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What is a Conservation Easement?

No one would confuse a deed with fee simple ownership of land. One is a legal document and the other is a real property interest. But in recent years, many have come to identify the granting document as if it were the conservation easement -- forgetting that a conservation easement is an interest in real estate. That mistake has snowballed in effect. Focus on the granting document to the exclusion of the real estate interest has led some to mistakenly conclude that a conservation easement is a two-party agreement governed by contract law or that it is a trust indenture that binds the land trust to carry out the wishes of the original grantor. In either case, the resulting analysis appears to be carefully reasoned, but it is totally off-base because the wrong set of rules is applied to a mistaken concept – that the granting document rather than the real estate interest is the conservation easement. This article explores the different set of answers that result when the law of servitudes is applied to resolve conservation easement issues.

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Conflation

Conflation is the error in logic of treating two distinct concepts as if they were one. Using the same name for two separate things -- the land-based interest and the document creating it -- has resulted in conflation of the two into a single thing and, unfortunately, the single thing that seems to have prevailed is the granting document rather than the land-based interest.

Historical understanding

The pioneers of conservation understood that a conservation easement was an interest in land – not an agreement or a document. In 1980, the Internal Revenue Code adopted §170(h) allowing a charitable deduction for a "qualified conservation contribution" defined as the contribution of a qualified real property interest to a qualified organization to be used only for conservation purposes. Early practitioners of conservation law understood the technical problems that might arise when applying the law of servitudes to a negative easement in gross and advocated for a model statute, which

became the Uniform Conservation Easement Act in 1981, to overcome those obstacles. The UCEA defines a conservation easement as follows:

A non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property….

Note that there is no conflation or confusion in any of these definitions – the conservation easement is clearly an interest in land.

Present Understanding

Search "conservation easement" online today and you will find dozens of statements describing a conservation easement solely in terms of its being a contract between two parties – the landowner and the land trust or government agency. This definition, from the website of Land Trust Alliance, is typical:

A conservation easement … is a voluntary, legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values.

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These document-based definitions may be easier to understand than the historical definition excerpted above but user-friendliness has come at the cost of a muddled approach to conservation easement issues and a number of potential risks discussed later in this article.

A Land-Based Definition

A better definition of a conservation easement is a power vested in a land trust or governmental agency to constrain, as to a specified land area, the exercise of rights otherwise held by a landowner so as to achieve certain conservation purposes. This definition is, for the most part, a simplified and updated version of the historical definition of a conservation easement as a negative easement in gross granted for purposes of conserving natural or scenic resources.

The essentials of a conservation easement

Nothing more is necessary to create a conservation easement but a grant by the landowners to the land trust or governmental agency vesting the above-described power, a description of the affected land, and a description of the conservation purposes to be achieved by the grant. That's the crux of the

conservation easement. The emphasis is on the conservation purposes to be achieved and, with respect to donated conservation easements, the gift is the power to achieve conservation purposes by constraining landowner's free exercise of ownership rights.

Agreements within the granting document

If a conservation easement can be established by a few basic granting provisions, then why do granting documents include lengthy lists describing what activities and uses may or may not be conducted within the property? These ancillary agreements reflect the meeting of the minds that the landowners and land trust have reached as to how the land can continue to be used consistent with the conservation purposes enunciated in the granting document. In other words, landowners and land trust agree upon those activities, uses and improvements that landowners can rely upon initiating or continuing without concern that the land trust will exercise its conservation easement; i.e. its right to prohibit activities inconsistent with conservation purposes.

Differentiating ancillary agreements from the easement itself

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Because many practitioners view the list of do's and don't as the substance of the conservation easement, the example and discussion below is furnished to differentiate the conservation easement from agreements, and other administrative provisions, embedded in the granting document. An ordinary access easement is used in the example, rather than a conservation easement, for clarity but the principle is the same for all types of servitudes.

Example: Access Easement

Owner sells a portion of his land to Neighbor including the right of Neighbor to use a driveway crossing Owner's property for access to the public right-of-way. They add to the granting document their agreements about who provides snow-plowing and other maintenance, who pays what portion of maintenance expenses, and limitations on the kinds of vehicles that can use the driveway.

Servitudes law: utilitarian and pragmatic

The law of servitudes has for centuries provided fair, reasonable and (literally) down-to-earth answers to questions that arise between holders of interests in the same piece of land. Often, the answers are intuitive even without any special training in the law. Here are some questions and answers based on the access easement example:

Question: Can Owner and Neighbor change their agreements about cost-sharing without changing the easement? Answer: Of course, the easement is unchanged. Only their ancillary agreements are changed.

Question: Can they change the location of the easement without negating the easement? Answer: Of course, so long as the relocated driveway continues to serve the purpose of the original grant of easement. Serving a purpose is what servitudes are all about.

Question: If the granting Owner sells and moves away, is his approval still needed for any of these changes? Answer: Of course not, the relationship is land-based, not people-based, and the arrangements are intended to last indefinitely -- so long as the purpose continues to be served -- long past the lifetimes, or known whereabouts, of the original parties to the document.

Using Servitudes Law to Resolve Conservation Easement Issues

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The intuitive answers in the preceding section hint that a number of issues recently under debate and discussion in the conservation community might be resolved in a fair, reasonable and down-to-earth manner if the following principles were accepted and the law of servitudes applied:

1. A conservation easement is a right or power held by a land trust or government agency to constrain activities and uses of the land in furtherance of particular conservation purposes.
2. The granting document is not the conservation easement.
3. The agreements about uses and activities embedded within the granting document are (a) not the conservation easement; and (b) do not create contractual or fiduciary relationships between the parties signing the document. The purpose of these agreements (properly referred to as covenants) is to refine the land-based relationship, and avoid potential sources of conflict between, interest holders in the same piece of land.
4. Based upon the fundamentals summarized above, analyze the land-based relationships by application of the body of law developed for this purposes: the law of servitudes.

This approach will, in the following section, be applied to a number of conservation easement issues that require clarification and resolution.

What steps assure the enforceability of a conservation easement in perpetuity?

The law of servitudes was developed to permit land-based arrangements serving a useful purpose to continue to infinity so long as the purpose continues to be served. All servitudes are, by their nature, perpetual unless limited by the grant to a particular term.

Describe conservation purposes with a view to changing circumstances

The best method to insure that a conservation easement will be enforced in perpetuity, under the law of servitudes, is to describe the conservation purposes with great care. The conservation purposes must be described with sufficient clarity to address existing conditions, but also must be described with sufficient flexibility to continue the viability of at least one conservation purpose when applied to changing conditions; for example, changing patterns of land use in the vicinity, changing climactic conditions, or other reasonably foreseeable changes. The power of the easement holder to exercise its conservation easement in furtherance of an identified conservation purpose will be respected by a court for so long as that purpose is attainable.

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Be open to alternate means achieving same ends

Servitudes are all about the long-term and the law of servitudes encourages adaptation to changed circumstances so long as the purpose for the arrangement continues to be served. The particular arrangements agreed upon in the granting document were, as of the easement date, mutually acceptable to the landowners and easement holder. Those arrangements were, in all likelihood, not the only means available to achieve the conservation purposes for which the conservation easement was granted. Remember that the conservation easement is the power to constrain the activities and uses on the land in furtherance of conservation purposes. If another program for achieving that end is at least as good, and perhaps better, than the one embedded in the granting document, and is mutually agreeable to the landowners and the easement holder, the viability of the conservation easement is enhanced rather than diminished. For proof of this, ask a seasoned title practitioner whether covenants, easements and other servitudes in documents recorded decades, even hundreds, of years ago, maintain their validity if (a) written with a view only for existing conditions; and (b) not updated from time to time to maintain their applicability to changed conditions. Public records are replete with prohibitions against tanneries and charnel houses that have outlived their useful purpose.

What steps jeopardize the enforceability of a conservation easement in perpetuity?

Another way to phrase that question is the much-debated issue: what constitutes a failure to enforce a conservation easement in perpetuity? The definition of conservation easement furnished above in this article slices through the pros and cons of the debate and provides this answer:

The failure to enforce a conservation easement is the failure to exercise the powers vested in the easement holder in furtherance of conservation objectives.

Simple enough, but the devil is always in the details. How do we tell when that has occurred or, in the case of a proposed change to a granting document, may occur in the future as a result of the change?

Effect on conservation objectives as the standard

The conservation objectives set forth in the granting document are the substance of the grant. To *ignore or materially change those objectives, or to materially diminish or fail to use its powers to achieve those objectives*, is a serious breach of faith to those who support the easement holder and others who rely upon the holder's promise to exert its powers to achieve conservation objectives to the full extent it is permitted to do so under applicable law and the terms of the granting document.

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Application of Standard

The above standard is useful not only to determine whether a conservation easement should be taken away from an existing holder for failure to enforce but is also useful to determine, first, whether or not a proposed change to the granting document so changes the conservation easement as to constitute a failure to enforce; and second, whether a court approval of the change would be appropriate if good cause for the change could be shown.

Example 1: Change in conservation objectives

This example is furnished to show the application of the standard to a proposed change to the granting document that changes the conservation easement.

The conservation document seeks to preserve habitat for certain native species and, for that reason, forest is not to be disturbed. Changed conditions by surrounding development have severely

compromised the habitat values identified in granting document and the particular native species mentioned have not been discovered on or about the property for some time. Owners request a change in the granting document to allow sustainable timbering under a forestry management plan on the grounds that there are no habitat values or native species to protect.

Questions for analysis*:*

- Does the proposed change to the granting document change the conservation easement? Yes, it does. The power granted to easement holder was to constrain activities so that undisturbed forest is available as habitat for the identified species. The servitude granted in the governing document did not empower holder to constrain activities for the purpose of maintaining forest as a valuable resource for any number of other reasons; for example, preserving native species of trees, providing habitat for birds and mammals, countering the effects of carbon and pollutants in the air . These may be worthwhile conservation purposes but, unfortunately, they were not identified in the document as conservation purposes either in the first instance or, if the specifically identified habitat value was no longer attainable, as an alternative.
- Conclusion: Easement holder cannot agree to the change in the granting document without court approval *changing the conservation objectives* that are the purpose for the conservation easement. Failure to do so constitutes a failure to enforce the conservation easement granted to holder in the granting document.
- Is court-approval required to permit tree-cutting in accordance with a forestry plan? Not if the conservation objectives are broadened along the lines described above. The change in conservation objectives permits the easement holder to consider a number of means to achieve these ends including a change to the granting document to allow for tree-cutting in accordance with a forestry plan.
- Should such approval be sought and the governing document changed? Absolutely, this conservation easement is in jeopardy of outliving its useful purpose.

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Example 2: Change in granting document affecting conservation easement

A conservation easement is granted for the protection of forest and woodland resources for a variety of conservation purposes. Over time, easement holder acquiesced in a number of accommodations that allowed owners to clear, cut and remove trees for a number of non-conservation purposes. Sometimes

the exception was subject to a verifiable limit; sometimes only to a vague or subjective guideline; sometimes none at all. There was no aggregate limit and no requirement for holder review or approval prior to exercise of any of these rights.

Questions for Analysis:

- Have the changes in restrictions changed the conservation easement? Yes, if the slide down the slippery slope of piecemeal changes has made it difficult, if not impossible, for easement holder to protect forest and woodland resources within the property. *A change in restrictions changes the conservation easement when the proposed change or changes, taken as a whole, materially impair, or even preclude, the holder's ability to exercise its power to achieve those conservation objectives that were the subject of the gran*t.
- What can be done to salvage the conservation easement? Not much, if a contract analysis is applied to the granting document, as amended. Assuming the amendments were supported by consideration, or a valid substitute for consideration, and easement holder was duly authorized to enter into them, the later amendments would prevail over more stringent provisions in the original granting document.
- On the other hand, if a servitudes analysis is applied, there is an inconsistency between the conservation easement vested in the easement holder and the granting document, as amended. For the conservation easement to continue to serve a purpose, the holder must be empowered to protect the forest resources described in the easement objectives. There is a very good chance a court would resolve the inconsistency by reading into the granting document reasonable limits on tree-cutting consistent with maintaining the conservation purposes of the conservation easement.

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Example 3: Change in restrictions not affecting conservation easement

The conservation objectives of a conservation easement include maintaining availability of agricultural soils and scenic views. An area identified for residential use is proposed to be relocated.

Questions for Analysis:

- Does the proposed change, and prior changes, if any, materially impair the holder's ability to exercise its power to achieve the conservation objectives of maintaining availability of agricultural soils and scenic views. If there is no expansion in size, adverse effect on more

valuable soils, or adverse impact on scenic views, then *this is not a change to the conservation easement although an amendment to the granting document will be necessary to implement it*.

Summary of Results of Application of Standard

1 A change in conservation objectives always changes the conservation easement.

2 The conservation easement is diminished when changes to the granting document have impaired or can reasonably be expected to impair easement holder's ability to maintain or achieve the conservation purposes for which the easement was granted.

3 Changes to the conservation easement described above constitute a failure to enforce the conservation easement granted to the easement holder and a serious breach of the trust and confidence placed in easement holder by the granting landowner, public and private participants in the conservation project and other sources of support for conservation, both public and private.

4 Proposed changes affecting the conservation easement should be strictly scrutinized by the easement holder. If it is determined that significant benefit to the long-term viability of the conservation easement will result if the change is implemented, approval of the change may be sought from appropriate authorities. If approved, the granting document may then be amended to reflect the change to the conservation easement.

5 A proposed amendment to a granting document may have no effect on the conservation easement vested in the easement holder by that document.

6 Requests for changes to the granting document that have no effect on the conservation easement may be accepted or rejected by easement holder after such review and authorization as is determined to be appropriate by the easement holder.

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Problems with Application of Contract Law

There is no good reason to characterize conservation easements as "voluntary agreements between landowner and holder", other than perhaps some public relations benefit, and a number of reasons recommending against that approach.

Diminishes easement holder vis-a-vis landowner

The holder of a conservation easement holds a superior interest to that of landowner in the property. While this superiority is not absolute, due to the ancillary agreements embedded in the granting document, why forfeit that position in order to be a co-equal party to a contract?

Lack of clarity as to rights and responsibilities of original parties

When land is transferred under and subject to a conservation easement, there is rarely any documented assignment of rights and assumptions of responsibilities under the granting document. This lapse is irrelevant for purposes of application of servitudes law: the relationship is land-based, not people-based. The original grantor is neither bound nor benefited by the arrangement once title passes. The application of contract law results in a muddle. Does the original grantor continue to have rights to enforce the contract against the easement holder and, perhaps, veto changes to the granting document? Are those contract rights assignable to others? Do they pass to beneficiaries of the grantor's estate? When, if ever, do they end? And, for those who believe that the continuing involvement of original grantor is a good thing, consider the flip side as well: absent a release by easement holder, the original grantor continues to be primarily liable, under contract law, for non-compliance with the terms of the granting document.

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Contract remedy in damages rather than enforcement?

When a contract breach occurs, the primary remedy available to the non-breaching party is the civil remedy of a money judgment filed against the breaching party in an amount calculated to make the non-breaching party whole. Other remedies, such as an order to restore damaged property, may be available, in the court's discretion, if the non-breaching party can convince the court that its loss cannot be compensated by money. When a servitude is violated, the primary remedy available to the holder of the servitude is the equitable remedy is an injunction accompanied, where appropriate, by an order to restore the property to condition prior to the violation. If the land trust community represents to easement grantors that their relationship is a contractual arrangement set forth in the granting document, they should not be surprised if landowners offer to buy-out the contract or act in blatant disregard of restrictions in the granting document after calculating the probable cost to them of a money judgment imposed upon them for the violation.

Executory contracts vulnerable in bankruptcy

Property of a landowner who has filed for relief under the federal bankruptcy laws can be sold free and clear of "executory contracts": ongoing contractual arrangements where each side continues to have rights and duties following the bankruptcy filing. If the relationship between the debtor and the land trust is founded solely on the agreements embedded in the granting document, the risk of sale free and clear of these arrangements is heightened. If, however, the land trust holds a fully vested real estate interest in the property -- the conservation easement -- the bankruptcy court has no power to lift the servitude from the property of the debtor.

Problems with Application of Trust Law

When the granting document became identified as the conservation easement and viewed as a private agreement between landowners and land trust, concerns arose that, based upon principles of contract law, the agreement could be amended at any time to reflect the desires of the parties whether or not consistent with the stated conservation objectives.

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Fiduciary obligation to enforce terms of granting document

To alleviate those concerns, principles of trust law were applied to elevate the granting document to a declaration of trust, imposing on the land trust fiduciary obligations to enforce each and every one of the list of do's and don'ts in the granting document as a charitable trust. The fiduciary obligation was owed to the public and, by some accounts, to the original grantor as well. The result was an approach that enshrined the text of the original granting document so that any change to any provision required a high degree of scrutiny and, often, approval by a higher authority as well.

This did not comport with the reality of negotiating conservation easements. In the experience of many, any particular list of do's and don'ts was, in the first draft, how the land trust proposed to exercise its power to constrain the owner's discretion as to the use and development of the land in furtherance of conservation objectives and, in the second draft, how the landowner proposed to constrain the land trust's discretion as to the means for achieving the agreed upon conservation objectives. There was no particular magic in the individual items so long as, at the end of the process, the restrictions were, as a whole, reasonably sufficient to enable the holder to achieve the conservation objectives.

Balanced approach

The above analysis and discussion explaining how a standard based upon servitudes law can clarify and resolve a number of conservation easement issues dealt with the concerns, properly raised, that amendment of the granting document based solely on the desires of landowners and land trust was inappropriate due to the public support for conservation and need for public confidence in the long-term viability of conservation easements. As discussed above, the charitable trust or public trust approach went too far and elevated the granting document to be something it was never intended to be -- a single program for achievement of conservation purposes etched in stone for all time.

Separating the conservation easement from the granting document allows for a balanced approach that, on the one hand, provides a high degree of scrutiny and accountability for changes that, individually or in the aggregate, impair holder's exercise of its conservation easement; and, on the other hand, allows the easement holder to use its reasonable discretion when considering changes to the granting document that do not diminish the holder's power to constrain uses and activities to achieve conservation purposes.

The approach recommended in this article is also useful to clarify other questions that arise about the nature of a charitable gift of a conservation easement.

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What is the gift?

If a donated conservation easement is a gift of the duty to enforce in perpetuity a list of restrictions set forth in the granting document, then it's hard to understand how that's a gift at all. The gifted asset is a burden rather than a benefit and the gift of stewardship funds seems like an inducement to take on that burden of enforcement. The mindset of the conservation community has accepted that negative view of the grant: a burden that must be carried out and funds expended to enforce each and every term set forth in the granting document.

In contrast, a gift of a conservation easement is clearly an asset – the power to constrain the use and development of land to achieve conservation purposes. The gift of stewardship funds furthers the empowerment of the land trust – not only does it have the vested real property interest necessary to achieve the objective but it also has the means to do so via the funding to enforce restrictions. This is a far more positive message to communicate the powerful asset held by the land trust and the need for funding to assure its exercise as and when needed.

Whose conservation easement is it?

Landowners are sometimes induced to grant a conservation easement by the promise that the land trust will preserve the land forever exactly as desired by the landowner. The donor and, perhaps, family members are led to believe that no change of the list of do's and don'ts will ever be made and, as a result, when the land trust approves a change, conflict ensues. The gift of a set of restrictions that serves only to deputize the land trust to carry out the will of the owner is not a charitable gift at all. To be a charitable gift, the landowner has to let go and vest in the land trust the power to achieve the conservation objectives that are the subject of the gift. A gift of the power to achieve specifically identified conservation purposes is a gift indeed.

Conclusion

A course correction is needed to undo the errors, confusion and mistaken choice of law that have resulted from the conflation of the granting document with the conservation easement. Focus on the conservation easement, elevation of the conservation purposes served by the conservation easement, and application of the law of servitudes to conservation easement issues, are the means to maintain effective constraints on the use of conserved land far into the future.

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