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NEWS & ANALYSIS

Conservation Easements as an Effective Growth Management Technique

by Rebekah Helen Pugh

Editors' Summary: A number of innovative smart growth programs are being used to battle urban sprawl and protect environmentally sensitive land. This Article advocates for the use of conservation easements as an effective growth management technique, and demonstrates how the benefits greatly outweigh the disadvantages. Four conservation easement programs are described, which have been very effective in preserving land, historical structures, wildlife habitats, and scenic views. The Article concludes that conservation easements can become one of the most effective means for land preservation, and an essential component of any comprehensive land use plan.

I. Introduction

The United States is facing a major problem in land preservation: urban sprawl. Urban sprawl occurs when population and infrastructure spread to undeveloped lands away from large metropolitan areas.¹ It is defined as “low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent, and designed without regard to its surroundings.”² The consequences of urban sprawl have been the decline of natural resources and open lands,³ increased air and water pollution, loss of wildlife habitat, a decrease in agricultural lands, and extravagant transportation spending.⁴ More than any other factor, urban sprawl is responsible for the disappearance of open space and agricultural lands in this nation.⁵

However, a solution has emerged: conservation easements. Smart growth programs are a fairly new approach to battle urban sprawl and protect environmentally sensitive

lands.⁶ Many smart growth programs are focused on preserving open space, historic structures, wetlands, and farmland.⁷ One method for protecting these “sensitive lands” is the use of conservation easements. Conservation easements are very flexible and are often implemented as part of a comprehensive land use plan.⁸ Conservation easements can be used in conjunction with zoning, outright purchases in fee, and tax incentives.⁹

Conservation easements are best suited to protect private lands for several reasons.¹⁰ Since conservation easements

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1. Adam E. Draper, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 250 (2004).
2. *Id.* at 252.
3. *Id.* at 250.
4. *Id.* at 252-53. Other long-term problems created by sprawl include “traffic congestion, lost farmland, threatened water quality, shrinking parkland, and abandoned industrial sites.” Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl With Smart Growth?*, 35 WAKE FOREST L. REV. 563, 567 (2000).
5. Draper, *supra* note 1, at 252.

6. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 326-27 (Thomson West 2003) (discussing the use of smart growth programs as an “antidote” to urban sprawl).

7. See *id.* at 327, defining smart growth as

using comprehensive planning to guide, design, develop, revitalize and build communities for all that have a unique sense of community and place; preserve and enhance valuable natural and cultural resources, equitably distribute the costs and benefits of development, expand the range of transportation, employment and housing choices in a fiscally responsive manner; value long-range, regional considerations of sustainability over short term incremental geographically isolated actions; and promotes public health and healthy communities.

See also Griffith, *supra* note 4, at 568 (referring to the foundational principles of smart growth as: “(1) [A]n efficient use of land use resources, (2) the full use of urban services, (3) a mix of land uses, (4) transportation options, and (5) the use of detailed, human-scale designs”).

8. Mark Thornburg, *Conservation Easement Overview*, at <http://www.state.in.us/oca/ilrc/CEs.pdf> (last visited Nov. 5, 2004). See, e.g., Wood v. City of Madison, 659 N.W.2d 31 (Wis. 2002) (upholding the use of conservation easements as part of an overall smart growth program).
9. Thornburg, *supra* note 8.
10. Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 112 (1983).

are voluntary agreements, they do not receive the same kind of scrutiny as zoning or eminent domain power, which are subject to constitutional challenges, especially under the Takings Clause of the Fifth Amendment.¹¹ Because a landowner voluntarily enters into a conservation easement contract, it will likely be prima facie valid.¹²

This Article will advocate for the use of conservation easements as an effective growth management technique. The nature of common-law easements and conservation easements will be discussed in Part II. Part II will also discuss the purposes and history of conservation easements. Part III will focus on how these easements are created, including common items that are found in a conservation easement contract, purchase of development rights programs, and statutory authority under the Uniform Conservation Easement Act (UCEA). The disadvantages of conservation easements will be discussed in Part IV. Part V will discuss the many benefits of conservation easements. This Article will demonstrate how the benefits greatly outweigh the disadvantages.

Enforcement, duration, and termination methods of conservation easements will be discussed in Part VI. Part VII will discuss four conservation easement programs that have been very effective. These four case studies will include a program focused on protecting agricultural lands, a program focused on protecting green space and scenic views, a program that protects historical lands, and a program that protects natural wildlife habitats for many varieties of animals and vegetation. The strengths and weaknesses of these programs will be discussed in detail. Finally, this Article will conclude with how conservation easements are a very effective growth management technique.

II. Nature and History of Conservation Easements

An easement is defined as “an interest in land in the possession of another which . . . entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists . . . and is not subject to the will of the possessor of the land.”¹³ Essentially, an easement is a right to use the property of another for some purpose.¹⁴ Easements are typically

classified according to whether they are negative or affirmative, and whether or not there is a dominant estate.¹⁵

Easements can be negative or affirmative in character.¹⁶ An affirmative easement entitles the easement holder to make use of the servient estate for a particular purpose.¹⁷ A negative easement allows the easement holder to prevent the servient estate owner from using his estate for an otherwise allowable purpose.¹⁸ A negative easement always benefits another piece of property.¹⁹

Easements are also classified as either appurtenant or in gross.²⁰ An easement appurtenant burdens the owner’s land and benefits another’s land.²¹ It runs with the land, unless limited by the terms of the instrument.²² In contrast, an easement in gross is a personal right of the landowner and does not involve a dominant estate, only a servient estate.²³

A conservation easement is a legal contract in which a landowner agrees to permanently restrict his land for conservation purposes.²⁴ It is defined as a “voluntary restriction placed by a landowner on the use of his or her property to protect resources such as wildlife habitat, agricultural lands, natural areas, scenic views, historic structures, or open space.”²⁵ A conservation easement is usually classified as a negative easement in gross.²⁶ It is a negative easement because it restricts how the landowner may use his property.²⁷

CONSERVATION EASEMENTS IN ESTATE AND CONSERVATION PLANNING (Virginia Cooperative Extension Pub. No. 448-094, 2001), available at <http://www.ext.vt.edu/pubs/agecon/448-094/448-094.html> (last modified Aug. 2001).

11. JUERGENSMEYER & ROBERTS, *supra* note 6, at 395.

12. Cf. Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Lane Preservation*, 32 LAND & WATER L. REV. 89, 110 (1997) (pointing out that when conservation easements are challenged in court, the validity of the easement itself is rarely challenged). *E.g.*, Maryland Env’tl. Trust v. Gaynor, 803 A.2d 512, 517 (Md. 2002) (holding a conservation easement valid even though the easement holder was accused of misrepresentation in obtaining the donated easement); Parkinson v. Board of Assessors of Medfield, 495 N.E.2d 294, 296 (Mass. 1986) (holding that a conservation easement is valid if it meets all the state-law requirements for creating a valid easement).

13. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. L. 319, 326 (1997); see generally JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 492 (Foundation Press 8th ed. 2002), defining an easement as

an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and (e) is capable of creation by conveyance.

14. L. LEON GEYER & JESSE J. RICHARDSON, MANAGING PROSPERITY: ESTATE AND RETIREMENT PLANNING FOR ALL AGES USE OF

15. Hollingshead, *supra* note 13, at 326. Easements can have both a dominant and a servient estate or just a servient estate. The servient estate is the land that contains the easement. The servient estate is burdened by the easement. The dominant estate is the land that is benefited by the easement. The dominant estate holder has use of the easement on the servient estate. See generally Baldwin, *supra* note 12, at 103.

16. Baldwin, *supra* note 12, at 103.

17. Hollingshead, *supra* note 13, at 326; see generally Madden, *supra* note 10, at 114 (giving an example of an affirmative easement as a right-of-way across a neighbor’s land).

18. Hollingshead, *supra* note 13, at 326; see generally Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1193 (1989) (giving an example of a negative easement would be one that prevents the owner from building something on his property).

19. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 380 (2001).

20. Hollingshead, *supra* note 13, at 326.

21. Baldwin, *supra* note 12, at 103.

22. Hollingshead, *supra* note 13, at 326-27. Under the restatement, appurtenant easements are only enforceable between the original parties to the contract. See RESTATEMENT OF PROPERTY §§491, 492 (1944).

23. Hollingshead, *supra* note 13, at 327. Easements in gross are enforceable between the original landowner and the original easement holder. The easement burden will pass on to subsequent landowners so long as the subsequent landowners acquire the entire original estate. Madden, *supra* note 10, at 116.

24. Draper, *supra* note 1, at 249.

25. U.S. Environmental Protection Agency, *EPA Smart Growth: Smart Growth Policies Glossary*, at <http://cfpub.epa.gov/sgpdb/glossary.cfm?type=strategy> (last visited Nov. 2, 2004).

26. Baldwin, *supra* note 12, at 103. The common law does not recognize conservation easements because the common law did not acknowledge negative easements in gross. The common law required privity and touch and concern, which prevent one landowner from binding subsequent purchasers to the terms of a conservation easement. Morrisette, *supra* note 19, at 383.

27. Morrisette, *supra* note 19, at 381.

It is an easement in gross because a land trust, not the property owner, holds the benefit.²⁸ The commonly used purposes are to protect open space, preserve wildlife habitat and other ecologically sensitive lands, to preclude development from agricultural lands, and to protect historical structures.²⁹

The first conservation easement occurred in Massachusetts in the 1880s.³⁰ During the 1930s, the U.S. Fish and Wildlife Service purchased over 250 conservation easements in Minnesota, North Dakota, and South Dakota.³¹ The primary use of early conservation easements was the protection of scenic views along highways.³² California enacted the first conservation easement statute in 1959, followed by New York in 1960.³³ However, these statutes allowed only governmental agencies to hold easements.³⁴ In 1969, Massachusetts became the first state to pass legislation that allowed these easements to be held by private conservation organizations as well as governmental agencies.³⁵

Since the 1980s, conservation easements have become a very popular land planning tool.³⁶ In 1980, there were only 431 land trusts in the United States at the local, state, and regional level.³⁷ Since 1990, there has been a 500% increase in the quantity of land that is permanently protected by conservation easements.³⁸ By 2000, there were 1,263 land trusts at the local, state, and regional level.³⁹ Conservation easements are usually used in suburban and rural areas near metropolitan locales.⁴⁰ Today, 26 states have an easement program that is publicly funded.⁴¹ To date, there are over one thousand land trust organizations that protect over four million acres of land through the use of conservation easements.⁴²

III. Creation of Conservation Easements

A. Type of Instruments

A conservation easement is created when a landowner voluntarily conveys a deed to the easement holder through a

written contract.⁴³ The deed normally restricts the kind and quantity of development permitted on the property.⁴⁴ The deed should be recorded with the city or county recording office and, once recorded, everyone is assumed to have notice of the deed and restrictions.⁴⁵ Conservation easements may also be created by reservation, such as when a land trust sells a piece of land in fee with a conservation easement attached to it.⁴⁶

There are several items that are typically included within a conservation easement instrument. The contract begins with introductory information that explicitly identifies the document, the date, the parties involved, and the property at issue.⁴⁷ A legal description of the property is included in this part.⁴⁸ Also included in this section is the duration of the easement and language that ensures that the landowner will receive a tax deduction.⁴⁹ This section should also include the relevant state statute that permits the creation of the conservation easement.⁵⁰

The second part of the document contains the provisions of the conservation easement.⁵¹ There are four broad provisions that are included in this section.⁵² The first provision is the purpose of the contract, which includes language requiring the property to be used in its natural, historical, agricultural, or open-space condition and prohibitions against using the property in any manner inconsistent with its stated purpose.⁵³

The second provision discusses the rights that are conveyed to the easement holder.⁵⁴ These rights will definitely include the right to enter the property to inspect for violations.⁵⁵ The third provision lists the restrictions on the landowner's use of the property, specifically listing activities that are prohibited.⁵⁶ The fourth provision identifies the remaining rights of the landowner.⁵⁷ Some documents will specifically identify the rights that the owner does not forfeit.⁵⁸ These rights typically include title to the property, ability to keep the public out, and ability to use the land as collateral for a loan.⁵⁹

The last part of the instrument contains several provisions of universal applicability.⁶⁰ Included in this section is language that ensures that the easement will be enforceable.⁶¹ This section will explain under what conditions the landowner's and land trust's rights and obligations may be ter-

28. *Id.*

29. *Id.* at 379.

30. Hollingshead, *supra* note 13, at 333; Draper, *supra* note 1, at 251.

31. Hollingshead, *supra* note 13, at 333.

32. *Id.*; Blackie, *supra* note 18, at 1190.

33. Morrisette, *supra* note 19, at 385.

34. *Id.*

35. *Id.* Private land trusts were first established around this time in New England. Today, more than one-third of the nation's land trusts are located in New England. Charles Wilkinson, *Land Use, Science, and Spirituality: The Search for a True and Lasting Relationship With the Land*, 21 PUB. LAND & RESOURCES L. REV. 1, 16 (2000).

36. Draper, *supra* note 1, at 251.

37. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004). Also, there were only 128,000 acres protected by conservation easements in 1980. *Id.* at 4-5.

38. Draper, *supra* note 1, at 263.

39. McLaughlin, *supra* note 37, at 4.

40. *University of California Study: Easements Shield Suburban Farms From Development*, ASCRIBE NEWS, Oct. 17, 2003, available at 2003 WL 66226514.

41. *Id.*

42. Katherine S. Anderson & Marybeth K. Jones, *Conservation Easements: An Essential Tool in the Practitioner's Estate Planning Toolbox*, 35 LAND & WATER L. REV. 183, 200 (2000).

43. Baldwin, *supra* note 12, at 105.

44. *Id.* at 105-06.

45. Geyer & Richardson, *supra* note 14.

46. *See Madden v. Nature Conservancy*, 823 F. Supp. 815, 817 (D. Mont. 1992).

47. Baldwin, *supra* note 12, at 121.

48. Morrisette, *supra* note 19, at 396.

49. Baldwin, *supra* note 12, at 121.

50. Morrisette, *supra* note 19, at 396.

51. Baldwin, *supra* note 12, at 121.

52. *Id.*

53. *Id.*

54. *Id.*

55. Morrisette, *supra* note 19, at 396.

56. Baldwin, *supra* note 12, at 121-22.

57. *Id.* at 122.

58. Thornburg, *supra* note 8.

59. *Id.*

60. Baldwin, *supra* note 12, at 122.

61. *Id.*

minated.⁶² Also, specifications for amending the document, assigning rights, and recording the easement should be included.⁶³ An arbitration clause and a clause identifying who bears the cost of enforcement actions are often included.⁶⁴

B. Purchase of Development Rights (PDR) Programs

PDR⁶⁵ programs are the use of conservation easements to obtain the rights to develop certain property.⁶⁶ In a PDR program, the government or a private conservation organization will purchase development rights on environmentally sensitive lands.⁶⁷ PDRs are usually voluntary programs.⁶⁸ PDR programs differ slightly from pure conservation easement programs in one important aspect: in PDR programs, development rights can be sold to another landowner, but conservation easements do not transfer a development right.⁶⁹

C. Statutory Authority

In 1981, the National Conference of Commissioners on Uniform State Laws drafted the UCEA to help states “develop statutory language that would permit landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements.”⁷⁰ At least 21 states and the District of Columbia have adopted the UCEA in some form.⁷¹ Twenty-three other states have adopted some other type of conservation easement statute.⁷²

62. *Id.*

63. *Id.*

64. Morrisette, *supra* note 19, at 396.

65. Development rights are defined as

the rights permitted to a lot, parcel or area of land under a zoning ordinance or local law respecting permissible use, area, density or height of improvements executed thereon, and development rights may be calculated and allocated in accordance with density or height limitations or a criteria that will effectively quantify a development right in a reasonable and uniform manner.

Anita P. Miller, *Rural Development Considerations for Growth Management*, 43 NAT. RESOURCES J. 781, 796-97 (2003).

66. Thornburg, *supra* note 8.

67. Robert H. Freilich, *Smart Growth in Western Metro Areas*, 43 NAT. RESOURCES J. 687, 694 (2003).

68. Theodore A. Feitshans, *PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools*, 7 DRAKE J. AGRIC. L. 305, 340 (2002).

69. Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 305 (2004).

70. Morrisette, *supra* note 19, at 385; *see also* Draper, *supra* note 1, at 258 (noting that “the primary objective enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments”).

71. *See* Thornburg, *supra* note 8; *see also* Elizabeth Watson & Stefan Nagel, *Establishing an Easement Program to Protect Historic, Scenic, and Natural Resources*, SG040 ALI-ABA 1085, 1090 (2001) (noting that some states that have adopted the UCEA include Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, and Wisconsin).

72. Thornburg, *supra* note 8. The only states that have not adopted some form of a conservation easement statute are Oklahoma, Pennsylvania, and Wyoming. Morrisette, *supra* note 19, at 385.

The UCEA defines conservation easements very broadly as

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, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property.⁷³

The UCEA changed the common law of conservation easements in several aspects.⁷⁴ The UCEA specifically provides that a conservation easement will be 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.⁷⁵

Under the UCEA, both charitable and governmental organizations can hold conservation easements.⁷⁶ The UCEA also enlarged the class of persons able to enforce a conservation easement.⁷⁷ Likewise, enforcement of these easements is possible without privity of contract.⁷⁸ It also provides that acceptance of the easement does not become effective until it is duly recorded.⁷⁹

IV. Disadvantages of Conservation Easements

Unfortunately, conservation easements do have some disadvantages. For the most part, these are only minor drawbacks that could also occur with other types of growth management techniques, such as zoning, purchases in fee, or tax incentives. The disadvantages of conservation easements can be placed into six distinct categories. These categories are: (1) the ability of one landowner to bind future owners in perpetuity; (2) negative aspects of the requirement of voluntary participation; (3) encouraging surrounding developments; (4) monitoring and enforcement problems; (5) valuation difficulties; and (6) local government commitment concerns and incentive limitations.

73. Hollingshead, *supra* note 13, at 335 (quoting the UCEA §1(1), 12 U.L.A. 170 (1996)).

74. *See* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 343 (1995) (noting that a conservation easement is valid regardless of whether the easement holder owns adjoining property and whether the obligations are affirmative or negative).

75. Draper, *supra* note 1, at 258; Morrisette, *supra* note 19, at 387.

76. Hollingshead, *supra* note 13, at 336; *see also* Morrisette, *supra* note 19, at 388 (noting that under the UCEA, only a nonprofit organization can qualify as a charity organization).

77. Hollingshead, *supra* note 13, at 336. The UCEA allows a conservation easement to be enforced by the easement holder, the landowner, any persons with third-party enforcement rights specifically granted in the easement instrument, or any other person authorized by law. *Id.*

78. Hollingshead, *supra* note 13, at 336.

79. *Id.*

A. Ability of One Landowner to Bind Future Landowners in Perpetuity

The first problem with conservation easements is the ability of one landowner to bind future landowners to the terms of the easement.⁸⁰ In essence, a single landowner has the power to hinder future development of the property and the marketability of the property forever.⁸¹ Future owners of the property are unable to use the property as they wish because the conservation easement will run with the land.⁸² Because land is considered to be a scarce commodity, there is concern that one generation should not be able to have a “dead hand control” over the next generation’s use of that land.⁸³

The ability of one landowner to have this kind of control over subsequent landowners is criticized for two reasons.⁸⁴ The first criticism is that it allows the actions of one private landowner to determine public goals.⁸⁵ Normally, the zoning process determines public planning goals.⁸⁶ The conservation easement process allows a single landowner to determine the perpetual use of the land, possibly to the detriment of the community.⁸⁷ The second criticism is that there is a decrease in flexibility when future landowners are bound by terms of a conservation easement.⁸⁸

Some commentators actually argue that this could be a positive aspect of conservation easements. By donating a conservation easement, a landowner will reduce the disagreement over what the future use of the property should be when passed on to the next generation.⁸⁹ A legal agreement, such as a conservation easement, can be reversed, but physical development on land cannot be.⁹⁰ The easement can always be modified in the future if need be, but development on land is irreversible.

B. Requirement of Voluntary Participation

The second problem with conservation easements concerns the voluntary nature of easements.⁹¹ Since participation with these easement programs is voluntary, conscription is entirely dependent upon the charitable desire of the landowner.⁹² However, this is not a massive problem because today there are more landowners “interested in selling conservation easements than there is money available” for the purchase of these easements.⁹³ Voluntary

participation can be viewed as a positive aspect of a conservation easement because it cannot be imposed on a landowner against his will.⁹⁴

C. Encouraging Surrounding Developments

Conservation easements may have the effect of encouraging future surrounding developments.⁹⁵ These easements are acquired piecemeal, creating areas of open space with no developments.⁹⁶ This type of open space may actually encourage surrounding developments for aesthetic reasons.⁹⁷ Developers may build on lands that border conservation easements because these lands may be very desirable to live on. Land that surrounds islands of open space is desirable to homeowners because of the beautiful scenery of an open plain or wooded area. A solution to this problem is for land trusts to purchase many lands that border each other in an effort to protect vast areas of lands.⁹⁸

D. Enforcement Problems

One of the biggest problems with conservation easements is the difficulty in monitoring and enforcing these easements.⁹⁹ Monitoring against violations of an easement’s terms can be a considerable burden on the easement holder.¹⁰⁰ Monitoring these easements can put a strain on the easement holder’s financial and human resources.¹⁰¹ However, violations of conservation easements occur very rarely.¹⁰²

When an easement violation occurs, the easement holder has several options for enforcement.¹⁰³ The first option is litigation.¹⁰⁴ This option is strongly discouraged because it can be expensive and may put a strain on the relationship between the easement holder and the landowner.¹⁰⁵ The other options for violations include arbitration, mediation, or restoration of the property back to its former condition.¹⁰⁶

80. Baldwin, *supra* note 12, at 112.

81. *Id.*

82. *Id.*

83. Farrier, *supra* note 74, at 344.

84. Baldwin, *supra* note 12, at 112.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *The Conservation Easement, A Flexible Tool for Preserving Family Lands*, at <http://www.natlands.org/Library/consease.html> (last modified Aug. 22, 2002).

90. Farrier, *supra* note 74, at 344.

91. Paster, *supra* note 69, at 304.

92. *Id.*

93. Tom Daniels, *Conservancy: The Land Trust Movement in America/Land Conservation Financing*, 70 J. AM. PLANNING ASS’N, Oct. 1, 2004, at 494, available at 2004 WL 69986693.

94. *See, e.g.,* Town of Libertyville v. Bank of Waukegan, 504 N.E.2d 1305, 1310 (Ill. App. Ct. 1987) (holding that a town is not allowed to take a conservation easement on a piece of land without the landowner’s consent). *But see* Smith v. Town of Mendon, 2004 WL 2941271 (N.Y. Dec. 21, 2004) (holding that the conservation easement in question was not an involuntarily forced taking because the landowner agreed to the easement in exchange for a special permit). *See also* Fallone Props., Ltd. Liab. Co. v. Bethlehem Township Planning Bd., 849 A.2d 1117, 1128 (N.J. Super. Ct. App. Div. 2004) (holding that it was proper for a town to require the donation of a conservation easement before a developer was permitted to construct a new development).

95. Paster, *supra* note 69, at 304.

96. *Id.*

97. *Id.*

98. Many land trusts are working toward cooperating with many landowners to obtain watershed protection of sensitive lands. Wilkinson, *supra* note 35, at 17.

99. Baldwin, *supra* note 12, at 113; Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 458, 469 (2002).

100. Baldwin, *supra* note 12, at 114.

101. *Id.*

102. *Id.*

103. *Id.* at 115.

104. *Id.*

105. *Id.*

106. *Id.*

E. Valuation Difficulties

Because correctly valuing a conservation easement for tax purposes is imperative, there are many concerns over appraisals.¹⁰⁷ Properly determining the value of a donated easement is essential to establish the tax benefits available to the landowner because the benefits are based on the fair market value of the easement at the time of donation.¹⁰⁸ This is important because a frequent motive for donation of easements is the tax benefits.¹⁰⁹ A landowner cannot receive a deduction unless he meets certain requirements, including obtaining an appraisal from a competent appraiser, attaching the appraiser's summary to his tax returns, and keeping detailed records concerning the donation.¹¹⁰

The problem with properly valuing conservation easements is twofold.¹¹¹ The first problem is that determining the fair market value is often difficult.¹¹² The valuation procedure is complicated by the need to consider many factors.¹¹³ The difficulty in determining the fair market value of a conservation easement could be attributed to the disagreement over the different methods used and the problems with each method.¹¹⁴

There are three approaches used by tax assessors to appraise conservation easements.¹¹⁵ The first method is referred to as comparable sales, which measures the value through comparison of similar properties recently sold in a similar market.¹¹⁶ The problem with this method is that sale prices of property burdened with a similar conservation easement for comparison are unlikely to be found.¹¹⁷ Each easement is fairly unique to each individual property and, therefore, similar easements often will not be available for comparison.¹¹⁸

The second method is referred to as cost approach, which measures the reduction in the cost of improvements on the land.¹¹⁹ The problem with this method is that it fails to take into account the overall circumstances of a conservation easement.¹²⁰ Land burdened with a conservation easement is unlikely to have any improvements.¹²¹ The third approach

is the income approach, which measures the reduction in value of the economic benefits generated from the property.¹²² This method is usually difficult to apply to land with a conservation easement because the land is likely to be unproductive and undeveloped anyway.¹²³

The second problem involves government audits. The audits done by the government may differ significantly with the landowner's appraisal.¹²⁴ Although a landowner may be able to prove the proper value of his donation, this process can result in significant time and financial losses for him, especially if he is required to prove the easement's value through a judicial proceeding.¹²⁵

If the landowner's value is not validated, he may face severe tax penalties and fines.¹²⁶ If the easement value claimed by the landowner is 200% or more than the value determined by the U.S. Internal Revenue Service (IRS), a penalty will be applied, amounting to 20% of the extra liability.¹²⁷ If the value claimed by the donor is 400% or more than the value assessed by the IRS, the penalty is 40% of the underpayment.¹²⁸

F. Governments' Commitments and Incentive Limitations

The last two problems relate to the concerns over local government commitments and incentive limitations. The first problem deals with governmental appraisers' hesitance to value conservation easements at the appropriate level.¹²⁹ Because the local government is facing a decrease in property taxes, it has an incentive to underestimate the value of the easements.¹³⁰

Incentive limitations can be a huge problem for low- to moderate-income landowners.¹³¹ Governmental provisions limit the tax deductions for donations of conservation easements to 30% of the landowner's adjusted gross income.¹³² Therefore, some landowners cannot realize tax deductions equal to the value of the easement that they donate.¹³³ However, there is a solution to this problem. The tax credit can be spread over a six-year period.¹³⁴ The landowner may donate a conservation easement on part of his property, rather than

107. Madden, *supra* note 10, at 107.

108. Draper, *supra* note 1, at 269.

109. Baldwin, *supra* note 12, at 115.

110. Draper, *supra* note 1, at 269; McLaughlin, *supra* note 37, at 74.

111. Baldwin, *supra* note 12, at 115.

112. *Id.* A conservation easement is measured by the fair market value at the time of the donation. *Id.* at 116. Fair market value is usually defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." McLaughlin, *supra* note 37, at 69.

113. See Baldwin, *supra* note 12, at 116 (noting that the factors to be considered include the nature of the restrictions placed upon the land and how developable the property is without the restrictions. These factors can be difficult to measure, and may cause disputes between the landowner and the potential easement holder).

114. Daniel C. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 838 (1990).

115. *Id.* at 828; see also McLaughlin, *supra* note 37, at 70 (pointing out that most conservation easements are valued using some type of a before-and-after method).

116. Stockford, *supra* note 114, at 828.

117. *Id.* at 838.

118. *Id.*

119. *Id.* at 828.

120. *Id.* at 839.

121. *Id.*

122. *Id.* at 829.

123. *Id.* at 839.

124. Draper, *supra* note 1, at 269.

125. *Id.* at 270-71.

126. *Id.* at 270. However, overvaluation must be severe in order for the penalties to kick in. Also, the landowner may escape liability under the "reasonable cause exception." This exception excludes landowners who acted in good faith with reasonable cause, relied on the appraisal of a competent auditor, and did a good-faith investigation into the value of the easement. McLaughlin, *supra* note 37, at 75.

127. Baldwin, *supra* note 12, at 117; McLaughlin, *supra* note 37, at 75.

128. McLaughlin, *supra* note 37, at 75.

129. Draper, *supra* note 1, at 271.

130. Stockford, *supra* note 114, at 839. Nationwide, property taxes provide local governments with about 28% of their total revenue. Property taxes are paid ad valorem, based on the market value of the property. When a conservation easement is added to land, the market value decreases, thereby decreasing the ad valorem tax. Government auditors may be hesitant toward appraising land burdened with a conservation easement at a lower value because of the fear of losing a big source of revenue. *Id.* at 840-41.

131. Draper, *supra* note 1, at 271.

132. *Id.*; see also Thornburg, *supra* note 8 (noting that corporations can only receive a 10% tax deduction).

133. Draper, *supra* note 1, at 271.

134. Geyer & Richardson, *supra* note 14.

the whole property.¹³⁵ This can be effective to counteract the tax limitations because the landowner can receive the 30% income tax credit over a period of 12 years by donating an easement on one-half of the property, and then donating an easement on the other one-half.¹³⁶

V. Benefits of Conservation Easements

Despite all the negative aspects of conservation easements, they have many advantages as well. These benefits can be placed into two broad categories: benefits to the landowner and benefits to the easement holder. Benefits to the landowner include personal flexibility and tax deductions. Benefits to the easement holder include the lowered costs of purchasing a conservation easement and maintaining it and the lack of litigation.

A. Benefit to the Landowner: Personal Flexibility

A very important strength of conservation easements is their flexibility.¹³⁷ No two conservation easements are alike.¹³⁸ They are the result of extensive negotiations between the landowner and the easement holder.¹³⁹ The end result is a conservation easement that is formed to fit the individual characteristics of the land involved.¹⁴⁰ Conservation easements are usually more tolerable to landowners than zoning or eminent domain purchases because an easement allows the landowner to retain title to the property and choose how it will be used.¹⁴¹ The landowner may continue to use the property in any manner that he wishes, so long as it is consistent with the restrictions.¹⁴² Because conservation easements are voluntary, they cannot be imposed on a landowner without his consent.¹⁴³ Contrary to popular belief, public access to property subject to a conservation easement is not part of a standard conservation easement agreement.¹⁴⁴

B. Benefit to the Landowner: Tax Deductions

Conservation easements allow for tax deductions in several ways. A landowner who donates a conservation easement may receive a deduction in federal and state income tax, reduced real property taxes, and a reduction in federal gift and estate tax.¹⁴⁵ However, the donated property “cannot be

subject to a mortgage or lien that could defeat the interest to be preserved.”¹⁴⁶

The federal tax code permits a landowner to deduct the donation of a conservation easement from his federal income tax if it qualifies as a conservation contribution.¹⁴⁷ In order to qualify, the donation must be a real property interest, and in the case of a conservation easement, it must be a perpetual restriction on the use of land.¹⁴⁸ The easement holder must be a qualified organization, which includes any public or private establishment whose purpose is conservation of natural or cultural resources.¹⁴⁹

Last, the donation must serve a conservation purpose.¹⁵⁰ The tax code’s permitted conservation purposes include “preservation of land for public outdoor recreation and education uses, protection of habitat for plants, fish, wildlife, or similar ecosystems, preservation of open space, and preservation of historic structures.”¹⁵¹ The income tax deduction can be spread over six years, and may be applied to federal and state income tax returns.¹⁵²

A landowner may also receive a deduction in estate taxes because of the reduced value of the property.¹⁵³ When a property owner dies, the probate court appraises the value of the property in order to impose an estate tax.¹⁵⁴ Generally, the same provisions that apply to a reduction in income taxes apply to estate taxes.¹⁵⁵ A reduction in estate taxes is possible whether the conservation easement occurs prior to death or through a will.¹⁵⁶

Property owners can take advantage of estate tax benefits in two ways.¹⁵⁷ First, a landowner may donate a conservation easement before his death, thereby reducing the value of the property.¹⁵⁸ Because the property value is lowered, the estate taxes will be lowered, since they are measured by the value of the property.¹⁵⁹ The reduction in estate taxes can be beneficial because a landowner’s heirs may inherit his property without being forced to sell it to pay the estate taxes.¹⁶⁰ This creates a greater chance of land remaining in the family

135. *Id.*

136. *Id.* By donating a conservation easement on one-half of his property, a landowner can receive a 30% income tax deduction for that one-half of his property. This deduction can be spread over a six-year period. Then after that six-year period, the landowner can donate the other one-half of his property for a conservation easement. He will receive another 30% income tax deduction for another six years. By doing this, he will receive a 30% income tax deduction for up to 12 years, instead of the usual 6. *Id.*

137. Morrisette, *supra* note 19, at 415; Baldwin, *supra* note 12, at 106.

138. Morrisette, *supra* note 19, at 415.

139. *Id.*

140. *Id.*; see also Hollingshead, *supra* note 13, at 322 (noting that most conservation easements are tailored to the specific desires of the easement holder and landowner).

141. Draper, *supra* note 1, at 255.

142. Baldwin, *supra* note 12, at 106.

143. Draper, *supra* note 1, at 255.

144. Florida Forestry Information—Conservation Easements, at <http://www.sfrc.ufl.edu/Extension/ffws/ce.htm> (last visited Nov. 2, 2004).

145. Morrisette, *supra* note 19, at 393; Baldwin, *supra* note 12, at 107-08.

146. Thornburg, *supra* note 8.

147. Jesse J. Richardson, Symposium, *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449, 450 (1995); Preservation Easement Trust, *Tax Benefits*, at <http://www.preservationeasement.org/conservation/taxbenefits.asp> (last visited Nov. 2, 2004) [hereinafter Preservation Easement Trust].

148. Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENVT. 244, 245 (2001).

149. Morrisette, *supra* note 19, at 394. A qualified charitable organization includes both local and national organizations. Anderson & Jones, *supra* note 42, at 200.

150. Morrisette, *supra* note 19, at 394.

151. Karen M. White, “Extra” Tax Benefits for Conservation Easements: A Response to Urban Sprawl, 18 VA. ENVTL. L.J. 103, 105-06 (quoting 26 C.F.R. §1.170A-14(d)).

152. Preservation Easement Trust, *supra* note 147.

153. Morrisette, *supra* note 19, at 394.

154. Preservation Easement Trust, *supra* note 147.

155. Morrisette, *supra* note 19, at 394.

156. Baldwin, *supra* note 12, at 107.

157. Richardson, *supra* note 147, at 456.

158. *Id.* at 456-57.

159. *Id.*

160. Morrisette, *supra* note 19, at 395. A landowner’s heirs are often forced to sell inherited property to pay the estate taxes, especially when the land is very valuable. A conservation easement prevents the heirs from being forced to sell the property because the value of the land is greatly decreased, thereby decreasing the estate taxes. *Id.*

for generations.¹⁶¹ Second, a landowner may be able to use the \$10,000 annual gift tax exclusion.¹⁶² This exclusion allows an individual to “give gifts valued at up to \$10,000 per donee per calendar year without paying gift tax and without it counting toward the unified credit.”¹⁶³

A landowner who donates a conservation easement may also receive a reduction in real property taxes.¹⁶⁴ States allow municipalities to tax landowners based on the fair market value of their property.¹⁶⁵ When determining the property taxes, most states will consider the reduction in the value of the property due to the easement.¹⁶⁶

C. Benefits to the Easement Holder: Lowered Costs and Lack of Litigation

The purchase of a conservation easement is much more economical than purchasing land in fee simple.¹⁶⁷ On top of that, many landowners are willing to agree to the sale of a conservation easement, but may refuse to sell the land itself.¹⁶⁸ The costs of maintaining the property are the landowner’s responsibility, reducing the costs to the easement holder.¹⁶⁹ The financial benefits to the government also include protection for conservation purposes without paying the purchase price of the land, and the land still remains on the government’s tax docket.¹⁷⁰

Conservation easements have become an effective device for land preservation because there have been so few enforcement problems that result in litigation.¹⁷¹ Even if disputes concerning the enforcement of a conservation easement do arise and are litigated in court, the validity of the easement itself is usually not challenged.¹⁷²

VI. Enforcement, Duration, and Termination

A. Enforcement

Enforcement is a very important aspect of conservation easements because it is the key to maintaining the integrity of a conservation easement program.¹⁷³ Proper enforcement of the easement is only possible through effective monitoring.¹⁷⁴ Without suitable monitoring, the easement holder is unlikely to discover violations of the contract.¹⁷⁵ If viola-

tions of the terms of the easement contract do arise, the easement holder has several options, including litigation, arbitration, mediation, or restoration of the property to its condition prior to the violation.¹⁷⁶

Under the UCEA, the easement holder, an authorized third party, or any person authorized under law may bring an enforcement action.¹⁷⁷ All states allow the easement holder to enforce the easement, but only those states that have adopted the UCEA will allow enforcement by third parties.¹⁷⁸ Third-party enforcement can be useful if the easement holder is unable or unwilling to enforce the easement.¹⁷⁹ Any person authorized under law usually refers to the attorney general of the state in which the conservation easement is located.¹⁸⁰ Some states have allowed enforcement actions to be brought by any resident of the state in which the easement is located.¹⁸¹

A conservation easement is a legal contract that allows the easement holder to seek redress in the courts if the terms are violated.¹⁸² Therefore, remedies for breach of the terms are very similar to remedies for breach of contract. Equitable relief, such as an injunction, is probably the most appropriate remedy.¹⁸³ However, the easement holder may also recover monetary damages.¹⁸⁴

There are only a few cases dealing with the enforcement of conservation easements.¹⁸⁵ Courts are very likely to enforce the terms of the easement, due largely in part to public policy benefits.¹⁸⁶ Courts are also willing to enforce the terms of the easement even if there is no monetary consideration given to the landowner in exchange for the conservation easement.¹⁸⁷ The few cases that have arisen usually involve successors-in-interest and not the original easement donor.¹⁸⁸ Fortunately,

176. Baldwin, *supra* note 12, at 115.

177. Morrisette, *supra* note 19, at 389.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See, e.g.,* Tennessee Env’tl. Council, Inc. v. Bright Par 3 Assocs., 2004 Tenn. App. LEXIS 155 (Tenn. Ct. App. Mar. 8, 2004) (holding that because the conservation easement was held for the benefit of the people of Tennessee, any resident of Tennessee had standing to enforce it). *But see* Knowles v. Codex Corp., 426 N.E.2d 734, 737 (Mass. App. Ct. 1981) (holding that citizens of the town in which a conservation easement is located do not have standing to enforce the terms of the easement).

182. Watson & Nagel, *supra* note 71, at 1099.

183. Morrisette, *supra* note 19, at 389-90.

184. Patricia Templar Dow, *The Unique Benefits of Conservation Easements in Colorado*, 30 COLO. LAW. 49 (2001); *see also* Watson & Nagel, *supra* note 71, at 1099 (noting that monetary damages are most appropriate when the violations are irreversible).

185. Morrisette, *supra* note 19, at 390. In the cases that do exist, there is a strong tendency by courts to uphold the terms of the conservation easement. *See, e.g.,* Bennett v. Commissioner of Food & Agric., 576 N.E.2d 1365 (Mass. 1991) (upholding the validity of restrictions in a conservation easement).

186. *See* Morrisette, *supra* note 19, at 390.

187. *See* Western N.Y. Land Conservancy v. Town of Amherst, 773 N.Y.S.2d 768, 770 (N.Y. 2004) (holding that the conservation benefits are legally sufficient consideration for the grant of the conservation easement).

188. Morrisette, *supra* note 19, at 390. Courts have been very willing to enforce the terms of a conservation easement against succes-

161. White, *supra* note 151, at 109-10.

162. Richardson, *supra* note 147, at 457.

163. *Id.*

164. Morrisette, *supra* note 19, at 395.

165. Richardson, *supra* note 147, at 457.

166. Morrisette, *supra* note 19, at 395.

167. *Id.* at 418.

168. *Id.* at 419.

169. Hollingshead, *supra* note 13, at 323; Baldwin, *supra* note 12, at 108.

170. Draper, *supra* note 1, at 256. The government will still receive property taxes from the landowner, but these taxes will be lowered. This is still an advantage because if the government owns the land in fee, it will receive no property taxes. Baldwin, *supra* note 12, at 108.

171. Baldwin, *supra* note 12, at 110; Morrisette, *supra* note 19, at 419.

172. Baldwin, *supra* note 12, at 110.

173. Morrisette, *supra* note 19, at 388.

174. *Id.* at 388-89. In some states, it is actually a crime to obstruct access to an easement by one who has a right to inspect it. *See, e.g.,* CAL. PENAL CODE §420.1 (West, WESTLAW through 2004 Sess.) (making it a crime punishable by up to a \$500 fine).

175. Morrisette, *supra* note 19, at 388-89.

courts have held conservation easements valid against successors-in-interest.¹⁸⁹

B. Duration

Generally, conservation easements run perpetually.¹⁹⁰ Under the UCEA, a conservation easement is “unlimited in duration unless the instrument creating it otherwise provides.”¹⁹¹ However, some states statutorily provide a maximum number of years that these easements can run.¹⁹² Easements that terminate after a certain number of years are referred to as “term easements.”¹⁹³ The majority of conservation easements run perpetually because in order for a landowner to receive a tax benefit from the donation, the easement must run in perpetuity.¹⁹⁴

C. Methods of Termination

Although in theory conservation easements are supposed to run forever, they can be terminated in several ways, much like common-law real covenants or equitable servitudes. The UCEA provides that they may be terminated in the same manner as other easements.¹⁹⁵ These methods of termination are: (1) eminent domain; (2) foreclosure of a preexisting lien on the property; (3) marketable title acts; (4) doctrine of changed conditions; and (5) release and inaction.¹⁹⁶ Also, the instrument granting the easement may provide that the restrictions will terminate after a certain number of years, upon the occurrence or nonoccurrence of a happening, after the conclusion of the easement’s purpose, or upon a failure to obey the easement restrictions.¹⁹⁷

Eminent domain is the power of the government to “force transfers of property from owners to itself for public purposes.”¹⁹⁸ It occurs when the state condemns property for public use.¹⁹⁹ When the government takes property by way of its eminent domain power, the property is condemned without any restrictions.²⁰⁰

Foreclosure of a preexisting lien on the property refers to an unpaid mortgage or unpaid real estate taxes.²⁰¹ When the property is purchased at a foreclosure sale, the purchaser is able to take title to the property without the conservation easement.²⁰² Similarly, some courts have allowed a subsequent bona fide purchaser for value to take land free from a conservation easement when the subsequent purchaser had

no knowledge of the easement.²⁰³ Marketable title acts provide that restrictions on real property expire after a specified number of years unless the interest holder records his interest within a set period of time.²⁰⁴ However, some states statutorily exempt conservation easements from marketable title acts.²⁰⁵

Under the doctrine of changed conditions, a court may terminate an easement if conditions surrounding the easement have changed so much that the restrictions no longer make sense or create an undue hardship.²⁰⁶ The doctrine of changed conditions will often occur in situations where the surrounding land has substantially increased in value due to development, and a landowner wishes to remove the easement in order to receive financial gain.²⁰⁷

There has been extensive debate about whether the doctrine of changed conditions should apply to conservation easements.²⁰⁸ In considering whether the doctrine applies, courts take several factors into account, including the intent of the parties, the foreseeability of changes, the effect of the restrictions on economic efficiency of the land, the location of the changes, the duration of the easement,²⁰⁹ the benefit to the easement holder, and the loss of potential profits.²¹⁰

Release and inaction are methods of extinguishments by the easement holder.²¹¹ A release occurs when the easement holder terminates the conservation easement in a contractual agreement.²¹² However, the U.S. Congress has provided in the U.S. Treasury Regulations that conservation easements can only be extinguished by a judicial proceeding.²¹³

203. See, e.g., *Turner v. Taylor*, 673 N.W.2d 716, 718 (Wis. Ct. App. 2003) (holding that a bona fide purchaser defense does apply to conservation easements).

204. Baldwin, *supra* note 12, at 119.

205. *Id.*

206. *Morrisette*, *supra* note 19, at 392; *Draper*, *supra* note 1, at 267. Under the *Restatement (Third) of Property*, a conservation servitude

may not be modified or terminated because of changes that have taken place since its creation except as follows: (1) If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the cy pres doctrine, except as otherwise provided by the document that created the servitude. (2) If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude. (3) If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination. (4) Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.

RESTATEMENT (THIRD) OF PROPERTY: SERVIDITUDES §7.11 (2000).

207. *Draper*, *supra* note 1, at 267.

208. See *Blackie*, *supra* note 18, at 1188. The argument is that courts should apply the doctrine of changed conditions to conservation easements the same way as it is applied to common-law servitudes. *Id.*

209. *Draper*, *supra* note 1, at 267-68.

210. *Blackie*, *supra* note 18, at 1209.

211. Baldwin, *supra* note 12, at 120; *Hollingshead*, *supra* note 13, at 328.

212. Baldwin, *supra* note 12, at 120.

213. See *Anderson & Jones*, *supra* note 42, at 204 (citing to Treas. Reg. §1.170A-14(g)(6)(i) (1999)).

sors-in-interest. See, e.g., *Chatham Conservation Found. v. Farber*, 779 N.E.2d 134 (Mass. App. Ct. 2002).

189. *Morrisette*, *supra* note 19, at 390.

190. *Id.* at 391.

191. *Id.*

192. *Id.*

193. *McLaughlin*, *supra* note 37, at 4.

194. *Morrisette*, *supra* note 19, at 391.

195. *Draper*, *supra* note 1, at 264.

196. Baldwin, *supra* note 12, at 118-20.

197. *Hollingshead*, *supra* note 13, at 328.

198. *Draper*, *supra* note 1, at 264.

199. Baldwin, *supra* note 12, at 118.

200. See, e.g., *County of Marin v. Assessment App. Bd., County of Marin*, 134 Cal. Rptr. 349, 352 (Cal. 1976) (holding that a conservation easement may be extinguished by eminent domain).

201. Baldwin, *supra* note 12, at 118.

202. *Id.*

Inaction, or abandonment as it is sometimes referred to, terminates an easement through non-use.²¹⁴ This occurs when the easement holder fails to bring an enforcement action or fails to properly monitor the land.²¹⁵ When this occurs, the landowner has an estoppel argument.²¹⁶

VII. Conservation Easement Programs That Work—Four Case Studies

Conservation easement programs can be very effective in preserving sensitive lands across the nation, as the following four case studies demonstrate. These land trusts represent some of the various types of conservation easement programs. The first program, the Montana Land Reliance (MLR), primarily focuses on preserving agricultural land and farmland. The second program, the Historic Preservation League of Oregon (HPLO), exclusively works to preserve historical structures and lands. The third program, the Red-Tail Conservancy (RTC), works to preserve wildlife habitats for various species of animals and vegetation. The last program, the Ozaukee Washington Land Trust (OWLTL), preserves open space and scenic views for the public to enjoy and use.

A. Agricultural Easement Program—The MLR

The MLR currently holds 440 conservation easements that protect more than 537,000 acres in Montana.²¹⁷ The MLR was founded by a group of “forward-thinking” Montanans in 1978.²¹⁸ By 1988, it had acquired 23 conservation easements.²¹⁹ The MLR currently contracts for an average of 40 new easements each year.²²⁰ The MLR boasts that it holds 18% of all conservation easement acreage in the nation.²²¹ In 2003, it acquired over 37,000 acres in conservation easements.²²² The mission of the MLR is to provide “permanent protection for private lands that are ecologically significant for agricultural production, fish and wildlife habitat and open space.”²²³ The two primary purposes of the MLR are to prevent development and to preserve agricultural lands.²²⁴

The MLR protects various types of lands, but especially agricultural operations.²²⁵ Many Montana ranchers are faced with rising land prices that result from residential and

commercial development.²²⁶ The MLR seeks to aggressively protect these agricultural lands through the passage of federal legislation that will significantly improve the tax benefits for agricultural easement donors.²²⁷

Each conservation easement is personalized to meet the specific needs of each individual landowner and the particular attributes of the land.²²⁸ However, the MLR will only accept easements donated in perpetuity.²²⁹ It prides itself on creating a personal relationship with each landowner.²³⁰ The MLR does not restrict how property owners manage their lands.²³¹ There are many permitted uses under the terms of each conservation easement, but the landowner must inform the MLR if the property is sold.²³² The MLR specifically prohibits certain uses on the protected lands, including subdivisions for residential or commercial use, construction of nonagricultural buildings, strip mining, and dumping of waste.²³³

All of the conservation easements are donations, most often for the tax benefits.²³⁴ In some cases, donating a conservation easement is the only way that many landowners can keep the lands in their family.²³⁵ Often times, the reduction in estate taxes that the landowners’ heirs receive prevent them from having to sell their property in order to pay estate taxes.²³⁶

The MLR monitors its property with yearly site checks, which include meeting with the property owner, going over a checklist regarding the easement, and touring the property.²³⁷ A conservation easement granted to the MLR will give the group three rights to the protected land.²³⁸ These rights include the right to preserve and protect the property, the right to enter the property for annual site visits, and the right to “enjoin and restore,” which assures that the terms of the easement will be enforceable.²³⁹

There have been a couple of enforcement problems, but the MLR has never been involved in litigation concerning these problems.²⁴⁰ The most typical enforcement problem

214. Baldwin, *supra* note 12, at 120.

215. *Id.*

216. *Id.*

217. Morrisette, *supra* note 19, at 399; Joel Connelly, *Undaunted, They Fight for the Montana Way of Life*, SEATTLE POST-INTELLIGENCER, Oct. 6, 2004, at A2, available at 2004 WL 60150795.

218. *Charitable Giving Problems—Rock Ringling*, 111th Cong. (2004) (statement of Mr. Rock Ringling, Managing Director, MLR Comm. on Senate Finance), available at 2004 WL 2012918 [hereinafter Rock Ringling].

219. Morrisette, *supra* note 19, at 399.

220. Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 126 (2000).

221. *The Montana Land Reliance, Who We Are, What We Do, and How We Do It*, at <http://www.mtlandreliance.org/who.htm> (last visited Nov. 2, 2004).

222. *Id.*

223. *Id.*

224. Morrisette, *supra* note 19, at 399.

225. *See id.*

226. MLR, *Agricultural Heritage*, at <http://www.mtlandreliance.org/agland.htm> (last visited Nov. 2, 2004).

227. *Id.*

228. Morrisette, *supra* note 19, at 399-400.

229. MLR, *FAQs*, at <http://www.mtlandreliance.org/faq.htm> (last visited Nov. 2, 2004).

230. *Rock Ringling*, *supra* note 218.

231. Morrisette, *supra* note 19, at 399. However, although the easements do not impose management plans on the landowners, they are required to take steps to protect conserved lands. *Id.*

232. *Id.* at 402.

233. Morriss & Meiners, *supra* note 220, at 126.

234. Morrisette, *supra* note 19, at 400.

235. *Id.*

236. *Id.*

237. *Id.* at 402.

238. MLR, *An Introduction to Conservation Easements*, at <http://www.mtlandreliance.org/easment.htm> (last visited Nov. 2, 2004).

239. *Id.*

240. Morrisette, *supra* note 19, at 401. However, the MLR has been involved in litigation concerning other problems surrounding easements held by it. *See, e.g., Amerimont, Inc. v. Gannett*, 924 P.2d 1326 (Mont. 1996) (plaintiffs brought suit against the MLR and the landowner alleging that a prescriptive easement had been established over the land protected by the conservation easement); *Strasburg v. Commissioner of Internal Revenue*, 2000 WL 288276 (U.S. Tax Ct.) (donor of conservation easement sued by the IRS for taxes due when the donors improperly valued the decrease in value of their land).

has not involved permitted uses, but simply a landowner failing to inform the MLR of the use.²⁴¹ For example, under the terms of the easement, the landowner is required to provide notification to the MLR of any changes in the land.²⁴² However, a typical problem occurs when a landowner builds a shed or similar building on the land, which is permitted under the easement, but fails to inform the MLR of the change.²⁴³

B. Historic Preservation Easement Program—HPLO

A historic preservation easement is a conservation easement that restricts the owner's ability to change historic structures on land.²⁴⁴ There are three general types of historic preservation easements.²⁴⁵ The first type is referred to as a facade conservation easement, which prevents alterations to the exterior facade of a historic building.²⁴⁶ The second type is an interior space conservation easement, which prevents alterations to the interior of a historic building.²⁴⁷ The last type is referred to as a development rights conservation easement.²⁴⁸ This type permanently restricts future development on the property that could potentially degrade the historic attributes of the property.²⁴⁹

The HPLO is a nonprofit organization that was founded in 1977,²⁵⁰ and it is dedicated to preserving and protecting the historical heritage of Oregon.²⁵¹ It has held preservation easements in the state of Oregon since 1981, and it currently holds over 35 preservation easements.²⁵² The goals of the HPLO are to preserve historic buildings, structures, and areas in the state of Oregon and to increase public awareness of the importance of historic structures.²⁵³ The HPLO defines historic property to include both architectural and/or culturally significant property.²⁵⁴

The HPLO boasts that each preservation easement is unique and takes into account the distinctive qualities of each historic property.²⁵⁵ The exact terms of the easement are negotiated between the HPLO and the property owner.²⁵⁶ The characteristics of the protected lands include the facade, interior, grounds, view sheds, or air rights.²⁵⁷ The preservation easements typically run in perpetuity, but the landowner and the HPLO may agree upon a shorter dura-

tion.²⁵⁸ To protect against easement violations, the HLPO inspects each property annually.²⁵⁹

A typical easement drafted by the HPLO may include the following protections: (1) protection against improper alterations to the property; (2) restrictions on additions that may be made to the property; (3) requirements that the property be properly maintained to preserve the historic character; (4) oversight of potential future developments; and (5) restoration of the property to the appropriate condition.²⁶⁰ The landowner must obtain the HPLO's permission before making any alterations or additions to the property.²⁶¹ The landowner is required to make repairs to the property to keep up the historic character of the land.²⁶² Also, the owner must take out fire and liability insurance, with the HPLO as named insured.²⁶³

In order to be eligible to donate a historic preservation easement, the land must be historically significant, must not have suffered from irreversible damage, and be listed on the National Register of Historic Places.²⁶⁴ Along with federal income tax deductions, Oregon law allows the landowner to receive a deduction in property taxes.²⁶⁵ The easement donor is required to contribute to an endowment fund at the time of the donation.²⁶⁶ The fund is used to pay for the costs of monitoring the property, inspecting the property, and enforcing the terms of the easement.²⁶⁷ The HPLO has not been involved in litigation concerning enforcement of any of its easements.²⁶⁸

C. Wildlife Habitat Easement Program—The RTC

The RTC was founded on May 23, 1999, in eastern Indiana.²⁶⁹ It currently holds 13 conservation easements²⁷⁰ on over 1,000 acres.²⁷¹ The RTC is a member of the Land Trust Alliance, a national organization devoted to the conservation of privately owned lands.²⁷² One of the RTC's top priorities is to preserve wildlife habitat areas along the water-

241. Morrisette, *supra* note 19, at 401.

242. *Id.*

243. *Id.*

244. Stockford, *supra* note 114, at 824.

245. Preservation Easement Trust, *Program Description*, at <http://www.preservationeasement.org/conservation/programdescription.asp> (last visited Oct. 31, 2004).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. HPLO, *Preservation Easement Program*, at http://www.hplo.org/programs/easement_expanded.htm (last visited Nov. 17, 2004) [hereinafter HPLO—*Program*].

251. HPLO, *Home*, at <http://www.hplo.org/> (last visited Nov. 21, 2004).

252. HPLO—*Program*, *supra* note 250.

253. HPLO, *Goals*, at <http://www.hplo.org/about/missions.htm> (last visited Nov. 21, 2004).

254. HPLO—*Program*, *supra* note 250.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. However, the HPLO has been involved in two lawsuits concerning other aspects of the conservation easements held by the HPLO. *See, e.g.,* P&C Constr. Co. v. American Diversfield/Wells Park II, 789 P.2d 688 (Or. Ct. App. 1989) (sued by general contractor to foreclose construction lien).

269. Randy Jones, *View From the Perch*, RED-TAIL NEWS, Summer 2004, at 2, available at http://www.fortheland.com/summer_2004.htm (last visited Nov. 21, 2004).

270. Barry Banks, *Land Acquisition: Process Brings Success!*, RED-TAIL NEWS, Autumn 2004, at 3, available at http://www.fortheland.com/autumn_2004.htm (last visited Nov. 21, 2004) [hereinafter Banks, *Land Acquisition*]. The 14th conservation agreement was signed on November 27, 2004. E-mail from Barry Banks, Executive Director, Red-Tail Conservancy, Inc., to Rebekah Pugh (Nov. 25, 2004) (on file with author) [hereinafter E-mail from Barry Banks].

271. Jones, *supra* note 269.

272. Hugh Brown, *View From the Perch*, RED-TAIL NEWS, Spring 2003, at 2, available at http://www.fortheland.com/spring_2003.htm (last visited Nov. 21, 2004).

ways of eastern Indiana.²⁷³ The reason for this is that the waterways are among the last remaining passageways for wildlife to move freely between protected habitat areas.²⁷⁴

The RTC holds many conservation easements, which it refers to as “conservation agreements,”²⁷⁵ on wildlife habitat lands.²⁷⁶ One such habitat is the Steussy-Williams Conservation Easement, which was acquired in March 2004.²⁷⁷ This protected land is home to a variety of wildlife, including the yellow-billed cuckoo.²⁷⁸ Another conservation agreement held by the RTC is the Meramec Easement, which is a highly wooded area containing a seasonal pond and fen wetland.²⁷⁹ The RTC also has a conservation agreement on the Randolph Preserve, which is another woodland area containing three ponds and is home to a variety of species of mammals, birds, waterfowl, aquatic life, amphibians, and reptiles.²⁸⁰

The RTC credits its success to its full-time staff, which possesses “excellent communication and sales skills in addition to a thorough knowledge of the process and documentation aspects of the agreements.”²⁸¹ The RTC also boasts about its knowledgeable and hard-working board of directors.²⁸² The board members continue to increase their insight into effective conservation agreement programs by attending Land Trust Alliance rallies and training seminars.²⁸³

The RTC accepts donated conservation agreements and also purchases conservation agreements when necessary.²⁸⁴ Of the 13 conservation agreements currently held by the RTC, 10 were donated and 3 were purchased.²⁸⁵ The RTC’s donation process can be broken down into distinct phases which comprise contacting and educating the landowner, negotiating the terms of the easement, and drawing up the agreement contract.²⁸⁶ This process can take months or even years to complete.²⁸⁷

To protect against easement violations, the RTC employs an extensive stewardship program.²⁸⁸ This program involves both maintenance and monitoring of the conservation agreements.²⁸⁹ Maintenance includes keeping the property in good condition and protecting the conservation val-

ues set out in the agreement.²⁹⁰ The monitoring involves making sure that the landowner is in compliance with the conservation agreement restrictions.²⁹¹ A monitoring visit of each protected property occurs annually.²⁹² The RTC has had only one minor violation of a conservation agreement, which was voluntarily corrected.²⁹³

D. Open Space and Scenic View Easement Program—The OWLT

The mission of the OWLT is to “protect and preserve the natural areas, open spaces and rural character of Ozaukee and Washington Counties.”²⁹⁴ A group of residents from Ozaukee County, Wisconsin, founded the OWLT in 1992.²⁹⁵ Between 1992 and 1997, the land trust worked only in Ozaukee County to protect open spaces.²⁹⁶ In 1998, the land trust began to preserve land in Washington County and changed its name.²⁹⁷ Since 1992, the OWLT has preserved over 2,300 acres through the use of conservation easements.²⁹⁸

One of the OWLT’s most celebrated project areas is the Holy Hill region in the town of Erin.²⁹⁹ Holy Hill is a 300-acre upland wood region containing the Holy Hill monastery, which is listed on the National Register of Historic Places and is an important scenic attraction.³⁰⁰ The OWLT owns a 40-acre conservation easement, which protects the scenic views surrounding the monastery.³⁰¹ Sometime in the future, the OWLT hopes to open the easement up for public access to the beautiful scenic landscape surrounding the monastery.³⁰²

The OWLT boasts its flexibility in working with each individual landowner to create a conservation easement agreement that is tailored to meet the needs of each piece of land.³⁰³ The OWLT’s easements specifically prohibit construction or subdivision on the protected land.³⁰⁴ The OWLT will only accept easements in perpetuity.³⁰⁵ It prefers to receive donations of conservation easements; however, the

273. RTC, *Robert L. Hughes Nature Preserve*, at http://www.fortheland.com/robert_l_hughes.htm (last visited Nov. 17, 2004).

274. *Id.*

275. E-mail from Barry Banks, *supra* note 270.

276. See RTC, *Our Properties*, at http://www.fortheland.com/our_properties.htm (last visited Nov. 17, 2004).

277. RTC, *Steussy-Williams Conservation Easement*, at http://www.fortheland.com/steussy-williams_conservation_easement.htm (last visited Nov. 17, 2004).

278. *Id.*

279. RTC, *Meramec Easement*, at http://www.fortheland.com/Meramec_Property.htm (last visited Nov. 17, 2004).

280. RTC, *Randolph Preserve*, at http://www.fortheland.com/randolph_preserve.htm (last visited Nov. 17, 2004).

281. E-mail from Barry Banks, *supra* note 270.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Banks, *Land Acquisition*, *supra* note 270.

287. E-mail from Barry Banks, *supra* note 270.

288. Hugh Brown, *View From the Perch*, RED-TAIL NEWS, Summer 2003, at 2, available at http://www.fortheland.com/summer_2003.htm (last visited Nov. 21, 2004).

289. *Id.*

290. *Id.*

291. *Id.* If a violation does occur, the RTC has pro bono legal services provided by a local law firm. E-mail from Barry Banks, *supra* note 270.

292. E-mail from Barry Banks, *supra* note 270.

293. *Id.*

294. OWLT, *Mission/History*, at <http://www.owl.org/about.htm> (last visited Nov. 12, 2004).

295. *Id.*

296. *Id.*

297. *Id.* The land trust changed its name from the Ozaukee Land Trust to the Ozaukee Washington Land Trust.

298. Steve Tews, *Taking the Helm: A Wonderful Past, a Challenging Future*, OPEN SPACES, Fall 2004, at 2, available at <http://www.owl.org/news.htm> (last visited Nov. 12, 2004).

299. OWLT, *Project Areas*, at <http://www.owl.org/projarea.htm> (last visited Nov. 12, 2004).

300. *Id.*

301. *Id.*

302. Don Behm, *Donations Keep Three Parcels From Being Developed*, MILWAUKEE J. SENTINEL, Jan. 20, 2004, at 5B, available at 2004 WL 58790041 (last visited Nov. 21, 2004).

303. OWLT, *Conservation Methods*, at <http://www.owl.org/preserve.htm> (last visited Nov. 12, 2004) [hereinafter OWLT—*Conservation Methods*].

304. Behm, *supra* note 302, at 5B.

305. OWLT—*Conservation Methods*, *supra* note 303.

306. *Id.*

OWLT will purchase land in fee if it considers that land to be significant and threatened with imminent development.³⁰⁶

VIII. Conclusion

Conservation easements have developed into an important tool in protecting "sensitive lands." Conservation easements have the potential of becoming one of the most effective means to preserve agricultural and historical aspects of land, wildlife habitat, and open-space areas. The effectiveness of these easements is due in large part to the fact that they can be used as part of an overall comprehensive land plan.

Conservation easements have many benefits, and these benefits greatly outweigh any potential problems. Although conservation easements are sometimes criticized for requiring voluntary participation, this is actually a positive attribute. When a landowner voluntarily agrees to restrict his land, he cannot later complain about the restrictions. Likewise, when a subsequent landowner purchases land subject to an easement, he cannot rightfully complain about his decision to purchase the land. This can also be a benefit in the form of the flexibility of conservation easements. Each easement is designed according to the desires of the landowner and the land trust.

Although properly evaluating a conservation easement is important and often the subject of dispute, the tax advan-

tages that a landowner will receive far outweigh any potential problems that could arise. If a landowner wishes instead to sell a conservation easement as opposed to donating it, many land trusts and governmental organizations will purchase easements. Both purchasing and accepting a donated conservation easement poses a benefit to the land trust because these costs are significantly lower than purchasing land in fee. Also, the local government will continue to receive property taxes from the landowner, although these taxes will be lowered.

There may be some enforcement problems with conservation easements, but these problems rarely result in litigation. Of the four case studies presented, none has had enforcement problems that resulted in litigation. The RTC has had only one enforcement problem, which was voluntarily corrected by the landowner. The HPLO and the MLR have both had some enforcement problems, but these problems have not resulted in litigation.

Conservation easements are the new wave in smart growth programs. Due to the many benefits and few disadvantages, it is no wonder that over four million acres in the United States are protected by conservation easements. To continue to protect endangered lands, land trust organizations need to educate the public about the benefits of these donations. Conservation easements have the potential of becoming one of the most valuable and most often implemented land use techniques.