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CONSERVATION EASEMENTS AND CLIMATE CHANGE

by Daniel L. Aaronson & Michael B. Manuel*

INTRODUCTION

Governments at all levels are increasingly engaging the challenges posed by global climate change. Conservation easements have provided income tax deductions to their grantors for decades in recognition of certain special benefits afforded by the conservation of land subject to the easement.¹ As policy makers search for effective means to address climate change issues, conservation easements may well be recognized as an important tool. However, the current law of conservation easements does not recognize the full potential for carbon capture resulting from land conservation, in part because the tax code limits the types of land that may benefit from such easements. Current laws will need to be revised and expanded to better recognize the climate change benefits that could be achieved from placing land under conservation easements.

CONSERVATION EASEMENTS

A conservation easement is a legal agreement, made between a landowner and an eligible organization, that serves to restrict the activities that may take place on the landowner's property.² The restrictions embodied in a conservation easement apply to all future owners of the burdened land and may be enforced by the easement holder or in some cases by the state attorney general.³ A conservation easement can cover all or part of the property, and can restrict the uses of various parts of the property differently.⁴ Conservation easements are individually negotiated and the restrictions that a conservation easement imposes on the landowner will thus vary from one conservation easement to another.⁵

Ownership of land has often been likened to a bundle of sticks, where each stick represents a particular right associated with the land.⁶ Landowners may elect to sell or donate individual "sticks," such as the right to construct buildings, or the right to harvest timber, while preserving other rights associated with the land.⁷ A landowner who grants a conservation easement gives up only those rights that are spelled out in the conservation easement, retaining all others. The conservation easement has thus emerged as one of the most popular land conservation tools in the United States because it allows its holder, typically a land trust, to protect land without the necessity of owning and managing the property.

TAX DEDUCTIONS FOR DONATED CONSERVATION EASEMENTS

While taxpayers are generally not permitted to take charitable deductions for contributions of less than the taxpayer's full interest in property, the Internal Revenue Service makes an exception to this rule in the case of deductions for "qualified conservation contributions."⁸

As a general rule, the available income tax deduction for a qualified conservation contribution is equal to the fair market value of the subject property before the conservation easement was put in place, minus the fair market value of the property after it has been encumbered by the conservation easement.⁹ This formula is intended to compensate the grantor of a conservation ease-

ment for the lost development potential that results from the conservation easement's imposition of development restrictions.¹⁰

Another potential tax benefit of a validly created conservation easement is that the easement may serve to lower the assessed value of the property on which it is placed. Put simply, property taxes are based on two things: the assessed value of the parcel, and the local tax rate.¹¹ In many taxing jurisdictions, the assessed value of a parcel is determined based on the property's highest and best use, which often assumes the maximum level of development allowable under applicable zoning regulations.¹² Many states allow for—or even expressly mandate—the reassessment of land upon which a conservation easement is created, requiring the assessor to take into account the conservation easement's development restrictions in determining the property's value.

COMMON LAW IMPEDIMENTS TO THE ENFORCEABILITY OF CONSERVATION EASEMENTS

In today's practice, conservation easements are exclusively creatures of statute.¹³ This is because under the common law, the perpetual enforceability of conservation easements is doubtful.¹⁴

The current law of conservation easements does not recognize the full potential for carbon capture.

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In order to be enforceable under the common law, the property interest created by a conservation easement must be classifiable as one of three types of servitudes: (1) an easement, (2) a real covenant, or (3) an equitable servitude. For all three classes of servitudes, troublesome common law doctrines serve as obstacles to perpetual enforceability.¹⁵ Despite its nomenclature, a conservation easement is not enforceable under the common law as an easement because it does not fall within one of the four recognized types of negative easements, which are defined as easements granting the right to restrict the types of activities that can be performed on a parcel of land.¹⁶ Conservation easements are not enforceable in perpetuity as equitable servitudes because they run afoul of what is known as the “touch and concern” doctrine.¹⁷ Courts also have generally held that a real covenant held “in gross”—one which benefits a specific individual rather than a specific parcel of land—cannot be binding on successive landowners due to its failure to satisfy the “touch and concern” test.¹⁸

In light of the aforementioned impediments to the enforceability of conservation easements—and recognizing the fact that, from a land preservation standpoint, the permanence of a conservation easement is its most critical aspect—states began to enact conservation easement legislation in the 1980s.¹⁹

STATUTORY CONSERVATION EASEMENTS

In the early 1980s, the National Conference of Commissioners on Uniform State Laws proposed model state legislation intended to strengthen the reliability of conservation easements as a land preservation tool by exempting them from the common law doctrines that would otherwise impede their enforcement.²⁰ This model legislation, titled the Uniform Conservation Easement Act (“UCEA”), has since been adopted in twenty states, while most others have enacted functionally equivalent legislation modeled after the UCEA.²¹ Conservation easements that satisfy the requirements of the local state conservation easement statute are often referred to as statutory conservation easements.

Statutory conservation easements are sheltered from the impediments to enforceability that would otherwise plague them under the common law. The UCEA and the various state conservation easement statutes place conservation easements beyond the reach of the “touch and concern” doctrine by providing that a conservation easement is valid even though its benefit does not touch and concern real property.²² The other primary obstacle to enforcement of conservation easements under the common law—that a negative easement may serve only a limited number of recognized purposes—is also expressly eliminated by statute.²³

Statutory conservation easements must be granted in favor of a non-profit land trust or a governmental agency.²⁴ Private foundations or other for-profit entities are ineligible grantees of conservation easements.²⁵ State conservation easement statutes

typically also impose a conservation purpose requirement that in many instances mirrors that of the Internal Revenue Code (“IRC”). A conservation easement that is granted to an eligible donee and satisfies the requirements of both the applicable state conservation easement statute and the IRC will yield an income tax deduction for its grantor and will be enforceable in perpetuity.

“CONSERVATION PURPOSES” AND CARBON SINKS

Not every parcel of land is eligible for preservation by way of a conservation easement. The IRC and the various state conservation easement statutes provide that the property to be protected by a conservation easement must possess significant conservation or historic preservation values.²⁶ Determining whether a particular parcel of land exhibits such conservation values is an inexact science.

The tax code recognizes only four legitimate conservation purposes: (1) preservation of land areas for outdoor recreation by, or the education of, the general public; (2) protection of a significant wildlife habitat

or plant community; (3) preservation of open space (including farmland and forestland) for the scenic enjoyment of the general public or pursuant to government policy; and (4) preservation of a historically important land area or a certified historic structure.²⁷ As a general rule, a conservation easement that satisfies one of the conservation purposes recognized by the tax code will also be deemed to satisfy the conservation purpose requirement of the applicable state conservation easement statute. A conservation easement cannot yield tax benefits to its grantor, nor will it likely be perpetually enforceable under state law, if it does not fit into one of the four recognized conservation purposes.

In the case of undeveloped land that a landowner does not intend to open to the general public, a conservation easement will most likely be appropriate if the land is home to an “ecologically significant” habitat of flora or fauna²⁸ or if there is sufficient public road frontage for the easement area to provide a scenic view to passersby.²⁹ IRS regulations and recent jurisprudence have shown both of these conservation purposes to be unduly difficult to satisfy. Land to be protected by a conservation easement will not be deemed ecologically significant if it does not contain endangered or threatened species or adjoin a designated conservation area such as a state or national park. Meanwhile, the open space conservation purpose is notorious for its ambiguity. One thing IRS regulations have made clear, however, is that the preservation of “ordinary” tracts of land would not be deemed to yield the significant public benefit requisite for purposes of satisfying the conservation purpose test.³⁰

The current law of conservation easements does not recognize the potential for carbon capture resulting from land conservation. Otherwise “ordinary” tracts of land can produce

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a significant social benefit by acting as carbon sinks, as growing vegetation absorbs carbon dioxide from the atmosphere.³¹ Young forests comprised of still-growing trees are especially effective at absorbing carbon dioxide,³² but even the conservation of mature forests can result in emissions reductions by preserving existing carbon stocks where development—which releases carbon—might otherwise occur.

CONCLUSION

The defining characteristic of a conservation easement is the yielding of a public or social benefit from preserving land in its natural state. But present laws do not recognize carbon capture as a legitimate social benefit. If the law could develop so that carbon attributes are recognized as valid conservation purposes, the conservation easement could become a meaningful component of the overall climate change solution.



Endnotes: Conservation Easements and Climate Change

¹ C. Timothy Lindstrom, *The Tax Benefits of Conservation Easements*, 79 MICH. B.J. 690, 691 (2000).

² Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements As Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 100 (2002).

³ The Nature Conservancy, *Conservation Easements*, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/> (follow “Conservation Easements” hyperlink; then follow “About” hyperlink) (last visited Mar. 9, 2008).

⁴ See *Glass v. C.I.R.*, 124 T.C. 258 (T.C. 2005).

⁵ Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U.L. REV. 1077, 1078 (1996).

⁶ Myrl L. Duncan, Essay, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773 (2002).

⁷ Duncan, *id.*

⁸ Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees Out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENVTL. L. REV. 471, 494-95 (2003); see also Maureen Rudolph & Adrian Gosch, *A Practitioner’s Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143, 162 (2000).

⁹ Rudolph & Gosch, *supra* note 8, at 171-73.

¹⁰ Rudolph & Gosch, *id.* at 173-75.

¹¹ Katherine S. Anderson & Marybeth K. Jones, Comment, *Conservation Easements: An Essential Tool in the Practitioner’s Estate Planning Toolbox*, 35 LAND & WATER L. REV. 183, 199-200 (2000).

¹² Rudolph & Gosch, *supra* note 8, at 173-75.

¹³ Sean P. Ociepa, Casenote, *Protecting the Public Benefit: Crafting Precedent for Citizen Enforcement of Conservation Easements*, 58 ME. L. REV. 225, 228-30 (2006).

¹⁴ Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 479-80 (1984).

¹⁵ Korngold, *id.* at 479-80.

¹⁶ Korngold, *id.* at 437.

¹⁷ Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 383 (2001) (“The rationale behind this bias derives from the general prohibition in the common law against dead-hand controls on property that restrain alienability.”).

¹⁸ Morrisette, *id.* at 383.

¹⁹ Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 297-304 (2006).

²⁰ Klass, *id.* at 302-06.

²¹ Klass, *id.* at 303 (“Currently, the District of Columbia and all the states except North Dakota have specific statutes facilitating the creation of conservation easements.”).

²² Morrisette, *supra* note 17, at 384.

²³ Morrisette, *supra* note 17, at 383-84.

²⁴ Dominic P. Parker, *Land Trusts and the Choice to Conserve Land With Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483 (2004).

²⁵ Lindstrom, *supra* note 1, at 691 (The key is that the organization be a charitable organization qualified under [I.R.C. § 501(c)(3)]; have the ability to enforce the easements it holds over time; and be organized, at least in part, for the conservation of the property subject to easements it holds.).

²⁶ Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U.L. REV. 1057, 1059-60 (2006).

²⁷ I.R.C. § 170(h)(4)(A) (2006).

²⁸ A conservation easement meets the conservation purpose standard if it protects “a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.” I.R.C. § 170(h)(4)(A)(ii) (2006). Courts have found compliance with this prong of the conservation purpose standard in only two general situations: (1) where an endangered or threatened species is present on the property, or (2) where the property is deemed to play a role in the ecological viability of a public park or wildlife refuge. See Nicholas Agopian, *Conservation Easements – Preserving Privately Owned Natural Habitats*, 6 WYO. L. REV. 447, 463 (2006).

²⁹ I.R.C. § 170(h)(4)(A)(iii) (providing that a conservation easement meets the conservation purpose standard if it preserves open space either “for the scenic enjoyment of the general public” or pursuant to a “clearly delineated” governmental conservation policy and also yields a “significant public benefit.”); see Treas. Reg. § 1.170A-14(d)(4)(i) (clarifying that the “significant public benefit” requirement applies to any conservation easement evaluated under the open space prong of the conservation purpose standard).

³⁰ 5 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 82:22 (4th ed.) (citing 26 C.F.R. § 1.170A-14(d)(iv)(B), Significant public benefit can probably best be shown by demonstrating that the land in question has some characteristic that distinguishes it from what might be called ordinary land.).

³¹ Klaus S. Lackner, *A Guide to CO₂ Sequestration*, 300 SCI. 1677, 1678 (2003) (stating that photosynthesis is currently the only practical form of air capture of carbon dioxide).

³² Richard Birdsey, Kurt Pregitzer & Alan Lucier, *Forest Carbon Management in the United States: 1600-2100*, 35 J. ENVTL. QUALITY 1461, 1466 (2006) (“The rate of carbon sequestration, as indicated by either net primary productivity (NPP) or net ecosystem productivity (NEP), increases after disturbance to a variable point in time, and then declines as forests mature.”).