her right to change the use of the land, but also constrains the rights of any future owner to change the use of the land. Only gifts of perpetual easements will qualify for income and estate tax benefits.

In reality, conservation easements are more like restrictive deed covenants than traditional real estate easements. If the landowner dies and the property is acquired by inheritance, or if the land is sold, the new owner will own the property with whatever affirmative obligation is required by the terms of the conservation easement. The management practices that the original owner had agreed to must be continued. If the new owner does not meet the terms of the agreement, the conservation agency may sue for breach of contract.

Unlike many deed restrictions, conservation easements are closely monitored to assure that the limitations on the property are strictly being adhered to. Typically, the land trust will be responsible for enforcing the restrictions that are spelled out in the easement document. Usually, once a year the land trust will do an on-site inspection of the land to determine that the property remains in the condition prescribed by the easement contract. Written records are maintained by the trust and the landowner receives written notification of compliance. In the event that the terms of the easement are breached, restoration of the property to its prior condition complying with the easement is required.

One of the authors of this paper is a stockholder of a closely held Subchapter S corporation that owns agricultural and timberland on the eastern shore of Maryland. The corporation and the Maryland Environmental Trust entered into an agreement in 2002 whereby the corporation sold a conservation easement on one of its farms. The property consists of approximately 350 acres of farmland, timber and marshland. The land borders both a bay and creek. The Maryland Environmental Trust has purchased easements on several thousand acres in the area to protect fragile wetlands and rural property from

residential development. The easement restricts the number of residential structures that can be constructed on the property and the future sub-division of the parcel. The corporation received several hundred thousand dollars for agreeing to these restrictions.

TAX INCENTIVES

Why would anyone voluntarily give up development rights on his land? Some owners may be motivated by strictly altruistic conservation reasons, but most seek to take advantage of one of the many forms of tax compensation that can make the donation or sale of conservation easements a smart move. Aside from the fact that money might be received from the sale of the easement, the possibility exists of income tax, estate tax, capital gains tax and property tax benefits. Whether or not these benefits apply to a particular easement depends on the conditions of the easement, the landowner’s income and estate value, whether the easement is purchased or donated, and other factors. Recent changes in federal and state tax law have, however, significantly increased the tax benefits associated with the donation of conservation easements.

In order to qualify for a tax deduction, easements must be donated to a federal, state or local government agency. The federal rules also allow a private, charitable organization with the ability to enforce the terms of the easement to hold deductible easements. Private easement holders, under the terms of the federal rules, need not be environmental organizations to qualify the easements they hold for tax benefits. The key is that the organization be a charitable organization qualified under IRC 501(c)(3); have the ability to enforce the easements it holds over time; and be organized, at least in part, for the conservation of the property subject to easements it holds. Before entering into a conservation easement of any kind, landowners should consult with their attorneys. If the easement donor hopes to capitalize on tax advantages, the services of a tax professional and a certified land appraiser will also be needed.

The package of tax benefits that is newly available for conservation easement donations can turn the conservation of family land into an effective tool for the conservation of family wealth as well. The value of the donation for tax purposes can be determined by an appraiser, who compares the value of the unrestricted land with its value subject to the easement. If the owner decides that the appraised value

Conservation Easements: Windfall or Straitjacket?

of the easement is sufficiently large, he or she should file the easement and take advantage of the tax benefits.

INCOME TAX BENEFITS

Donors may deduct from taxable income the full market value of a conservation easement that was granted in perpetuity. If the property has been owned for less than one year, the deduction is based on the percentage of easement value as it is applied to the basis of the property. Of course, the donor's basis in the property is reduced by the value of the easement. As a result of new legislation signed by the president on August 17, 2006, easements donated in 2006 and 2007 can be deducted at the rate of 50 percent of the donor's adjusted gross income per year and the unused portion of the gift may be carried forward for an additional 15 years or until the value of the donation is fully expended (whichever comes first). Farmers who receive more than 50 percent of their income from agricultural activities may claim deductions of up to 100 percent of their income.⁴ On January 31, 2007, Sen. Max Baucus (D-Mont.) introduced S. 469, a bill that would make the newly expanded tax incentive for conservation easement donations permanent.

It also should be remembered that in addition to the federal income tax incentives, most state income tax laws provide for charitable deductions of conservation easements. There are currently nine states that offer an even better income tax incentive — tax credits — for easement donations on agricultural property.⁵

It also should be mentioned that landowners who sell conservation easements might consider a tax-deferred exchange instead of actually receiving cash from a land trust. It is possible to arrange having the purchasing agency buy another property, which they trade for a property owner's easement rights. The conservation easement and a fee interest in land have been ruled to be sufficiently similar to constitute property of "like kind" for purposes of section 1031(a) of the IRS Code. This process delays the recognition of income and defers the payment of taxes on easement rights that were sold.

ESTATE TAX BENEFITS

Estate taxes in 2006 were as high as 46 percent of the value of the donor's estate. In many cases, a landowner's heirs must sell their inherited property in order to pay the estate taxes. By donating an easement, landowners can reduce estate taxes in two ways. First, to the extent that

the restricted value is lower than the fair market value, the estate will be subject to a lower estate tax. There will be cases where an easement can reduce the value of an estate below the level that is taxable, thereby eliminating any estate tax liability. The American Farm and Ranch Protection Act of 1997 and amendments found in the Economic Growth and Tax Relief Reconciliation Act of 2001 allow heirs to exclude up to an additional 40 percent of the remaining value of their land subject to a donated qualified conservation easement from the taxable estate regardless of the property's location. For example, if land is worth \$1 million prior to the easement and \$600,000 after the easement, the exclusion would allow 40 percent of the remainder value of \$600,000, or \$240,000, to be excluded. The exclusion is limited to \$500,000, but is in addition to any reduction in the value of the estate as a result of placing a conservation easement on the land. If the fair market value of the property is reduced by at least 30 percent, the full benefit is available. Smaller exclusions are available when easements reduce the land value by less than 30 percent.⁶ The exclusion is available not only to the estate of the donor, but also to the estates of any of the donor's family members and descendants so long as the land remains in the family (IRC 2031[c][8][c]).

PROPERTY TAX BENEFITS

In jurisdictions where property taxes are assessed on the basis of potential use rather than actual use, a conservation easement can provide substantial savings. Land cannot be taxed for a use that the property owner legally cannot perform. Therefore, land that is restricted by a conservation easement should not pay a property tax based on its highest and best use.

TAX ABUSES

Starting in 2003, David Ottaway and Joe Stephens of *The Washington Post* published a series of articles questioning some of the practices employed by some of the nation's largest and most well-funded land trusts. Those articles raised the ire of Congress and the IRS. In 2004, the IRS issued a nationwide notice that it was aware of improper claims of charitable deductions involving conservation easements and, as a result, was initiating a series of audits around the country. Until this time, conservation easements had received little IRS attention. With the increased use of this type of easement, and the possibility of sufficient tax implications, the IRS has started to see abuses.

Conservation Easements: Windfall or Straitjacket?

The Senate Finance Committee also has held hearings on the perceived abuses in charitable contribution deductions claimed for gifts of conservation easements. A series of scandals has revealed major abuses of the use of conservation easements. There is evidence that some landowners who donated easements to nonprofit land trusts have used inflated appraisals to take huge tax write-offs at the expense of taxpayers. Additionally, some property owners have used easements to protect swamps and mountaintops that could never have been developed, or golf courses and private lots that have little or no conservation value. There is a fear that lawmakers will crack down on these abuses by curtailing the tax benefits associated with conservation easements. Land trust agencies argue that cutting tax incentives is the wrong approach to solving tax abuse. They suggest that laws that require more realistic appraisals can provide safeguards against this problem. There is little doubt that appraisers who value conservation easements, land trusts that help set up conservation easements, and those receiving tax benefits from the easements are now being more closely scrutinized.

APPRAISAL CONSIDERATIONS

Fair market value of the conservation easement can be determined through a comparable sales appraisal approach using sales of similar easements in the area. Such information, however, is often limited. Therefore, the value of a conservation easement is assumed to equal the difference between the fair market value (highest and best use) of the property before and after the easement is donated. The valuation problem for conservation easements arises because of excessive claims of income, estate and property tax deductions.

To take a tax deduction for gifts worth more than \$5,000, including land or conservation easements, the donor must obtain a “qualified appraisal” by a “qualified appraiser.”

A qualified appraiser is one who holds him/herself out to the public as an appraiser who is qualified to make appraisals of the specific type in question (such as a conservation easement) and whose relationship to the taxpayer and donor would not cause a reasonable person to question the appraiser’s independence. Land trust agencies cannot provide the appraisal itself, but can give donors a list of appraisers with experience in valuing gifts of land and conservation easements. The appraisal is necessary only if the donor is seeking a charitable contribution tax deduction for their land or easement donation.

The IRS requires that the appraisal must not be completed earlier than 60 days before the date of the gift and must state the fair market value of the gift as of the date of the contribution. Alternatively, an appraisal may be done at any time after the gift, retroactive as to the date of the gift. The appraiser’s report must meet IRS standards, and a summary of the appraisal (IRS Form 8283) signed by the land trust and the appraiser must be attached to the donor’s income tax return. Section 1219 of the Pension Protection Act of 2006 also adds a new penalty provision. If the claimed value of property based on an appraisal results in a substantial or gross valuation misstatement, a penalty is imposed on any person who prepared the appraisal and who knew, or reasonably should have known, the appraisal would be used in connection with a return or claim for refund.

LEGAL ISSUES

Conservation easements represent a significant departure from common law property principles. Under those principles, there are two general types of easements — easements appurtenant and easements in gross. Easements appurtenant are those in which the owner of one piece of land has a liberty, privilege or advantage in the land of another. The land for which the privilege is created is the “dominant estate” and the land subject to the privilege is the “servient estate.” An easement in gross is a personal right in the land of another; it is not appurtenant to a second parcel of land. It benefits an entity rather than a parcel of land. While there is a servient estate, one burdened by the easement, there is no dominant estate.⁷

In addition to being either appurtenant or in gross, common law easements are either affirmative or negative. Affirmative easements convey to one person the privilege to use the land of another. Negative easements convey a right to demand that the servient owner refrain from certain uses of his property that would otherwise be permissible.⁸

A conservation easement is in gross, and negative. It favors an entity rather than a second parcel of land, and it grants to that entity the right to demand that the owner of the servient estate, the party who gave the easement, refrain from certain activities that would have been permissible in the absence of the conservation easement. As such, a conservation easement finds no favor in common law principles; in common law, easements appurtenant were favored over easements in gross, and

Conservation Easements: Windfall or Straitjacket?

affirmative easements were favored over negative ones.⁹

In order to minimize the threats that common law principles would pose to the use of conservation easements, the national Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Conservation Easement Act (referred to as the UCEA, or Act) in 1981. There are now at least 32 states that have statutes authorizing the use of conservation easements, many of them incorporating the provisions of the UCEA.¹⁰ Some, however, have deviated from the provisions of the UCEA, making it essential that the code of a particular state be consulted before the creation of a conservation easement encumbering land in that state.

The “relatively narrow purpose”¹¹ of the UCEA is to remove the common law impediments to the use of conservation easement. The Act includes six sections:

- Section 1 defines *conservation easement* and who may be a holder of one. This section also defines the term *third party right of enforcement*.
- Section 2 addresses the methods of creating conservation easements, their duration and their effect on preexisting interests.
- Section 3 lists those who may bring an action to enforce the conservation easement.
- Section 4 directly focuses on the characteristics of a conservation easement that might have caused it to be challenged in common law.
- Section 5 deals with applicability of the Act.
- Section 6 deals with uniformity.

CONCLUSION

Conservation easements are relatively modern creations in real estate law, and they represent a marked departure from common law principles. Common law principles are based on the theory that real property should be put to its highest and best use, and that this goal is frustrated by restrictions that one generation might place on future decision makers. The assumption underlying conservation easements is that people are capable of making decisions today that will benefit the public in perpetuity.

In addition to the perpetual nature of conservation easements, they are also distinguished by the differing roles of the public in the transaction versus their common law

counterparts. Because the public good, rather than the interests of the property holder, is the motivation for creating these restrictions, these restrictions should be subject to greater scrutiny. There is understandable concern about the nature of the holder of a conservation easement, because that party is acting in a representative capacity for the public.

The UCEA provides a meaningful framework for the creation of conservation easements, primarily by removing the common law threats to their perpetual existence. But the omissions from that statute, the state statutes that are based upon it, and the lack of guidance from courts on the meaning of the terms used in conservation easements make it imperative that landowners carefully consider the consequences of their actions. In areas where development seems to be suffocating green pastures and, where the owners of pastures feel their convictions about open space are becoming more and more expensive to maintain, the conservation easement is a tempting solution. It allows the landowner to realize a financial advantage now and ensures that their property will remain the same forever. However, conservation easements represent a departure from the traditional approach that attempts to strike a balance between the interests of today’s landowners and those that might arise in the future. They seem instead to assume that what is good today will always be so. If the interests of future landowners have not been estimated accurately by those creating conservation easements, the results may create more problems than would otherwise have occurred.

The attractiveness of conservation easements is obvious by the explosive growth of land trusts established to accept easements. Land trusts have become big business based on their enormous land holdings, increasing membership and finances. You and I as taxpayers, and therefore government at all levels, should care about how conservation easements are created and managed. Although most easements are donated by private landowners to private land trusts, they almost always result in public subsidies in the form of income tax deductions to the easement donors. Also in many cases, a further subsidy comes in the form of reduced estate and property taxes. Additionally, much of the funding used to purchase conservation easements is increasingly coming from public money. ■

Conservation Easements: Windfall or Straitjacket?

ENDNOTES

- ¹ Land Trust Alliance, “2005 National Land Trust Census Report,” page 4.
- ² *Id.*, page 8.
- ³ Land Trust Alliance, “2005 National Land Trust Census Report,” page 4.
- ⁴ <http://www.uvlt.org/html/taxbenefitsoflandconservation.html>
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ See generally, *Ephrata Area School District v. County of Lancaster*, 886 A.2d 1169 (2005).
- ⁸ *Id.*
- ⁹ Uniform Law Commissioners Summary, Uniform Conservation Easement Act, http://www.nccusl.org/Update/uniformact_summaries/ (last visited Jan 2, 2007). See also, Lincoln Institute of Land Policy, *Reinventing Conservation Easements*, page 5.
- ¹⁰ Uniform Law Commissioners, *A Few Facts About the Uniform Conservation Easement Act*, http://www.lta.org/Update?informact_factsheets (last visited Jan. 2, 2007). The Act has also been adopted in the District of Columbia and the U.S. Virgin Islands.
- ¹¹ Uniform Conservation Easement Act, Commissioners’ Prefatory Note.
- ¹² IRS, Treasury 1.170A-14; www.lta.org/publicpolicy/treasury-regs-on-ce.pdf.