

# INTRODUCTION

Few land conservation tools enjoy the flexibility and broad public support of conservation easements. The promise of perpetual land protection and availability of favorable economic incentives have made conservation easements a popular tool across the political spectrum. Working with governmental agencies or one of the more than 1,500 private, nonprofit “land trusts,” landowners have protected nearly 7 million acres through conservation easements.<sup>1</sup> All states have enacted statutory authority for conservation easements in some form, with the substantial majority adopting the Uniform Conservation Easement Act with few or no modifications.

The past decade has been a time of great promise and great uncertainty for the conservation easement community. New tax incentives at the federal and state levels have further spurred the increasing pace of conservation easement donation, but renewal of these incentives is uncertain and often year-to-year, leaving attorneys and landowners in the dark as to future tax consequences. At the same time, publicized abuses of conservation easement transactions have increased scrutiny on attorneys, land trusts, and appraisers, and ongoing debates about the legal framework in which conservation easements exist have revealed a lack of consensus on many aspects of conservation easement law.

Despite these uncertainties, the future of conservation easements appears bright. While the primary driving force behind the growth of and support behind conservation easements is assuredly landowners’ genuine love for land and desire for its long-term preservation, the federal and state tax savings that can be achieved through careful use of conservation easements and related land-protection techniques can be extremely significant. Wealthy landowners can use conservation easements as part of estate-planning techniques, protecting important conservation interests while preserving family wealth for future generations through income and estate tax savings.

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1. 2005 National Land Trust Census, published by the Land Trust Alliance.

Less well-off agricultural and rural landowners without significant income tax considerations have also found conservation easements to be an invaluable tool, as they are able to lower the value of their land, thereby avoiding an estate tax bill so large that it forces the sale of the property when the ranch is passed down to the next generation. Private property rights advocates have praised conservation easements for achieving conservation goals through private rather than governmental means, and staunch environmental advocates have praised conservation easements for their flexibility, efficiency, and effectiveness. Perhaps the somewhat unsettled nature of the law of these modern, still-evolving legal tools has allowed differing perspectives to find what they are looking for in the conservation easement realm.

Conservation easements are still evolving, in part because they are a new type of legal tool, not in existence while traditional common-law doctrines developed. As the first easements begin to age and easement-encumbered land changes hands between generations or in arm's-length transactions, the appropriate law of easement modification and termination has replaced impediments to easement formation as the central focus of conservation easement scholarship. This newfound focus has renewed the importance of understanding the common-law principles applicable to conservation easements.

Traditional notions of easements under the common law of real property are so at odds with many facets of conservation easements that it has been suggested that conservation easements are less closely related to common-law "easements" than they are to other fields of common law, such as restrictive covenants, equitable servitudes, and charitable trusts. Conservation easements undeniably resemble all of these doctrines and more, and they are most accurately considered a statutorily created legal instrument in part for this reason. Many statutes, however, simply remove some common-law impediments while explicitly or implicitly leaving any other applicable equitable or common-law doctrines intact, and so the common-law framework remains highly relevant. The remainder of this introduction will discuss the framework that is usually considered applicable to conservation easement law.

# I. Conservation Easements and the Common Law of Real Property

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## 1. Conservation Easements Are Considered Negative Easements

The term “conservation easement” is the accepted name for a legal tool that fits in the real property law of easements like a square peg in a round hole. The traditional “easement” under common law consisted of “a grant of an affirmative right by a landowner to another party to come onto the grantor’s land in order to carry out some prescribed activity or land use.”<sup>2</sup> As conservation easements *prohibit* certain land uses rather than enabling them, they are considered *negative* easements, which the common law allowed in only four limited circumstances: prohibiting the blocking of sunlight, the blocking of air, the removal of subjacent and lateral support for a building on adjacent property, and interference with the flow of an artificial stream.<sup>3</sup> Negative easements were disfavored by a property law system designed to promote the marketability and alienability of property and to guard against restrictions that might work against these ends. Courts have hesitated to expand these historic categories of negative easements to include new types.<sup>4</sup> In addition, conservation easements do not share other important characteristics with existing negative easements, and thus are not likely to be recognized at common law.

## 2. Conservation Easements Are Considered Easements in Gross

One such characteristic is that conservation easements are easements “in gross” rather than “appurtenant” easements. None of the negative

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2. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L. J. 2, 12 (1989).

3. Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L. J. 1187, 1199 (1989); C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity*, 8 WYO. L. REV. 25, 37 (2008); Dana & Ramsey, *supra* note 2, at 13; P. GOLDSTEIN, REAL PROPERTY 670–816, 681 (1984).

4. GOLDSTEIN, *supra* note 3, at 13, “[e]xpansion of [categories of negative easements], when it occurs, is toward approval of easements that are closely analogous to the existing categories . . . .”

easements present at common law was recognized in gross, as they all relate to activities that interfere with interests of adjacent land parcels. Appurtenant easements are non-possessory interests in land that are tied to ownership of a particular parcel of land.<sup>5</sup> That is to say, the owner of an appurtenant easement possesses the easement because he owns the land parcel associated with the easement. Examples of appurtenant easements include access easements to cross particular parcels of land to reach an adjacent parcel owned by the easement holder, or a negative easement allowing the owner of a parcel of land to prohibit an adjacent parcel's landowner from interfering with an artificial stream. In-gross easements, in contrast, are non-possessory interests in land that are *not* tied to ownership of any particular parcel of land.

As the rights held by the holder of a conservation easement are not tied to any parcel of land, conservation easements are undoubtedly easements in gross—not a traditionally recognized form of negative easements. Thus, given the disfavored status and tight boundaries of allowable negative easements and the dissimilarity of conservation easements with existing negative easement types, under common law, conservation easements would likely not be permissible or enforceable.

An additional problem with in-gross easements serving as a framework for conservation easements arises regarding their transferability. Historically, the transferability of in-gross easements has been severely restricted. Only in-gross easements created for commercial purposes are assignable in most jurisdictions, and therefore, at common law, conservation easements would not survive a change in the holder.<sup>6</sup> Easements frequently include a backup holder who can enforce the easement terms if the original grantee is unable or unwilling to do so, and these third parties might be prohibited from succeeding to the original grantee's rights under common-law principles.

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5. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.5(1) (2000) states, "An 'appurtenant' non-possessory interest in land 'means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.'"

6. Dana & Ramsey, *supra* note 2, at 14; Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1268 (1982); GOLDSTEIN, *supra* note 3, at 716.

### **3. Conservation Easements May Also Be Considered Restrictive Covenants or Equitable Servitudes**

Given the lack of a ready analogue in easement law, it is tempting to consider conservation easements a form of restrictive covenant, as restrictions on free use of land have usually been dealt with by the law as restrictive covenants, not negative easements. This has led some commentators to suggest that the conservation easement is “more akin to . . . the restrictive covenant.”<sup>7</sup> Yet this common-law classification poses problems as well.

Restrictive covenants were considered personal promises arising from contractual rights rather than interests in real property.<sup>8</sup> It is important that an easement be considered an interest in property for a variety of reasons, not least because only interests in property are compensable in the event of a taking. But more importantly, restrictive covenants, as personal promises, are usually not enforceable against the successor in interest to the original promisor unless the covenant “runs with the land,” meaning that the obligation burdens the land itself and survives a change in ownership.

Covenants “run with the land” in most jurisdictions only if they “touch and concern” adjacent land—a distinction similar to that between appurtenant and in-gross easements. In this framework, conservation “covenants” would likely not be enforceable against subsequent owners of encumbered property, as the beneficiaries of the easement are not adjacent landowners. Clearly, this directly conflicts with the premise of perpetual conservation easements as conceived by the tax code. Additionally, enforceability of restrictive covenants may be limited by horizontal privity requirements, as under common law the promisor and promisee must have occupied “a grantor-grantee relationship with regard to a fee interest in the affected land at the time that the parties created the covenant.”<sup>9</sup>

Courts often sit in equity when deciding these cases, and so the potential exists for conservation easements to be enforced, notwithstanding some legal difficulties, as equitable servitudes. However, many jurisdictions neglect to recognize equitable servitudes that do not con-

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7. Dana & Ramsey, *supra* note 2, at 13.

8. Lindstrom, *supra* note 3, at 37; Blackie, *supra* note 3, at 1199.

9. Dana & Ramsey, *supra* note 2, at 16.

cern neighboring land parcels. The *Restatement of Property* has advocated enforceability for all equitable servitudes in gross, but this position has not been widely adopted by courts and thus may present difficulties.<sup>10</sup>

## II. Conservation Easements and the Common Law of Charitable Trusts

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### 1. *If Donated Conservation Easements Constitute Restricted Gifts, Charitable Trust Law Applies*

Considering the above, it is apparent that many real property common-law doctrines fit conservation easements poorly if at all. Further complicating the picture, common-law principles from charitable trust law may also apply to conservation easements. Whether these principles apply is dependent on whether the donation of the easement to the charity constitutes an *unrestricted* or *restricted* gift. A restricted gift imposes a common-law charitable trust on the gift recipient, who then must administer the gift under principles derived from trust law, which most notably affects the amendment and termination of easements. Typical unrestricted gifts include cash donations for use in any way the organization sees fit, and property donated for use or sale at the discretion of the charity. In an unrestricted gift, any language in the granting instrument that indicates a desire for specific disposition of the gift must be seen as a “request, suggestion or entreaty,” and “merely precatory in nature,” as opposed to legally binding.<sup>11</sup>

While some commentators assert that language typically found in conservation easements indicates that easement donations are intended as unrestricted gifts, this conclusion seems to give too little weight to the specific-use restrictions negotiated for at the outset of the transaction, which are regularly interpreted as strictly binding in court inquiries into legal burdens imposed by conservation easements. As other commenta-

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10. RESTATEMENT OF PROPERTY § 537 (1944).

11. Andrew Dana, Conservation Easement Amendments: A View From the Field 8 (unpublished manuscript, 2006) (copy on file with authors), *citing* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 438 (2005).

tors have observed, statements of purpose in conservation easements regularly include language that is reasonably interpreted only as intending that the restrictions stated therein be fully legally binding, and not merely precatory.<sup>12</sup> In addition, an interpretation of the restrictions in conservation easements as merely precatory would seem at odds with the treatment that those restrictions receive in tax law. The size of the charitable contribution is measured with great precision and is based directly on the impact on property value of the specific permitted and prohibited uses in the language of the easement.

## **2. Charitable Trust Law May Also Present Difficulties**

Charitable trust law exhibits legal and practical tensions with conservation easements as well. If a proposed amendment to a conservation easement negatively impacts any of the purposes of a conservation easement, it will be invalid absent a court-approved modification under the *cy pres* or administrative deviation doctrines, both of which require a finding that the original purpose has become “impossible or impracticable.” Even if within the bargained-for amendment powers in the easement, the amendment could still be challenged in court by anyone with standing to enforce the easement, and the validity of amendments made without court approval would be called into question.

In contrast, easements under common law merely require the consent of the holder to amend. The charitable trust imposed may be problematic for amendments where a conservation purpose is negatively impacted, but other more important conservation purposes are positively impacted, resulting in a net conservation benefit. A court may find its hands tied if the impacted purpose can be possibly and practicably maintained, and the involvement of courts in routine amendments is undesirable for time and cost issues. Trust law and real property law may carry other contradictions as well when it comes to easements, and it is unclear which principles a court would follow.

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12. McLaughlin, *supra* note 11, at 442.

### III. Conservation Easements in Statutory and Case Law

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#### 1. *Easement Enabling Statutes Remove Common-Law Impediments While Leaving Other Common-Law Principles Intact*

The myriad difficulties facing conservation easements under the common law were the target of the state-by-state conservation easement enabling statutes. These statutes remove many of the common-law impediments discussed above, although it bears mentioning that some of these historic prohibitions have begun to fade out on their own. For example, the Uniform Conservation Easement Act provides:

A conservation easement is valid even though:

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch or concern real property; or
- (7) there is no privity of estate or of contract.<sup>13</sup>

The need of conservation easements for specific statutory override of common-law easement doctrines has led to the observation that they are primarily “creatures of statute . . . governed by the statutes that authorize them.”<sup>14</sup> But common law is certainly implicated, as the Act provides that “[e]xcept as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” And where the Act or other easement enabling statutes do not address common-law impediments, or to the

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13. Nat’l Conf. of Comm’rs on Uniform State Laws, Uniform Conservation Easement Act § 4 [Validity] (2007) [hereinafter UCEA].

14. Lindstrom, *supra* note 3, at 35.



extent that the Act merely allows creation of easements *subject to* existing common-law principles, common law is certainly still applicable. Some easement enabling statutes, for example, remove impediments to creation of the easement but not problems encountered later in the life of the easement, such as modification or termination.

Virtually no statutes address the applicability of the charitable trust doctrine, but the UCEA acknowledges that it may be applicable to the modification and termination of conservation easements and provides that “[t]his Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.” The Comment to this provision clarifies that the UCEA drafters considered addressing charitable trust law as beyond their charge, stating that its omission is partly because “states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes,” but that “existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.”<sup>15</sup>

## **2. Courts Have Applied Various Rules of Construction to Conservation Easements**

It is difficult to ascertain what background common-law principles courts will find applicable to conservation easements, and this logically impacts basic decisions facing attorneys representing conservation easement stakeholders. Restrictions on land use, for example, are interpreted quite differently under real property rules of construction than under charitable trust law rules of construction. Courts have not yet thoroughly addressed the interplay between these bodies of law and have relied on a wide range of doctrines to resolve cases.

In one District of Columbia case, the court applied the common property law rule of construction that ambiguities relating to restrictions on land are to be construed in favor of the free use of land and against the drafter, and allowed a landowner to build a patio awning and enclose an additional space on the roof despite an easement clause prohibiting any “extension of the existing structure or erection of additional structures.”<sup>16</sup> The court rejected arguments that contract and real

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15. UCEA § 3 cmt. (2007).

16. *Found For the Pres. of Historic Georgetown v. Arnold*, 651 A.2d 794, 795–96 (D.C. Cir. 1994).

property rules of construction should not apply to statutorily created conservation easements, dismissing such arguments as vague and unconvincing. One review of conservation easement case law offered a scathing review of the decision, stating that real property rules of construction have “no business being recognized at all by courts determining . . . disputes concerning conservation easements,” and that “common law principles of property as well as contract construction and interpretation are not consistent with the goals of conservation statutes.”<sup>17</sup>

On the other hand, courts have declined to apply these same rules of construction. A recent Maine case declined to resolve an alleged ambiguity in a conservation easement land-use restriction in favor of free use of land, rejecting the landowner’s arguments that background free-use principles should settle the outcome of the case. The court instead upheld a prohibition against all activity besides “residential recreational activity” on the easement when the landowner began soliciting paying guests for recreational activities and claiming that only uses not typical of normal recreational use were prohibited.<sup>18</sup>

Other courts have also rejected various common-law attacks on the validity of conservation easements. In a 1991 case, the Massachusetts Supreme Court upheld building restrictions on conservation easement land in the face of arguments that the easement was unenforceable at common law for lack of privity of estate or contract.<sup>19</sup> The court ruled that “[w]here the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.”<sup>20</sup> It is difficult to predict whether courts will resolve ambiguities using applicable principles from real estate law, which disfavor conservation restrictions, or find that the ambigu-

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17. 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, 404, 408 (2001) (available at [http://learningcenter.lta.org/attached-files/0/56/5629/Denver\\_law\\_review\\_J\\_Jay.pdf](http://learningcenter.lta.org/attached-files/0/56/5629/Denver_law_review_J_Jay.pdf) (last accessed Apr. 20, 2011)); Arnold, *supra* note 16, 651 A.2d at 797.

18. Windham Land Trust v. Jeffords, 967 A.2d 690 (Me. 2009).

19. Bennett v. Comm’r of Food and Agric., 576 N.E.2d 1365 (Mass. 1991).

20. *Id.* at 1367.

ity should be resolved in light of the conservation purpose as expressed in easement enabling statutes and the easement itself.

### **3. Courts Have Largely Avoided Applying Charitable Trust Law to Conservation Easements**

The potential applicability of charitable trust law is yet more challenging to determine. The doctrine has very rarely been applied by courts to conservation easements, but a few cases have acknowledged the applicability of the doctrine, several attorneys general have intervened in conservation easement modification or termination cases (presumably under charitable trust standing principles), and even detractors of the theory admit that anyone who wants to make use of the doctrine has some legal support to do so.<sup>21</sup> Other cases have not explicitly made reference to the doctrine, but have rejected amendments harmful of the conservation purposes stated in the easement, despite enabling statutes giving easement holders the power to release conservation easements, and basic common-law allowance for easement modification by mutual agreement.<sup>22</sup>

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21. *Salzburg v. Dowd*, No. CV-2008-0079 (4th Jud. Dist., Johnson Cty.); *Hicks v. Dowd*, 157 P.3d 914 (Wyo, 2007) (where Wyoming attorney general was invited to intervene in proceedings relating to a release of a conservation easement by a Wyoming county in capacity as supervisor of charitable trusts, as the parties stipulated that charitable trust law applied, and the court thus did not make a determination that it did, in fact, apply); *State v. Miller*, Dkt. No. 20-C-98-003486 (Md. Cir. Ct. 1998) (the “Myrtle Grove” case, where Maryland attorney general intervened in case later settled on improper modification of conservation easement, in capacity as supervisor of charitable trusts; see discussion in Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006)); *Chattowah Open Land Trust v. Jones*, 636 S.E.2d 523, 525, (where court held that a devise of property to a land trust for conservation purposes as defined in I.R.C. § 170(h) “unambiguously created a charitable trust.” See discussion, Nancy A. McLaughlin & William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 8 WYO. L. REV. 25, 31 (2008)).

22. *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008) (where court struck down land trust’s approval of amendment at request of subsequent landowner, stating that “no amendment is permissible if it conflicts with other parts of the easement”), *aff’d*, 2010 Ill. App. LEXIS 1040.

## IV. Living with Uncertainty and Moving Forward

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The playing field on which conservation easement transactions are carried out thus presents uncertain footing for the attorney. It is not clear to what extent possibly relevant background principles of common law will influence a court's decision on issues relating to conservation easements. Clear and unambiguous drafting of easement terms will head off uncertainty to the greatest degree possible, allowing questions to be answered directly rather than turning to rules of construction to supply answers. Still, drafting an easement that foresees all possible future situations is an unattainable goal, and questions will inevitably remain.

### 1. Attorney Roles in Initial Easement Transactions

Yet for all that remains unclear, there is ample statutory and regulatory guidance directly addressing the most pressing legal concerns. Most important, as the easement transaction is coming together, easement donors will want to be sure to comply with federal tax requirements to take advantage of the generous income and estate tax incentives. The Internal Revenue Code limits the applicability of the federal income tax deduction to specific types of easements, fitting into four distinct categories according to the purpose of the easement. As the boundaries of common law become clear only if specifically tested, planning for compliance with assuredly applicable statutory requirements should be the conservation attorney's main concern.

Conservation attorneys need to understand how these categories have evolved and how to ensure compliance with the tax code. This includes consideration of many other requirements for the interest granted, such as that it be granted in perpetuity, that it consist only of certain types of land ownership interests, that it not be subordinate to any mortgage interests, and that it not be in danger of a third-party exercise of surface mining rights.<sup>23</sup>

The easement deed itself will be the focus of much of the attorney's attention, as it is here that compliance with tax requirements is assured through management plans and permitted and prohibited uses, and the

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23. I.R.C. § 170(h).

framework of the ongoing relationship between landowner and easement holder is established. Drafting the provisions of the easement will be a collaborative effort between landowner (and landowner's attorney) and land trust or governmental agency, although easement holders often prefer to use model agreements with most of the easements they hold. Conservation attorneys must thus familiarize themselves with different characteristics and likely demands of land trusts in order to find the best match for their landowner's interests.

## **2. Continued Attorney Involvement Over the Life of the Easement**

Attorneys may have a role to play over the life of the easement as well. As the first easements begin to age and change hands to second generations or arm's-length purchasers, questions are likely to arise as to the exact boundaries of prohibited and permitted uses. Land uses are likely to be questioned as a result of changing conditions and pressures as well, and conservation aims may become outdated or difficult to achieve. For this reason, attorneys should make themselves familiar with the working relationship between easement holder and landowner and understand the framework imposed on amendment and modification requests.

Considerations after the easement is in place extend far beyond usage and amendment concerns. Attorneys can aid landowners in securing funding made available by conservation activities from governmental and private sources and may need to help protect the easement from various threats, such as eminent domain, marketable title acts, and other problems. Much has been written about the possible impact of these issues on conservation easements, and attorneys should be familiar with issues that may crop up over the life of the easement so that they and their clients know when legal assistance is warranted.