



Solving the Contentious Issues of Private  
Conservation Easements:  
Promoting Flexibility for the Future and Engaging the  
Public Land Use Process

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Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility  
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Gerald Korngold\*

*Abstract*

*Over the past thirty years, statutes have reversed the common law and authorized private conservation organizations to hold conservation easements “in gross.” These interests allow nonprofits to control the use and development of the burdened property by preventing alterations of the natural and ecological features. Conservation easements can be held by organizations geographically distant from the restricted land.*

*Conservation easements bring great benefits as they support conservation, represent private initiative, yield efficiency benefits, and exemplify freedom of choice of property owners. There are costs, however: significant federal and state tax subsidies, the lack of coordinated planning and public process, class issues, stewardship failures by nonprofits, and lack of flexibility by easement holders to meet emerging needs of the community (such as for economic development or affordable housing). There is a risk to effective policy making and democratic principles when local, public land use decisions are delegated to non-representative, non-accountable private organizations.*

*The benefits of private conservation easements are significant, and they should be continued but with changes. The paper suggests five principles and related specific reforms that should be enacted: restoring market mechanisms in the creation of conservation easements; enhancing governance and operations of easement holders; protecting the expectations of future generation owners; achieving flexibility through*

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*expanded termination and modification doctrines; and preserving the public's power of eminent domain.*

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Book 12 of Homer’s *Odyssey* tells how Odysseus avoided the lure of the Sirens’ singing from nearby shore that had enticed many other sailors to shipwreck and death. On the counsel of Circe, Odysseus plugged the ears of his sailors with wax so they could ignore the voices, stay by their oars and propel their ship past the Sirens’ promontory. Odysseus ordered his men to tie him tightly to the mast. So bound, Odysseus would be able to hear the beautiful words and voices, but the inflexible restraints would prevent him from leaping to his death. And so the ship proceeded, with his men adding further bonds when Odysseus indicated his desire to break free, until it passed beyond the reach of the Sirens’ call. The unyielding ties on Odysseus protected him from his own curiosity if not folly, in the face of a deadly peril.<sup>1</sup>

Standing alone, the narrative of Odysseus and the Sirens could be read as advocating for the placing of inflexible restraints on people and preventing them from altering course. But the lens should be zoomed out and the story should instead be seen in the context of the entire *Odyssey*, a life journey both physical and spiritual.<sup>2</sup> In that broader voyage, Odysseus was not tied to the mast but stood on deck piloting his ship, as master of his vessel.<sup>3</sup> Thus, his binding to the mast should be understood as a unique and extreme measure, necessary because of extraordinary circumstances danger. The lashing to the mast is not representative, nor prescriptive, for how Odysseus met the many other

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<sup>1</sup> On interpretations of the Sirens story, see Gerald Gresseth, *The Homeric Sirens*, 101 *Transactions & Proceedings of the Am. Philological Ass’n* 203 (1970); Albrecht Werner, *The Death of the Sirens and the Origin of the New Work of Art*, 81 *New German Critique* 5 (2000).

<sup>2</sup> On the meaning of *The Odyssey*, see R.B. Rutherford, *The Philosophy of the Odyssey*, 106 *J. of Hellenic Studies* 145 (1986); Michael J. Shapiro, *Politicizing Ulysses: Rationalistic, Critical, and Genealogical Commentaries*, 17 *Political Theory* 9 (1982).

<sup>3</sup> While he did not have free will as we today would understand it, he had freedom of choice to the extent permitted by the fates and ancient gods of the text.

demands on his trip. Binding restraints have their role at times, but flexibility opens the way to a myriad of opportunities and benefits.

This broader, contextual understanding of the narrative of the binding of Odysseus to the mast provides helpful lesson for the law of property and perpetual real property arrangements. Binding arrangements can certainly be beneficial at times, providing certainty and clarity. But because human needs and desires, technology, and the condition and ecology of land all organically shift over time, parties to consensual arrangements and the law have usually opted for agreements and doctrines that permit flexibility necessary to respond to inevitable change. Facing certain danger, Odysseus temporarily bound himself, but on an uncertain voyage he needed freedom and flexibility to respond to the endless and unknown obstacles he encountered.

The tension between restraints and flexibility is seen clearly in private conservation easements. Over the past three decades, nonprofit organizations and trusts have been granted the authority to hold conservation easements. A conservation easement empowers the nonprofit to perpetually prevent the owner of the property subject to the easement from altering the property's scenic and ecological status quo. Such conservation easements are referred to as being "private" or "privately held," in contrast to being owned by a governmental body.<sup>4</sup> Moreover, the nonprofit may hold the

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<sup>4</sup> See, e.g., *Harris v. U.S.*, 19 F.3d 1090 (5<sup>th</sup> Cir. 1994) (conservation easements placed on property by federal Farmer's Home Administration); *Sabine River Authority v. U.S.*, 745 F. Supp. 388 (E.D. Tex. 1990), *aff'd*, 951 F.2d 669 (5<sup>th</sup> Cir. 1993) (federal Department of the Interior's Fish and Wildlife Service acquisition of conservation easements); *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4<sup>th</sup> 477 (2004) (conservation easements used by city as part of environmental impact mitigation of proposed building project); *Dept. of Hous. & Comm. Dev. v. Mullen*, 165 Md. App. 624, 886 A.2d 900 (2005) (conservation easement on historical property granted to division of state department); *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 786 A.2d 616 (Me. 2001) (town practice of conditioning subdivision plan on developer granting conservation easement was permitted); *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 476 N.E.2d 988 (1985) (enforcing conservation easements purchased by Palisades Interstate Park Commission in 1977); see Frederick W. Cubbage & David H. Newman, *Forest*

conservation easement “in gross”—meaning that the nonprofit is not required to own neighboring land benefited by the easement, and it can enforce its ownership interest from outside of the community in which the burdened property is located.<sup>5</sup>

Conservation easements held by private nonprofit organizations serve important interests of this generation and those to come by preserving ecologically valuable property. By preventing the, often irreversible, destruction of natural features, landscapes, habitat, and open space, conservation easements serve a vital public need. The current legal regime and incentive system of conservation easements, however, simultaneously create a serious risk of binding future generations with outmoded and rigid restrictions on land. Inevitable changes in the human condition, society, technology, and the ecology may require the shift of land use patterns in the future. Future generations will likely be required to make choices that we cannot now imagine. As to the ones that we can even contemplate, such as the tradeoff between conservation and economic development or affordable housing, we cannot and should not determine the balance that future generations should strike in light of then current needs and conditions. There is a risk, therefore, of the current generation creating a network of conservation easements that no longer serve environmental purposes and at the same time frustrate future generations from using the land to meet then-pressing needs. This danger

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Policy Reformed: A United States Perspective, 9 *Forest Policy & Economics* 261 (2005) (describing ongoing use of conservation easements by federal forest programs); Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin’s Great River Road: A Progress Report on Perpetuity*, 66 *J. Am. Planning Ass’n* 177 (2000) (reporting on government program began in the 1960’s).

<sup>5</sup> Conservation easements may not be held by private parties or for-profit entities unless they own a neighboring property benefited by the easement. See *Unif. Conservation Easement Act* §§ 1(2) and Comment (limiting ownership to charitable and governmental entities), 4 (not requiring the easement to be “appurtenant,” i.e., attached to a benefited parcel), 12 *Unif. L. Ann.* 163 (1996) (“Unif. Conservation Easement Act”).

is exacerbated because control over important public land issues has been delegated to non-representative, non-accountable private organizations.

These threats can be mitigated, however, and the value of private conservation enhanced if legislators and courts follow five principles to implement needed reforms. These principles include: first, restoring market mechanisms in the creation of conservation easements; second, enhancing easement holder governance and operations; third, protecting the expectation of future generation owners; fourth, achieving flexibility through expanded modification and termination doctrines; and fifth, preserving the public's power of eminent domain. By taking these steps, we can give future generations the benefits of conservation but at the same time allow them to find their own better paths when they require flexible solutions.

Section I shows the dramatic growth in private conservation easements over the past thirty years, stemming from the adoption of authorizing legislation that reversed common law impediments. The section examines the federal and state tax subsidies that underlie many conservation easements. It also highlights key features of private conservation easements—perpetuity and in gross ownership—that represent a break from prior legal rules and traditional concerns about restrictions on land. Section II examines the advantages and concerns with private conservation easements. It analyzes the value of conservation of natural environment, the benefit of private rather than governmental action, the efficiency of private easement arrangements, and the freedom of choice of property owners. The disadvantages of conservation easements are identified and evaluated. First, the cost of tax subsidies is significant and growing, and Congress has not produced meaningful reform legislation. Moreover, there is a lack of public planning

and process in private organizations' decisions on conservation easements, which affect local land use. This loss of democratic local land use control is exacerbated by in gross ownership allowing distant organizations to hold conservation easements and by potential or real class conflicts. Additionally, there are concerns about consistent stewardship of easements and whether nonprofits can and will be flexible in their enforcement when the public interest requires modification and perhaps termination.

Despite these questions about the current structure of conservation easements, Section III argues for the continuation of private conservation easements. It does, however, propose important modifications of legal rules in accordance with the five principles described above. First, to enhance market operations, the Internal Revenue Code should be amended to permit a deduction only if federal, state, or local government has approved the particular conservation easement. Additionally, the states should require local recorders to maintain clearer records of conservation easements so that policymakers and market players can better identify and account for them. Second, state attorneys general should play a greater role in the enforcement of conservation easements and ensuring that good governance practices are maintained by nonprofits holding such interests. Moreover, state law must be clarified to allow nonprofit boards to flexibly deal with conservation easements without fear of breaching their fiduciary duty. Third, courts should follow doctrines of strict construction of conservation easements so that future owners of the burdened property are not restricted without fair notice. Fourth, the courts should apply the doctrine barring enforcement of covenants violating public policy to deny injunctive enforcement of, or even terminate, conservation easements when enforcement would violate public policy. Finally, the legislatures and courts should

reaffirm eminent domain power to terminate conservation easements for economic development purposes, in light of the post *Kelo* narrowing of this power by state courts and legislatures.

These steps will preserve the benefits of private conservation easements while minimizing their negative effects on current and future citizens. This will make conservation easements a true gift to those that follow us.

## I. The Origins and Development of Conservation Easements

### A. Defining Conservation Easements

The term “conservation easement” first received notice in the late 1950’s, and has grown in recognition over the years.<sup>6</sup> Conservation easements are negative restrictions that bar the owner of the burdened parcel from altering the ecological, natural, open, or scenic features of the property.<sup>7</sup>

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<sup>6</sup> William H. Whyte, Jr. popularized if not coined the phrase, and was an early proponent. William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements* (1959). Early influential legal writers and supporters of conservation easements included Russell Brenneman, *Private Approaches to the Preservation of Open Land* (1967); Roger Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 *Denv. L.J.* 168 (1968). For a history of the land trust movement and its work on conservation easements, see Richard Brewer, *Conservancy: The Land Trust Movement in America* (Univ. Press of New England 2003). For prior work on the conservation easements, see Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 *Tex. L. Rev.* 433 (1984) (“Korngold, Conservation Servitudes”). Other articles on conservation easements include James Boyd, Kathryn Caballero & David R. Simpson, *The Law and Economics of habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 *Stan. Env’tl L.J.* 209 (2000); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 *Denv. U.L. Rev.* 1077 (1996); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 *Env’tl Law.* 319 (1997); Jessica O. Lippman, *The Emergence of Exacted Conservation Easements*, 84 *Neb. L. Rev.* 1043 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 *Harv. Env’tl L. Rev.* 421 (2005); Peter M. Morissette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 *Nat. Resources J.* 373 (2001); Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 *Denv. U.L. Rev.* 373 (2001)

<sup>7</sup> Unif. Conservation Easement Act § 1(1); Conn. Gen. Stat. §47-42a(a). A related interest in a “historic façade easement,” that prevents alterations or obstructions in the facades of buildings, or requires pre-approval to such actions. See, e.g., *Bagley v. Foundation for the Preservation of Historic Georgetown*, 647 A.2d 1110 (D.C. App. 1994).

Conservation easements employ provisions designed to achieve their overall goals of preserving the subject property in the current condition, without further development or degradation of natural of features. Some conservation easement documents provide an overall statement of purpose to conserve the property's natural and scenic features and then a catchall undertaking by the property owner not to take actions that would violate this purpose.<sup>8</sup> Easement documents typically include specific clauses, such as those that limit or prohibit additional building on the premises, cutting timber or tree removal, subdivision of the parcel, the granting of rights of way easements, construction of roads and driveways, storage of trash, the use of all terrain vehicles, or disturbing of the surface.<sup>9</sup> The easement may enumerate specific actions related to the particular property that the owner may take consistent with the easement, such as maintaining and replacing a deck and boat house or pruning trees to maintain a scenic view,<sup>10</sup> the building of an additional residence,<sup>11</sup> or maintenance and repair of the existing dwelling.<sup>12</sup> Importantly, conservation easements protecting natural habitat do not usually grant access to the public to the burdened property<sup>13</sup> and easements protecting open space only grant "visual (rather than physical) access" to a portion of the property.<sup>14</sup> Thus, except for

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<sup>8</sup> See, e.g., *Glass v. Commissioner*, 471 F.3d 698, 703 (6<sup>th</sup> Cir. 2006); see *Rattee v. Comm'r*, 761 A.2d 1076, 1078 (N.H. 2000) (barring activities that "result in rendering the Site no longer useful for agricultural use"); see *Boyd, Caballero & Simpson*, supra note 6, at Table 1.

<sup>9</sup> See, e.g., *Glass v. Commissioner*, 471 F.3d 698, 703 (6<sup>th</sup> Cir. 2006) (barring subdivision and new buildings); *McLennan v. U.S.*, 24 Cl. Ct. 102 (1991) (permitting subdivision and construction of four new homes), *aff'd*, 994 F.2d 839 (Fed. Cir. 1993); *Goldmuntz v. Town of Chilmark*, 38 Mass. App. Ct. 696, 651 N.E.2d 864, 867 (1995) (barring billboards, signs, dumping of soil, removal of minerals or soil, activities detrimental to drainage). For a description of various possible restrictions, see *Anella & Wright*, supra note 9, at 61-67.

<sup>10</sup> See, e.g., *Glass v. Commissioner*, 471 F.3d 698, 704 (6<sup>th</sup> Cir. 2006).

<sup>11</sup> See, e.g., *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 (2000).

<sup>12</sup> See, e.g., *Goldmuntz v. Town of Chilmark*, 38 Mass. App. Ct. 696, 651 N.E.2d 864, 867 (1995).

<sup>13</sup> See 26 C.F.R. 1.170A-14(d)(3)(iii) (not requiring public access); *Brenneman*, supra note 6, at 100.

<sup>14</sup> 26 C.F.R. § 1.170A-14(d)(4)(ii)(B). It is claimed that "the public receives the benefit of keeping land in open space for scenic vistas and in working land uses." *The Nature Conservancy, Conservation Easements: Facts vs. Fiction*,

conservation easements creating recreational rights, public access is usually not granted.<sup>15</sup>

Conservation easements may, however, allow access for occasional inspections by the easement holder.<sup>16</sup>

## B. The Growth in Conservation Easements

There is limited data on the number and acreage of conservation easements. The vast majority of states do not require a special index or set of recording books for conservation easements.<sup>17</sup> During a title search of a specific parcel the searcher should find a conservation easement properly recorded against a specific parcel, but there is no centralized list of all conservation easements within the jurisdiction.<sup>18</sup> Thus, it is difficult to see the full scope, pattern, and number of conservation easements within an area or state. Some reports indicate that even land trusts holding conservation easements were unclear as to the easements that they owned.<sup>19</sup> Lack of information makes it difficult for

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<http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/myths.html>, found 6/14/07.

<sup>15</sup> Anella & Wright, *supra* note 9, at 66 (“The overwhelming majority of easements grant no rights to the public to enter the property.”); Boyd, Caballero & Simpson, *supra* note 6, Table 1; Elizabeth Byers & Karen Marchetti Ponte, *The Conservation Easement Handbook* 21 (2d ed. 2005 Land Trust Alliance & The Trust for Public Land). See 26 C.F.R. § 1.170A-14(d)(2)(ii).

<sup>16</sup> See, e.g., *Glass v. Commissioner of Internal Revenue*, 471 F.3d 698, 704 (6<sup>th</sup> Cir. 2006) (providing the donee land trust with a right to enter the property for monitoring and scientific collection purposes). A provision for entry to inspect is required for a federal tax deduction. 26 C.F.R. § 1.170A-14(g)(5)(ii).

<sup>17</sup> A few states have such requirements. See, e.g., Cal. Govt. Code Ann. § 27255(2) (mandating county recorders to maintain a comprehensive index of all conservation easements created after 1/1/02); *U.S. v. Ponte*, 246 F.Supp.2d 74 (D. Me. 2003) (referring to conservation easement books); N.Y. Env’t Conservat. L. § 49-0305(4) (easement must be recorded locally as other real estate documents and copy sent to state department “which shall maintain a file of conservation easements”).

<sup>18</sup> Massachusetts, with its statutory requirement of state and local governmental approval for all conservation easements, Mass. Gen. Laws Ann. ch. 184 §§ 31-32, has been able to compile a list of conservation easements. Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* 12 (Lincoln Institute of Land Policy 2005)

<sup>19</sup> See Pidot, *supra* note 18, at 12 (citing report of Bay Area Open Space Council that one-third of surveyed land trusts lacked list of easements); U.S. Sen. Finance Comm., Report on The Nature Conservancy, Part II, 2 (2005) (describing central file system for easement documents).

There is also some wide differences in totals offered by different sources. For example, the Nature Conservancy reports that in New York there are 685,000 acres under conservation easements held by local and regional land trusts, while the Land Trust Alliance reports only 191,095 acres held by local and state land trusts in New York.

<http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/files>

policy makers and potential market players to get a comprehensive view of conservation easements, which essentially establish a land use regulation scheme, within an area.

Still, there are some numbers indicating the significant growth of privately held conservation easements in America.<sup>20</sup> According to a 2005 Land Trust Alliance report, local and state land trusts in the United States held easements on over 6.2 million acres, showing a 148% increase from the 2000 figure of 2.5 million.<sup>21</sup> The Nature Conservancy reported in 2007 that it holds over 3.2 million acres of land under conservation easements, in addition to the land held by local and regional land trusts.<sup>22</sup> The Land Trust Alliance and The Nature Conservancy combined figures yield over 9 million acres under conservation easements, and this does not include conservation easements held by other types of nonprofit organizations or land trusts not included in the Land Trust Alliance report.<sup>23</sup> 9 million acres is an area equivalent to the aggregated size of Rhode

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[/ce\\_newyork.pdfm, found 6/15/07](#); Land Trust Alliance, 2005 National Land Trust Census Report, [www.lta.org/census/](http://www.lta.org/census/), at Chart 5 (“2005 Census Report”).

<sup>20</sup> Conservation easements have also spread to the international arena. See Charles E. Di. Leva, *The Conservation of Nature and Natural Resources through Legal and Market-Based Instruments*, 11 *RECIEL* 84 (2002); Joshua P. Welsh, *Comment: Firm Ground for Wetland Protection: Using the Treaty Power to Strengthen Conservation Easements*, 36 *Stetson L. Rev.* 207 (2006); Anastasia Telesetsky, *Graun Bilong Mipela Na Mipela No Tromweim: The Viability of International Conservation Easements to Protect Papua New Guinea’s Declining Biodiversity*, 13 *Georgetown Int’l Envtl. L. Rev.* 735 (2001); American Bird Conservancy, *For Immediate Release: Spectacular Hummingbird Protected by First Conservation Easement in Northern Peru* [http://www.abcbirds.org/media/releases/spatuletail\\_release.htm](http://www.abcbirds.org/media/releases/spatuletail_release.htm), found 3/22/07.

<sup>21</sup> 2005 Census Report, *supra* note 20, at 8. There are also numerous media reports of specific conservation easements. See, e.g., Shannon McCaffrey, *Ga. Rocker Donates Conservation Easement*, [http://www.usatoday.com/life/music/2007-03-19-1874986560\\_x.htm](http://www.usatoday.com/life/music/2007-03-19-1874986560_x.htm), found 6/1/07 (300 acre tract, donation by Rolling Stones keyboardist Chuck Leavell); *Rocky Mountain Front Range Under Conservation Easement*, *Billings Gazette*, 2/6/2007 <http://www.billingsgazette.net/articles/2007/02/06/news/state/44-front.txt>, found 3/22/07 (conservation easement purchased by The Nature Conservancy on 4,300 acre ranch).

<sup>22</sup> <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/art18979.html>, found 5/31/07 (stating 3.2 million acres held by The Nature Conservancy and 5.1 million acres as of 2003 by local and regional land trusts). For a discussion of the growth of conservation easements in the period of 1988-1998, see Julie Ann Gustanski in Julie Ann Gustanski & Roderick H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* 9-25 (Island Press 2000).

<sup>23</sup> See, e.g., Univ. of Tex. At Austin, Office of Public Affairs, *News Release 8/11/2006, University of Texas at Austin Signs Conservation Easement for Fennessey Ranch*,

Island, Delaware, Connecticut and Hawai'i.<sup>24</sup> Moreover, the data show that conservation easements are becoming the conservation tool of choice, as during the 2000-2005 period land trusts increased their fee holdings by only 40% compared to 148% for conservation easements.<sup>25</sup>

Common law rules in most jurisdictions either barred privately held conservation easements or placed their legality into serious doubt.<sup>26</sup> Legislative validation within the states was necessary to reverse common law prohibitions and give donors and organizations confidence to create these interests. The drive for such statutes during the 1970s led to the promulgation of the Uniform Conservation Easement Act in 1981,<sup>27</sup> subsequently adopted by 20 jurisdictions.<sup>28</sup> The Act's key operative provision equates conservation easements to traditional easements for the purpose of creation, conveyance, recording, assignment, release, modification, and termination.<sup>29</sup> Common law objections to conservation easements are specifically rejected.<sup>30</sup> Other states adopted statutes with

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<http://www.utexas.edu/opa/news/2006/08/msi11.html>, found 3/22/2007 (conservation easement held by University of Texas on 3,256 acre ranch).

<sup>24</sup> Joan M. Youngman, Taxing and Untaxing Land: Open Space and Conservation Easements, State Tax Notes, 9/11/2006, pp. 747-762, at n. 1.

<sup>25</sup> 2005 Census Report, supra note 20, at 8.

<sup>26</sup> See Unif. Conservation Easement Act, 12 Unif. L. Ann. 163, Prefatory Note at 164; § 4, Comment at 179 (1996) (discussing common law hurdles to conservation easements); U.S. v. Blackman, 270 Va. 68, 613 S.E.2d 442 (2005) (discussing common law prohibition and statutory changes that permitted creation of both affirmative and negative easements in gross, even prior to passage of Uniform Act). See infra sec. I.D.2. on the in gross issue.

<sup>27</sup> 12 Unif. L. Ann. 163 (1996).

<sup>28</sup> The jurisdictions and the effective dates are: Alabama (1997), Alaska (1989), Arizona (1985), Delaware (1996), District of Columbia (1986), Georgia (1992), Idaho (1988), Indiana (1984), Kansas (1992), Kentucky (1988), Maine (1985), Minnesota (1985), Mississippi (1986), Nevada (1983), New Mexico (1991), Oklahoma (1999), South Carolina (1991), Texas (1983), Virginia (1988), Wisconsin (1981). See 12 Unif. L. Ann. 54 (Supp. 2006).

<sup>29</sup> Unif. Conservation Easement Act § 2(a).

<sup>30</sup> Id. § 4.

similar effect to the Uniform Act.<sup>31</sup> Conservation easements are now recognized as bona fide real property interests.<sup>32</sup>

### C. The Tax Subsidy

The creation of conservation easements held by nonprofit organizations is usually subsidized by the public purse through tax deductions on the federal and state level.<sup>33</sup>

Under section 170(h) of the Internal Revenue Code, a taxpayer can deduct for federal tax purposes the value of a “restriction”<sup>34</sup> “exclusively for conservation purposes”<sup>35</sup> that is donated to a “qualified” nonprofit organization.<sup>36</sup> Providing the particular Code requirements are met, a private conservation easement given to a nonprofit can qualify for the deduction. Importantly, the deduction is only permitted if the conservation restriction is “granted in perpetuity.”<sup>37</sup>

Moreover, the presence of a conservation easement, created during the life of the decedent or in his will, lowers value of the subject property for federal estate tax purposes.<sup>38</sup> The Internal Revenue Code also provides for post-mortem donations of conservation easements by the estate<sup>39</sup> and an additional exclusion from estate tax for

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<sup>31</sup> See, e.g., Conn. Gen. Stat. §§ 47-42a, -42b, -42c; Mass. Gen. L. Ann. ch. 184 §§ 31-33; Mont. Code Ann. §70-17-102; Tenn. Code Ann. § 66-9-301.

<sup>32</sup> See Fenster v. Hadi, 1991 WL 257295 (Conn. Super.) (conservation easement is a clog on marketable title).

<sup>33</sup> The Land Trust Alliance states that “[a]nother major contributing factor to the surge in private land conservation is the availability of state and federal tax incentives.” 2005 Census Report, supra note 20, at 8.

<sup>34</sup> I.R.C. § 170(h)(2)(C) (26 U.S.C.A. § 170(h)).

<sup>35</sup> I.R.C. § 170(h)(1)(C).

<sup>36</sup> I.R.C. § 170(h)(1)(B). For a discussion of § 170(h), see C. Timothy Lindstrom, Income Tax Aspects of Conservation Easements, 5 Wyo. L. Rev. 1 (2005); Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach, 31 Ecology L. Q. 1 (2004); Stephen Small, Real Estate Developers and Conservation Easements, 19 Probate & Prop. 24 (May/June 2005).

<sup>37</sup> I.R.C. § 170(h)(2)(C).

<sup>38</sup> 26 C.F.R. § 25.2703-1(a)(4); see Estate of Smith v. U.S., 979 F. Supp. 279 (D. Vt. 1997).

<sup>39</sup> I.R.C. § 2055(f).

certain conservation easements.<sup>40</sup> These provisions mean additional revenue losses for the Treasury due to conservation easements.

Local and state tax revenues are also reduced by the presence of conservation easements. Assessments for state and local property taxation are made based on the land's market value,<sup>41</sup> taking into account the restrictions on the title. Thus, where a conservation easement eliminates the potential for development of the property, the assessed value of the property and hence the tax revenues from the parcel are decreased.<sup>42</sup> The local municipality must then either cut services because of the decreased revenue or increase the tax burden on other citizens to make up for the gap.<sup>43</sup>

States also subsidize the donation of conservation easements through deductions on state income taxes.<sup>44</sup> An increasing number of states go farther and provide for an

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<sup>40</sup> I.R.C. § 2031(c) (permitting the exclusion from the estate of an additional 40% of the land's restricted value, up to \$500,000).

<sup>41</sup> See *Bd. of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146 (Colo. 1988) (including reasonable future use of the property); Joan Youngman, *Legal Issues in Property Valuation and Taxation* 55-92 (2006).

<sup>42</sup> See *Jet Black, LLC v. Rout County Bd. of Cty. Cmmrs.*, 2006 WL 2828871 (Colo. App.) (referring to special statutory treatment of conservation easement land under agricultural use); *Firethorn Investment v. Lancaster County Bd. of Equalization*, 622 N.W.2d 625 (Neb. 2001) (when land's highest and best use was as a golf course, presence of conservation easements did not reduce its value); *Ross v. Town of Santa Clara*, 266 A.D.2d 678 (N.Y. 1999) (since land was already restricted against development, conservation easement did not decrease value); *Gibson v. Gleason*, 20 A.D.3d 623, 798 N.Y.S.2d 541 (2005) (upholding trial court's order to reduce property tax assessment because of conservation easement barring subdivision and limiting lot to agricultural uses); *McKee v. Dep't of Rev.*, 2004 WL 2340265 (Or. Tax Ct. 2004) (finding significant effect of conservation easement on value when compared to other properties); *Luca v. Lincoln County Assessor*, 2003 WL 21252488 (Or. Tax Ct. 2003) (court acknowledges drop in development potential); Daniel S. Stockford, *Comment: Property Tax Assessment of Conservation Easements*, 17 B.C. Env'tl. Affairs L. Rev. 823 (1990). For an excellent discussion of the various jurisdictional treatments of conservation easements for state tax purposes, see Youngman, *supra* note 24.

<sup>43</sup> Christopher M. Anderson & Jonathan R. King, *Equilibrium Behavior in the Conservation Easement Game*, 80 *Land Economics* 355 (2004); Jonathan R. King & Christopher M. Anderson, *Marginal Property Tax Effects of Conservation Easements: A Vermont Case Study*, 86 *Amer. J. Agricultural Economics* 919 (2004).

<sup>44</sup> This is usually reflected not by a specific state tax code provision but by the state tracking the federal income tax structure and its deductions. See Jeffrey O. Sundberg & Richard F. Dye, *Tax Property Value Effects of Conservation Easements*, Lincoln Institute of Land Policy Working Paper WP06JS1, at ns. 15-16 & accompanying text, <http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=1128>; Vermont Land Trust, *Conservation Easement Donations*, [http://www.vlt.org/Conservation\\_Easement\\_Donations.pdf](http://www.vlt.org/Conservation_Easement_Donations.pdf), found 6/25/07.

income tax credit, rather than a simple deduction.<sup>45</sup> Colorado, for example, gives an income tax credit of fifty percent of the easement's value up to a maximum of \$375,000.<sup>46</sup> Moreover, taxpayers unable to use these credits may sell them to others at approximately 80-85 percent of face value, or, if there is a budget surplus, cash in their credits for a refund from the state government.<sup>47</sup> These state subsidies provide additional incentives to federal income tax and local property tax benefits.

#### D. Perpetuity and In Gross Ownership

Perpetual duration and “in gross” ownership are two fundamental attributes of the modern private conservation easement. These features, however, run counter to traditional legal rules, attitudes, and policy considerations. Despite legislative surmounting of common law misgivings on perpetuity and in gross ownership, the policy considerations remain and require accommodation.

##### 1. Perpetuity

Privately held conservation easements are typically created for an unlimited duration. While theoretically the duration should be a matter of active negotiation, various factors in combination are yielding a pattern of perpetual conservation easements. First, the Uniform Act reflects the dominant legislative scheme of defaulting to perpetuity by providing that “a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.”<sup>48</sup> Moreover, a conservation easement is deductible under

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<sup>45</sup> See, e.g., N.Y. Tax Law § 210(38); N.C. Gen. Stat. Ann. § 105-151.12; Va. Code Ann. § 58.1-512, see State Tax Notes, 2007 STT 53-17, March 12, 2007, “Virginia Tax Commissioner Issues Guidelines on Land Preservation Tax Credit,” Land Trust Alliance, State Tax Credits for Conservation, [http://www.landtrustalliance.org/publicpolicy/state\\_tax\\_credits.htm](http://www.landtrustalliance.org/publicpolicy/state_tax_credits.htm), found 6/25/06.

<sup>46</sup> Colo. Stat. Ann. § 39-22-522.

<sup>47</sup> “Mountains for the Centuries,” *The Economist*, 2/3/2007, p. 35.

<sup>48</sup> Unif. Act § 2(c). North Dakota is an exception, providing for a 99 year duration. N.D. Cent. Code § 47-05-02.

the Internal Revenue Code only if it “is granted in perpetuity.”<sup>49</sup> That provision is a huge motivation for creating interests with an unlimited life. Finally, conservation organizations typically provide for an unlimited duration in their model documents.<sup>50</sup>

## 2. In Gross Ownership

An easement or a covenant is held “in gross” when its owner does not have neighboring land that is benefited by the interest on the burdened property.<sup>51</sup> The Uniform Act, like other legislation authorizing private conservation easements, specifically permits nonprofits to hold these interests in gross.<sup>52</sup> Thus, through the ownership of easements, an out-of-state nonprofit can control related land use decisions even though it owns no other land in the area. Because easements can be held in gross, nonprofits have no geographical limits to their easement acquisition programs nor physical limitations on areas in which they can be involved.

## 3. Covenants, Easements, and Property Theory

The presumption of perpetuity and in gross ownership of conservation easements raise serious public policy issues about flexibility and the control of land use policy by non-local, private groups. Moreover, allowing unlimited duration and in growth ownership runs counter to both legal theory and doctrinal rules that were traditionally in

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<sup>49</sup> I.R.C. § 170(h)(2)(C). The Tax Act of 1976, which first created conservation easement donation deductions, originally provided for deductibility of an easement with a 30 year duration, but that was subsequently changed to the perpetual requirement. Youngman, *supra* note 24, at 749.

<sup>50</sup> See Anella & Wright, *supra* note 9, at 153 (Model Easement, para. M3); The Nature Conservancy, Fiction: Easements should not be permanent but should be limited to a specific term of years, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/myths.html>, found 6/11/07; see also U.S. v. Blackman, 270 Va. 68, 613 S.E.2d 442, 444 (2005) (deed providing “in perpetuity”).

<sup>51</sup> Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes* 10-15 (2d ed. 2004). An easement or covenant is appurtenant when the benefit is attached to land owned by the holder near the burdened parcel.

<sup>52</sup> Unif. Act § 4(1).

place, and that had to be supplanted by legislation, to validate private conservation easements.

a. Conservation easements or covenants? Conservation easements are really not “easements” in the way that law has understood such interests. Terming them “easements” is a misnomer. Traditionally, easements were affirmative interests, giving the easement holder the right to do something on the land of another, such as to cross another’s land by a right of way.<sup>53</sup> Except for a few rare and limited exceptions, the term “easement” was not applied to negative interests that served to restrict the burdened property owner.<sup>54</sup> Rather, negative interests were typically created as “covenants” and enforced as “covenants running with the land at law” or “equitable servitudes.”<sup>55</sup>

Since conservation “easements” typically involve only negative restrictions on the burdened owner’s use of his property, they should more accurately be called conservation “covenants.”<sup>56</sup> Or, following the taxonomy of the Third Restatement of Property-Servitudes that unifies easements and covenants for many purposes under the rubric “servitude,” these interests could be called conservation “servitudes.”<sup>57</sup> Despite the inaccuracy, this article uses the term “conservation easement” as this has received common acceptance in the legal and popular literature.

b. Policy against restrictions. This is not merely a matter of semantics. Covenants, unlike easements, have historically been viewed by the courts with suspicion,

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<sup>53</sup> Korngold, Private Land Use Arrangements, supra note 51, at 1-4.

<sup>54</sup> Korngold, Private Land Use Arrangements, supra note 51, at 7-10. There were only a few negative easements recognized at common law—light, air, view, support, and stream flow—and the Third Restatement of Property has abolished the category of negative easement. Ibid.

<sup>55</sup> Korngold, Private Land Use Arrangements, supra note 51, at 287-293.

<sup>56</sup> See *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C. App. 1994) (specifically rejecting application of rules of affirmative easements to a façade easement, finding it more akin to a restrictive covenant); *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 (2000) (applying law of restrictive covenants to a conservation easement).

<sup>57</sup> I so advocated in Korngold, Conservation Servitudes, supra note 6.

as reflected in their theoretical musings and rules of law. Courts have often expressed an antipathy towards covenants that create restrictions or restraints on land and state that they favor a policy of free and unrestricted use of land.<sup>58</sup> This “antirestrictions policy” has led the courts to declare a hard line against covenants, noting that they are “not favorites of the law.”<sup>59</sup> This antipathy led the law to erect various barriers to the enforcement of covenants, reflected in various common law rules. Two such rules would have made it difficult if not impossible to create private conservation easements at common law. First, some courts attempted to narrow the duration<sup>60</sup> and operation of covenants<sup>61</sup> with constructional devices, raising (perhaps surmountable) questions about the perpetual nature of conservation easements. Second, the common law prohibition of enforcement of covenants in gross<sup>62</sup> would have been fatal to the modern private conservation easement.

Although the courts do not typically explain the reasons for their concern about restrictions created by covenants, the antirestrictions policy serves two important, longstanding goals that resonate in the current conservation easement discussion. First, stripping away restrictions that would hamper the functioning of real estate markets helps to promote efficient use of our limited supply of land. The rule against in gross ownership can be understood in this context.<sup>63</sup> When a covenant is held in gross, the covenant owner does not need to own a neighboring fee interest to which the covenant

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<sup>58</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 298.

<sup>59</sup> See, e.g., *Genovese Drub Stores, Inc. v. Connecticut Packing Co.*, 732 F.2d 286 (2d Cir. 1984); *Frander & Frander, Inc. v. Griffen*, 457 So.2d 375 (Ala. 1984); *Andrews v. Lake Serene Property Owners Ass’n*, 434 So.2d 1328 (Miss. 1983).

<sup>60</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 435-439.

<sup>61</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 402-408.

<sup>62</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 381-388.

<sup>63</sup> Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 *Am. U. L. Rev.* 101, 125-127 (2007).

attaches and so the covenant owner may be far removed from the area.<sup>64</sup> And as time passes, there may be multiple owners of the in gross right through inheritance or sale, all living in parts unknown. This may make it expensive or impossible for the fee owner to locate the covenant holder to enter into negotiations about the covenant and to achieve modification or termination. Transaction costs will be high. Moreover, there is no ongoing neighborly exchange between the parties which is often a lubricant in a give-and-take bargaining process. Without the opportunity to negotiate, the market process cannot work. The prohibition on in gross covenants can be understood as preventing such market malfunctioning.

Second, the antirestrictions policy expresses a concern about permitting past generations to control current owners of property, where the old ties would frustrate the personal autonomy of current owners.<sup>65</sup> For example, covenants to barring occupancy by members of racial and religious were denied enforcement only in 1948,<sup>66</sup> and covenants are still employed to control the nature of family units living in a residential subdivision.<sup>67</sup> When courts express general concerns about duration of covenants, they may be reflecting some discomfort with perpetually imposing the past's vision on the lives of the future. Even the frustrating and rough Rule Against Perpetuities teaches the salutary lesson that at some point the past must relinquish power and warns of the

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<sup>64</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 378.

<sup>65</sup> For example, direct restraints on alienation can force people to live where they no longer want to remain and prevent them from moving to new areas. Rest. 3d Prop. (Servitudes) § 3.4, comment c. See Korngold, *Intergenerational Conflicts*, supra note 63, at 127-129.

<sup>66</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 399.

<sup>67</sup> Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. Davis L. Rev. 951 (1989).

dangers of “dead hand” control.<sup>68</sup> Moreover, the prohibition on in gross ownership of covenants may also reveal that while there is a willingness to tolerate ties between neighbors, they may be suspicious of outsiders trying to assert control over an area.

The choice of the term conservation “easement” by their proponents, despite the inaccuracy under then existing and current legal conceptualizations, may have served the goal of making these interests more accepted by legislators, courts, and parties. In general, easements have long been accepted by the courts while covenants have been viewed with some suspicion.<sup>69</sup> More specifically, there is no doubt that easements can be created in fee, i.e., perpetually, as well as in “in gross.”<sup>70</sup> Semantic sleight-of-hand and legislation removed constraints of the common law rules on conservation easements, but the policy issues remain.

## II. The Policy Matrix: The Advantages and Concerns With Private Conservation

### Easements

#### A. Advantages of Conservation Easements

Privately held conservation easements bring significant advantages to current and future citizens. These include conservation of our natural environment, private action, efficiency, and freedom of choice. In combination, these benefits make a powerful case for the continuation of private conservation easements, on both policy and normative levels.

##### 1. The Conservation Value

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<sup>68</sup> The rule is being repealed by many jurisdictions, for taxation and commercial reasons, without adequate consideration of the social policy. See Robert H. Sitkoff & Max. M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *Yale L.J.* 356 (2005).

<sup>69</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 2-3.

<sup>70</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 28-29, 10-15.

The conceptualization and legislative authorization of private conservation easements reflects a fundamentally new outlook of Americans toward our nation's land over the past forty years.<sup>71</sup> From the time of the first European settlers in North America, land had been viewed exclusively as a commercial asset, to be fully exploited by its owner.<sup>72</sup> In contrast, over the past several decades, Americans have viewed conservation of our natural and historical heritage as an important value, to be balanced against a traditional "full development" model.<sup>73</sup> Conservation easements are an important tool of to preserve ecological conditions and to protect this new conservation value.

Moreover, development activities on unique environments are highly expensive if not impossible to reverse.<sup>74</sup> This increases the stakes for effective, strong preservation. For conservation proponents, the fixed, perpetual nature of conservation easements is major plus.<sup>75</sup>

## 2. Private Action

Conservation easements are "private" rather than governmental initiatives. Given the excessive demands on government for top priority services and the limits of government resources and energy, there are advantages when private citizens step forward to take on roles to improve their communities. Costs of acquisition, monitoring, stewardship, and enforcement of conservation easements are shifted from local, state, and

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<sup>71</sup> See Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. Pa. L. Rev. 85 (2001).

<sup>72</sup> See Lawrence M. Friedman, *A History of American Law* 169 (3d ed. Touchstone 2005); Morton J. Horwitz, *The Transformation of American Law 1780-1860* 31 (Harvard Univ. Press 1977); Korngold, *Intergenerational Conflicts*, supra note 63, at 108-110.

<sup>73</sup> See Brewer, supra note 6, at 1-12; D.T. Kuzmiak, *The American Environmental Movement*, 157 *The Geographical J.* 265 (1991); Bob Pepperman Taylor, *Environmental Ethics and Political Theory*, 23 *Polity* 567 (1991); Adam W. Rome, William Whyte, *Open Space, and Environmental Activism*, 88 *Geographical Rev.* 259 (1998).

<sup>74</sup> See generally Alexander James, Kevin J. Gaston & Andrew Balmford, *Can We Afford to Conserve Biodiversity?*, 51 *BioScience* 43 (2001).

<sup>75</sup> See Anella & Wright, supra note 9, at 31 (asserting that most land trusts only accept perpetual easements). Certainly the Internal Revenue Code contemplates perpetuity. See supra sec. I.C.

federal government to non-profit organizations when the holder is a non-profit rather than a governmental entity.<sup>76</sup> Furthermore, government actors exercising decision making over conservation easements may be subject to short term pressures and special interests, based on looming elections or the need to derive additional tax revenues through development.<sup>77</sup> These forces may not make for the best long term conservation easement policy and practice. In contrast, nonprofits can hold these easements free of special interest and short term pressures.

### 3. Efficiency Benefits

Permitting private conservation easements in gross also yields the market efficiency advantages embodied in the notion of “freedom of contract.” The law generally allows a land owner to enter into market transactions with respect to her property and to sell partial interests, such as a lease or a mortgage, in her land. The law upholds these arrangements because free market exchanges of land achieve an efficient allocation of our limited (and non-renewable) land resources.<sup>78</sup>

Private conservation easements are a good example of the efficiency benefits of market transactions in fractional interests of real property. The fee owner retains the rights that he wishes in the property (perhaps a live in a home or to farm the land) and the nonprofit organization gets the control that they seek (the ability to prevent further development). If the law barred the exchange of this partial interest of the fee, the only way that the nonprofit could prevent development would be to buy the property in fee

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<sup>76</sup> See Byers & Ponte, *supra* note 15, at 9-10; Dominic P. Parker, Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements, 44 *Natural Resources J.* 483 (2004); Korngold, *Conservation Servitudes*, *supra* note 6, at 442-446.

<sup>77</sup> See James M. Buchanan, *Constraints on Political Action* in James M. Buchanan & Richard A. Musgrave, *Public Finance and Public Choice* 107-128 (MIT Press 1999) (on public choice theory and pressures on elected government officials).

<sup>78</sup> Richard A. Posner, *Economic Analysis of the Law* 9-10 (6<sup>th</sup> ed. 2003).

simple absolute. This would be a poor result as the nonprofit would have to pay a much higher amount than for an easement acquisition, creating an overinvestment in conservation. Also, the land the owner would lose the option of cashing out some of the land's value through sale or donation (with tax benefits) of the easement while still living on the land, causing an overinvestment in living space.<sup>79</sup> This is not an efficient use of land resources.

#### 4. Freedom of Choice

The notion that people are free to dispose of their property in the marketplace is a key assumption of freedom of contract. Ownership of property entitles the holder to seek her personal happiness and satisfaction by exercising her free choice with respect to the property, whatever that choice may be and whatever other people may think of the wisdom of that decision. The law should trump this freedom of choice of property and impose on this right of property owners only in rare circumstances and for overriding reasons. Thus, if an owner wishes to donate or sell a conservation easement to a nonprofit organization, she should be able to do so.<sup>80</sup>

#### B. Concerns About Conservation Easements

Although there are compelling policy and normative reasons for permitting private conservation easements, these interests come with costs that must be addressed. Some problems can appear when the easement is created, and others may emerge over time.

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<sup>79</sup> See Korngold, Intergenerational Conflicts, *supra* note 63, at 118-120.

<sup>80</sup> See Richard Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. Cal. L. Rev. 1353, 1359 (1982); James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 17 (2d ed. Oxford Univ. Press 1998); *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968) (“Where a man’s land is concerned, he may impose ... any restrictions he pleases.”); see also Anthony Anella and John B. Wright, *Saving the Ranch: Conservation Easement Design in the American West* 16 (Island Press 2004) (“Conservation easements fully respect private property rights. In fact, the tool is a powerful way of helping landowners do what they want with their land.”).

## 1. Creation

There are several concerns about permitting private organizations to hold conservation easements that arise at the time of creation of the interests. These include the tax subsidy to donors; the lack of standards, public participation, and process in the creation of conservation easements; and class issues.

a. Tax subsidy. Very often conservation easements held by nonprofits are in reality not purely “private” endeavors but rather are subsidized by the public purse through federal or state tax deductions.<sup>81</sup> It is therefore legitimate for the public to ask whether it is getting full value in exchange for these subsidies.

In the tax year of 2003, federal income tax deductions for conservation and historic easements totaled \$1.49 billion.<sup>82</sup> Assuming high bracket taxpayers, the revenue loss to the Treasury could be roughly approximated in the \$600 million plus range. The presence of a tax benefit does not deny the charitable, environmental motive of the donor<sup>83</sup> nor the fact that despite the deduction the net value of the property to the donor is reduced. There are also some cases where the easement is purchased by the nonprofit,

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<sup>81</sup> See supra sec. I.C. Tax benefits are described by at least some nonprofits on their websites, see, e.g., <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html>, found 6/1/07, and are otherwise described in the literature. See, e.g., Christopher E. Williams and Meredith E. Lathbury, Economic Incentives for Habitat Conservation on Private Land: Applications to the Inland Pacific Northwest, 24 Wildlife Society Bulletin 187 (1996); Rachel Emma Silverman, Tax Break With A View, Landowners Rush to Take Advantage of New Law That Boosts Deductions for Blocking Development, Wall St. Journal, 2/7/07, p. D1.

<sup>82</sup> Janette Wilson & Michael Strudler, Individual Noncash Charitable Contributions, 2003, SOI Bulletin Spring 2006, <http://www.irs.gov/pub/irs-soi/03inccart.pdf>.

<sup>83</sup> See Byers & Ponte, supra note 15, at 15-16; Lorna Thackeray, Conservation Easement Preserve (sic) Family's Way of Life, Billings Gazette, 2/26/06, <http://www.billingsgazette.net/articles/2006/02/26/news/state/25-easement.txt>, found 3/22/07 (citing continuity of family ranching as fundamental motivation for the subject of the article); but see J. B. Wright, Conservation Easements: An Analysis of Donated Development Rights, 59 J. Amer. Planning Ass'n 487 (1993) (tax savings is the most common motivation for the donation).

albeit sometimes at a bargain price.<sup>84</sup> It is clear, though, that where a deduction is taken, the public purse does subsidize the transfer. Abuses have also cost the Treasury, especially through dubious appraisals and some insider deals.<sup>85</sup> Private conservation easements thus decrease federal revenues.

Moreover, conservation easements have an impact on state and local property tax revenues. The unilateral decision of one homeowner to place a conservation easement on her property can reduce state and local property tax revenues, forcing government to cut services or to increase taxes on other citizens to maintain services.<sup>86</sup> This could have a negative impact on the municipality's civic agenda and other residents.<sup>87</sup> Experimental economics has shown that a donor's decision to create conservation easements is based on his personal welfare maximization and not on a consideration of the effects on others.<sup>88</sup> Thus, conservation easements pose a cost to local governments and citizens.

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<sup>84</sup> See *Murphy v. Long*, 170 S.W.3d 621 (Tex. App. 2005) (sale of lots by The Nature Conservancy subject to conservation easement, with restriction presumably reflected in the price); Byers & Ponte, *supra* note 15, at 50, 250-251, 270-271 (describing acquisition techniques); Rocky Mountain Front Range Under Conservation Easement, *Billings Gazette*, 2/6/07 <http://www.billingsgazette.net/articles/2007/02/06/news/state/44-front.txt>, found 3/22/07 (conservation easement purchased by The Nature Conservancy on 4,300 acre ranch).

<sup>85</sup> See Youngman, *supra* note 24, at 749-751. Abuses led to a Congressional investigation of The Nature Conservancy, see U.S. Sen. Finance Comm., Report on the Nature Conservancy (2005), and legislation in 2006 that tightened appraisal standards and penalties. Pension Protection Act of 2006, P.L. 109-280 (H.R. 4), 29 U.S.C.A. § 1219 ("Provisions relating to substantial and gross overstatements of valuations"); Staff Report, Joint Committee on Taxation, Technical Explanation of H.R. 4, 8/3/06, at 308-312. The Nature Conservancy increased its oversight rules as a result. The Nature Conservancy, Final Report of the Conservation Easement Working Group, 4/29/04, [http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/files/easements\\_report.pdf](http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/files/easements_report.pdf), found 3/23/07.

<sup>86</sup> See *supra* sec. I.C.

<sup>87</sup> Theoretically, a desirable and effective conservation easement on the donor's property could enhance the value of neighboring properties, increasing the welfare of those owners and the value of their properties. Tax revenues would thus not drop since the increased assessments on the neighboring properties would yield increased revenues when the tax rate is applied. But the effect on neighboring parcels' values is in actuality hard to predict. Youngman, *supra* note 24, at 753; see J. Geoghegan, L. Lynch & S. Bucholtz, Capitalization of Open Spaces into Housing Values and the Residential Property Tax Revenue Impacts of Agricultural Easement Programs, 32 *Agricultural & Resource Economics Rev.* 33 (2003).

<sup>88</sup> Anderson & King, *supra* note 43, at 357, 360.

State income tax conservation easement programs also create challenges. The annual revenue loss to Colorado from its income tax credit program in 2005 was \$85.1 million, up from \$2.3 million in 2001.<sup>89</sup> The cost and conservation efficacy of this program has led to attempts to amend it.<sup>90</sup> Colorado's program may indeed be consistent with the strong environmental preference of its citizenry and may support its substantial outdoor recreation industry. It is unclear, however, whether the public is getting the maximum benefit for its tax subsidy dollars from a patchwork of private conservation easements that were created outside of an overall environmental planning process.

b. Standards, public planning and process. Private groups have virtually unlimited discretion in purchasing or accepting donations of easements and do not have to follow standards or a plan in making such determinations.<sup>91</sup> The nonprofit may simply accept any easement that comes its way, even though the land to be conserved and the terms of the easement are of dubious environmental benefit. Best practices on easement selection and terms may help to address these issues, but they are not a true solution in any case since they are not binding or not mandatory.<sup>92</sup>

Moreover, private organizations do not accumulate conservation easements pursuant to a *public* land use plan. This can easily result in a patchwork of easements that do not add up to an effective community-wide preservation plan.<sup>93</sup> Thus open space

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<sup>89</sup> See State Tax Notes, 2007 STT 72-4, April 13, 2007, "Colorado Lawmakers Want Tighter Controls on Credit for Donated Land," discussing Utah HB 1361.

<sup>90</sup> *Ibid.*

<sup>91</sup> § 1(1) of the Uniform Act merely defines the values inherent in a conservation easement but does not provide a standard or measurement. § 170(h) of the I.R.C. does provide some limitations for deductibility, but they set a floor not an optimal level. See *supra* secs. I.C. & II.B.1.a.

<sup>92</sup> For examples of best practices, see Anella & Wright, *supra* note 9, at 52-81; Byers & Ponte, *supra* note 15, at 26-42; John B. Wright, Conservation Easements: An Analysis of Donated Development Rights, 59 J. Amer. Planning Ass'n 487 (1993).

<sup>93</sup> See Heidi J. Albers & Amy W. Ando, Could State-Level Variation in the Number of Land Trusts Make Economic Sense?, 79 Land Economics 311, 312 (2003) ("local land trusts specializing in providing open

and habitat protection can be sited based on the chance decisions of private landowners and unaccountable private groups—appropriately pursuing their *own* interests and mission but not necessarily the wider and inclusive land use policies that the public requires. Random creation of conservation land is not consistent with modern notions of planning that supports broader, regional, even cross-border approaches to land use planning.<sup>94</sup> Private decision makers are not subject to the accountability of the electoral and regulatory processes that bind governmental officials and decisions.

Even those nonprofits that might follow suggested best practices as to easement selection, operate as private entities. They are not subject to the democratic, administrative, and legal constraints and process of a public land use planning process. Permitting the outsourcing of local land use decisions from a public, governmental procedure to a private entity raises serious concerns that will only multiply as acreage under private conservation continues to increase.<sup>95</sup> The situation is exacerbated by “in gross” ownership, where an out-of-state, geographically distant nonprofit that is removed from local issues and citizens, controls patterns of land usage and development.<sup>96</sup> Indeed, it can be corrosive of the public trust in government if difficult decisions are abdicated to the private sector.

Outsourcing public land issues to private organizations through the conservation easement vehicle may also serve the interests of some elected officials. Just as legislators

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space do not consider the impact of their decisions on regional conservation benefits;” “lack of coordination” among land trusts “has become a serious problem.”).

<sup>94</sup> See Anthony Downs, *New Visions for Metropolitan America* 26-30, 132-134 (1994); Robert Fishman, *The Death and Life of American Regional Planning* in Bruce Katz (ed.), *Reflections on Regionalism* 107-123 (2000); see also Terri Mashour, Janaki Alavalapati, Ral Matta, Sherry Larkin & Doug Carter, *A Hedonic Analysis of the Effect of Natural Attributes and Deeds Restrictions on the Value of Conservation Easements*, 7 *Forest Policy & Economics* 771 (2005) (describing the need for a state planned program to deal with wildland-urban interface issues).

<sup>95</sup> See *supra* sec. I.B.

<sup>96</sup> See *supra* sec. I.D.1.

sometimes delegate difficult and potentially unpopular issues to agencies in order to avoid political fallout,<sup>97</sup> they may be taking similar steps in outsourcing land use decisions—a volatile area of particularly high interest to voters<sup>98</sup> --to nonprofits. The public deserves better from its elected officials.

c. Class issues. As a related matter, there is the potential for class conflict and elitism in conservation easement creation and enforcement. The effect, if not the intent, of a pattern of conservation easements in a community can be “private large-lot zoning.”<sup>99</sup> Limiting development on a large tract to a single (often existing) home can prevent the building of affordable housing in the area or environmentally friendly planned unit developments. A pattern of conservation easements may actually increase the “exclusivity” of the neighborhood and keep out newcomers.<sup>100</sup>

Despite his promotion of conservation easements, William H. Whyte noted the inherent “muted class and economic conflicts”<sup>101</sup> in this endeavor. He believed that the donors of conservation easements would be the “gentry” and that their interest was in natural areas in the countryside rather than open space for parks and playgrounds. Thus, there would be a divergence of interests on conservation questions and without a public process to manage the friction there is a risk that traditionally powerful groups will be successful in privately imposing their vision. These potential negative class effects can

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<sup>97</sup> See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

<sup>98</sup> William A. Fischel, *The Homevoter Hypothesis: How Home Voters Influence Local Government Taxation, School Finance, and Land-Use Policies* (paperback 2005).

<sup>99</sup> Consider, for example, the recent dispute between environmentalists seeking to preserve scenery and those supporting the development of lower income housing for immigrant laborers living in crowded conditions in Monterey, California. Miriam Jordan, *In Tony Monterey County, Slums and a Land War*, *The Wall St. J.*, 8/26/06, A1.

<sup>100</sup> See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975) (declaring the obligation of towns to provide fair share of affordable housing within the state).

<sup>101</sup> Whyte, *supra* note 6, at 37.

be exacerbated by an unrepresentative, parochial, homogenous, self-perpetuating nonprofit board of directors of organizations holding conservation easements.<sup>102</sup> It is fine for people to associate with whomever they wish and they should be free to pursue their own happiness and interests, but that does not mean that public land policy should be delegated to such private groups.

d. Governmental easements. The growth of private conservation easements should not mask the public's willingness positive attitudes towards governmentally owned conservation easements. Moreover, data indicate that the public is willing to pay for the acquisition of such easements. 77% of 1,630 ballot measures providing fund for land conservation between 1994 and 2005 were approved, providing \$31.1 billion in funding.<sup>103</sup> Other reports show a willingness by citizens to pay for governmental acquisition of conservation easements.<sup>104</sup> While far from perfect, government has been able to successfully plan and execute major infrastructure and public projects over the generations. The citizenry could expect and require them to effectively manage a conservation easement program.

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<sup>102</sup> See Alice Korngold, *Leveraging Good Will: Strengthening Nonprofits by Engaging Businesses* 138-142 (Jossey Bass 2005) ("The right board composition and structure in the past is unlikely to be the right composition and structure today and tomorrow."); David Lipton, *Significant Private Foundations and the Need for Public Selection of Their Trustees*, 64 Va. L. Rev. 779 (1978). See also John B. Wrights, *Cultural Geography and Land Trusts in Colorado and Utah*, 83 *Geographic Rev.* 269, 277-278 (1993) (finding factors in disparity in numbers and success of land trusts between areas: cultural values, economic conditions, transient population, racial composition, political attitudes). The Land Trust Alliance's *Standards and Practices, Standard 3B* (2005) calls for a board with "diverse skills, backgrounds and experiences." [http://www.lta.org/sp/land\\_trust\\_standards\\_and\\_practices.pdf](http://www.lta.org/sp/land_trust_standards_and_practices.pdf), found 6/10/07—the key to increasing diversity of perspective and background will be in adoption, interpretation, and implementation of this and similar standards.

<sup>103</sup> Andrew J. Plantinga, *The Economics of Conservation Easements* in Gregory K. Ingram & Yo-Hung Hong, *Land Policies and Their Outcomes* 90-117, at 91-92 (Lincoln Institute of Land Policy 2007).

<sup>104</sup> See, e.g., Seong-Hoon Cho, David H. Newman & J.M. Bowker, *Measuring Rural Homeowners' Willingness to Pay for Land Conservation Easements*, 7 *Forest Policy & Economics* 757 (2005); Brad Haire, *Georgians Want to Preserve Farmland*, 5/19/04, [www.southeastfarmpress.com](http://www.southeastfarmpress.com) (reporting on University of Ga. survey); *California Growers Permanently Protect Land*, *American Nurseryman*, 3/1/02, vol. 195, issue 5 (reporting on California program of easement acquisition and bond issues).

2. Ongoing. In addition to concerns at the time of creation, conservation easements present challenges over the years of their existence. These include stewardship and the perpetuity issue.

a. Stewardship. While many organizations do a fine job of stewarding the conservation easements that they hold, others do not fare as well.<sup>105</sup> Quality stewardship requires periodic inspection and monitoring of the burdened property, discussions with the fee land owner over general issues and incipient and actual violations, and enforcement actions if resolution of disputes becomes impossible.<sup>106</sup> Without adequate stewardship, the conservation benefit to be enjoyed by the public dissipates. Where a tax benefit accompanied the creation of the easement, this means that the public has paid for a conservation advantage that has been squandered through inaction or misjudgments of a nongovernmental organization. The risk of stewardship failure is greatest, but not exclusive, to poorly funded, inadequately governed nonprofits that lack the institutional and financial capital to develop and maintain quality stewardship programs. The stewardship gap and loss of publicly financed easements clearly has public policy ramifications.

There has been a concerted effort by leading conservation groups to provide education and best practices for stewardship, as well as a recommendation that nonprofits seek accompanying stewardship funds from donors of conservation easements.<sup>107</sup> This advice may help the situation—longitudinal studies will ultimately tell the story. But

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<sup>105</sup> Pidot, *supra* note 18, at 18-19. See Report on The Nature Conservancy, *supra* note 19, at Part Two 2-4 (criticizing monitoring efforts), Exec. Summary 10-11 (suggesting loss of tax exempt status and officer and director penalties for failure to monitor and enforce).

<sup>106</sup> See Anella & Wright, *supra* note 9, at 137-143; Byers & Ponte, *supra* note 15, at 143-168.

<sup>107</sup> Anella & Wright, *supra* note 9, at 28; Byers & Ponte, *supra* note 15, at 126. The Land Trust Alliance and Trust for New Hampshire Lands with assistance from the National Trust for Historic Preservation publishes Brenda Lind, *The Conservation Easement Stewardship Guide* (1991).

more importantly, these steps are not mandatory on nonprofits and there is no evidence that they will be adopted and implemented effectively, especially by those low performing nonprofits who most need to upgrade their operations.

b. Perpetuity and flexibility. Perhaps the greatest risk of conservation easements comes from what many view as their most important attribute—their perpetual nature.<sup>108</sup> While advocates of conservation easements seek to prevent changes in the land forever, it is unclear whether this serves the public welfare in all situations. First, our sense of what is ecologically and scenically valuable and the best methods to preserve such areas evolve over time. Establishing immutable conservation easements may ultimately frustrate conservation efforts in the future.<sup>109</sup>

Moreover, history shows us that the constant shifts in the human condition, technology, and economic arrangements have meant differing uses of land over the generations. There may come a point in the future where a parcel of land subject to a conservation easement is best suited for development as a commercial or industrial property to provide employment in a economically depressed area, or for affordable housing for moderate income tenants or owners in an area where little developable land remains and large private homes dominant, or for some other socially desirable purpose.

Typically decisions about developing undeveloped land are made in two arenas: the market place and the public land use process. In the first, the parties negotiate and reach agreement as to economic terms of a land transfer and development deal. The deal is subject to being shaped in the second arena—the zoning, subdivision, environmental

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<sup>108</sup> Marketable title acts may provide no relief, even in those states that have adopted such legislation. See Rest. 3d of Prop. (Servitudes) § 7.16(5) (exempting conservation easements from marketable title acts).

<sup>109</sup> Julia D. Mahoney, Perpetual Restrictions on Land and the Problem of the Future, 88 Va. L. Rev. 739 (2002).

regulation, and related land use control processes—that give the public a voice in the nature of the project. This two track development process functions today, albeit with high transaction costs and many complaints, and is how socially desirable and economically feasible projects get completed.

If, however, the land is subject to an existing conservation easement, this two track process may be unable to function. First, the presence of a conservation easement held by a nonprofit creates a flawed market process, almost by definition. Conservation organizations, appropriately devoted to their mission of land conservation and opposed to land development, rarely enter market exchanges to sell (i.e., release) their conservation rights. Conservation organizations may be unwilling, regardless of the price, to sell their easement rights for various reasons: creation of complications for the donor under the Internal Revenue Code,<sup>110</sup> concerns about their own nonprofit tax status,<sup>111</sup> doubts about the power to make such sales under their governing documents, and misgivings that potential donors will no longer trust them to hold conservation easements which will prevent them from accomplishing their mission.<sup>112</sup>

The market process may be further impeded. A low-functioning, merged, or defunct nonprofit will likely not be a viable negotiating partner for an owner seeking to

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<sup>110</sup> See 26 C.F.R. § 1.170A-14(c)(2) (placing limits on transfer by easement donees, but allowing termination for changed conditions if proceeds are used for new conservation purpose); Lisa Black & Courtney Flynn, Couple Sue Neighbor Over Use of Conservation Land, *Chicago Tribune*, Metro North Shore, 12/1/05, p. 1 (describing concerns of nonprofit by allowing modification of easement).

<sup>111</sup> See Brad Wolverton, Conservation Charities Come Under Questioning by the Senate, *The Chronicle of Philanthropy*, 6/23/05, p. 4 (describing the intense scrutiny facing these organizations). The Report on the Nature Conservancy, *supra* note 19, Exec. Summary 10-12, suggested that the Senate consider revoking tax-exempt status and imposing excise taxes on officers and directors for failure to monitor.

<sup>112</sup> In the event of a “sale” or release of a conservation easement, logically the consideration should be re-invested in conservation purposes and should be commensurate with any original deduction taken by the easement donor, or else there would be a revenue loss to the public by allowing a deduction and receiving no public benefit. See *infra* sec. III.D.5.

purchase the release of a conservation easement.<sup>113</sup> Moreover, since conservation easements can now be held in gross, there may be a problem in finding the easement owner because the owner is no longer tied to the neighborhood but could literally be located anywhere in the world. Thus, markets may simply not be an answer to deal with removal of conservation easements.

Moreover, the public did not get its usual input into the decision as to whether the conservation easement will be relaxed to accommodate the public interest in light of current conditions. Rather, the nonprofit owner will decide on its own and in a non-public process whether to enforce its easement or yield to the asserted public interest for flexibility.<sup>114</sup> Thus, this key decision on local land use control will be made outside of the public view and electoral process and without public participation. The non-profit may be based at a geographical distance from the locality, without key facts and understanding of the issues. Notions of local, democratic control over key land use decisions would be violated.<sup>115</sup> Issues of class and elitism may influence decisions as well, perhaps not out of ill will but because of the lack of opportunity to hear different viewpoints on the issue.<sup>116</sup>

Finally, perpetual conservation easements that lock in future generations, no matter how well meaning, can violate the autonomy of citizens of the future. Land

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<sup>113</sup> The organization may no longer be filing annual IRS Form 990s, making it hard to locate.

<sup>114</sup> Contrast this with the significant public process in the enforcement of governmental conservation easements. See, e.g., *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446 (2d Cir. 1985).

<sup>115</sup> See *Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523 (2006) (court removed land trust as holder of conservation easement as it is not approved to do business in the state and substituted the county as holder; court dismissed objections that county may have conflict in the future if it seeks to widen nearby road).

<sup>116</sup> Consider the inherent class issues in the recent dispute in Marin County, California over an attempt by Habitat for Humanity to build four affordable housing units in the face of criticism that this would increase traffic and be inconsistent with the neighborhood. Jim Staats, *Crowd Rips Habitat for Humanity Proposal*, *Marin Independent J.*, 1/17/2007, [www.marinij.com/marin/ci\\_5029025](http://www.marinij.com/marin/ci_5029025).

ownership has played an important economic, social, and political role in America, from the time of the first European settlers to the current day.<sup>117</sup> Land is also a limited resource, and by its nature non-renewable. While future citizens no doubt will, and should, be grateful to the current generation for many actions that conserve the environment for the future, the price cannot be the loss of the ability of coming generations to make important decisions on land use for themselves based on their current needs, values, and trade-offs.<sup>118</sup> The current generation must allow adequate flexibility in conservation easements and cannot have the hubris to think that the answer of today will be the answer of eternity. Thus, in order to meet intergenerational responsibilities, a balance must, and can, be struck between the conservation values of the current generation and the autonomy of future generations.

### III. Five Principles for Improving the Law of Conservation Easements

As demonstrated in Section II, there are significant concerns about the devolution of key land use control decisions to private citizens and organizations. Effective public policy decision making, including in the land use arena, requires accountability of actors.<sup>119</sup> That typically includes voter control of key decisions and/or officials—a situation not present when independent nonprofits are making policy. Transparency is

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<sup>117</sup> See Korngold, *Intergenerational Conflicts*, supra note 63, at 108-114.

<sup>118</sup> This would violate the value of free alienability of land. See supra sec. I.D.3.b.

<sup>119</sup> See Ehtisham Ahmad, Maria Albino-War & Raju Singh, "Subnational Public Fiscal Management: Institutions and Macroeconomic Considerations", in Ehtisham Ahmad & Giorgio Brosio (eds.), *Handbook of Fiscal Federalism* (Edward Elgar 2006) (fixed terms of office, fair elections, independent judiciary, auditors are essentials for democracy); Jerome B. McKinney, *Process Accountability and the Creative Use of Intergovernmental Resources*, 41 *Public Administration Rev.* 144 (1981) (evaluating costs and performance); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 *Colum.* 531, 539-541 (1998) (describing prevailing view of accountability); Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 *Amer. Econ. Rev.* 1034, 1037 (2004) (describing literature on elections and accountability).

also a precondition to accountability.<sup>120</sup> This requires standardized information flows—hardly present under the current system where even data on the number, location, and acreage of existing conservation easements cannot be readily ascertained. Transparency also requires a strong probability of the detection of abuse and effective political and legal processes to resolve them; given other demands on attorney-general and regulatory resources, it is unclear how much detection and investigation of abuses is realistically possible under current conditions.<sup>121</sup> Equity is another major concern of public policy decision making; so, it is fair to ask whether private conservation organizations can effectively meet the needs of an economically, socially, and racially diverse America. Potential problems with stewardship and inflexibility present serious challenges for future generations.

Yet, the reasons for validating and using private conservation easements remain powerful—the growing conservation value, the benefits of private initiative, efficiency gains, and freedom of choice for property owners. Conservation easements are attractive to many land owners and citizens. Therefore, private conservation easements in gross should continue to be authorized by the legislatures and the courts, provided some changes are made to address the most pressing issues. The following section describes five principles that, if adopted by legislatures and courts, will strengthen the legal structure of conservation easements for current and future generations.

#### A. Principle I: Restore Market Mechanisms in the Creation of Conservation Easements

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<sup>120</sup> See Lindsay Stirton & Martin Lodge, *Transparency Mechanisms: Building Publicness into Public Services*, 28 *J. Law & Society* 471 (2001) (suggesting four transparency mechanisms: information, choice, representation, voice); Dennis E. Thompson, *Democratic Secrecy*, 114 *Political Sci. Q.* 181, 182, 184-186 (1999) (describing need for information).

<sup>121</sup> See Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 *U. Haw. L. Rev.* 593, ns. 245-252 & accompanying text (1999) (describing limited actions by attorneys general, limited resources, and methods of operation).

One of the claimed benefits of private conservation easements is that they represent private rather than nongovernmental activities, based on consensual rather than compelled transactions. Two aspects of conservation easements, however, need to be reformed to address market distortions resulting from the creation of conservation easements under the current legal regime: the federal tax subsidy and the recording of conservation easements.

### 1. Federal Tax Deductions

The current version of the Internal Revenue Code allows tax benefits for conservation easement donations that might not bring matching public benefits. Deductions in those cases create incentives that encourage transactions that yield an inefficient market allocation of our limited land resources. The tax incentive system also frustrates organized and public land use planning.

Under I.R.C. § 170(h), a donation of a conservation easement qualifies for a deduction if it is for a “conservation purpose.” Such a purpose includes “the preservation of land areas for outdoor recreation by or education of the general public;” “the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;” or the preservation of open space for “the scenic enjoyment of the general public or pursuant to a clearly delineated” governmental conservation policy, and that “will yield a significant public benefit.”<sup>122</sup> Qualifying for the open space deduction thus requires either “scenic enjoyment” (the regulations provide eight factors to determine this, using vague terminology since aesthetic considerations are being described)<sup>123</sup> or consistency with a local, state, or federal governmental policy (with the regulations requiring a focused and

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<sup>122</sup> I.R.C. § 170(h)(4)(A)(i), (ii), and (iii).

<sup>123</sup> 26 C.F.R. § 1.170A-14(d)(4)(ii).

specific government policy).<sup>124</sup> Then, with either open space easement scenario, the easement must meet the “significant public benefit” test, with the regulations describing eleven, again elastic, factors that might be considered in this determination.<sup>125</sup> There are limited reported cases on the natural habitat and open space easement categories,<sup>126</sup> and not much guidance to taxpayers or the Service.

Beyond the administrative concerns engendered by such ambiguity, there is the public subsidy question. Property rights and freedom of contract notions support the removal of common law restraints on property owners’ ability to create conservation easements benefiting nonprofits. But this should not be conflated with the separate question of whether the public should subsidize the free choice of owners through a tax deduction. This is especially so when the benefits of the conservation easement are somewhat amorphous and verifiable, especially when compared to other conservation investments that the public could make. In both the natural habitat and open space conservation easement categories, no public physical access is required for deductibility.<sup>127</sup> With open space easements, the public must only have a view of part of the property, but the extent of what they must be allowed to see and the benefit they receive are unclear.<sup>128</sup> It is fair to ask what the public is getting in return for its investment, especially since the choice of the property is being made by private parties outside of a public land use plan or process.

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<sup>124</sup> 26 C.F.R. § 1.170A-14(d)(4)(iii). Historic easements are a fourth category of conservation easement. I.R.C. § 170(h)(4)(A)(iv).

<sup>125</sup> 26 C.F.R. § 1.170A-14(d)(4)(iv).

<sup>126</sup> See, e.g., *Glass v. Comm’r*, 471 F.3d 698 (6<sup>th</sup> Cir. 2006) (affirming finding that habitat areas were “significant” over challenge of IRS); *Turner v. Comm’r*, 126 T.C. 299 (2006) (finding open space requirement not met since easement did not restrict building on buildable lots and there could be no building on the remaining acreage as it was in a floodplain).

<sup>127</sup> 26 C.F.R. § 1.170A-14(d)(3)(iii), (4)(ii)(B).

<sup>128</sup> *Ibid.*

Moreover, tax subsidies for conservation easements motivate owner choices in the marketplace.<sup>129</sup> Legislators must ensure that public benefits actually result and that the subsidy does not distort market behavior and cause a suboptimal allocation of our limited land resources. The worst case scenario would be a patchwork of conservation easements substantially paid for with public dollars, of dubious public value and not part of an overall conservation plan, controlled by a private not public entity, that perpetually remain on the property, frustrating the legitimate land use, conservation, and development goals of citizens for the land in their area. This is not a description of current reality but the challenge is how to maintain the benefits of private conservation easements and avoid these potential problems.

In contrast to the natural habitat and open space categories, an easement for the preservation of a historically important land area or historic structure will qualify for a deduction only if there is governmental process and action.<sup>130</sup> Claimed historic land must be listed in the National Register and a building must be listed either in the National Register or be a part of a registered historic district and certified by the Secretary of the Interior as being of historic significance.<sup>131</sup> The National Register process involves standards, administrative action, and public participation that includes state historic preservation officers, a state review board (comprised of professionals, property owners and local officials), a federal advisory council, and the National Park Service as decision maker.<sup>132</sup> The Secretary of the Interior also sets out specific requirements for

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<sup>129</sup> See *supra* note 83.

<sup>130</sup> I.R.C. § 170(h)(4)(A)(iv).

<sup>131</sup> I.R.C. § 170(h)(4)(C).

<sup>132</sup> See National Register Criteria for Evaluation, 36 C.F.R. § 60.4; <http://www.nps.gov/history/nr/listing.htm>, found 6/14/07.

administrative certification of historic districts.<sup>133</sup> The presence of a governmental decision maker, process, and articulated standards make it more likely that the public will receive a benefit in exchange for the tax subsidy.

Therefore, the Internal Revenue Code should be amended to require local, state, or federal governmental certification that the conservation easement serves a public conservation purpose in order for its donor to receive a federal tax deduction. This certification would be required only in the case of open space and natural habitat conservation easements, where there is no meaningful right of physical access by the public.<sup>134</sup> To be valid, the certification decision would have to be consistent with a specific local, state, or federal conservation plan, and the governmental agency must approve the particular easement on the specific parcel in question. Although the federal deduction does not cost local and state treasuries, one would expect them to be judicious in considering applications since the creation of an easement will likely mean a reduction in state and local property tax revenues<sup>135</sup> and out of a concern for local land policy. In any case, currently there are no pre-approvals required for federal deductions, so it is hard to imagine how the tax expenditure will increase under the proposed system.

The benefits of such a system are clear—improving the planning process of conservation easement creation, ensuring that public funds are well spent, and avoiding market distortions.<sup>136</sup> There are costs, but they are justified: transaction costs will increase, as donors and nonprofits must go through a governmental approval process, and

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<sup>133</sup> 26 U.S.C. A. § 47(c)(3)(B); 36 C.F.R. 67.4.

<sup>134</sup> Easements for education or recreation that grant public access should not require governmental approval—the public access is a clear and tangible benefit.

<sup>135</sup> See supra secs. I.C. & II.B.1.a.

<sup>136</sup> The Senate Report for the 1980 legislation state that “the Committee believes that provisions allowing deductions for conservation easements *should be directed at the preservation of unique or otherwise significant land areas or structures.*” S. Rep. 96-1007, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1980, 1980 U.S.C.C.A.N. 6736m, 1980 WL 12915, sec. F (emphasis added).

it may slow down the process.<sup>137</sup> Bureaucracy may grow. The complication or ultimate denial of a deduction may also dissuade some owners from creating conservation easements.<sup>138</sup> However, Massachusetts, which presently requires governmental approval to create any conservation easement even if a deduction is not sought, has been able to create a high number of conservation easements even with that requirement in place.<sup>139</sup> Currently .9% of Massachusetts land is controlled by conservation easements held by state and local land trusts. This is a high number in comparison to other states that do not have such an approval requirement, for example, New York (.4%), Arizona (.04%), and Iowa (.01%).<sup>140</sup>

The proposal here does not affect the *validity* of private conservation easements in gross, just their potential *deductibility* under federal tax law. It is different than the current Massachusetts legislative scheme that allows the creation of a conservation restriction only if there is local and state governmental approval.<sup>141</sup> The Massachusetts legislation, while perhaps a good choice for that state and its resources and culture, can be viewed in other places as unnecessarily stifling the free choice of property owners to achieve their personal conservation wishes. The proposal suggested above, however, simply provides that there is no automatic right to a public subsidy for a conservation easement without public access. The owner may still give freely without subsidy, or

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<sup>137</sup> If delays become a problem, the Code might provide a presumed approval after a set period of time after an application. This might get action.

<sup>138</sup> Another alternative that would address concerns about validity of the deduction under current standards but not the issue of governmental planning would be pre-approval of deductions by the I.R.S. See generally Report on the Nature Conservancy, *supra* note 19, Exec. Summary, p. 11.

<sup>139</sup> Mass. Gen. Laws Ann. ch. 184 §§ 31-32.

<sup>140</sup> These percentages are compiled from 2005 Census Report, *supra* note 20, Chart 5 and U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table E-1, <http://www.census.gov/compendia/smadb/TableE-01.pdf>, found 6/15/07 (the factor of 640 acres per square mile was used to convert area figures).

<sup>141</sup> The drafters of the Uniform Act specifically rejected governmental approval to create a conservation easement. Unif. Act, Prefatory Note, 12 Unif. L. Ann. 163, 165 (1996).

receive a deduction without the necessity of governmental approval by donating a fee or an easement with meaningful public access.<sup>142</sup>

Despite the intensive Congressional investigation and study of conservation easements and abuses,<sup>143</sup> the 2006 tax reform legislation made only a few and insubstantial changes in the deductibility of conservation easements.<sup>144</sup> A more serious response, as suggested here, is needed.

## 2. Unclogging the Market

Information is a prerequisite for effective functioning of policy makers and markets. Currently, the recording system does not provide good data about the ownership of conservation easements.<sup>145</sup> We lack good figures on key conservation easement questions: the number of easements; amount of acreage; current holders of interests (i.e., assignees); nature of the restrictions. Developing this data would enhance the public discourse about the costs and benefits of conservation easements, enable better decision making by legislatures and officials, and more clearly identify restrictions to potential market players. Therefore, it is recommended that all jurisdictions should require and enforce the establishment of separate recording books for conservation easements within the county recorder offices.

By doing so, the antirestrictions policy will be served. The full range of restrictions can easily be recognized by policymakers and necessary actions taken to limit

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<sup>142</sup> Other aspects of I.R.C. § 170 that have received recent attention have been reform of appraisal abuses, see supra note 85, and proposals to accredit conservation organizations, see Report on the Nature Conservancy, supra note 19, at Exec. Summary p. 11.

<sup>143</sup> See Report on the Nature Conservancy, supra note 19.

<sup>144</sup> Pension Protection Act of 2006, P.L. 109-280 (H.R. 4), 29 U.S.C.A. § 1219 (placing penalties on abusive appraisals).

<sup>145</sup> See supra sec. I.B.

the dead hand.<sup>146</sup> Transactions costs generated by perpetual, in gross interests can be reduced,<sup>147</sup> preventing the frustration of the efficient operation of the land transactions system. Costs to establish such a book system for conservation easements on a going forward basis should be minimal and are worth the investment.

## B. Principle II: Enhance Easement Holder Governance and Operations

### 1. Stewardship and Enforcement

The many responsible, effective nonprofits holding conservation easements have been unfairly tarnished by the improper acts of a few. Concerns about nonprofit holders of conservation easements tend to focus on a lack of capability to effectively manage, monitor, and enforce the easements and frivolous waiver of easement provisions—with the result that the benefit of the easements, and the public subsidy, can be lost.<sup>148</sup>

Various attempts have been made to address these issues. In order for a donor's deduction to be valid, the Internal Revenue Code requires that a donee organization must have the resources to enforce the restriction<sup>149</sup> and the easement must provide for a right of access to the property by the organization to monitor compliance.<sup>150</sup> Still, there is nothing to guarantee that the organization will be effective, especially over the long term.

Congressional staff has also raised the possibility of accreditation of easement holders in order to address stewardship and enforcement problems,<sup>151</sup> although such a provision did not appear in the 2006 reform legislation. The Land Trust Alliance has developed a voluntary program of accreditation for land trusts and detailed Standards and

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<sup>146</sup> See supra sec. I.D.3.b.

<sup>147</sup> See supra sec. I.D.2.

<sup>148</sup> See supra sec. II.B.2.a.

<sup>149</sup> 26 C.F.R. § 1.170A-14(c)(1).

<sup>150</sup> 26 C.F.R. § 1.170A-14(g)(6).

<sup>151</sup> Report on the Nature Conservancy, supra note 19, at Exec. Summary p. 11. This raises many questions, such as who would administer such a program? at what cost? with what demonstrable benefits?

Practices, and is currently rolling out the accreditation process through a lottery system as demand is high.<sup>152</sup> This program may increase operational quality of those organizations that receive certification. Still, participation in the program is only voluntary, and the poorer performing organizations are likely to avoid the costs and transparency that accreditation will bring. Moreover, it is unclear that the fact that an organization has received accreditation will affect the actions of a donor who is primarily motivated by the tax deduction—as long as the federal income tax bar is cleared, best practices may not be of interest.<sup>153</sup>

The solution may come through the power of the attorney general in the various states to intervene, as the public's representative, in matters related to charitable gifts and nonprofits organizations and trusts.<sup>154</sup> The attorney general could enforce a conservation easement when a nonprofit fails to do so or take a position on enforcement contrary to the nonprofit on modification of the easement where the public interest requires. Additionally, the attorney general could pursue breach of fiduciary duty actions against nonprofit board members where appropriate. The possibility of action against board members can be an effective and necessary motivator of board behavior.

There are some difficulties with achieving attorney general intervention. First, customs in the various states have meant different levels of intervention by attorneys general over the years.<sup>155</sup> Second, there is the cost to the attorneys general of enforcement, especially given other, arguably more serious, demands on the budget.

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<sup>152</sup> See [www.lta.org/accrediation/pilot.htm](http://www.lta.org/accrediation/pilot.htm), found 6/15/07; Maggie I. Jaruzel, Land Trusts Seek Self-Regulation Through Accreditation, Mott Mosaic (Charles Stewart Mott Foundation), April 2006, p. 12.

<sup>153</sup> See supra note 83.

<sup>154</sup> See Evelyn Brody, The Limits of Charity Fiduciary Law, 57 Md. L. Rev. 1400 (1998); Susan N. Gary, Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law, 21 U. Haw. L. Rev. 593 (1999).

<sup>155</sup> See Evelyn Brody, Whose Public? Parochialism and Paternalism in State Charity Law Enforcement, 79 Ind. L.J. 937 (2004).

Since stewardship and enforcement of conservation easements have been an ongoing concern and a major public issue, it might be possible to attach a special fee to creation of these interests to go to an attorney general monitoring and enforcement fund.

Third, some jurisdictional issues would have to be resolved. Consider the example of a Virginia nonprofit that holds a conservation easement on Montana land, and the nonprofit fails to monitor and enforce. The attorney general of Virginia may not be interested or well informed about the land dispute in Montana but would be concerned about governance issues of the nonprofit. The attorney general of Montana might be interested in the land but not in ongoing governance issues of the nonprofit. The interests of both states would need to be accommodated and protected.

Finally, there is again the issue of whether the attorney general even knows of the existence and terms of a conservation easement within the jurisdiction. To address this, the recorder of deeds should be required to notify the attorney general of conservation easements that are presented for recording.<sup>156</sup>

## 2. Ability to Compromise

There is another set of issues related to nonprofit operations. As discussed above,<sup>157</sup> sometimes it may be necessary in the public interest for a nonprofit to amend or release amend a covenant. Nonprofit directors may fear to do so, out of a concern over

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<sup>156</sup> There has been some suggestion that third parties, as opposed to the attorney general, should be empowered to enforce private conservation easements. See Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 Ga. L. Rev. 85 (2005); Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 Vt. L. Rev. 757 (2005). This, however, would lead to increased litigation and associated costs. Moreover, this would mean the further privatization of a public land issue, as the public's interest would be represented not by a public official but by a private citizen perhaps having a different perspective and goals. The cases are unclear on the third party standing issue. Rejecting third party standing, see, e.g., *Spirit of Sage Council v. City of Pasadena*, 2006 WL 3199929 (Cal. App.); *Burgess v. Breakell*, 1995 Conn. Super. LEXIS 2290; finding standing for all citizens within the state, see, e.g., *Tenn. Environmental Council, Inc. v. Bright Par 3 Assocs., L.P.*, 2004 WL 419720 (Tenn. App.). Interestingly, all three cases are not released for reporting and are subject to citation limitation rules.

<sup>157</sup> See supra sec. II.B.2.b.

I.R.S. regulations governing easement holders<sup>158</sup> or language in the easement document or organizational documents. Statements such as the one from Senator Charles Grassley, then chair of the Senate Finance Committee, that “modifying these easements is a huge no-no”<sup>159</sup> can intimidate nonprofit directors from making appropriate decisions in the public interest.

Obtaining declaratory judgments that board actions are permitted is a cumbersome, expensive, and impractical process. Directors insurance and lawyers’ opinion letters may give some comfort. Better methods must be developed, though, to empower directors to act in those rare instances when the public interest requires deviation from the terms of a conservation easement.

### C. Principle III: Protect Expectations of Future Generation Owners

There have been a number of reported cases centering on disputed meaning of language in conservation easements. In developing rules of interpretation of conservation easements, the courts should remember that these are perpetual interests that will be enforced against successor owners to the servient parcel. They must protect the interests of future generation owners living with these restrictions.

In “general” contracts (i.e., those not involving real property) enforcement is usually between the original parties to the transaction. In such cases, there is some divergence of judicial approach on interpretation of the agreement. Some courts prefer to look to the language of the document exclusively if at all possible, believing that this best reflects the parties’ intent—a “strict construction,” “plain language,” or “objective”

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<sup>158</sup> 26 C.F.R. § 1.170A-1(c)(2), (g)(6).

<sup>159</sup> Lisa Black & Courtney Flynn, Couple Sue Neighbor Over Use of Conservation Land, Chicago Tribune, Metro North Shore, 12/1/05, p. 1.

approach.<sup>160</sup> Others, however, place greater weight on extrinsic evidence, reflecting an attitude that particular words can be imprecise or can have special meanings to the original parties—a “subjective” approach.<sup>161</sup>

Whichever view controls in general contracts, interpretation of conservation easements should follow a strict construction approach. Over time there will be successor owners of the burdened parcel<sup>162</sup> and in some cases the easement right may be transferred to another organization.<sup>163</sup> Successors will likely have no knowledge of extrinsic evidence not appearing in the language of the recorded document, and should not be bound by information of which they are unaware. Instead, the courts should, whenever possible, interpret conservation easement language involving successors by relying exclusively on the express language of the document. In rare cases the courts may have to allow extrinsic evidence when the language does not produce a meaning. The courts in these situations, though, should not allow evidence that was unknown to the successor.<sup>164</sup>

Moreover, the court should be aiming to establish not the original meaning of the language to the initial parties. Rather, it should be looking at the point in time that the successor purchased and should determine what a reasonable successor should have

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<sup>160</sup> See *Beanstalk Group, Inc. v. AM Gen'l Corp.*, 283 F.3d 856 (7<sup>th</sup> Cir. 2002).

<sup>161</sup> See Rest. 2d Contracts § 212, comment b.

<sup>162</sup> See, e.g., *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 (2000); *Sabalyn v. Foundation for the Preservation of Historic Georgetown*, 691 A.2d 107 (D.C. App. 1997); *Redwood Construction Corp. v. Doornbosch*, 248 A.D.2d 698, 670 N.Y.S.2d 560 (1998); see *Dept. of Hous. & Comm. Dev. v. Mullen*, 165 Md. App. 624, 886 A.2d 900 (2005) (occupant of property subject to conservation easement controlled by its terms).

<sup>163</sup> See, e.g., *U.S. v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005) (original nonprofit grantee of easement transferred it to National Park Service); see Unif. Conservation Easement Act § 2(a) (permitting assignment of easement benefit); *Byers & Ponte*, supra note \_\_, 169-173 (describing use of back-up holders of easements)<sup>15</sup>

<sup>164</sup> See *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C. App. 1994) (court rejected appraisal report as providing meaning in enforcement against second generation owner as it was prepared only by the grantor and was for tax purposes).

thought that the original agreement, based on the language of the recorded instrument and, if necessary, extrinsic evidence known to the successor. This will protect the legitimate expectations of successors of the burdened parcel. It also places the burden on the easement owner (who may continue to own the easement perpetually) to make the terms of the easement clear and to spell out any “special understandings” on the face of the original document for successor servient purchasers to see before committing.

Unfortunately, the statements of various courts too glibly apply “general” contract interpretation principles to conservation easement cases, without recognizing the successor issue involved in recorded conservation easements. They refer to the contest as a matter of “contract” ambiguity, interpretation, and extrinsic evidence. Even when a successor is involved, they still adhere to the bilateral, general contract language.<sup>165</sup>

Fortunately, despite these troubling articulations, some cases have strictly applied the language of conservation easements and rejected attempts to broadly read the words or bring in other understandings to alter the “clear” terms of the agreement. Sometimes this close reading protects the servient owner from a conservation easement owner’s attempt to restrain activities.<sup>166</sup> For example, in one case, a nonprofit conservation organization sought to bar the building of an additional house on the burdened property for the easement grantor’s son.<sup>167</sup> The court found that the “plain language” allowing the construction of “an additional dwelling unit” for a family member did not require it to be situated in an already existing building but could be new, free-standing construction.

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<sup>165</sup> See, e.g., *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 (2000) (“where the language of the contract is clear and unambiguous”; relying on language in the document and zoning regulations to interpret); *Redwood Construction Corp. v. Doornbosch*, 248 A.D.2d 698, 670 N.Y.S.2d 560 (1998) (case involved successor owner of burdened parcel, but court stated “where as here a *contract* is unambiguous on its face;” as a result no external evidence was needed) (italics added).

<sup>166</sup> See, e.g., *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C. App. 1994) (refusing to construe “extension” to bar addition of dog run and canopy).

<sup>167</sup> *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 757 A.2d 1263 (2000).

Sounding antirestrictions strains, the courts stated that “a restrictive covenant must be narrowly construed and ought not to be extended by implication.”<sup>168</sup> This strict reading appropriately balances the competing interests by protecting the legitimate expectations of the servient owner and not creating land ties where none were intended. If the conservation group had wanted to bar new construction, “they easily could have accomplished this by adding certain language to the restriction.”<sup>169</sup>

In other cases, a narrow reading of the language serves the conservation purpose. Thus, in a case involving a conservation easement granted by a predecessor to the local government, the court ruled that a current life tenant could not build a pool as it was a “structure on or above the ground” and barred by the language.<sup>170</sup> A pool would also conflict with the grantor’s purpose stated in the easement document that the restriction as to “restrict the use of [the property] and retain it predominantly in its natural, scenic, and open condition.”<sup>171</sup>

Perhaps the strongest example of strict enforcement of a conservation easement’s terms against a successor involved the purchase of a property subject to an existing restriction limiting the use of the property to farming, wildlife sanctuary, or nature conservation area.<sup>172</sup> The purchasers obtained a building permit for a 4900 square foot house and the defendants brought an action to prevent construction. During the pendency

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<sup>168</sup> Id. at \_\_\_; accord *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C. App. 1994).

<sup>169</sup> See also *Conrad v. Mattis*, 2000 WL 33115395 (Conn. Super.) (noting that there were “some differences of opinion as to the exact definition of clear-cutting” but finding, based on the dictionary, governmental regulations, and academic definitions that it did not include the cutting of some trees to put in a vegetable garden where use as a farm or garden was specifically permitted by the easement).

<sup>170</sup> *Goldmuntz v. Town of Chilmark*, 651 N.E.2d 864 (Mass. App. 1995). See *U.S. v. Ponte*, 246 F.Supp.2d 74 (D. Me. 2003) (finding that distance should be measured horizontally, according to the prevailing custom, and so holding that the easement has been violated).

<sup>171</sup> Id. at 865. See also *Bagley v. Foundation for the Preservation of Historic Georgetown*, 647 A.2d 1110 (D.C. App. 1994) (finding that building that obscured façade violated specific language of easement).

<sup>172</sup> *Natale v. Schwartz*, 151 F.Supp.2d 562 (E.D. Pa. 2001).

of the suit, the purchasers went ahead and built their residence. The court ultimately found for the defendants, and ordered the purchasers to vacate their home and to remove it. The court granted the defendants the right to enter and remove the house if the purchasers failed to do so. The defendants contracted with a demolition company to remove the house and the company demolished the residence. This strict application of the conservation easement is noteworthy in that it was enforced against a second generation owner (apparently deemed to have consented to the easement by purchasing with notice), it yielded a significant financial loss for the owner, and it resulted in the destruction of a residence, often an area of special protection for American courts.<sup>173</sup>

When the “plain meaning” of the easement language is not clear, care must be used in considering extrinsic evidence when successors are involved. In one case, the court had to decide whether the consolidation of the several lots into a new record lot would violate a conservation easement provision barring “subdivision” of lots that had been granted by a preceding owner to a nonprofit organization.<sup>174</sup> The current owners argued that “subdivide” has a plain and ordinary meaning of cutting a larger tract of land into smaller pieces. The court stated that the jurisdiction followed an “objective” view of interpretation and written language would control, but that the context in which the word was used shapes its meaning. Thus, the court held that “subdivide” is susceptible to different meanings than the owner’s asserted dictionary definition, and thus ambiguous. To resolve the ambiguity, the court looked to the local planning regulation that defined “subdivision” to include assembly of lots finding that “the parties knew or should have

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<sup>173</sup> See John Leland Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine of Equity*, 28 S. Cal. L. Rev. 139, 144 (1955) (“the basic concept that private ownership of a dwelling house is still the most inviolable of property rights”).

<sup>174</sup> *Sagalyn v. Foundation for the Preservation of Historic Georgetown*, 691 A.2d 107 (D.C. App. 1997).

known the meaning of ‘subdivide’ in real estate at the time the Easement was created.”<sup>175</sup>

Presumably, “parties” referred to the original parties to the easement. The real question should have been whether the *successors* knew or could have known the terms of the regulation. Assuming that they could have (for example, if the statutory definition of subdivide remained the same at the time of purchase, they should have been aware of the broader meaning of “subdivide” in real estate transactions), then the *result* in the case is correct though the articulation (i.e., “[original] parties”) needs clarifying.

Closely interpreting conservation easements serves the goals of freedom of contract while not saddling buyers with unknown or unknowable restrictions. In this way, parties can freely bargain—and count on enforcement of their deals. At the same time, the burden is on them to make clear the extent of the restriction so that future owners will not be caught unaware, thus serving the spirit of the antirestrictions policy.

#### D. Principle IV: Flexibility through Expanded Modification and Termination Doctrines

The law of covenants provides several doctrines that may be useful in addressing perpetual conservation easements. Again, note the irony that despite the easement misnomer, the law of covenants not easements, has developed doctrines to deal with outmoded negative restrictions on land. While traditional doctrines of changed conditions, cy pres, and relative hardship may provide some assistance in dealing with outmoded conservation easements, a revitalized doctrine barring enforcement of covenants violating public policy may provide the most powerful tool.

##### 1. Changed Conditions

First, the doctrine of changed conditions provides that the courts will not enforce a covenant if conditions since it was created have so change that enforcement will not

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<sup>175</sup> Id. at 112.

bring the intended benefits of the covenant to a substantial degree.<sup>176</sup> A typical case involves a subdivision burdened by residential building and use restrictions, with the goal of creating a quiet living situation. Internal changes, such a strong pattern of nonenforcement against breaches or a governmental taking of a large portion of the subdivision, may make it impossible to achieve the original residential goal.<sup>177</sup> The doctrine of changed conditions would bar enforcement of the covenant against a new violator of the covenant.

Changed conditions theory could be applied to terminate a conservation easement.<sup>178</sup> The following may be such situations: surrounding pollution and development becomes so great that a conservation easement on a property to protect habitat for migrating species no longer can accomplish its purpose; or a historic stand of trees is destroyed by fire. These will not be easy cases to make, however. Proponents of the easement will argue that any open space is valuable and especially necessary when surrounding conditions have worsened.<sup>179</sup> Moreover, the Third Restatement of Property has a specific provision that prohibits that application of changed conditions to private conservation servitudes unless certain conditions are met.<sup>180</sup> It provides that if the particular conservation purpose becomes impracticable, then it should be modified for other conservation purposes based on cy pres doctrine; and if it can no longer accomplish any conservation purpose, it may be terminated with damages and restitution.<sup>181</sup>

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<sup>176</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 453-455.

<sup>177</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 456-462.

<sup>178</sup> Korngold, *Conservation Servitudes*, supra note 6, at 485-486. See Susan F. French, *Perpetual Trusts, Conservation Easements, and the Problem of the Future*, 27 *Cardozo L. Rev.* 3523 (2006); Note: Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 *Hastings L.J.* 1187 (1989).

<sup>179</sup> Korngold, *Conservation Servitudes*, supra note 6, at 485.

<sup>180</sup> Rest. 3d of Prop. (Servitudes) § 7.11.

<sup>181</sup> Rest. 3d of Prop. (Servitudes) § 7.11(1),(2).

Most importantly, though, changed conditions doctrine, even if applied by the courts, does not address the fundamental public policy choices raised in this article. Changed conditions theory provides a means to deal with covenants that are obsolete and serve little or none of the original purpose. It does not, however, provide a mechanism for balancing a strong public interest in a new use for the land (perhaps for necessary industrial development, affordable housing, or health care facilities) against the conservation value exemplified by the easement held by a private organization.

## 2. Cy Pres

The doctrine of cy pres, borrowed from charitable trusts, can provide an important method to adjust a conservation easement where the particular purpose of the easement has become impossible or impracticable.<sup>182</sup> Applying the doctrine, the court will adapt the easement to another conservation purpose compatible with the overall conservation goal.<sup>183</sup> This might even mean the sale of the easement and the transfer of the conservation purpose to another parcel of land.<sup>184</sup> Cy pres brings some desirable suppleness into perpetual land interests, and should be embraced by the courts. But it too does not provide a solution to the concerns raised in this article. Indeed, the term “cy pres” comes from the “Norman French phrase ‘cy pres comme possible,’ meaning ‘as nearly as possible.’”<sup>185</sup> The doctrine contemplates incremental changes from the original instrument, not the broader deviations to serve the public interest that may be required under the analysis suggested in this article.

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<sup>182</sup> See Rest. 3d of Prop. (Servitudes) § 7.11(1); McLaughlin, Rethinking Conservation Easements, *supra* note 6; Nancy A. McLaughlin, Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy, 40 U. Rich. L. Rev. 1031 (2006).

<sup>183</sup> Rest. 3d of Prop. (Servitudes) § 7.1, comment b.

<sup>184</sup> See McLaughlin, Rethinking Conservation Easements, *supra* note 6.

<sup>185</sup> Jesse Dukeminier, Stanley M. Johanson, James Lindgren & Robert H. Sitkoff, *Wills, Trusts, and Estates* 738 (7<sup>th</sup> ed. 2005).

### 3. Doctrine of Relative Hardship

The doctrine of relative hardship may provide some support for a court attempting to balance the public interest in relaxing a conservation easement against the holder's attempt to strictly enforce the restriction, though some shifts in judicial attitude would be required to make this possible. The relative hardship doctrine is quite amorphous and stated in a variety of ways by the courts. A common formulation is that a court will not specifically enforce a covenant and limit the remedy to damages if the harm of the injunction will be disproportionate to the benefits of specific enforcement.<sup>186</sup>

Despite its elasticity, the relative hardship doctrine as presently conceived cannot be easily used to deny enforcement of a conservation easement because of public concerns. The current formulations of the relative hardship doctrine do not include an express consideration of the public interest.<sup>187</sup> Rather, the courts describe relative hardship as a matter between two individuals and sometimes even specifically reject the public factor.<sup>188</sup> Relative hardship doctrine lacks the stated dimension of the societal interest, unlike the Second Restatement of Torts assertion that "the interests of the public are factors to be considered in determining the appropriateness of an injunction against tort."<sup>189</sup> This broad standard of the Second Restatement of Torts is reflected in nuisance

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<sup>186</sup> For a complete discussion of the rule, see Korngold, *Private Land Use Arrangements*, supra note 51, at 462-470.

<sup>187</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 468.

<sup>188</sup> See, e.g., *Wier v. Isenberg*, 95 Ill. App. 3d 839, 842, 420 N.E.2d 790, 793 (1981) ("the court does not balance the equities as it would in an ordinary nuisance case or in a request for rezoning"); *Evangelical Lutheran Church v. Sahlem*, 254 N.Y. 161, 172 N.E. 455 (1930) (refusing to weigh the public interest of a church: "Neither at law nor in equity is it written that a license has been granted to religious corporation by reason of the high purpose of their being to set covenants at naught.").

<sup>189</sup> Restatement (Second) of Torts § 941 (1977). Rest. 3d of Prop. (Servitudes) § 8.3(1), comment h now suggests that courts should consider the costs and benefits to the parties, third parties, and the public when forming remedies for covenant violation.

cases, giving courts significant latitude to balance competing interests.<sup>190</sup> The public's interest is unfortunately lacking in judicial statements of the relative hardship doctrine.

Relative hardship doctrine can become a meaningful and legitimate tool to balance the public interest against conservation values if two shifts in judicial attitude and doctrine occur. First, currently courts routinely state that covenants (which would include conservation easements) are automatically enforceable by injunction even though no irreparable harm or monetary loss can be shown.<sup>191</sup> The reality, though, is that Courts would need to remember that while injunctions are generally awarded, they are not and need not be granted in every case. Injunctions are a doctrine of equity and can be refused in a covenant action based on the equities of the situation.<sup>192</sup> Rote repetition of the typical result (i.e., that an injunction is granted) does not make it a universal rule; rather it may serve to cloud the law and confuse courts and actors, by writing the flexibility of the courts out of the equation.

Second, the courts and legislatures need to expand the doctrine of relative hardship to include express consideration of the public interest in the requested injunction. Thus, in a conservation easement injunction case, the court would have to consider the public's interest in specific enforcement and not only the positions of the conservation organization and the servient owner (hypothetically seeking to build affordable housing. If the court denied an injunction and awarded damages, the conservation organization could use such funds on another parcel consistent with the

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<sup>190</sup> See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (denying injunction and awarding one-time damages for nuisance caused in the past and future by dust from cement plant).

<sup>191</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 434.

<sup>192</sup> For example, laches and unclean hands by the applicant. See Korngold, *Private Land Use Arrangements*, supra note 51, at 450-453.

conservation goals of the original easement. This would maintain the donor's intent where the easement had been contributed, prevent the loss of the tax subsidy, and be consistent with the organization's mission and governing documents.

#### 4. Covenants Violating Public Policy

Courts often state that they will not enforce covenants that violate public policy.<sup>193</sup> Many of these declarations are dicta and there are few decisions where courts actually void a covenant on public policy grounds.<sup>194</sup> One line of cases, though, could be relied upon by a court seeking to modify or terminate a conservation easement that conflicts with fundamental, local land use policy. These cases found a public policy, clearly articulated in state statutes and regulations, favoring group homes for the disabled rather than institutional care. These courts relied on this public policy to refuse enforcement of private covenants that barred group homes,<sup>195</sup> despite the countervailing public policy favoring property rights and residential subdivision developments.<sup>196</sup>

Conservation easements, in contrast, do not violate public policy but rather are favored by public policy as evidenced by express, statutory authorization of these interests. As a general matter, conservation easements are beneficial and should be enforced. There may be, however, a rare occasion where another major, clearly articulated state policy—such as one favoring economic development, affordable housing, or public planning—is threatened by the continued enforcement of the original

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<sup>193</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 397.

<sup>194</sup> Korngold, *Private Land Use Arrangements*, supra note 51, at 398.

<sup>195</sup> See, e.g., *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *Sate v. District Court*, 187 Mont. 126, 609 P.2d 245 (1980); *Crane Neck Ass'n v. New York City/Long Island County Services Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, cert. denied, 469 U.S. 804 (1984); but see *Mills v. Kubena*, 685 S.W.2d 395 (Tex. App. 1985); *Mains Farm Homeowners Ass'n v. Worthington*, 64 Wash. App. 171, 824 P.2d 495, aff'd, 121 Wash.2d 810, 854 P.2d 1072 (1993).

<sup>196</sup> Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 Wis. L. Rev. 513.

conservation easement. In such a situation, the court would have to balance the competing public interests, perhaps to the disfavor of conservation goals, when deciding on the enforcement or modification of a particular conservation easement. This would be a legitimate expression of the principle that courts should not enforce covenants that violate public policy.

#### 5. Termination and the I.R.C.

Judicial application of changed conditions, expanded relative hardship doctrine, and prohibitions on covenants violating public policy will have federal tax ramifications in the case of a donated easement. The Regulations seek to prevent a revenue loss in the event that “a subsequent unexpected change in the conditions surrounding the property ... makes impossible or impractical the continued use of the property for conservation purposes.”<sup>197</sup> The original deduction by the donor will not be affected as long as the restrictions are extinguished in a judicial proceeding and the nonprofit’s portion of the proceeds are used in a manner consistent with the conservation purpose of the original easement. While the Regulation specifically contemplates termination due to changed conditions, the theory of the provision—prevention of revenue loss—would make it similarly applicable in situations of termination or rejection of specific enforcement under relative hardship doctrine or the prohibition against violation of public policy.

#### E. Principle V: Preserving the Public’s Power of Eminent Domain

Like other covenants<sup>198</sup> (and, for that matter, easements<sup>199</sup>), private conservation easements are subject to being taken via eminent domain.<sup>200</sup> Various conservation

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<sup>197</sup> 26 C.F.R. § 1.170A-1(g)(6)(i).

<sup>198</sup> See Korngold, *Private Land Use Arrangements*, supra note 51, at 473-476.

<sup>199</sup> See Korngold, *Private Land Use Arrangements*, supra note 51, at 268-271.

easement statutes even expressly provide for taking by eminent domain.<sup>201</sup> With appurtenant covenants, compensation is usually the difference in value of the benefited parcel with and without the covenant.<sup>202</sup> With covenants in gross, such as conservation restrictions, there is no benefited land so an alternative measure is used: the difference in the value of the burdened land with and without the covenant.<sup>203</sup> This alternative, though, focuses exclusively on the burdened land and may not capture the ecological value and benefit of the conservation easement to the nonprofit easement owner.<sup>204</sup>

It is essential that government have the ability to assert its eminent domain power to take conservation easements for compensation. This will allow communities to inject flexibility into past plans imposed on them by private organizations and to address through a public process the new communal challenges that inevitably will develop in the future. Eminent domain has long provided the collective with a necessary tool to remedy errors of the past. The state's ability to bring an eminent domain action also offsets the land owner's monopoly power over his land, and thus facilitates bargaining between

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<sup>200</sup> See *Hartford National Bank & Trust Co. v. Redevelopment Agency of City of Bristol*, 164 Conn. 337, 321 A.2d 469 (1975) (in gross building restriction, much like a conservation easement); Byers & Ponte, *supra* note 15, at 191-192.

<sup>201</sup> See, e.g., N.Y. Env't'l Conservat. Law § 49-0307(3)(b); N.C. Gen. Stats. § 121-36(c); Va. Code Ann. § 10.1-1010(F). See Unif. Act § 2(a) (providing that a conservation easement can be "terminated" like any other "easement") and Prefatory Note, 12 Unif. L. Ann. at 166 ("The Act neither limits nor enlarges the power of eminent domain.").

<sup>202</sup> See Korngold, *Private Land Use Arrangements*, *supra* note 51, at 475.

<sup>203</sup> *Ibid.* The measure is the same when calculating the value of a (true) easement in gross for taking purposes. See Korngold, *Private Land Use Arrangements*, *supra* note 51, at 270. See generally, Gregory Bialecki, *What Must the Taking Authority Pay for Land Subject to a Conservation Easement?*, *The Back Forty*, July/Aug. 1990, p. 6; Gregory Bialecki, *Eminent Domain Takings of Land Subject to Conservation Easements*, *The Back Forty*, Sept. 1990, pp. 8-9.

<sup>204</sup> Section 170(h) and the accompanying I.R.S. Regulations do not provide for distribution of proceeds on condemnation. While not required by I.R.S. regulations, good stewardship and corporate fiduciary norms would appear to require the organization to invest the proceeds from the taking in new conservation activities. One would think that there would be a requirement for the proceeds to be used for conservation purposes, as in a case of a court approved voluntary transfer due to impracticability or impossibility. See 26 C.F.R. § 1.170A-1(c)(2).

government and the owner to resolve the issue. Eminent domain power, well exercised and under rigorous judicial supervision, is essential to current and future generations.

This important governmental power has been under siege, however, since the decision of the Supreme Court in *Kelo v. City of New London*.<sup>205</sup> *Kelo* involved a comprehensive redevelopment plan on 90 waterfront acres to create new commercial, retail, residential, and recreational space. The plan had been through an extensive public process and received governmental approval. The purpose of the plan was to revitalize the declining economic condition of the city. Petitioners, owners of some residential properties, challenged the attempt to take their land pursuant to the plan, claiming that there was no “public use” under the Fifth Amendment. Rather, they argued that the land would be owned and used by private parties after the redevelopment and that economic development was not a legitimate public use for which a taking could be made.

The Court rejected the Petitioners’ claims. It found that the area did not need to be “blighted” to find a public use and that the local legislative determination that “economic rejuvenation” was entitled to deference. Moreover, while the land ultimately ended up in the hands of private parties, *Kelo* did not involve the improper situation of government using its taking power in an ad hoc manner to favor one individual owner over another. Rather, the entire public benefited by the comprehensive development and plan in *Kelo*.

There has been a huge and ongoing popular, legal, and scholarly backlash against the *Kelo* decision. Many state legislatures have passed restrictions on eminent domain power of state and local government, often barring takings for economic development

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<sup>205</sup> 546 U.S. 469 (2005).

purposes.<sup>206</sup> Voters in November 2006 approved similar ballot measures.<sup>207</sup> State courts have rejected the Kelo interpretation by reading their state constitutions to bar takings for economic development or unless the area is blighted.<sup>208</sup> Popular press and scholarly opinion have generally blasted Kelo.<sup>209</sup>

Contrary to the critics, Kelo was decided correctly. As a matter of constitutional law, the Court provided plausible support for its decision.<sup>210</sup> As a matter of public policy, the Court made the right choice, providing government with the tool necessary to meet changing needs and correct the errors of the past. The alternative would be a frozen land utilization pattern, with ill effects for the present and future citizenry. Conservation easements provide an important illustration. Eminent domain is necessary to address those rare situations when an essential public need—for example, economic development or affordable housing-- cannot go forward because of a prior privately-made arrangement. It allows for a public process to vindicate communal values and protect

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<sup>206</sup> See, e.g., 2006 Alaska Laws ch. 84 (H.B. 318); 2006 Colo. Laws ch. 349 (H.B. 1411) (prohibiting eminent domain for economic and tax revenue enhancement and requiring proof of blight); 2006 Idaho Laws ch. 96 (H.B. 555). For a list of various state enactments, see the website of the American Planning Association [www.planning.org/legislation/eminentdomain/edlegislation.htm](http://www.planning.org/legislation/eminentdomain/edlegislation.htm). See also Marcilynn A. Burke, Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court, 75 U. Cinn. L. Rev. 663 (2006); Donald E. Sanders & Patricia Pattison, The Aftermath of Kelo, 34 Real Est. L.J. 157 (2005).

<sup>207</sup> See, e.g., Georgia Const. Amend. passed, set out in Ga. H.R. 1306; South Car. Const. Amend. passed, set out in S.C. S.B. 1030.

<sup>208</sup> See, e.g., Centene Plaza Redevelopment Corp. v. Mint Properties, 2007 WL 1695163 (Mo.); Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 2007 WL 1687274 (N.J.); Norwood v. Horney, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006).

<sup>209</sup> See, e.g., Ilya Somin & Jonathan H. Adler, The Green Costs of Kelo: Economic Development Takings and Environmental Protection, 84 Wash. U.L.Q. 623 (2006) (arguing that economic development takings may cause environmental harm); Richard A. Epstein, Kelo: An American Original, 8 Greenbag 2d 355 (2005); Gideon Kanner, The Public Use Clause: Constitutional Mandate or “Horatory Fluff?,” 33 Pepperdine L. Rev. 335 (2006); Daniel B. Kelly, The “Public Use” Requirement in Eminent Domain: A Rationale Based on Secret Purchases and Private Influence, 92 Cornell L. Rev. 1 (2006); Carla T. Main, The “Blight” Excuse, Wall St. J., 6/23-6/24/07, p. A11; Editorial, “They Paved Paradise,” Wall St. J. [one week after Kelo/05]; see John M. Broder, States Curbing Right to Seize Private Homes, New York Times, 2/21/06, p. A1; Martin Kasindorf, Voters Get a Say on Land Rights, USA Today, 9/25/06, p.A1. There are few scholarly articles supporting Kelo. One noteworthy exception is Abraham Bell & Gideon Parchomovsky, The Usefulness of Public Use, 106 Colum. L. Rev. 1412 (2006).

<sup>210</sup> See, e.g., Berman v. Parker, 348 U.S. 26 (1954).

flexibility. Such a utilitarian argument may be rejected by pure “property rights” proponents, but the Fifth Amendment expressly contemplates limitations on private property based on a notion of the social contract.

This does not mean that eminent domain should be cavalierly used by government to take conservation easements or any other private property rights. Takings should involve careful planning, deliberations, and public debate. The constitutional protections outlined in *Kelo* and procedural safeguards must be followed. Given the severity of the action and the fact that government must pay “just compensation,” takings should be a rare last resort by government.

#### IV. Conclusion

Private conservation easements bring substantial benefits as we seek to preserve for future generations the ecological and natural values of land against the pressures of development. At the same time, the perpetual nature, rigidity, and non-public attributes of these interests present challenges for present and future generations. The advantages of private conservation easements can be enhanced by implementing the five principles suggested in this paper that will result in market benefits, increased flexibility, and community participation.