

Skeptic's Perspective on Voluntary Conservation Easements

by John D. Echeverria



*In an article written especially for the **Ecosystem Marketplace**, John D. Echeverria, the Executive Director of the Georgetown Environmental Law & Policy Institute, explains why he thinks conservation easements are a relatively ineffective and financially wasteful way of pursuing conservation goals in the United States.*

As a result of media scrutiny and various ongoing congressional investigations, the use of easements to achieve conservation goals is under the microscope. In my view, this scrutiny is well deserved, because conservation easements present a number of serious problems. Conservation easements become especially problematic when they are not used as a scattershot approach to achieve isolated conservation goals, as was the case until very recently, but rather are understood as the dominant paradigm for conducting land conservation and management generally, as is increasingly the case today.

In simple terms, easements involve the acquisition of partial interests in real property (typically, all or some of the development rights) by a non-profit group or government agency. The basic goal of a conservation easement is to restrict development in order to safeguard, ostensibly on a permanent basis, the public benefits of land in its relatively natural condition. Among these benefits are: open space, wildlife habitat, historic preservation, agricultural land use, and so on.

A Novelty

Despite their current widespread use, the idea of relying on conservation easements as a primary tool for achieving private land conservation is actually quite novel. At the birth of the modern environmental movement, leaders such as Russell Train and William Reilly championed the regulatory option instead, and promoted what they called a "quiet revolution" in state and local regulatory initiatives for managing growth. Only a few decades ago, the Land Trust Alliance, the vanguard of what has been called the "fastest growing" part of the

environmental movement, was literally operating out of a shoebox. It was not until 1980 that Congress passed permanent legislation authorizing tax deductions for gifts of partial interests in land, the event that sparked the recent boom in land trusts. More recently, conservation easements have gained popularity as a way of finessing or, depending on one's point of view, acquiescing in overblown "property rights" arguments. Novelty is not necessarily a fault, but it does indicate that easements are relatively untested.

Not a Real Free Market Solution

It is a myth that conservation easements represent a "free market solution"--as contrasted to the "top-down, command and control" approach supposedly represented by regulation. The lion's share of the funding for easements, whether in the form of direct public outlays, tax expenditures for donations of interests in land, or favorable tax treatment of charitable funds generally, comes out of the pocket of the taxpayer. In reality, "big government" is just as much involved in conservation when federal and state financial outlays are at issue as with regulations. A "real" market solution would involve individual companies and citizens spending their own financial resources in pursuit of their own self-interest; lobbying government to spend more money on conservation, whatever else can be said about it, is not a "free market" strategy.

The Ineffectiveness of Voluntary Action

The most fundamental problem with voluntary conservation easements is that they are voluntary. The basic challenge in environmental policy-making is how to deal with the "hold out"--the individual or firm who, for selfish or misguided reasons, would prefer not to join in community efforts to protect the environment for the benefit of all. From an economic standpoint, of course, the hold out is a perfectly rational actor, because each of us would benefit the most from environmental protection efforts if everybody else sacrificed for the common good while we were exempt from such obligations. The traditional solution to the hold out problem, of course, has been to mandate participation by all, as we do in dealing with air pollution or water pollution, for example. Likewise with land, the United States cannot hope to control the adverse consequences of bad land use in an effective, comprehensive fashion if good land use is treated as a purely voluntary action.

The problem with "voluntariness" goes even deeper, because--everything else being equal--those willing to make voluntary contributions to the achievement of conservation goals are likely to be those who think they will be burdened the least by making such contributions. In other words, those most likely to sell or donate conservation easements are those least likely to change land uses in the foreseeable future; conversely, those most likely to change land uses in the near future will be least likely to volunteer. In this sense, the voluntary nature of conservation easements means that conservation effort is effectively skewed and seriously misdirected.

Unfair Windfalls for Property Owners

Conservation easements also raise the very real risk that they will be unfair--in the sense that the public will end up paying more than they ought to pay for the interests offered by sellers. Under a traditional land use regulatory program, each individual owner bears the burden of having to comply with a regulation, but generally receives a countervailing benefit--often a significant benefit--based on her neighbors' compliance with the same or similar regulations. By contrast, under a compensated easement approach, individual owners may receive a windfall because they will be paid to sell an interest in their property AND may simultaneously benefit from the buying up of the same interests from their neighbors.

This potential inequality is exacerbated by the inherent difficulty of valuing conservation easements, many of which are customized arrangements whose value cannot be determined by inspecting ordinary real estate market data. There is also a risk of unfairness in the fact that all those most directly interested in public acquisition of an easement--from the land owner, to the intermediary conservation group, to the local politician championing a conservation deal--have little if any incentive to economize in the use of taxpayer dollars. When a landowner is making an easement donation in exchange for a federal tax deduction (as opposed to making an outright sale), the risk of overpayment should theoretically be less because the tax benefit is designed to cover only a fraction of the easement's value. The inability of the IRS to effectively track land donations, however, invites abuse and overpayments in this context as well. Tax-favored donations of facade easements in historic districts are only the most flagrant example of windfall payments to property owners at public expense.

The Democracy Deficit

In practice, reliance on conservation easements tends to privatize important public decisions about land use within a community that arguably should be made in an open process through democratic procedures. In the case of donations of land in exchange for tax benefits, the only parties to the conservation decision are, typically, the landowner donor and the charitable organization that will hold the easement. Even when easements are purchased outright with public funds, there is often little in the way of public debate. This is especially true when the negotiations over price and other aspects of the transaction have been conducted behind closed doors.

The Myth of Permanence

The "democracy deficit" leads to a discussion of the chief asserted benefit of conservation easements: namely, that they succeed in achieving "permanent" conservation solutions by transferring legal land titles to a non-profit organization or government conservation trust. This benefit, proponents claim, eliminates the possibility of political officials reversing the conservation decision in the future. While relative permanence is undoubtedly a point in favor of conservation easements, at least from a purely conservationist standpoint, permanence itself

can be problematic. Social, economic, and even ecological conditions and priorities will change over time, meaning that some of today's conservation decisions will appear misguided in the future. Adaptive conservation, rather than permanent conservation, is arguably better suited to a changing world. In addition, by what right, one might ask, does the current generation seek to limit choices available to future generations?

Some observers have recognized the practical reality that all conservation easements cannot be permanent, and have begun to consider how easement restrictions might be modified or even eliminated in appropriate cases at some point in the future. But once it is acknowledged that easements are not truly permanent, the primary argument for purchasing easements--instead of using traditional regulation--is fundamentally undermined. Furthermore, introducing the idea of easement modification or extinguishment raises complex questions about how the public, which typically will have paid for the easements in the first place, should be involved in the decisions.

Looming Enforcement Problems

On the other hand, taking seriously the claim that easements are "forever" (or at least for a very long time), the use of easements sets up daunting enforcement challenges, challenges that will only get worse over the long-term. By its nature, a conservation easement creates a strained marriage between the non-profit easement holder and the owner of the underlying land. Moreover, this relationship will inevitably become more contentious as the land is bought and sold and/or passes by inheritance. Will land trusts continue to prosper when the bulk of their activity shifts from the appealing work of "saving" special places to the grinding task of private law enforcement?

Promoting Dumb Growth

Finally, there is a substantial risk that the widespread use of conservation easements will promote dumb growth, the opposite of "smart growth". The major contribution of the smart growth movement to land use policy discussions has been the insight that significant new growth is inevitable in the United States for the foreseeable future, and that a primary emphasis for policy makers should be encouraging growth to occur in the best places. A system of largely private, voluntary conservation easements contributes little, if anything, to the smart growth agenda. Indeed, voluntary easements are likely to contradict smart growth strategies by placing--through purely private transactions--areas on the urbanizing fringe off limits to development. Because it is precisely in such areas that future development probably should be concentrated, easements may undermine efforts to promote compact metropolitan development and could actually exacerbate the problem of sprawl.

The ultimate response of easement advocates to these types of arguments is frequently that the regulatory option, however superior it may be, is simply untenable in the current political environment. But if regulation is both more

effective and more equitable than easements, is it really plausible to suggest that land use advocates should simply abandon the debate to politically motivated greed and misinformation? And if, as I suggest, easements prove to be a far less secure conservation tool over the long-term than some suppose, the need for effective, fair solutions will remain. Let the debate roll on.

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