Legal Aspects of Conservation Easements: A Primer for Transportation Agencies

DETAILS

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AUTHORS

Smith, Tyson; Allden, Tara D.; and Appel, Ross

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LEGAL ASPECTS OF CONSERVATION EASEMENTS: A PRIMER FOR TRANSPORTATION AGENCIES

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Tyson Smith, Esq., AICP, White & Smith, LLC; Tara D. Allden, Esq.; and Ross Appel,* Esq. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

Conservation easements can generally be defined as deed restrictions placed on land to protect its associated resources. These easements range from ecological to historic to scenic. Transportation agencies can also be faced with situations where they engage in beautification or historic preservation efforts and need to know how to protect their public investment with appropriate easement language. State and federal transportation agencies are faced with situations where they are encouraged or required to acquire conservation easements to mitigate adverse environmental effects arising from construction of transportation improvements.

Conservation easements have become an increasingly popular and useful mechanism to transfer and protect interests in real property. This digest, written as a Primer, provides an introduction and general overview of key conservation easement topics, from their origin in common law to key concepts in creation and termination.

Legal and transactional personnel at transportation agencies are most likely to need an understanding of conservation easements 1) when they create them to satisfy a legal requirement or policy during their acquisition effort (e.g., environmental mitigation and scenic beautification), and 2) when they encounter them in right-of-way planning and acquisition. These two situations provide the organization for this digest.

Finally, this digest provides assistance to legal practitioners in drafting documents for the acquisition and maintenance of conservation easements. Broad concepts are presented here in order to provide a strong legal basis from which the transportation agency professional may gain an understanding of the need for certain provisions within conservation easements. Many significant resources exist that will provide more in-depth coverage of each topic. The reader is encouraged to consult the references listed when greater coverage of a specific topic would be helpful.

This digest should be helpful to attorneys, transportation administrators, planners, real estate officials, engineers, real property owners, and others who are interested in this subject.

* formerly with White & Smith, LLC.

TRANSPORTATION RESEARCH BOARD
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By Tyson Smith, Esq., AICP, White & Smith, LLC; Tara D. Allden, Esq.; and Ross Appel, Esq.

I. INTRODUCTION

The conservation easement is a modern development of property law that enables the long-term protection of natural and cultural resources without a full transfer of ownership of the land itself. The legal transaction that creates a conservation easement differs from other real property transactions in that the property interest transferred is "nonpossessory," meaning that the land itself does not change ownership. Rather, certain rights to and uses of that land are removed from the landowner and the obligation of protection and enforcement are transferred to a third-party "easement holder."

The terms of the conservation easement, which are documented in a "deed of conservation easement," specify the relevant parties and the rights and restrictions remaining on the land. The deed of conservation easement should be recorded in the same manner as other property transactions in the governing jurisdiction. Because a conservation easement is an actual transfer of property interests[1] and is most often perpetual, the easement runs with the land and affects all subsequent transfers and future use of the property.

While a conservation easement may be transferred as an ordinary property interest, it may not be terminated in the same manner. Ordinarily the restrictions and obligations imposed by a conservation easement may be extinguished only by judicial proceeding or by eminent domain.

Conservation easements are often acquired and held by nonprofit land and historic property conservation organizations[2] for the purpose of protecting such land for the common good. Private landowners may choose to have a conservation easement placed upon their property for the protection of the property and also for the financial benefits, including tax and estate planning considerations. Local government entities and land developers may use conservation easements to protect certain ecologically or historically significant property in exchange for increased density or other considerations in the development process. Transportation agencies may use conservation easements to meet regulatory requirements in the permitting and construction of projects. Conversely, a parcel of land burdened by a conservation easement may be in the path of a planned transportation project and may be incompatible with the project.

In each of these situations, a thorough understanding of the legal aspects of conservation easements is essential to the practitioner, including right-of-way agents, private parties and their counsel, government attorneys, and outside counsel. This digest will provide the reader with an understanding of the background, utility, and implications of conservation easements.

II. BACKGROUND ON CONSERVATION EASEMENTS

Because conservation easement practice is a relatively new area of law, case law and precedent are limited. Therefore, an understanding of how the law of conservation easements developed will help practitioners work through the issues that arise.

A. Legal Origin

Conservation easement practice in the United States emerged in the late 1800s as a tool to protect public spaces. The first areas to be protected by conservation easement were Frederick Law Olmsted's "Emerald Necklace" parkways in Boston in the 1880s.[3] In the 1930s, the National Park Service began using conservation easements to protect scenic areas along the Blue

[1] It is this separation of property interests that differentiates a "conservation easement" from a "restrictive covenant." Restrictive covenants may be recorded with a deed and run with the land, but the entire property interest remains with the underlying fee. Deed restrictions do not generally provide the same level of protection to the land as do conservation easements. Deed restrictions may not be challenged or enforced by the public and may be terminated for reasons such as economic hardship or impracticability or consideration of public benefit. *See* Karin F. Marchetti Ponte, *Conservation Easements v. Deed Restriction*, Land Trust Alliance Fact Sheet (2008), http://www.landtrustalliance.org/conservation/documents/CE-deed-restriction.pdf.

[2] California Senate Bill (SB) 436, effective January 1, 2012, authorized transfer of mitigation property endowments to approved nonprofit organizations and special districts. California Senate Bill 1094, which became law September 28, 2012, clarified and expanded SB 436 by extending this authority to governmental entities, community foundations, and some water districts and utility commissions. *See* SB 1094 Bill Analysis, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1051-1100/sb_1094_cfa_20120419_151448_sen_comm.html.

[3] J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 URB. LAW. 19 (2007).

Ridge and Natchez Trace Parkways.[4] Building on this precedent, Wisconsin began protecting its parks with conservation easements in the 1950s. Notwithstanding the example of these early innovators, conservation easements were not common in the first 7 decades of their existence.

The common law was one of the principal early impediments to the use of conservation easements, which likely would have failed under the tenets of common law because they would have been categorized as "negative" (restricting use) and "in-gross" (not upon the land) easements. The common law recognized negative easements only for limited purposes. Moreover, negative easements under the common law, at that time, did not confer key affirmative rights to the easement holder, such as the ability to enter onto the property to inspect its condition and to confirm compliance with the terms of the easement.[5]

This posed a problem for modern conservation easements, whose purposes fell outside of the common law categories of recognized property rights and depended on holders to engage in management activities. In order for conservation easements to become a useful resource and land management tool, the limitations of common law had to be addressed. State legislatures seeking to "cure" these problems responded by adopting conservation easement enabling legislation that would supersede the common law.

B. State Enabling Legislation

Massachusetts, home to the first conservation easement, was also the first state to adopt express legislative recognition of conservation easements, and, in 1954, the State expressly authorized the Boston Metropolitan District Commission to purchase open space "in fee and otherwise [to acquire] lands *and rights in land*" for exercise and recreation in the Metropolitan Parks District (emphasis added).[6] California built on Massachusetts' action in 1959 by passing legislation that provided statewide authorization for counties and cities to acquire open lands via "fee *or any lesser interest or right in real property* in order to preserve…open spaces and areas for public use and enjoyment."[7] In the late 1960s, Massachusetts amended its statute to allow nongovernmental entities, such as private land trusts, to hold conservation easements. By the mid-1970s, 16 states had adopted conservation easement legislation.

In 1981, the profusion of state conservation easement legislation resulted in the drafting of the Uniform Conservation Easement Act (UCEA) by the National Conference of Commissioners on Uniform State Laws. This standardization effort, along with the increasing use of conservation easements for financial planning, resulted in more and more states adopting statutes. Today, all 50 states and the District of Columbia have some form of conservation easement enabling legislation.[8]

In addition to removing common law impediments,[9] state-specific enabling legislation also describes how conservation easements are created, enforced, and administered in more detail than had emerged though the common law. While many states have based their conservation easement legislation on the UCEA, each state has its own variations, and some are entirely unique in their approach. As a result, when working with conservation easements, especially across multiple jurisdictions, each state's statute must be consulted. This section summarizes the core property law elements that will govern most conservation easement issues that underpin the statutory frameworks adopted by the states. Since roughly half of the states follow the UCEA, the following discussion is based on the UCEA with selected, notable state variations highlighted.

A Common Framework

The UCEA defines "conservation easement" as follows:

> A nonpossessory 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.[10]

The definition establishes the particular protections for which conservation easements can be used. Some states have changed or added to this list of acceptable "conservation purposes." For example, Alabama lists "silvicultural" and "paleontological" uses as permitted conservation purposes.[11] Moreover, the UCEA provides that conservation easements may be for an unlimited duration or for a shorter term of years in order to retain and protect the specific characteristics of the property.[12]

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[4] ELIZABETH BYERS & KAREN M. PONTE, THE CONSERVATION EASEMENT HANDBOOK 10, The Trust for Public Land and the Land Trust Alliance (2d ed. 2005), hereinafter cited as "BYERS & PONTE."

[5] *Uniform Conservation Easement Act* (UCEA) (1981), National Conference of Commissioners on Uniform State Laws, drafted and approved by the American Bar Association in 1982, http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf.

[6] MASS. GEN. LAWS ch. 92, § 79 (2012).

[7] CAL. CIV. CODE § 815.

[8] Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1900 (2008), hereinafter cited as "McLaughlin."

[9] *See* UCEA § 4.

[10] UCEA § 1(1).

[11] ALA. CODE § 35-18-1(1), § 35-18(2).

[12] UCEA § 2(c).

Some states require perpetual easements,[13] whereas others may limit the duration.[14]

The UCEA defines the "holder" of the conservation easement—the individual or entity holding the right to enforce the easement's terms—to include federal, state, and local governmental entities, as well as private environmental or charitable organizations, such as land trusts.[15] The conservation easement may identify more than one party that will serve as the holder and divide the holder's responsibilities and obligations between these parties. For example, a local government may want to be a holder for purposes of enforcing the easement but may want another entity to provide onsite monitoring services. Both of these parties would be documented in the conservation easement as holders.

Some states place restrictions on who can be an easement holder. For example, Arizona prohibits unincorporated charitable associations from being a holder.[16] Conversely, North Carolina allows private businesses or corporations to be a holder if their organization's purpose includes one or more of the listed conservation purposes.[17]

Within the accepted definitions of "holder," a wide variety of entities can hold conservation easements. On the governmental side, examples include, but are not limited to, state departments of natural resources or local governments themselves. However, increasingly, governmental entities have come to rely on the expertise and resources of private, nonprofit land trusts. As a result, it is not uncommon for a conservation easement required by a governmental agency to be held by a private land trust. Examples of this are discussed in Section IV with regard to compensatory mitigation. According to the Land Trust Alliance, today there are 1,700 land trusts in the United States, including the Nature Conservancy and the Trust for Public Lands at the national level, and community land trusts, such as the Lowcountry Open Land Trust, a Charleston, South Carolina, local-level land trust.[18] The surge in the number of land trusts over the last several decades has coincided with a variety of factors that promote conservation easements, including tax and estate planning benefits, intense development pressure, regulatory compliance, and a growing environmental ethic across the nation.[19] The impetus for any conservation easement greatly affects how it is established, implemented, monitored, and transferred.

The Mechanics of Implementation

Creation.—The UCEA provides that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[20] This flexibility enables conservation easements to be used for a variety of purposes and allows for transactions between private parties with minimal government oversight.[21] Again, however, individual states may require an increased level of review. In Massachusetts, all "conservation restrictions" (the state's term for "conservation easements") must be approved by the Massachusetts Secretary of Environmental Affairs and those held by land trusts approved by the local governing body.[22] Conservation easements put in place to meet regulatory parameters may require review from multiple parties at many governmental agencies, depending on the state.

Land with a conservation easement on it may be bought and sold as any ordinary land transaction, but the burden of the conservation easement will remain with the land and its benefits and rights to enforcement with the easement holder. The terms of the conservation easement should specify whether notice among the parties to the easement is required when ownership of the land or the easement changes or the holder changes.

The application of eminent domain to the creation, transfer, and extinguishment of conservation easements is of particular importance to transportation agencies and of particular relevance to this digest. While the government is empowered to and often does "take" private land for public use, the law in several states, including Alabama, California, and Florida, prohibits the creation of conservation easements by eminent domain.[23]

Recordation.—Unlike the common law easements of old, which often came into being by the evident and conspicuous use of the property, today's statutory easements may not be obvious to one simply observing a particular piece of property. Thus, the UCEA requires that a conservation easement be recorded to bind the parties to its terms.[24] Recordation serves to provide "notice" to others of the existence of the conservation easement. Notice is a long-standing tenet of property law. The usual place of recording the transfer of a property interest is the Register of Deeds in the county seat, but may differ from state to state. Conservation easements may have additional recording requirements. For example, in New York, copies of recorded conservation easements must be sent to the Department of Environ-

[13] CAL. CIV. CODE § 815-2(b).

[14] ALA. CODE § 35-18-2(c).

[15] UCEA § 1(2).

[16] ARIZ. REV. STAT. ANN. § 33-271(3)(b).

[17] N.C. GEN. STAT. § 121-35(2).

[18] *See* Lowcountry Open Land Trust, http://www.lolt.org/. (Accessed July 10, 2012.)

[19] Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 454 (2002).

[20] UCEA § 2(a).

[21] *See, e.g.,* NRDC v. FAA, 564 F.3d 549, 553 (2009). To mitigate environmental damage that would be caused by the construction of a new airport, the owner committed to set 9,609 acres of its acreage as a conservation easement.

[22] MASS. GEN. LAWS ch. 184, § 32.

[23] ALA. CODE. § 35-18-(2)(a); CAL. CIV. CODE § 815.2(a), 815.3(b); FLA. STAT. § 704.06(2).

[24] UCEA § 2(b).

mental Conservation for inclusion in the statewide registry.[25] Transportation agencies benefit from early notice of the existence of conservation easements within a project area and should be familiar with the processes and places for documenting conservation easements.

Effect on Existing Interests.—Finally, the UCEA provides that "[a]n interest in real property in existence at the time a conservation easement is created is not impaired by [the easement] unless the owner of the interest is a party to the conservation easement or consents to it."[26] Any and all parties with an interest in the subject property should be involved in the creation of the conservation easement so that the interests of each are understood and properly protected or extinguished as necessary. In some states, such as Pennsylvania, conservation easements may allow for protection of certain rights and uses that may be incompatible with the conservation purpose, such as the rights to subsurface materials.[27] In such instances, the disallowance of these rights would bar almost all conservation projects.[28]

Enforcement.—In addition to requirements pertaining to easement creation and transfer, the UCEA provides rules regarding enforceability. Under the UCEA, the following four categories of parties have the authority to bring an action concerning a conservation easement:

1. The owner of the burdened property.
2. The holder(s) of the conservation easement.
3. A party having a third-party right of enforcement.
4. A person authorized by other law.[29]

The need for the first two categories is readily apparent since ordinarily these are the two principal parties affected by the use of the property subject to the easement, but the other two require additional explanation.

A third-party right of enforcement is defined by the UCEA as "a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder."[30]

Allowing third-party enforcement provides an additional means of securing the property value protected by the conservation easement and recognizes the public purpose of conservation easements.

The "other law" provision provides for the involvement of other local, state, or federal agencies. For example, the state attorney general may be designated to supervise charitable trusts. In Arizona, any governmental body may enforce a conservation easement if the holder no longer exists and the easement itself failed to create a third-party right of enforcement.[31] Other states, however, limit the list of eligible enforcers. For example, Wyoming statutes do not include the "person authorized by other law" provision, which traditionally has been viewed as precluding the Attorney General or the public from enforcing an easement.[32] Again, this is an area that varies from state to state and requires that the law be confirmed in each case.

Modification and Termination.—In most cases, conservation easements protect the underlying property in perpetuity. In practice, however, perpetuity may mean until the terms of the conservation easement no longer suit the parties or become impracticable.[33]

The issues of modification and termination are of particular relevance to transportation agencies and are often the basis of legal and political challenges. As between the parties to the conservation easement (i.e., the property owner grantor and the easement holder grantee), the UCEA allows conservation easements to be freely modified and terminated. In some cases, the UCEA also provides for limited modification and termination by governmental entities and the courts that are not express parties to the conservation easement, given the potential of changed conditions after the easement is executed. However, the UCEA broadly acknowledges that it "does not affect the power of a court to modify or to terminate a conservation easement in accordance with the principles of law and equity" of the particular jurisdiction.[34]

When termination of a conservation easement is deemed necessary by a nonparty, governmental entity, that entity, if authorized, may exercise its power of eminent domain to remove the conservation easement from the property. In this instance, the government is usually acquiring the underlying property at the same time and must provide just compensation for the value of the land taken.[35] As with other aspects of the UCEA, states have adopted the provisions regarding termination and may specifically address eminent domain. Hawaii, Idaho, and South Carolina, for example, expressly provide that conservation easements are subject to

[25] N.Y. ENVTL. CONSERV. LAW § 49-0305(4).

[26] UCEA § 2(d).

[27] 32 PA. STAT. ANN. § 5059.

[28] It is important to note that the conservation easement does not enable such uses, but only does not prohibit them. A proposed mining activity, for example, would have to undergo all ordinary regulatory processes.

[29] UCEA § 3(a).

[30] UCEA § 1(3).

[31] ARIZ. REV. STAT. ANN. § 33-273(A)(5).

[32] Land Trust Alliance, *A Guided Tour of Conservation Easement Enabling Statutes* (*citing* WYO. STAT. ANN. § 34-1-203(a)). *But see* Hicks v. Dowd, 2007 WY 74, 157 P.3d 914 (2007) (holding that a private citizen lacked standing to prevent county from releasing conservation easement based on charitable trust principles, but inviting the Attorney General to participate).

[33] Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012).

[34] UCEA § 3(b).

[35] *See* § III of this digest.

eminent domain.[36] When the government exercises its power to acquire land for a public purpose, the landowner must receive just compensation for the property. Some states provide rules on the issue of compensation for easements. For example, Arizona provides that easements are not to be considered compensable real property interests.[37] Conversely, states like Florida require increased scrutiny in the taking of land protected by a conservation easement.[38]

The doctrines of changed conditions and *cy pres* may each be used to terminate an easement when the purpose for which the conservation easement was established is no longer practicable or possible to enforce. Nebraska law, for example, allows the holders or grantors of any easement to petition a court for subsequent amendment or termination and provides a balancing test for the court to apply when considering the request.[39] Pennsylvania takes a somewhat different approach by providing that, even though courts may modify an easement, conservation easements "shall be liberally construed in favor of the grants contained therein to affect the purposes of those easements and the policy and purpose of this act,"[40] meaning that the bar for terminating the conservation easement is likely to be quite high.

Again, each of these termination issues—eminent domain, changed conditions, and *cy pres*—are discussed in more detail later in the digest. The discussion above illustrates how each issue is handled by the UCEA and the importance of reviewing the laws of the particular state when working with conservation easements.

C. How Conservation Easements Are Used by Non-Transportation Agencies

Conservation easements are used for many purposes, all of which are based on the public policy that conservation has an inherent positive value. One commentator has noted that "the framers of the [UCEA] intended to provide a loose legal framework with latitude for the parties to arrange their relationships as they see fit."[41] This breadth in development has enabled policy makers and the private property owners to use conservation easements as a tool in tax and estate planning, growth management policy, regulatory compliance,[42] and development review. Each of these items will be discussed in turn.

Private Property Owners

Financial Planning.—Private landowners may choose to protect historically- or ecologically-significant property with a conservation easement to receive significant tax and estate planning benefits. The federal income tax deduction for donated or "bargain sale" conservation easements was established in 1976, and, subsequently, activity spiked during the 1980s and 1990s. Many states have followed suit and provide a tax benefit for conservation easements.[43] Land trusts and other conservation organizations have been established throughout the United States to take on the role of overseeing and maintaining conservation easements. Between 1988 and 2003, the acreage protected by conservation easements held by private land trusts nationwide surged by 1,624 percent, and over the same period the number of private land trusts grew from 743 to 1,537.[44] Today there are 1,700 land trusts.[45]

Conservation easements are a popular tool given their financial advantages and the ability for property owners to preserve their land for the future while retaining the right to continue uses of the property that are compatible with the easement. Appendix A discusses how tax benefits work and their appeal to property owners. Though transportation agencies may not benefit directly from tax advantages of conservation easements, the well-prepared agency representative will be familiar with this aspect of the conservation easement formula. The landowner, however, should have his own legal and accounting professionals.

Regulatory Compliance.—Like private landowners and developers, transportation agencies will often be required to use conservation easements in order to comply with environmental or historic resource regulations. Private landowners and developers must comply with the same rules and regulations and may find conservation easements useful to meet compensatory mitigation requirements for both aquatic resources and threatened and endangered species.

Policy Makers

Growth Management.—Aside from the use of conservation easements as a financial planning tool, non-transportation entities commonly incorporate conservation easements into their growth management frame-

[36] HAW. REV. STAT. § 198-6; IDAHO CODE ANN. § 55-2108; S.C. CODE ANN. § 27-8-80.

[37] ARIZ. REV. STAT. ANN. § 33-275(3).

[38] FLA. STAT. § 704.06(11) ("In any legal proceeding to condemn land for the purpose of construction and operation of a linear facility as described above, the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid.").

[39] NEB. REV. STAT. § 76-2609(b).

[40] 32 PA. STAT. ANN. § 5055(c)(1), (2).

[41] JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 8 (Lincoln Institute of Land Policy 2005).

[42] Transportation agencies are most likely to encounter and use conservation easements in regulatory compliance.

[43] According to the Land Trust Alliance, 16 states have state tax incentives. *See* http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives/ (Accessed Jan. 2012).

[44] ELIZABETH BYERS & KAREN M. PONTE, THE CONSERVATION EASEMENT HANDBOOK 9 (2d ed. 2005).

[45] The Land Trust Alliance, http://www.landtrustalliance.org/land-trusts (Accessed Dec. 29, 2012).

works. For example, state, regional, and local authorities have long used transferable development rights (TDR) and purchase of development rights (PDR) programs to manage growth. TDR programs enable property owners in designated conservation areas to sell their development rights to parties in designated urban areas, in order to reallocate development rights consistent with adopted growth management policies. In reality, of course, this transfer occurs by the placement of a conservation easement over the property to be preserved, which restricts that property's use and severs its development rights. Through the enablement of local law, those same development rights become part of another property in an area designated for higher density. The Pinelands TDR Program in New Jersey has protected more than 58,600 acres of land and serves as an example of a successful program.[46]

With PDR programs, the governmental entity purchases the development rights by execution of a conservation easement and oftentimes simply extinguishes the development rights instead of transferring the density to other areas, as would be the case with TDR programs. Each year, voters around the country approve measures designed to raise funds for land preservation efforts like PDR programs.[47]

Land Use Planning.—Beyond general growth management, conservation easements are also used to protect specific land uses of great public importance. In the face of rapid suburbanization over the last several decades, a number of agricultural land preservation efforts have been established by private and public entities. For example, in western Marin County, California, the Marin Agricultural Land Trust has protected more than 46,000 acres of farmland through both conservation easement donation and purchase.[48] In addition, the Department of Defense, as part of its Sustainable Ranges Initiative, has identified conservation easements as an important tool for use in protecting land around military installations and training routes.[49] Working with regional and local governments as well as private land trusts, conservation easements enable the Department of Defense to leverage scarce financial resources in the protection of critical buffer zones around military bases.

Conservation easements are also used in site-specific development projects. Local land development codes often require or encourage "conservation subdivisions," which enable a developer to cluster smaller lots than may have otherwise been preferred, often at bonus densities, while preserving onsite habitat or open space through conservation easements.[50] In essence, development is focused or "clustered" on one section of the property with the remainder retaining its natural character, which is protected by conservation easement. Similarly, conservation easements may also be used in planned development zoning districts, which afford developers the opportunity to tailor the land development regulations to suit a particular development. They may also be used in conjunction with new urbanism, such as traditional neighborhood design or form-based code, both of which rely in various degrees on protected, natural public realms.[51]

Though conservation easement requirements are not without controversy,[52] they commonly are used to resolve disputes between neighbors.[53] For example, a party's apprehension over a proposed development's impact on his or her views may be minimized by the developer's execution of a conservation easement preserving scenic views and restricting aesthetically unpleasing design elements.[54] Despite the occasional controversy, conservation easements remain a flexible, powerful tool for local governments to use and reference in conjunction with development approval processes.

III. HOW CONSERVATION EASEMENTS ARE USED BY TRANSPORTATION AGENCIES

Conservation easements relate to the work of transportation agencies specifically in two major ways. First, they are *used by* transportation agencies to satisfy regulatory requirements, to complement transportation projects, and to achieve policy objectives. Second, transpor-

[46] http://www.nj.gov/pinelands/infor/fact/PDCfacts.pdf (Accessed July 7, 2012).

[47] https://www.quickbase.com/db/bbqna2qct?a=dbpage&pageID=10 (Accessed July 10, 2012).

[48] http://www.malt.org/MALT-map (Accessed July 7, 2012).

[49] http://www.denix.osd.mil/sri/index.cfm (Accessed July 10, 2012).

[50] *See* ROBERT FREILICH & MARK S. WHITE, 21ST CENTURY LAND DEVELOPMENT CODE 39-43 (American Planning Association 2008).

[51] *See* DANIEL K. SLONE & DORIS S. GOLDSTEIN, A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT FOR PLANNERS, DEVELOPERS, AND ARCHITECTS (Wiley 2008).

[52] Smith v. Town of Mendon, 4 N.Y.3d 1, 822 N.E.2d 1214, 789 N.Y.S.2d 696 (2004) (holding the condition was not an "exaction" subject to analysis under Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) and Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), because the conservation restriction did not amount to a full relinquishment of property rights, but rather only a development restriction). Nollan v. California Coastal Commission, a landmark U.S. Supreme Court case on exactions, involved a challenge to the Commission's requirement that the Nollans grant a public, beach-access easement in exchange for a coastal development permit. Though the easement in *Nollan* was not a *conservation easement*, this case illustrates how conservation easements can be utilized in conjunction with development approval.

[53] *See, e.g.,* Murphy v. Long, 170 S.W.3d 621, 623 (2005), where a conservation easement between neighbors and a nature conservatory became the basis for a fight between neighbors concerning the color of an access road.

[54] *See also* Coastside Habitat Coalition v. Prime Props., 1998 U.S. Dist. LEXIS 6367 (1998), where developers created a conservation easement and rerouted a road to provide protected habitat for snakes and frogs.

tation agencies may *encounter* land subject to conservation easements during the infrastructure expansion planning and acquisition processes.

The purpose of this section is to provide greater detail regarding these two general categories using specific examples of particular relevance. First, the use of conservation easements in the context of environmental mitigation will be discussed. Second, conservation easements will be discussed as they relate to the various public and private programs designed to provide incentives for and facilitate scenic beautification and historic preservation. Each of these subsections will focus on how conservation easements typically are used by transportation agencies, noting the key, specific, legal requirements governing their use in each instance. Third, this section concludes with a discussion of the key legal and political issues implicated in the process of acquiring land subject to conservation easements by eminent domain or otherwise.

A. Environmental Mitigation

Transportation agencies must comply with a myriad of federal and state environmental laws and regulations, which may be achieved by use of a conservation easement. The two primary examples of this are compensatory mitigation for aquatic resource impacts under the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). Under these laws, the adverse ecological effects of development may be lessened or "mitigated" by the improvement and protection of resources similar to those impacted by development activities.[55]

Compensatory Mitigation Under the Clean Water Act

The CWA was promulgated in 1972 for the purpose of improving and protecting the nation's waters.[56] Section 404 of the CWA establishes a program, administered by the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (ACOE), and several states, designed to regulate the discharge of dredged or fill materials into federal waters, which include wetlands, streams, and other waters of the United States.[57] The CWA requires any entity that cannot avoid impacts to jurisdictional waters to minimize the impact to the extent possible and then compensate for the lost resource.[58]

The Federal Compensatory Mitigation Rule of 2008 provided a much-needed regulatory framework for this process of avoidance, minimization, and mitigation.[59] The Mitigation Rule requires entities (both public and private, individual and corporate) that impact aquatic resources to replace lost functions of the systems through the restoration, enhancement, or preservation of like-kind resources. A permittee has three primary mitigation methods that may be used. The Mitigation Rule sets a priority for the choice as follows:

1. The purchase of mitigation bank credits.
2. Payment to an in lieu fee program.
3. Undertaking permittee-responsible mitigation.[60]

When seeking permits under the CWA, transportation agencies will use each of these mitigation methods.[61]

The Role of Conservation Easements.—With each mitigation methodology, the Mitigation Rule requires that land comprising the compensatory mitigation be protected. Specifically, the Rule provides that:

> The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants.[62]

The permitting and regulatory agencies that oversee compensatory mitigation prefer conservation easements to other land protection mechanisms because of their perpetual duration and third-party oversight.

The Mitigation Rule also includes conditions for the use of conservation easements. For example, recognizing that state law governs conservation easements and may vary considerably from jurisdiction to jurisdiction, the regulations provide that "when approving a method for long-term protection of nongovernment property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection."[63]

Another feature of the Rule concerns the role of third parties in regards to enforcement and monitoring of easements once they are established. Specifically, the regulations provide that "to provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit resource

[55] *See, e.g.,* Sierra Club v. U.S. Corps of Engineers, 464 F. Supp. 2d 1171 (development of mitigation banks for wetlands).

[56] *See* Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1294 (1996).

[57] *See* 33 U.S.C. 1344.

[58] Compensatory Mitigation Rule, EPA, available at http://water.epa.gov/lawsregs/guidance/wetlands/wetlands mitigation_index.cfm; *see also* Nw. ByPass Group v. U.S. Army Corps of Engineers 470 F. Supp. 2d 30 (2007).

[59] *See* 33 C.F.R. pts. 325 and 332 and 40 C.F.R. pt. 230.

[60] 33 C.F.R. 332.3(b)(1)-(3).

[61] Georgia DOT has made extensive use of the purchase of "banked" credits; North Carolina DOT is the primary user of a statewide in lieu fee program known as the Ecosystem Enhancement Program; both of these states also carry out project specific mitigation through their own agency personnel.

[62] 33 C.F.R. 332.7(a)(1).

[63] *Id*.

management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections."[64]

The parties involved in the conservation easement negotiation will vary depending on how the mitigation is being provided. In-lieu fee programs and private mitigation banks are generally wholly separate from transportation agencies. In these transactions, the agency will pay a fee or purchase credits in exchange for the transfer of liability for mitigation from the permittee (transportation agency) to the mitigation provider (in-lieu fee program or banker). For permittee-responsible or project-specific mitigation, the transportation agency will be directly involved in the full mitigation process, including the land protection.

Mitigation Banks.—Because of the legal preference expressed in the Rule and for purposes of convenience, transportation agencies increasingly have relied on the use of mitigation banks rather than permittee-responsible onsite and single-project offsite mitigation.[65] Private companies and public agencies develop mitigation banks throughout the country. The owner of a mitigation bank is the "sponsor." Private banks are usually developed to sell credits to permittees on an as-needed basis, whereas transportation agencies (or other public agencies) most often develop banks to meet their own permit needs.

The regulations define "mitigation bank" as:

> a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by ACOE permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument [(MBI)].[66]

The credits referred to in the above definition are the "currency" of a mitigation bank. Each credit represents a unit of compensation (for permitted impacts to wetlands and streams). Credits are generally based on acreage for wetlands and linear feet for streams. While the MBI is the legal instrument governing how the bank will operate and how and when the credits will be released, a mitigation plan is developed to fully describe the project property and how it will be restored, enhanced, or preserved to provide mitigation (i.e., how the credits will be generated). Before any credits are released from a bank, the MBI and mitigation plan must be completed and approved by the district engineer after considerable review and coordination with other agencies through the Interagency Review Team (IRT), financial assurances must be provided, and long-term protection of the mitigation bank property must be established.[67] The regulations addressing site protection requirements for mitigation banks refer to "real estate instruments…or other long-term mechanisms used for site protection," which as previously discussed have been defined to include (and, in fact, to prefer) conservation easements.[68]

To illustrate how the mitigation banking process works, two case studies are presented below.[69] One is a bank established by a transportation agency (South Carolina Department of Transportation (SCDOT)). Restoration Systems, LLC (a private mitigation provider), established the other bank to mitigate impacts from a transportation agency's (North Carolina Department of Transportation) (NCDOT) permitted actions.

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[64] *Id*.

[65] Mitigation Banking Factsheet, EPA, available at www.epa.gov/owow/wetlands/facts/fact16.html#three (*citing* WENDY ELIOT, IMPLEMENTING MITIGATION POLICIES IN SAN FRANCISCO BAY: A CRITIQUE (The Conservancy 1985); Margaret Seluk Race, *Critique of Present Wetlands Mitigation Policies in the United States Based on an Analysis of Past Restoration Projects in San Francisco Bay*. ENVIRONMENTAL MANAGEMENT 9 (1), 71–82 (Jan. 1985); KEVIN L. ERWIN, WETLAND EVALUATION FOR RESTORATION AND CREATION*:* THE STATUS OF THE SCIENCE (J. A. Kusler & M. E. Kentula eds., Island Press 1990).

[66] 33 C.F.R. 332.2.

[67] *See* 33 C.F.R. 332.8.

[68] 33 C.F.R. 332.7(a)(1), 332.8(t)(1).

[69] The U.S. Army Corps of Engineers maintains a comprehensive database of mitigation banks and in lieu fee programs within each of the 39 Corps districts across the United States. The Regulatory In lieu fee and Bank Information Tracking System (RIBITS) may be accessed at http://geo.usace.army.mil/ribits/index.html. In addition to site-specific information, RIBITs provides templates for mitigation documents, including conservation easements.

Case Study: SCDOT Big Pine Tree Creek Mitigation Bank

The SCDOT, in partnership with the South Carolina Department of Natural Resources (SCDNR), has developed the Big Pine Tree Creek Mitigation Bank in Kershaw County to mitigate the impacts of ongoing and future transportation projects in the Sand Hills ecoregion of South Carolina. The Big Pine Tree property includes approximately 440 acres of wetlands and stream buffer mitigation to be used by the Department for compensatory mitigation for its own transportation projects.

The property was and remains privately owned. SCDOT, however, purchased a conservation easement over the property, which it transferred to the SCDNR. The conservation easement is held, monitored, and enforced by the SCDNR. Beyond the land restrictions and obligations of the conservation easement, mitigation banks are expressly governed by the terms of the MBI. An interagency review team, led by the ACOE, is responsible for overseeing and enforcing the conditions of the MBI.

The Big Pine Tree Creek Mitigation Bank is a "variable credits" mitigation bank, meaning that credits are calculated according to total land area and the functions of the restored lands. In this case, there were 540 to 804.8 wetland credits and 7,666.4 to 12,845.1 stream buffer enhancement credits. Wetland restoration on the site was accomplished by plugging existing agricultural drainage ditches to restore wetland hydrology and by planting native wetland woody vegetation. The restoration focused on reestablishing a plant community of Atlantic white cedar.

Preestablished success criteria, management guidelines, and long-term monitoring will ensure that the construction activities restore a natural system. The management plan is designed to achieve the primary goal of protecting and restoring portions of the Big Pine Tree Creek watershed, thereby providing ecosystem benefits such as unaltered flow regimes, nutrient transfer, enhanced water quality, and reduced erosion due to substrate scouring. The SCDNR will provide long-term stewardship of the site and enforcement of the conservation easement terms.[70]

In addition to single-user banks, like the one the SCDOT maintains for Big Pine Tree Creek, private entities have established what are known as entrepreneurial banks. With these banks, instead of the permit-seeking entity establishing its own mitigation bank, a private entity is the bank sponsor that acquires the conservation easements, obtains approval from the ACOE and all other necessary agencies, and then sells mitigation credits to those needing mitigation to comply with Section 404 permit requirements. Through the purchase of credits from a mitigation bank, the responsibility for mitigation (including legal liability) transfers from the permittee to the mitigation bank sponsor. For many transportation agencies, the purchase of credits from private mitigation banks represents an attractive alternative to requiring the agency to restore habitat and establish the mitigation project.

Case Study: Bear Creek Wetland Mitigation Bank—Restoration Systems, LLC

Restoration Systems, LLC, based in Raleigh, NC, provides private-sector compensatory mitigation to transportation agencies and other permittees. Each project is comprised of a tract or several tracts of land, ranging from 5 to more than 500 acres that are held in private ownership. Restoration Systems restores the acreage so that it provides significant ecological benefits to the watershed in which it is located. The company oversees all project entitlement, design, construction, monitoring, maintenance, and credit sales. Credits and the restored lands are protected by a permanent conservation easement.

One of Restoration Systems' early projects was the Bear Creek Wetland Mitigation Bank, which was developed to compensate for wetland impacts created by NCDOT's roadway projects. The Bear Creek property is located adjacent to a large tributary to the Neuse River. Restoration Systems purchased the land in fee simple and then placed a conservation easement over the property. For this project, approximately 115 acres of ditched and drained farm fields were restored to their natural wetland condition. An additional 303 acres of existing wetland also were included in the bank as preservation. This made 418 acres available as offsite mitigation to the NCDOT.

The NCDOT purchased all of the mitigation credits (through one contract) from the Bear Creek Mitigation Bank. NCDOT will use the mitigation to compensate for permitted impacts in the Neuse River Basin. The North Carolina Coastal Land Trust is the conservation easement holder. Restoration Systems paid the Coastal Land Trust a one-time endowment for the costs associated with performing their duties as the easement holder.

The National Environmental Policy Act

Conservation Banking.—Federal transportation agencies (and any project receiving federal funding or a federal permit) may be required to mitigate impacts under NEPA,[71] which also may be addressed through offsite mitigation and the use of conservation easements.[72] While the CWA requires mitigation of transportation project impacts to aquatic resources, NEPA requires public agencies to take a "hard look" at a myriad of social and environmental considerations.[73] If a proposed project will have a significant effect on the environment, mitigation for that impact may be required. One of the most common areas of impact that will require mitigation through the NEPA process is

[70] South Carolina Department of Transportation Environmental Stewardship Program information can be found at http://www.scdot.org/doing/stewardship.aspx (Accessed Jan. 2, 2013).

[71] 42 U.S.C. § 4331 (1969).

[72] Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fla. 2006) (Mitigation plays an important role in the discharge by federal agencies of their procedural duty under NEPA to prepare an environmental impact statement).

[73] *See* Kleppe v. Sierra Club, 427 U.S. 390, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

any effect on threatened and endangered species habitat.[74]

Section 7 of the Endangered Species Act[75] requires that a federal agency (or the proponent of a project receiving federal funding or a federal permit) consult with the U.S. Fish and Wildlife Service to ensure that a proposed project will not have a detrimental effect on federally listed species or their designated critical habitat.[76] As with the regulation of aquatic resources discussed above, in certain instances no feasible alternative exists that would avoid negative impacts on a protected species or its habitat. A primary means of mitigating these unavoidable "losses" is the permanent protection of "like-kind" habitat similar to that of the protected species. The transportation agency may undertake this effort itself by locating suitable lands, acquiring the appropriate protections (e.g., a conservation easement), and obligating itself to ongoing monitoring of the site. Or, as with wetlands and streams, mitigation credits may be purchased from an established conservation bank.

In 2003, the U.S. Fish and Wildlife Service recognized the value of large-scale conservation banks in the protection of endangered species and their habitats and published express guidance for the establishment, use, and operation of such projects.[77] This guidance was based on the already established protocol for wetland mitigation banks and incorporated many of the same processes, with a focus on the perpetual protection of the property by a conservation easement.[78] The intent of conservation banking is to provide large areas where species may flourish and contribute to the recovery of an endangered population. The conservation bank property will be managed toward this goal and provide required monitoring and maintenance reports to the appropriate government agencies who oversee the process, which will include the U.S. Fish and Wildlife Service and also any other federal, state, or local entities with a specific interest in the conservation process.

NEPA Review When a Transportation Agency Acquires a Conservation Easement.—While NEPA may be the impetus for acquiring a conservation easement as described above, transportation agencies should keep in mind that the acquisition of the easement itself likely implicates the NEPA process and will require some environmental documentation, as was the case in *Sabine River Authority v. U.S. Department of Interior*.[79] In most cases, as described below, the acquisition of a conservation easement will be considered a Categorical Exclusion activity and a concise environmental review may be all that is necessary.

"Categorical Exclusion"[80] is a category of actions that do not individually or cumulatively have a significant effect on the human environment.[81] The acquisitions of scenic easements are specifically contained in this category.[82] Even when a project falls in one of the specific Categorical Exclusion categories, documentation should be completed that clearly demonstrates compliance with the regulatory definition describing a Categorical Exclusion project. Such documentation includes evidence that the project will not affect historic structures, regulated aquatic resources, floodways, traffic patterns, and a number of the same topics generally addressed in NEPA documentation. This Categorical Exclusion documentation, however, may take the form of a checklist or other shortened form.[83]

Where a proposed action is not one categorically excluded or where special circumstances exist, an Environmental Assessment must be prepared. If it is found that no corresponding change in the physical environment will occur, then a Finding of No Significant Impact is made. The finding in the *Sabine* case referenced above was that an Environmental Assessment was the appropriate level of NEPA documentation in the acquisition of a conservation easement to protect 3,800 acres of wetland in east Texas. In this case, the size of the easement being acquired by the U.S. Fish and Wildlife Service and the quality of the habitat being protected likely necessitated the preparation of an Environmental Assessment rather than a Categorical Exclusion, but the court concluded that a federal action that did not change the existing environment did not require the preparation of an Environmental Impact Statement (EIS).

When a proposed major federal action will significantly affect the quality of the human environment, then an EIS must be prepared.[84] As discussed in *Sabine*, the acquisition of a conservation easement where the property will remain in its original condition is unlikely to require an EIS.

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[74] 16 U.S.C. 1531–1544 (1973).

[75] 16 U.S.C. 1536.

[76] 50 C.F.R. pt. 402.

[77] *Guidance for the Use, Establishment and Operation of Conservation Banks*, U.S. DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Washington, D.C., April 2003, http://www.ecosystemmarketplace.com/pages/dynamic/resources.law_policy.page.php?page_id=194&section=home&eod=1.

[78] *See* Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209 (2002) (protection of birds and snakes, notwithstanding the construction of a public parkway).

[79] 745 F. Supp. 388 (1990). *See also* Sierra Club v. FHWA, 715 F. Supp. 2d 721 (S.D. Tex. 2010).

[80] 40 C.F.R. 1508.4.

[81] 23 C.F.R. 771.117.

[82] 23 C.F.R. 771.117(c)(10).

[83] For example, the Washington State Department of Transportation and the Federal Highway Administration have a memorandum of understanding regarding Categorical Exclusion processes and procedures on a programmatic basis that can be found at http://www.wsdot.wa.gov/publications/manuals/fulltext/M31-11/Agreements/MOU_ProgrammaticCE.pdf (Accessed June 5, 2012).

[84] 42 U.S.C. § 4332(c).

Recent Development

The March 15, 2012, *Federal Register* contained a Notice of Rulemaking on this precise topic. Public comments were due May 14, 2012.[85] The purpose of the rulemaking was to streamline environmental documentation in response to a Presidential Memorandum on the subject; ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review,'' issued August 31, 2011. The proposed rule adds a new section to 23 C.F.R. 771.117 that specifically addresses 10 Federal Transit Authority actions that would be considered Categorical Exclusions. The new section will be 23 C.F.R. 771.118(c) and will replace 771.117(c). Proposed Section 771.118(c)(3) specifically addresses environmental mitigation activities as being Categorical Exclusions. In this analysis, always consider the list of special circumstances contained in 771.117(d) [proposed 771.118(d)], where an Environmental Assessment may be necessary even if the action is one ordinarily contained among the Categorical Exclusions.

B. Scenic Beautification and Historic Preservation

The first conservation easements were drafted and executed to protect scenic views associated with public infrastructure, mainly parks and roads.[86] This tradition continues as transportation agencies at both the federal and state levels find themselves involved in scenic beautification and historic preservation efforts.[87] Examples include preserving farmland corridors along a new stretch of highway or preserving a historic train station. Generally, transportation agencies become involved in one of two ways on a particular project—either they fund and acquire the conservation easement or they provide grants to nonprofit land trusts or other entities to acquire and hold the conservation easements.

This subsection first provides background on the federal and state grant programs that have resulted in transportation enhancements (TEs), which often involve the use of conservation easements, and then turns to a discussion of how conservation easements may be structured to best meet the transportation agency's needs and protect the public's investment. The two primary types of TEs that were implemented prior to 2012 are corridor enhancement and historic preservation. [88]

TEs are activities that "enhance the transportation experience" and have stood as a major driving force behind transportation scenic beautification and historic preservation efforts. Established by the Intermodal Surface Transportation Efficiency Act of 1991[89] (ISTEA), TE programs directed a portion of federal transportation dollars to 12 specific activities. Since 1991, TEs have funded more than 20,000 projects around the country, including beautification and scenic preservation efforts. TEs were subsequently funded by Congress and amended in 1998 under the Transportation Equity Act for the 21st Century[90] (TEA-21) and in 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users[91] (SAFETEA-LU). Projects eligible for TE funding include:

- Acquisition of scenic easements and scenic or historic sites (including historic battlefields).
- Scenic or historic highway programs (including the provision of tourist and welcome center facilities).
- Historic preservation.
- Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals).
- Preservation of abandoned railway corridors (including the conversion and use of the corridors for pedestrian or bicycle trails).[92]

Each of these project types is greatly enhanced by the use of conservation easements as a means of protecting the resource in perpetuity. The Moving Ahead for Progress in the 21st Century Act (MAP-21) law, effective October 1, 2012, has replaced the Transportation Enhancement Program with the Transportation Alternatives Program. Funds apportioned to the states under the Transportation Enhancement Program continue to be available under the same terms and conditions prior to MAP-21 until the funds apportioned to states have been obligated, rescinded, or lapsed.[93] Under MAP-21, the acquisition of scenic easements and scenic or historic sites is no longer an authorized activity.[94] However, community improvement activities, including historic preservation and rehabilitation of historic transportation facilities and historic preservation of historic transportation facilities related to a byway, are authorized.

Below is a case study of the Hearst Ranch TE project in California, where a conservation easement was acquired using federal funding and will protect in perpe-

[85] Fed. Reg., Vol. 77, No. 51, Mar. 15, 2012, Proposed Rules, http://www.gpo.gov/fdsys/pkg/FR-2012-03-15/pdf/2012-6327.pdf (Accessed June 5, 2012).

[86] *See* § II.B of this digest.

[87] *See* Davis v. Slater, 148 F. Supp. 2d 1195 (2001), supported by Jones v. Peters 2007 U.S. LEXIS 70332 (2007) (conservation easement securing the long-term maintenance of historic property).

[88] *See* http://www.fhwa.dot.gov/environment/transportation_enhancements/ for an overview of Federal TE funding (Accessed Dec. 5, 2012).

[89] 102 P.L. No. 240, 105 Stat. 1914 (1991).

[90] 105 P.L. No. 178, 112 Stat. 107 (1998).

[91] 105 P.L. No. 59, 111 Stat. 1268 (1997).

[92] 23 U.S.C. 101(a)(35).

[93] Fed. Reg., Vol. 77, No. 51, Mar. 15, 2012, Proposed Rules, http://www.gpo.gov/fdsys/pkg/FR-2012-03-15/pdf/2012-6327.pdf (Accessed June 5, 2012).

[94] *Transportation Alternatives Interim Guidance,* http://www.fhwa.dot.gov/map21/guidance/guidetap.cfm (Accessed Dec. 5, 2012). *See also MAP-21 and Its Effects on Transportation Enhancements*, http://www.virginiadot.org/business/resources/transportation_enhancement/MAP-21_and_Transportation_Enhancements.pdf.

tuity a large and ecologically important piece of property along a byway.

Case Study: Hearst Ranch Scenic Conservation Easement[95]—San Luis Obispo County, California

In 2004, a group of private and public stakeholders worked to place conservation easements on more than 1,445 acres of scenic rangeland and coastline property between the Pacific Ocean and Highway 1, using approximately $21 million of TE funds. The Hearst Corporation (the property owner), the California Department of Transportation (Caltrans), and the American Land Conservancy all worked together to secure federal TE funding and structure the conservation easements and other land protection mechanisms.

After years of failed attempts to develop its property—due primarily to objections from environmental regulators and advocacy groups—the Hearst Corporation became eager to reduce property maintenance costs and to realize a return on its holding. At the same time, Caltrans was interested in preserving scenic views along Highway 1, an All American Road, which is the highest ranking under the Federal Highway Administration's National Scenic Byways Program.

During the negotiation process, given the large public expenditure for property acquisition (including conservation easements and fee purchases) and significant views to be protected in perpetuity, Caltrans insisted on the use of conservation easements over other legal mechanisms to ensure active monitoring and enforcement, which the American Land Conservancy could undertake.

C. When Transportation Agencies Encounter Conservation Easements

In addition to acquiring conservation easements to fulfill regulatory requirements or advance policy objectives, transportation agencies also encounter preexisting conservation easements on properties sought for right-of-way acquisition. For example, if the transportation agency is planning a road corridor across a privately-held property that contains a conservation easement, which would preclude use of the property as a transportation corridor, the question arises whether the agency's delegated condemnation powers allow it to extinguish the easement in pursuit of its transportation objectives.[96]

Not surprisingly, these issues give rise to several legal and practical issues of importance to transportation agencies. Addressing both of these, this subsection discusses some fundamental legal issues relevant to acquiring property subject to conservation easements, including the rights and obligations of holders, particularly as they relate to just compensation. Next, the discussion turns to an examination of some of the major challenges transportation agencies may face during this process, including the previously noted public purpose doctrine (Subsection 4(f) of the 1966 Department of Transportation Act[97] review), and political opposition.

Detecting Conservation Easements

A conservation easement in the path of a planned transportation project will add time and expense to the planning and land acquisition processes, which are often handled by separate departments within the transportation agency. Conservation easements may be detected either through the property records when examined by right-of-way personnel once the preferred alternative alignment has been chosen or by those carrying out the environmental review and project planning. Because early detection is better, project planning personnel should examine all available conservation easement databases as part of the environmental screening. While no uniform conservation easement database exists at this time, efforts are underway,[98] and local land trusts, state Natural Heritage Programs, and county governments may maintain conservation easement databases. Time spent checking these sources during project planning will result in significant savings during implementation.

Analysis Before Acquisition

Upon identifying a conservation easement in the path of a planned project, the transportation agency must identify the parties with interest in the land—including the conservation easement holder—and carry out a full analysis of the property and the intended action before proceeding with the land acquisition. Key concepts that must be considered by the transportation agency are the "Prior Public Use Doctrine," Subsection 4(f) analysis, and specific state law considerations.

Prior Public Use Doctrine.—The common law "prior public use doctrine" prohibits the condemnation of land owned by certain government entities. The Florida Supreme Court articulated this rule as follows: "[g]enerally, property held by an authority that *has* the power of condemnation cannot be taken by *another* authority with the same power of condemnation absent specific legislation" (emphasis added).[99]

The reference to "same power of condemnation" refers to the ability for higher levels of government to

[95] *See* California Natural Resources Agency Web site, http://resources.ca.gov/hearst_ranch.html, for extensive information, including legal documents, regarding the Hearst Ranch (Accessed May 17, 2012).

[96] *See also* CUNA Mutual Life Insurance v. L.A. County MTA, 108 Cal. App. 4th 382, Cal. Rptr. 2d 470 (2003) (inverse condemnation action brought by plaintiff who held a conservation easement to maintain historic building against transportation authority planning excavation and construction of new rail station).

[97] 49 U.S.C. 1653(f) (as of 2008 at 23 C.F.R. 774), requiring specific analysis (including "no feasible and prudent" alternative) before a transportation agency may impact a protected area.

[98] *See, e.g.,* National Conservation Easement Database, http://nced.conservationregistry.org/.

[99] Fla. E. Coast Ry. Co. v. Miami, 321 So. 2d 545, 547 (Fla. 1975).

condemn conservation easements held by lower levels of government, but not vice versa, on preemption grounds.[100] One rationale behind the prior public use doctrine is to prevent governmental agencies from continuously condemning and recondemning each other's property.[101] This is an important consideration for transportation agencies because conservation easements are often held by governmental entities at the federal, state, and local level.

New Hampshire provides an interesting example of the prior public use doctrine in action to protect conservation investments. The state has implemented a program wherein an independent entity (The Land Conservation Investment Program) was created by legislation to hold conservation easements on behalf of the state, as either the sole holder or as a coholder with a governmental agency.[102] The program's enabling statute initially required legislative authorization for a state agency, including the New Hampshire Department of Transportation, to condemn an easement held or coheld by a local government.[103] Recognizing the difficulty this presented, the legislature amended the law in 1999 to allow the Department of Transportation to condemn minor slope and drainage easements after providing notice to all interested parties and determining that there were no "reasonable and prudent alternatives."[104] The impacts and judicial treatment of the public use doctrine vary from state to state.

Section 4(f) Review.—Section 4(f) of the Federal Department of Transportation Act imposes procedural and substantive requirements on certain protected lands.[105] Specifically, the law applies to publicly owned parks, recreational areas, wildlife and waterfowl refuges, and public and private historic sites.[106] Should a proposed transportation agency project threaten any of these uses, the law allows the project to go forward only if "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use."[107]

Conservation easements are relevant to Section 4(f) analysis because many conservation easements are owned or co-owned by public entities at the local, state, and federal level and protect the types of lands identified above. For example, the U.S. Fish and Wildlife Service holds conservation easements designed to offer endangered species habitat protection pursuant to the Federal Endangered Species Act. When faced with these types of publically held conservation easements, transportation agencies must ensure that Section 4(f) alternatives analysis is performed or otherwise risk inviting a legal challenge.

Although Section 4(f) offers some protection to conservation easements in that a stringent analysis must be undertaken and conclusions made, a few limitations are worth noting as well. First, the law does not apply to privately-held conservation easements; in other words, those held solely by land trusts such as the Nature Conservancy. Also, the law does not apply to transportation projects funded entirely with state and local transportation dollars. In addition, it is worth noting that a recent amendment to Section 4(f) provides a simplified process for projects having a relatively minor impact on qualifying conservation easements.[108]

The federal courts have made it more difficult to challenge Section 4(f) determinations. The U.S. Supreme Court's 1971 decision in *Citizens to Preserve Overton Park v. Volpe* clarified the role of district courts in reviewing agency decisionmaking and opened the door for grassroots judicial advocacy pursuant to Section 4(f).[109] Since that time, other federal court decisions have made it more difficult to challenge agency determinations, specifically as they relate to Section 4(f).[110] Despite these limitations, transportation agencies must still acknowledge Section 4(f) where applicable, adjust planning efforts accordingly, and, where appropriate, avoid impacting land protected by a conservation easement.

State Laws.—A few states have imposed statutory planning requirements designed to avoid, where reasonable, the condemnation of conservation easements. For example, although Florida's conservation easement enabling legislation provides that "nor shall this section prohibit the use of eminent domain for [acquiring conservation easements]," the law goes on to require that

[100] "Preemption" is derived from the Supremacy Clause of the U.S. Constitution, Article VI, Section 2.

[101] McLaughlin, *supra* note 8, at 1897, 1930 (*citing* United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land, 753 F. Supp. 50, 54 (D.P.R. 1990) ("Without the prior [public] use doctrine, there could be a free for all of battling entities all equipped with eminent domain power, passing title back and forth."); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01[2] (3d ed. 2007), hereinafter cited as "Sackman." ("The underlying rationale is to prevent condemnation back and forth between competing condemnors.").

[102] Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 612 (2001), hereinafter cited as "Levin."

[103] *Id*.

[104] *Id*. n.87 (*citing* N.H. REV. STAT. ANN. § 162-C:6(IV)).

[105] 49 U.S.C. § 303.

[106] 49 U.S.C. § 303(c).

[107] *Id*.

[108] In 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) made the first substantive revision to Section 4(f) since its original enactment by simplifying and streamlining the review process for projects having only *de minimis* effects on uses protected by Section 4(f).

[109] 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

[110] *See* Matthew Singer, *The Whittier Road Case: The Demise of Section 4(f) Since Overton Park and Its Implications for Alternatives Analysis in Environmental Law*, 28 ENVTL. LAW 729, 731 (1998) (observing just one successful Section 4(f) case between 1985 and 1998).

"In any legal proceeding to condemn land for the purpose of construction and operation of a linear facility…the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid."[111]

Linear facility is defined to include "electric transmission and distribution facilities, telecommunications transmission and distribution facilities, pipeline transmission and distribution facilities, *public transportation corridors*, and related appurtenances."[112] As of the date of this writing, no reported cases in Florida have been decided that actually litigated the issue of the merit of the public benefit of a conservation easement as compared to the proposed linear facility.

Similarly, New York legislation places special procedural requirements on condemning government-held conservation easements in that State.[113] Beyond conservation easement enabling legislation, some states with agricultural lands preservation programs, like Rhode Island, afford added protection for conservation easements acquired with state funds for such purposes.[114] Such provisions, where applicable, invite an additional measure of judicial scrutiny and may provide legal grounds for those seeking to defend a conservation easement against eminent domain proceedings.

Procedural Requirements of Terminating or Working Within Conservation Easements

A transportation agency's approach toward property subject to a conservation easement often is determined by the nature of the particular transportation project. The project may be entirely compatible with the uses remaining under the conservation easement. In other cases, the project may have a minor incompatible impact that the easement holder will accept through a minor amendment to or modification of the easement.[115]

Most often, however, transportation projects will fundamentally be at odds with the purposes of the conservation easement,[116] or one or more parties to the conservation easement will refuse to allow or be prohibited from consenting to an amendment. In these situations, some or all of the property may need to be acquired either voluntarily through negotiation or by eminent domain. As for any conservation easements on the property, "the condemning authority would need to take both the encumbered land and the conservation easement, and either extinguish or release the easement…thereby freeing the land to be used in manners formerly restricted by the easement."[117] This subsection is concerned with the legal and practical issues that arise when acquisition, commonly through eminent domain, is required.

The law in most states allows for the condemnation of property subject to conservation easements. When the condemning authority takes title to the property, the conservation easement holder is a party to the action and the conservation easement is "taken" (or extinguished) as well.[118] Conservation easement enabling legislation in roughly half of the states expressly provides that conservation easements are subject to, and not somehow specially protected from, eminent domain.[119] For example, South Carolina's legislation provides that "[a] person or entity empowered to condemn may condemn a conservation easement for other public purposes pursuant to applicable provisions of the 1976 Code or federal law."[120] Illinois' statute similarly provides that "[n]othing in this Act shall diminish the powers granted in any other law to acquire by…eminent domain or otherwise and to use land for public purposes."[121] In these states, transportation agencies and even private entities endowed with eminent domain powers, as a matter of law, are expressly authorized to acquire and extinguish conservation easements by eminent domain.

Under the common law, conservation easements may be acquired by eminent domain, the general rule being that "[s]ervitude benefits like other interests in property may be condemned under the power of eminent domain."[122] For example, "if a conservation easement

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[111] FLA. STAT. § 704.06(11).

[112] *Id*. (emphasis added).

[113] N.Y. ENVTL. CONSERV. LAW § 49-0307.

[114] *E.g*. R.I. GEN. LAWS § 42-82-6 ("[a]ny state or local agency must demonstrate extreme need and the lack of any viable alternative before exercising a right of eminent domain over any farmland to which the development rights have been purchased by the commission on behalf of the state….").

[115] *See, e.g*., NEB. REV. STAT. § 76-2, 117(4) ("An entity having the power of eminent domain may, through agreement with the owner of the servient estate and the holder of the conservation or preservation easement, acquire an easement over the land for the purpose of providing utility services.").

[116] "Condemning authorities acquiring land frequently also acquire and extinguish any servitudes burdening the land because continuance of the servitude burdens would interfere with the purposes for which the property is acquired." McLaughlin, *supra* note 8, at 1897, n.206 (*citing* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.8 cmt. b).

[117] McLaughlin, *supra* note 8, at 1897, 1945. *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.8 cmt. a ("[E]xtinguishment [of a servitude] may take place either as a direct result of the condemnation, or as the result of release or merger after the government has acquired the property benefited by the servitude. As the owner of a servitude benefit, a governmental body may use any of the means available to a private owner to extinguish the servitude.").

[118] McLaughlin, *supra* note 8, at 1897, 1904 ("conservation easements are generally accorded little protection from condemnation); Levin, *supra* note 102, at 592, 598 ("Privately held conservation easements…offer surprisingly little protection from condemnation."), http://www.massland.org/files/When%20Forever%20Proves%20Fleeting.pdf.

[119] McLaughlin, *supra* note 8, at 1897, 1929.

[120] S.C. CODE ANN. § 27-8-80.

[121] 765 ILL. COMP. STAT. § 120-6.

[122] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.8 cmt. a. "A 'servitude' is a general category that includes a variety of

restricts the development of real property that is needed for a school, hospital, or publicly aided housing, eminent domain may be exercised."[123] This power also extends to property condemned for public transportation infrastructure. As a result, conservation easements may be terminated by condemnation either directly or in virtue of condemnation of the underlying subject property.[124] The fact that a conservation easement was donated for charitable purposes does not preclude later acquisition of the easement through eminent domain,[125] though some have argued otherwise.[126] As a result, conservation easements may be condemned by state transportation agencies, whether by express statutory authority or under the common law, depending on the state.

Just Compensation

Under the Fifth Amendment of the United States Constitution and state constitutional provisions, the government must pay "just compensation" for property "taken for public use."[127] Therefore, fee simple owners of property are entitled to compensation for their properties and the conservation easements being condemned. However, in some states, the law is unsettled as to 1) whether the holder of the conservation easement must receive compensation for the property interest that is held through the conservation easement, and 2) how the amount of just compensation should be measured. These issues can be significant ones for a transportation agency acquiring property given the resources invested in conservation easements, either by those purchasing them or benefiting from their dedication.[128]

Conservation easement enabling legislation may directly address which party is entitled to compensation. Some states expressly require that just compensation be paid to the holder of the conservation easement being condemned, not to the underlying property owner whose property is being condemned. Virginia's legislation, for example, provides that "[i]n [an eminent domain] proceeding the holder of the conservation easement shall be compensated for the value of the easement."[129] Other states, however, provide for the opposite. Arizona's law, for example, states "the existence of a conservation easement shall not be considered an interest in real property for which compensation or damages may be awarded under the laws pertaining to eminent domain."[130] In Arizona and states with similar laws, neither the property owner nor the easement holder need be compensated for condemnation of the easement. Some legal scholars have opined, however, that this approach is unconstitutional because conservation easements are an interest in real property, just like the underlying property itself, and that legislation may not simply remove the just compensation requirement for that portion of the rights associated with the property.[131] The issue is largely unsettled, so agencies should seek counsel in their state, particularly where enabling legislation is silent on who or whether compensation is owed for the easement itself.[132]

Should compensation be owed in a particular case, a number of principles govern how the amount of compensation is determined. The general rule is that just compensation means the property's fair market value.[133] However, conservation easements are most

non-possessory interests in land, including easements." *Id*. § 1.1(2).

[123] RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.07[2] (Michael Allan Wolf ed., Matthew Bender, Co., Inc., 2009).

[124] *See* JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 10.42 (Thomson Reuters/West 2007), hereinafter cited as "ELY & BRUCE."

[125] Phillip E. Hassman, Annotation, *Eminent Domain: Right to Condemn Property Owned or Used by Private Educational, Charitable, or Religious Organization*, 80 A.L.R. 3d 833, § 2[a] (1996) ("The fact that property is owned or used by a private educational, charitable, or religious organization has not ordinarily, in itself, served to protect the property from being taken under an eminent domain power.").

[126] *See* Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010).

[127] U.S. CONST. amend. V.

[128] Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 49, Fig. 1 (2011), http://www3.law.harvard.edu/journals/elr/2011/04/01/notional-generosity-explaining-charitable-donors-high-willingness-to-part-with-conservation-easements/.

[129] VA. CODE ANN. § 10.1-1010(F).

[130] ARIZ. REV. STAT. ANN. § 33-275(3).

[131] *See* McLaughlin, *supra* note 8, at 1897.

[132] *Id*. at 1933 ("conservation easements should be treated as compensable property for eminent domain purposes in all jurisdictions, whether they are characterized under state property law as restrictive covenants, equitable servitudes, equitable or negative easements, or some statutorily modified amalgam of those interests, and whether they are held in gross or appurtenant to an anchor parcel. Given the considerable public interest and investment in conservation easements, as well as the significant adverse policy ramifications of denying compensation to the holders of conservation easements upon condemnation, it is difficult to imagine a partial interest in land that is more worthy of legal protection in the eminent domain context."). Some have advanced arguments to the contrary, including the claim that since many conservation easements prohibit or restrict subsequent sales, conservation easements by definition have no value. *See id*. at 1943. *See also* Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 46 A.3d 473, 484, *citing* Hardesty v. Md. SHWA, 276 Md. 25, 343 A.2d 884 (1975) (Negative easements involve the payment to landowner for a termination or extinguishment of a portion of his property rights).

[133] Sackman, *supra* note 101, at § 13.01[9]. The U.S. Supreme Court considers "fair market value" to be "what a willing buyer would pay in cash to a willing seller." *See* United States v. Va. Elec. & Power Co., 365 U.S. 624, 633, 81 S. Ct. 784, 790–91, 5 L. Ed. 2d 838, 847 (1961). *See also* tax deduction related cases, *e.g,*. Kiva Dunes Conservation v. Commr. T.C. Memo 2009-145 (June 22, 2009), cited in the appendix of this report.

often purchased by a governmental entity or donated by a private party to a nonprofit organization, not bought and sold in competitive and open markets.[134] Therefore, as a practical matter, it is difficult to establish the fair market value of an individual conservation easement. Nonetheless, courts have recognized alternative valuation methodologies, which offer some guidance to transportation agencies.[135]

Among the various valuation methodologies, commentators view the before and after methodology to be the most appropriate for conservation easements.[136] This approach holds that the value of a conservation easement equals the difference between 1) the fair market value of the property without the conservation easement, and 2) the fair market value of the property with the conservation easement in place.[137] For example, if a property without a conservation easement is worth $1 million and with a conservation easement is worth $750,000, the value of the conservation easement would be $250,000. This methodology is relied upon in many cases because the before and after values are ascertainable using recognized appraisal techniques and comparable sales of similar properties. This is the methodology sanctioned by federal regulations and recognized as the norm within the appraisal community for valuing conservation easement donations.[138]

To see how the before and after methodology works in practice, scenarios involving both total and partial takings need to be considered. The total taking scenario occurs when both the burdened property and the conservation easement must be acquired in whole to make way for an inconsistent public use, such as an airport or a highway expansion.[139] In these situations, the unit rule typically governs, meaning that the total compensation is apportioned between parties with interest in land in proportion to each party's interest.[140] Using the preceding example, the just compensation award would be capped at $1 million and the owner of the burdened property would be entitled to $750,000 and the holder of the conservation easement to $250,000. This approach ensures both that the condemning authority does not pay more than the fair market value of the property taken and that the holder of the conservation easement (and the public more generally) receives just compensation for the value of the conservation easement.

The partial-taking scenario occurs when only a portion of the property is taken for public purposes. This occurs, for example, when the amount of land needed for the right-of-way is relatively small compared to the size of the entire property. As with total takings, the before and after methodology ordinarily governs, but in a way that recognizes that only a portion of the property (and conservation easement) has been taken and that this has an effect on the residual, untaken portion of the property (and the conservation easement).[141] The value of the conservation easement itself may be lessened if value of the underlying parcel has been diminished, wherein the "value" of the conservation easement is the rights forgone by the landowner as a result of the conservation easement. If a previously attractive, highly developable piece of land became less desirable (and, thus, less valuable) as a result of an adjacent activity, the conservation easement would be, in essence, removing or protecting a lesser value. It may be appropriate for the holder of the conservation easement to be compensated for this lost value.[142]

For partial takings, just compensation equals "the difference between (1) the fair market value of the entire parcel immediately before the taking (and as unaffected thereby) and (2) the fair market value of the portion of the parcel remaining immediately after the taking (and as affected thereby)."[143] Using the $1 million property discussed above, but now taking just a corner (or 10 percent) of it, the value of the condemned portion would be $100,000 if unencumbered by an easement and $75,000 with the easement. Thus, the fair market value of $100,000 would be paid by the condemning authority, with $75,000 to the fee owner and $25,000 to the easement holder.

While the above appraisal methodologies may be applied to determine just compensation, they may not be the best methods and the conservation easement document itself may address valuation and apportionment of the proceeds.[144] At its essence, the conservation

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[134] McLaughlin, *supra* note 8, at 1897, 1937. Federal law requires that, for donated conservation easements, "the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction." Treas. Reg. § 1.170A-14(g)(6)(ii); 26 C.F.R. § 1.170A-14(g)(6)(ii).

[135] United States v. Miller, 339 U.S. 121, 123-124, 70 S. Ct. 547, 549, 94 L. Ed. 707, 712 (1950)

> …when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards…Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is "just" both to an owner whose property is taken and to the public that must pay the bill?

[136] McLaughlin, *supra* note 8, at 1897, 1937–1939 (arguing that this approach has regularly been used by courts in valuating nonpossessory interests in land, including easements held in gross).

[137] United States v. Miller, 339 U.S. at 138.

[138] *See* THE APPRAISAL OF REAL ESTATE 86–87 (Appraisal Institute, 12th ed. 2001).

[139] McLaughlin, *supra* note 8, at 1897, 1945.

[140] Sackman, *supra* note 101, at § 12.05[1].

[141] Sackman, *supra* note 101, at §§ 13.01[17], 14.02[1][a].

[142] McLaughlin, *supra* note 8, at 1897, 1957.

[143] *Id*. at 1951.

[144] *Id*. at 1954 (recognizing this approach as a rational, albeit "somewhat blunt instrument"). "Accordingly, if a credible means of more precisely apportioning the award is available, it should be utilized."

easement is a contract and the parties may negotiate and agree to specific terms, including how proceeds will flow when the easement (or a portion thereof) is taken, sold, or otherwise conveyed and compensation is received. If sound and equitable, it is likely that such contractual provisions will be enforced.

Lastly, the parties to the conservation easement should consider the taxation of proceeds from condemnation. The IRS treats these proceeds as income (or loss) from a real estate transaction.[145] Parties to the transaction should consult with their own professional real estate, accounting, and legal providers on how best to handle such situations.

Nonlegal Issues: Political Defense Strategies

Aside from the legal restraints, a number of practical considerations are relevant to the condemnation of conservation easements. As discussed, except in a handful of states, relatively few legal impediments stand in the way of the transportation agency's authority to condemn a conservation easement. However, prior to doing so—even though the legal authority exists—the agency should consider the conservation values of the property identified for a transportation improvement. The following two examples illustrate these dynamics.

The first relates to the construction of the US-17 Wilmington bypass in coastal North Carolina.[146] In conjunction with right-of-way expansion, the NCDOT had identified property for condemnation in and around Futch Creek for stormwater retention purposes. The property, however, was subject to conservation easements held by the North Carolina Coastal Land Trust. Seeking to defend Futch Creek and its surrounding wetlands, representatives from the land trust sought to negotiate with the transportation agency to identify alternatives for the department's stormwater needs. When these efforts failed, the land trust brought a lawsuit challenging the agency's stormwater permit, not its underlying authority to condemn the easement. Ultimately, the parties settled the lawsuit after a suitable alternative location was identified, one which would avoid damaging Futch Creek and the property subject to the conservation easement.

A second example, involving the 1,400-acre Mayacamas Mountain Sanctuary in California, demonstrates how cost-benefit alternatives may be used to balance the objectives of a preexisting conservation easement with the objectives of the transportation agency.[147] The City of Santa Rosa sought to establish both a wastewater pipeline and a road that would traverse a property owned by the National Audubon Society and subject to a conservation easement held by the Sonoma County Agriculture and Open Space District.

The Society brought a lawsuit against the city claiming that it failed to follow proper environmental review procedures. During the litigation, the Society demonstrated how an alternative route for the pipeline and road would both save money and reduce the risk of environmental contamination. Thus, instead of challenging the condemnation on its face, in the words of Sonoma County's Andrea MacKenzie, "I think we turned an unfortunate situation into an agreement that provides major benefits to the public." This, along with an agreement by the City to fund various mitigation efforts, provided the basis for reaching a settlement.

IV. ESTABLISHING A CONSERVATION EASEMENT

This section is devoted to the pre-creation phase, which encompasses planning, drafting, and partnerships. Section VI covers the post-creation phase, including monitoring and long-term stewardship.

A. The Conservation Easement Plan

Prior to drafting and executing a conservation easement, significant planning, analysis, and negotiation must take place between the parties to ensure the conservation easement satisfies each party's interests and applicable legal requirements. The relevant parties will include the landowner (i.e., the grantor); the transportation agency; and the land trust, governmental agency, or other party who will act as holder (i.e., the grantee). No single step-by-step planning process or single conservation easement template is appropriate for all cases. However, there are several universal planning and drafting considerations that are important and that can be summarized into the following steps:

- Beginning the Process.
- Parties and Negotiation.
- Due Diligence.

Beginning the Process

Early in the project development process, a transportation agency may know or suspect that a conservation easement is going to be needed to take the project to completion. At this point, the specifics of a conservation easement document should also begin to be considered. It is important to first consider the purpose of the con-

[145] IRS Publication 544, which can be found at http://www.irs.gov/publications/p544/ch01.html#en_US_publink100072305, provides discussion of this topic. *See also* 26 IRC § 1033(g), and Kaufmann v. Commissioner, 134 T.C. No. 9 (2010), cited in IRS publication on Conservation Easement Audit Techniques Guide, available at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Conservation-Easement-Audit-Techniques-Guide.

[146] Jon Halpin, *Condemnation: Coming to an Easement Near You?: Tactics for Fighting a Growing Threat to Conserved Land* 16–17, LAND TRUST ALLIANCE (2008), http://webcache.googleusercontent.com/search?q=cache:gwTK3khaFH8J:www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-insurance/CDdocuments/condemnation-article.pdf/at_download/file+&cd=1&hl=en&ct=clnk&gl=us&client=safari.

[147] Robert H. Levin, *When Eminent Domain Comes Knocking* 20, no. 2, LAND TRUST ALLIANCE 6 (2001) (subscription needed to access document).

servation easement, i.e., environmental mitigation or beautification and the legal requirements of each. In addition to informing the language and mechanics of the easement document, the purpose of the easement will determine the type of appropriate holder, the level of access needed, and even the type of land to be protected.

The transportation agency needs to consider not only whether or not it is appropriate for the agency to be the easement holder, but also whether or not it has the capacity or the desire to be the holder of the easement. If not, an appropriate holder should be identified, such as a land trust or natural resources agency.

Beyond the needs of the transportation agency, project assessment also involves an information-gathering component, including visiting the prospective property. These visits can be used to observe the property and assess its conservation potential, identify potential constraints, establish relationships and share information with landowners, and chart a path forward.

During the site visits, critical issues may be uncovered. For example, it may be discovered that the landowner wishes to continue agricultural or silvicultural operations that could be incompatible with the conservation purposes. Conversely, if the purpose of the conservation easement is to protect farmland, ongoing agricultural practices would be desirable. Identifying and assessing these issues during the initial site visit can help lay the foundation for a compromise on the conservation easement's restrictions and reserved rights, as well as to identify points of fundamental misunderstanding or disagreement, which may derail the project entirely. In short, the site visit is a key step and should be conducted early on.

Of course, project assessment is an ongoing process, which interrelates with the other planning efforts discussed. Months into the planning process, perhaps during a subsequent site visit after preliminary negotiations have taken place, significant problems may become evident. For example, the prospective holder may realize that the property's monitoring and enforcement demands outstrip its capabilities, in which case a new holder, capable of handling necessary monitoring, will need to be identified. Also, if title defects are detected during the due diligence process, the entire effort may need to be fundamentally reevaluated. Whatever the case may be, to ensure the transportation agency's objectives and interests are preserved prior to executing a conservation easement, the project needs to be continuously and thoroughly vetted.

Key Considerations in Initial Planning

- Will a conservation easement be needed?
- What is the purpose of the conservation easement: to meet regulatory requirements or to satisfy other concerns and local needs?
- What type of land should be protected?
- Are there any significant constraints: title issues, incompatible land uses, preexisting easements?
- Is there an appropriate easement holder willing and able to monitor and enforce the conservation easement area?

Parties and Negotiations

Conservation easements offer benefits to the parties, but they also involve land-use restrictions and affirmative obligations, which may be controversial and require consensus. Often, once a prospective property has been identified, the acquiring party, likely the transportation agency or its agent, will seek an initial, coordinating meeting with the identified landowner.

At this meeting all parties are introduced and the goals and objectives of each are put on the table. For the landowner, this meeting affords an opportunity to learn more about conservation easements and the creation process. Landowners are often struck by the severity of the required development and use restrictions, especially if the conservation easement has to meet federal or state tax law requirements[148] or strict environmental mitigation standards.[149] It is important for the proponent of the conservation easement to understand fully the reasons a conservation easement is being proposed, how it will be applied, and the timing of the acquisition. If a transportation agency is seeking the easement for regulatory compliance, it is standard for the landowner to be paid for the sale of those property interests. While discussing money at the first meeting may not be appropriate, setting expectations is. Transportation agencies purchasing conservation easements directly will be able to purchase the conservation easement only at the value set by the appropriate appraisal or other government-determined method.

If the landowner does not wish to move forward after the initial meeting, no significant resources will have been expended at this point, though the agency may seek alternative authorized means of acquisition. However, if the landowner wishes to move forward, the

[148] As discussed throughout, landowners may receive tax benefits for donating a conservation easement. Land trusts and other conservation organizations are often tax exempt and must adhere to strict operating procedures to maintain that status. Both of these situations will dictate certain language and restrictions of the conservation easement.

[149] Easements for compensatory mitigation projects will require review by the Interagency Review Team as discussed previously and also access for construction, monitoring, and enforcement.

meeting will have successfully shaped general expectations and fostered an understanding of the conservation easement process. It is important to realize that, as with any negotiation, the conservation easement process may take many twists and turns. Some landowners may welcome the protections that a conservation easement affords. Others may be fundamentally opposed to government restrictions. Generally, agreement is reached somewhere between these two points.

Should the parties desire to move forward, negotiations typically follow on the terms of the conservation easement, the purchase price, and the responsibility for other associated costs. The parties, especially the landowner, should consult with their own legal and tax professionals early in the negotiation process before making any decisions that may have taxation or other repercussions.

How these negotiations will take place depends on a number of factors, including the identity of the parties and the nature of the conservation easement. However, the conservation plan technique used often by land trusts (in working with landowners) offers significant practical advantages.[150] A conservation plan describes, in nonlegal terms, the key land-use restrictions and affirmative obligations to be created by the conservation easement. Periodically updating the plan based on continuing negotiations and due diligence efforts helps the parties have a clear understanding of the conservation easement's effect. Also, utilizing an informal conservation easement plan in the course of negotiations, as opposed to a draft conservation easement deed, enables the parties to more efficiently negotiate revisions and propose changes.

Ultimately, the goal of the negotiations is to identify and reach agreement in principle on all of the significant elements of the conservation agreement. Once this has taken place, the parties will have obtained a measure of security in committing additional time and resources to the project during the due diligence and drafting stages.

Identifying Key Parties and Relevant Interests

- Who is acquiring the easement: the transportation agency or another party, such as the intended holder?
- What is the purpose and mission of the holder's organization?
- Is the landowner willing and interested?
- Are all landowners represented in the negotiation?
- What are the key concerns of each party?
- Are the expectations of the parties being accounted for and reasonable?

[150] BYERS & PONTE, *supra* note 4, at 52.

Due Diligence

Once the acquiring agency has decided that the property is suitable for its needs, the landowner has agreed in concept to a conservation easement, and an appropriate holder has been identified, the real work of due diligence begins. These efforts will vary given the nature of the property and the purpose of the conservation easement. However, some common due diligence efforts include title examination, appraisal, and baseline documentation.[151]

Title Examination.—While the landowners whose names are on the deed for a property are the primary party to the conservation easement, other parties may hold a legal interest in the property, such as mineral and logging rights, utility easements, access easements, and financial encumbrances. Judgments and liens on the property must be removed or subordinated prior to placement of the conservation easement.[152] Any interests predating the conservation easement will remain with the property unless properly severed or subordinated prior to recordation of the conservation easement. Thus, identifying all parties holding any interest in the property is essential.

The cost of a title report should be accounted for in the financial arrangements between the parties. The buyer (i.e., transportation agency) will most often bear the cost of obtaining the title opinion, but the landowner may be responsible for clearing title issues as necessary. The holder of the conservation easement or other interested party[153] may require title insurance prior to creation of the conservation easement. Title insurance will protect the investment of the transportation agency should any latent title defects become known and ownership challenged in the future.

Appraisal (Valuation).—In addition to obtaining information about the property's ownership, it is important to document the property's value by appraisal. Regardless of the means of acquisition, an appraisal is appropriate to document value and to set pricing expectations. When a conservation easement is being donated

[151] See Pinal County v. United States, 2010 U.S. Dist. LEXIS 92347 (U.S. Dist. Ariz. 2010) (County's highway easement survives eminent domain condemnation proceedings when contemplated in baseline document).

[152] "An easement will be terminated by the sale of the servient parcel pursuant to a prior mortgage." C. Timothy Lindstrom, *Land and Water Division: Hicks v. Dowd: The End of Perpetuity*, 8 WYO. LAW REV. 25, 42, n.87 (2008), hereinafter cited as "Lindstrom." (*citing* ELY & BRUCE, *supra* note 124, at §§ 2:2, 10:41). "Unless the holder of a mortgage existing at the time of conveyance of a conservation easement agrees to subordinate its interest to the easement, a future default in payment of the sum secured by the mortgage can result in a mortgage sale in which the property is sold free of the conservation easement. For this reason federal tax law requires that outstanding mortgages be subordinated to any conservation easement for which a tax deduction is sought." *Id*. at 42.

[153] Such as a regulatory agency in the case of compensatory mitigation.

and the landowner is seeking tax benefits, IRS regulations require appraisals and place conditions on how they must be conducted. Appraisals are useful in determining the appropriate sales price in a purchase/sale transaction. Because a conservation easement is a partial interest in real property and not a commonly transacted interest, valuation can be subjective and complicated. It is not uncommon for the parties to disagree on price.[154] As a result, appraisals may help inject a measure of objectivity into the negotiation process.

Baseline Documentation.—The final component of due diligence is the baseline report, which documents the condition of the property being protected and necessary monitoring and maintenance activities to maintain the conservation value. As with appraisals, these reports are required for easement donations when tax benefits are being sought. The holder of the conservation easement often requires baseline documentation regardless of the means of acquisition. The holder should be consulted in preparation of the baseline document as the holder may have specific format or content requirements. It is important to note that baseline reports are often prepared prior to acquisition, and the time and cost of such should be factored in to the process.

Investing in Knowledge—Due Diligence

- Other than the grantor (landowner), who else has an interest in this land?
- Are those interests incompatible with the conservation purpose?
- Can those interests be removed or accommodated?
- What is the conservation easement worth?
- What is the fair market value of the conservation easement?
- What is the difference in the value of the property before and after the easement?

B. Drafting

Ultimately, a conservation easement must be translated into a formal, legal document. Though the landowner and acquiring party may have been working on their own behalf to this point, the drafting of the actual document and review of the document by the other party should be done by attorneys specializing in the area.

The conservation easement is generally drafted by whichever party is leading the transaction, by the party governing the transaction, or both. For example, in the development of a compensatory wetland bank, the sponsor (or party acquiring the easement and developing the project) will propose the conservation easement language (often based on a template established by the overseeing regulatory agency). When a land trust purchases a conservation easement (rather than serving as the holder), it will handle drafting responsibilities. In both of these examples, it is not uncommon for the parties to use templates tailored to their specific interests or to meet regulatory requirements. The templates, however, should allow flexibility in drafting to best reflect the negotiations and unique circumstances of an individual transaction and specific property.

The conservation easement is the legal document that will govern not only how the property should be protected and used, but also how each of the parties will interact. Remembering that the relationships created by the conservation easement are usually intended to exist in perpetuity will help to focus the drafters. Though parties may differ in their understanding of the project, this is the time to become as specific as possible in clarifying needs and expectations. While one party may want general language to allow flexibility, the other may want rigid language to avoid misinterpretation. A balanced approach must be applied.[155]

C. Partnerships

Conservation easements always involve at least two parties, the landowner and the holder, as discussed in the introductory sections. However, with the rise in the use of conservation easements and the role of regulations in the development of land, innovative partnerships beyond the two parties have become useful. For transportation agencies, such partnerships may entail the involvement of a land trust or other conservation organization to acquire and hold the easement along with the agency, or simply employing the conservation organization in the technical components of the acquisition.

Creation and Acquisition Partnerships

Since transportation agencies are not ordinarily in the business of land protection, the need to create a conservation easement provides a unique opportunity for agencies and land trusts to work together. Sometimes a transportation agency will identify the need to establish a conservation easement, but will lack the authority or the desire to act as the holder and perform the required monitoring and enforcement duties. In these situations, the transportation agency (or some other governmental entity) may provide funding for the

[154] *E.g.* James Boyd, Kathryn Caballero & R. David Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 234 (2000) ("Because there is no conventional market for easements, the usual procedure for valuing an asset—simple observation of an equilibrium market price resulting from a large volume of transactions—cannot be followed.").

[155] An example of this might be the challenge of drafting easement language that both limits the presence of invasive plant species and prohibits the use of chemical herbicides in the easement area. In reality, the first provision may make the second impossible. Drafters should keep an eye out for such conflicting language and fix it from the beginning with the input of appropriate parties. Such care will avoid problems in the future.

easement acquisition, monitoring, and maintenance directly to the land trust. The source of the funding may require specific easement terms as well as management conditions that should be considered throughout the acquisition and drafting process. The Rodden Ranch case study illustrates a mutually beneficial partnership between Caltrans and the Trust for Public Land.

Case Study: Caltrans Helps Fund Conservation Easement for Rodden Ranch

Catlrans recently awarded $350,000 to help the Trust for Public Land, a renowned national land trust, purchase a conservation easement for Rodden Ranch. The 6,198-acre property, located near Copperopolis, California, possesses blue oak woodland, extensive wildlife corridor open space, and grazing areas.

In addition to the funding from Caltrans, a million-dollar grant was awarded by the Sierra Nevada Conservancy. Efforts to attain all necessary funding and complete the acquisition are ongoing.[156]

In addition to partnerships designed to secure funding, occasionally land trusts may partner with transportation agencies when ultimately the latter will act as the holder. The impetus for these types of partnerships stems from the legal, bureaucratic, and administrative delays that may be associated with governmental acquisition of conservation easements.

Case Study: 770,000 Acres Preserved in North Carolina

Between 2003 and 2005, the North Carolina Ecosystem Enhancement Program (NCEEP) teamed with the Conservation Trust for North Carolina and its regional land trusts to locate, acquire, and protect large preservation parcels throughout North Carolina. The effort was largely funded by NCDOT to meet a backlog of compensatory mitigation needs. Each acquisition was secured either by a fee simple purchase or a perpetual conservation easement.

While preservation is not the preferred means of compensatory mitigation, this large-scale preservation effort allowed transportation projects to move forward. Subsequent NCEEP mitigation projects have been predominantly restoration based.

The North Carolina case study describes one such extraordinary partnership between a state compensatory mitigation program that is largely funded by the state department of transportation and the state's private land trust community.[157] This was an example of a situation where quick action was needed to meet an immediate need and the private land trust community was seen as nimble and responsive.[158] The state holds the vast majority of the conservation easements that have been acquired through the partnership.[159] Partnerships such as this one should be structured pursuant to a written agreement to ensure that both parties' interests are honored and that public funds are used with care and transparency.

Technical Assistance Partnerships

As discussed and demonstrated throughout this digest, conservation easements can be complicated to create and to subsequently monitor and enforce. For these reasons, transportation agencies may best accomplish conservation goals by contracting with private conservation professionals for technical assistance in the initial process and for the ongoing obligations of monitoring and enforcing conservation easements. To begin, the Rocky Pee Dee Farms example provides a specific illustration of North Carolina's EEP/DOT/Land Trust partnership.

Case Study: Rocky Pee Dee Farms, North Carolina—Maximizing the Property's Conservation Easement Potential

Rocky Pee Dee Farms, located in Anson County, North Carolina, and encompassing more than 600 acres, illustrates a unique partnering arrangement between a federal agency, a state agency, and a land trust. The federal agency, the United States Department of Agriculture through its Farm and Ranch Lands Protection Program, purchased a conservation easement covering the uplands of the property. The state agency, NCDOT, purchased a conservation easement along a stream corridor for wetland mitigation purposes. A conservation easement covering the remainder of the property was then donated to the Land Trust for Central North Carolina.

A single conservation easement was used to effectuate all three of the above purposes. This effort required extensive communication and collaboration between all three entities and the landowner. Also, to help facilitate the project, local real estate professional Kevin Redding offered assistance with the transaction. He noted that "[i]t's a tremendous accomplishment for all the parties involved to be able to come together in a way that secures the permanent protection of this farm. It's easy to criticize the bureaucracy of the state and federal governments, but this is a case of both being flexible and willing to work towards a common goal."[160]

[156] *Rodden Ranch Moves Closer to Conservation Easement*, http://myvalleysprings.com/pdfs/new2011/Rodden%20Ranch%20moves%20closer%20to%20conservation%20easement_CE_06_07_11.pdf, and phone correspondence between author and TPL on May 30, 2012.

[157] *Protecting North Carolina's Land and Waterways*, http://www.nceep.net/pages/pdfs/EEPbooklet.pdf.

[158] Press Release, Conservation Trust of North Carolina (May 10, 2006), http://www.nceep.net/news/releases/5_10_06_CTNC_eep_report.pdf.

[159] North Carolina has a legislatively created Conservation Easement Program (N.C. Statutes Article 16, § 113A-230) that provides for the holding, monitoring, and maintenance of conservation easements through the state's Stewardship Program. http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_113A/Article_16.pdf.

[160] *Rocky Pee Dee Farms*, http://landtrustcnc.org/2011/

Land trusts and other conservation professionals are often located in the communities where the land transaction will take place and typically are accessible and interested in projects that will facilitate their mission. Because the conservation easement creation process involves considerable interaction with landowners and unique issues may arise for each property, government agencies may prefer to contract with third-party organizations for transactional services. Professional services may also be the most thorough and efficient means to assess the baseline conditions of the property, such as the existence of wetlands and protected species, and to provide ongoing monitoring of these resources.

V. ELEMENTS OF A CONSERVATION EASEMENT

Inevitably, the written terms of the easement will be the first considered if a dispute arises among the parties subsequent to the easement's execution or when the property is transferred. Transportation agency personnel working in land acquisition and project implementation should be familiar with the elements of the easement document in order to be able to assist in both drafting and interpretation.

Conservation easements generally take one of two forms, either an indenture, i.e., a contract governing land use, or a deed, i.e., the traditional mode of creating and transferring a real property interest.[161] The specific legal form to be used should be determined on a case-by-case basis, while, as always, ensuring compliance with state property law generally and the state conservation easement enabling legislation specifically. For the purpose of this section, the term "conservation easement" means the document itself, not the rights and obligations created.

According to "The Conservation Easement Drafting Guide" contained in *The Conservation Easement Handbook*, a widely recognized authority, there are several essential elements to a conservation easement.[162] They are as follows:

1. Form of Conveyance.
2. Purpose and Recitals.
3. Land Use Provisions: Restrictions, Reserved Rights, and Holder's Affirmative Rights.
4. Administrative Provisions and Legal Boilerplate.
5. Signatures of Necessary Parties.
6. Exhibits.

Each of these elements is discussed below. In some situations, additional elements may be necessary for one reason or another; however, those listed above are the most common and fundamental, and they provide for a good understanding of how conservation easements work. A model conservation easement with the specific elements highlighted is included for reference.[163] While many land trusts and conservation programs have standard conservation easement templates, each transaction should be considered separate and unique and the easement should be adapted as needed.

A. Form of Conveyance

The Form of Conveyance element includes several distinct, important, legal requirements, including identification of the parties and property, title covenants, and words of conveyance. Almost always, the landowner (or grantor) and the holder (or grantee) are the principal parties, but third parties, including those with enforcement rights like co-holders or back-up holders, should be made parties to the conservation easement as the circumstances dictate. Additionally, any party with an ownership interest in the property that has not been extinguished or subordinated to the conservation easement may appropriately be a party to the agreement. These parties may include, for example, co-tenants or mortgagees. Where appropriate, the qualifications of the holder as an appropriate entity for tax purposes should be expressed. Elsewhere in the document it will be noted that any subsequent holder must also be a qualified organization.[164] In the example below, the Maryland Environmental Trust is a grantee, but space is provided in the document to name additional grantees.

Example: The Parties

This deed of conservation easement ("Conservation Easement") made this ____ day of _____ 20__, by and between _____ and _____, having an address at _____ (collectively, "Grantors") and the MARYLAND ENVIRONMENTAL TRUST, having an address at 100 Community Place, First Floor, Crownsville, Maryland 21032 ("MET") and _____, a Maryland Nonprofit Corporation, _____ (collectively, "Grantees").

Aside from identifying the parties, the conservation easement should include a clear, detailed description of the property over which the conservation easement is created. Often the legal description of the property is made by an exhibit and cross referenced early in the conservation easement itself (as in the example below). Should a conservation easement be created on only part

rocky-pee-dee-farms/.

[161] BYERS & PONTE, *supra* note 4, at 290.

[162] BYERS & PONTE, *supra* note 4. This section incorporates this reference extensively. Please consult the Handbook directly for specific drafting needs.

[163] The Model Easement used is from the Maryland Environmental Trust, which is a statewide conservation program. More information can be found at http://www.dnr.state.md.us/met/resources.asp. This model is used to illustrate the key provisions of most conservations easements and is not representative of what lawfully is required in any given circumstance.

[164] I.R.C. § 170(h)(3); Treas. Reg. § 1.170A-14 (26 C.F.R. 1.170A-14(c)(1), (2)).

of the property, or with respect only to certain buildings, the legal description should be carefully drafted to that effect. This may include referencing and including as exhibits surveys performed specifically for delimiting the scope of the conservation easement.

Example: The Property

Grantors own in fee simple ____ acres, more or less, of certain real property in _____ County Maryland, and more particularly described in Exhibit A attached hereto, which was conveyed to the Grantors by _____ by Deed dated _____ and recorded among the Land Records of _____ County, Maryland in Liber ___, Folio (the "Property"). The address of the Property is _____ . The Property is identified on tax map ____, parcel ____.

The property consists of ____acres of [agricultural land, woodlands, open fields, etc….]; a portion of the [stream or river]; shoreline on the Chesapeake Bay, ….

Having established the parties and property, the conservation easement must also express title covenants and words of conveyance. This language will specifically describe the quality of the interest being transferred and who bears the risk for any errors in title. Warranty deeds and quit claim deeds are two examples of title covenants with different risk-shifting characteristics. As for words of conveyance, this describes the reason for the conveyance to the holder—whether it is being sold, donated, or granted as a condition of development approval. Additionally, the terms of the transaction, for example, the price or the duration, will be set forth in this part of the conservation easement.

As demonstrated throughout this section and the digest, how a conservation easement is used triggers various substantive and procedural requirements imposed by law that must be included in the conservation easement. As a result, it is common for conservation easements to expressly mention and cross reference the legal basis for the conservation easement transaction, be it for federal income tax deduction purposes allowed by Internal Revenue Code (IRC) Section 170(h) or otherwise.

Example: What Is Being Granted and to Whom

In recognition of the Conservation Attributes defined below, Grantors intend hereby to grant a perpetual Conservation Easement over the Property, thereby restricting and limiting the use of the Property as provided in this Conservation Easement for the purposes set forth below. Grantors thus intend to make a charitable gift of a qualified conversion contribution in the form of this Conservation Easement with respect to the Property to further the preservation and conservation of the Property and the goals of Grantees.

Grantees intend hereby to accept this Conservation Easement and to hold such Conservation Easement exclusively for conservation purposes, as defined in Section 170(h)(4)(A) of the IRC. Grantees are able to monitor and enforce such conservation easement.

B. Purpose and Recitals

Well-drafted conservation easements include purpose statements and recital clauses (commonly referred to as "whereas clauses") to establish and emphasize legal sufficiency and the intent of the parties to the underlying transaction. As in the example below, it is common for the purpose statement to summarize the general effect of the conservation easement by laying out the prohibited and permitted uses of the property. Particularly important issues from the perspective of the parties may be included here as well, for example, monitoring and enforcement mechanisms important to the holder. These restrictions and rights are more clearly set forth in subsequent elements of the conservation easement, but the purpose statement provides a convenient orientation for those examining or interpreting the conservation easement at a later date. Many conservation easements may contain several recital clauses, whereas the Maryland example contains only the single paragraph. The easement template provides a note to remind the drafter to adapt the purpose statement for the specific transaction.

Example: Conservation Purpose Declaration

ARTICLE II. CONSERVATION PURPOSE

Pursuant to and in compliance with the requirements of Section 170(h)(4)(A) of the IRC and Section 1.170A-14(d) of the Treasury Regulations, the conservation of the Property will protect the following conservation attributes, as further set forth in Exhibit B: (1) the preservation of land areas for outdoor recreation by or the education of the general public; (2) the protection of relatively natural habitat of fish, wildlife or plants, or similar ecosystems; (3) the preservation of open space for the scenic enjoyment of the general public and which yields a significant benefit, or pursuant to a clearly delineated Federal, State, or local governmental conservation policy and which yields a significant public benefit; and (4) the preservation of historically important land areas or certified historic structures ("Conservation Attributes").

The recitals tend to provide more specific background on the conservation easement and may include a cross reference to the state's conservation easement enabling legislation along with an account of *how* it complies with those requirements. For example, in a state like Massachusetts, which requires conservation easements held by local governments to be approved by the state's Secretary of Environmental Affairs, satisfaction of this requirement may be indicated in the recitals.[165] As in the example above, the recitals allow the drafter to clearly demonstrate how applicable tax regulations are satisfied.

C. Land-Use Provisions: Restrictions, Reserved Rights, and Holder's Affirmative Rights

This element represents the heart of a conservation easement because it establishes the land-use restrictions on the property and specifies the rights reserved to the grantor. How these provisions are drafted and enforced depends on a variety of factors, including state enabling legislation requirements, other legal requirements (such as tax law), and negotiations between the grantor, grantee, and third parties during the predrafting phase. It is not uncommon for this part of a conservation easement to receive the most focus as the document circulates between parties. In this section some common issues are presented, but the discussion is by no means exhaustive. Each transaction presents its own unique issues. "The Conservation Easement Drafting Guide" contained in *The Conservation Easement Handbook* identifies several potential prohibitions:

1. Alteration of the land surface.
2. Alterations to existing or historic buildings.
3. Commercial or industrial uses.
4. Mineral development.
5. New and existing buildings, structures, roads, and other improvements.
6. Ponds and streams.
7. Soil and water.
8. Subdivision and development.
9. Trees, shrubs, and other vegetation.
10. Waste dumps.
11. Wetlands.
12. Wildlife and wildlife habitat.[166]

While most of these restrictions apply to activities within the easement area, such as no clearing, building, or mining, restrictions may extend to other activities not readily foreseeable as interfering with a conservation easement. For example, the easement language may prevent subdivision of the easement (see the example "Prohibition of Subdivision"). The practical purpose of this is to manage the burdens of access and oversight upon the holder. For the landowner, this restriction may inhibit future development of any remaining property outside of the easement area but contiguous to it. Similarly, the easement language may extinguish development rights within the protected area. This may prohibit the current or future owner of the burdened property from taking part in local government programs with regard to density and development. It is important that the parties understand these restrictions and are comfortable with their application.

Example: Prohibition of Subdivision

H. Subdivision. The division, partition, subdivision, or boundary line adjustment of the Property, including the lease of any portion less than one hundred percent (100%) of the Property for a term in excess of twenty (20) years ("Subdivision," or "Subdivided" as the case may be), is prohibited. Grantees, however, may approve the Subdivision of the Property for reasons which Grantees determine, in their sole discretion, are sufficiently extraordinary to justify an exception to the prohibition, in accordance with the provisions of Article V below.

To accomplish the restrictions intended by the parties, which also form the basis of the negotiated agreement, it is important to draft the conservation easement with careful attention to detail. Certain drafting techniques are helpful when it comes to clearly defining restricted uses. Including all restrictions on activity in one section of the agreement is useful. Beginning with the most general and moving to the most specific is also helpful. For example, with regard to a conservation easement placed on a historic home, a general restriction may be that no changes shall be made to the existing appearance. Then, more specifically, it may be stated that no paint color other than white may be used on the exterior. Where certain restrictions apply in some areas of the property but not others, the conservation easement should establish distinct areas with different requirements made applicable to each. A map

[165] MASS GEN. LAWS ch. 184, § 32.

[166] BYERS & PONTE, *supra* note 4, at 294.

incorporated as an exhibit to the agreement would be helpful in clarifying such provisions.

While the restrictions placed upon land by the conservation easement may be extensive, it is important to note that most easements contain a provision that any uses not specifically prohibited are allowable so long as they do not interfere with the conservation purpose. A reserved uses clause is shown below. Additionally, the grantor may retain certain compatible uses even within lands subject to the easement, such as the maintenance of existing structures and continuation of hunting, fishing, and agricultural activities. Exhibits such as maps showing existing structures and land-use practices, as well as the baseline documentation, are useful to establish the grantor's reserved uses.

Example: Reserved Rights

P. Reserved Rights Exercised to Minimize Damage. All rights reserved by Grantors or activities not prohibited by the Conservation Attributes identified above and water quality, air quality, land/soil stability and productivity, wildlife habitat, scenic and cultural values, and the natural topographic and open space character of the Property.

Notification provisions are helpful in maintaining the relationship between the grantor and grantee (or holder). One such provision with regard to permitted uses may require the grantor to notify the holder of all subsequent development activities on the properties even if they are permitted by the conservation easement. This notification is required for conservation easements used for federal income tax deductions,[167] but also may be included more generally at the insistence of the holder, especially if the holder is a nonprofit land trust.

Oversight of the restrictions and reserved rights established by a conservation easement is necessary to maintain the value of the transaction. Thus, the easement should contain provisions allowing and describing monitoring, maintenance, and enforcement. As with the discussion of restrictions and reserved rights, the nature and extent of the monitoring and enforcement provisions to be included depend on a variety of case-specific factors. However, some of the most important and common issues and techniques to be spelled out in the conservation easement are discussed next.

In order to carry out its role, the holder must have access to the property and the express right to carry out monitoring activities. Monitoring is required for conservation easements used for federal income tax deductions[168] and by some enabling statutes.[169] These provisions often specify reasonable times and means of accessing the property, as well as for providing notice to the grantor that the holder will be entering the property. For conservation easements involving complicated, sensitive, environmental management issues, the monitoring processes outlined or referenced in the conservation easement can be quite detailed and extensive. For example, for conservation easements predicated on habitat and wildlife conservation, monitoring may take place over the course of several days or even entire seasons and include very specific quantitative measurements of flora and fauna.

Example: Access Provision

A. Grantees and their employees and agents shall have the right to enter the Property at reasonable times for the purpose of inspecting and surveying the Property to determine whether Grantors are complying with the Provisions of this Conservation Easement. Grantees shall provide prior notice to Grantors at their last known address, unless Grantees determine that immediate entry is required to prevent, terminate, or mitigate a suspected or actual violation of this Conservation Easement which poses a serious or potentially permanent threat to Conservation Attributes, in which latter case prior reasonable notice is not required.

The example above allows the grantee to enter the property without notice where an exigent threat to the conservation easement is evident.

Enforcement terms should be included in the conservation easement. Some agreements include only very general enforcement provisions such as enabling the holder to enforce the conservation easement in a court of law or equity and may express a preference for specific performance as the preferred remedy for breach of the agreement. Other documents may detail a process for the resolution of disputes prior to enforcement action being taken. Such an approach may include the holder's obligation to notify the property owner of alleged violations and allow for a period to cure or challenge these claims. Also, forms of alternative dispute resolution such as mediation or arbitration may be specified. Finally, the conservation easement may be structured to allow for the recovery of costs should the holder find it necessary to pursue judicial remedies. The language from the Maryland agreement is a good example of a comprehensive enforcement provision.

[167] Treas. Reg. § 1.170A-14 (g)(5), 26 C.F.R. § 1.170A-14.

[168] *Id*.

[169] *See, e.g.*, ME. REV. STAT. ANN. tit. 33, § 477-A(3), (4) (requiring holders to monitor at least every 3 years and prepare reports).

Example: Grantors' Rights of Enforcement

B. Upon any breach of a Provision of this Conservation Easement by Grantors, Grantees may institute suit to enjoin any such breach or enforce any Provision by temporary, ex parte and/or permanent injunction, either prohibitive or mandatory, including a temporary restraining order, whether by *in rem*, *quasi in rem* or *in personam* jurisdiction; and require that the Property be restored promptly to the condition required by this Conservation Easement at the expense of Grantors. Before instituting such suit, Grantees shall give notice to Grantors and provide a reasonable time for cure; provided, however, that Grantees need not provide such notice and cure period if Grantees determine that immediate action is required to prevent, terminate or mitigate a suspected or actual breach of the Conservation Easement.

Grantees' remedies shall be cumulative and shall be in addtion to all appropriate legal proceedings and any other rights and remedies available to Grantees at law or equity. If Grantors are found to have breached any of Grantors' obligations under this Conservation Easement, Grantors shall reimburse Grantees for any costs or expenses incurred by Grantees, including court costs and reasonable attorney's fees.

One area of frequent misunderstanding in the negotiation and drafting of conservation easements is the issue of public access. In most instances where an easement is being placed on private property, public access to the property will not be allowed. On the other hand, large parklands purchased with transportation enhancement money, for example, may be required to have public access and use. In either situation, the conservation easement should specifically address the issue.

Lastly, another provision that is helpful is to expressly state which party is responsible for paying the property taxes and other expenses usually associated with property ownership not affected by the conservation easement. Ordinarily, this responsibility will remain with the grantor. The Maryland easement contains a general clause that addresses taxes.

Examples: Grantor Remains Responsible for Owner Obligations

C. Real Property Taxes. Except to the extent provided for by State or local law, nothing in this Conservation Easement shall relieve Grantors of the obligation to pay taxes in connection with the ownership or transfer of the Property.

D. Administrative Items—Regulatory Compliance and Changed Circumstances

A conservation easement should be drafted to effectuate its intended purpose and avoid, to the greatest extent possible, future misunderstandings and conflicts. This means, first, specifically addressing the legal requirements under state, federal, and sometimes even local law in addition to including provisions common to contracts and real property transactions in general. Second, this calls for establishing administrative mechanisms to handle changed and unforeseen circumstances down the road. Some notable examples from both of these categories are presented here.

As for legal requirements, compliance with state enabling legislation comes first and foremost. Though conservation easements are often used to secure a federal benefit (e.g., income and estate tax reductions) or requirement (e.g., wetlands mitigation under the CLA), fundamentally, conservation easements are a product of state law and must meet all pertinent threshold requirements.

A well-drafted conservation easement includes provisions that expressly reference the state's enabling statute and all necessary provisions to indicate compliance therewith. For example, Montana requires all conservation easements to be sent to the Department of Revenue and Department of Administration for publication;[170] therefore, a conservation easement created in Montana would likely indicate compliance with this provision, and all other state statutory requirements. Finally, in addition to the requirements pertaining to conservation easements in particular, those state requirements and techniques applicable to creation and transfer of real property interests *in general* need to be considered and included in the conservation easement as necessary. Examples of these boilerplate provisions often include severability clauses and formalities regarding holder acceptance and recordation.

The language necessary to comply with the regulatory programs that give rise to a particular conservation easement may also be addressed. For example, to qualify for tax benefits, federal regulations require the holder must be a "qualified organization,"[171] so the conservation easement used for these purposes needs to address how these requirements are satisfied. The Maryland Environmental Trust easement used as an example contains explicit language addressing the program that is acquiring the easement as well as the tax status of the land trust.

[170] MONT. CODE. ANN. § 76-6-212.

[171] I.R.C. § 170(h)(3); Treas. Reg. § 1.170A-14 (26 C.F.R. 1.170A-14(c)(1), (2)).

Example: Specific Regulatory Purpose Language

Maryland Environmental Trust, created pursuant to Subtitle 2 of Title 3 of the Natural Resources Article, Annotated Code of Maryland, is charitable in nature. It was established to conserve, improve, stimulate, and perpetuate the aesthetic, natural, health and welfare, scenic and cultural qualities of the environment, including, but not limited to, land, water, air, wildlife, scenic qualities, open spaces, buildings or any interest therein, and other appurtenances pertaining in any way to the State. MET is a "qualified organization" within the meaning of Section 170(h)(3) of the United States Internal Revenue Code ("IRC").

_____Land Trust, Inc. is a nonprofit tax exempt organization within the meaning of Section 501(c)(3) of the (IRC), established for _____, and is a "qualified organization" within the meaning of Section 170(h)(3) of the IRC.

Regulatory oversight agencies for conservation easements protecting compensatory mitigation projects—for both aquatic resources and protected habitat—generally have very strict template language. In fact the template conservation easement for California projects includes the following statement at the top of the first page:[172]

Please Note:

The following Conservation Easement Deed is provided by the multi-agency Project Delivery Team as a standardized template document for Mitigation and Conservation Banks in California. Any modifications to this template shall be identified using tracked changes or other electronic comparison and explained in a memorandum.

(Template Version Date: March 2010)

The same California document includes three separate recital clauses in the template in order to identify and describe the regulatory agencies and appropriate laws governing the conservation and aquatic resources property—the California Department of Fish and Game, the U.S. Fish and Wildlife Service, the EPA, and the ACOE (see below). These provisions provide the legal backbone for the conservation easement's purpose in providing compensatory mitigation, which is for both endangered species (paragraphs C and D) and aquatic resources (paragraph E).

C. The California Department of Fish and Game ("CDFG") has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of these species pursuant to California Fish and Game Code Section 1802. CDFG is authorized to hold easements for these purposes pursuant to California Civil Code Section 815.3, Fish and Game Code Section 1348, and other provisions of California law.

D. The United States Fish and Wildlife Service (the "USFWS"), an agency within the United States Department of Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the United States pursuant to the federal Endangered Species Act, 16 U.S.C. Section 1531, *et seq*., the Fish and Wildlife Coordination Act, 16 U.S.C. Sections 661-66c, the Fish and Wildlife Act of 1956, 16 U.S.C. section 742(f), *et seq*., and other provisions of federal law.

E. *[Remove/modify this recital as appropriate when USEPA or USACE is not a signatory to the BEI or CBEI*] The U.S. Environmental Protection Agency ("USEPA") and U.S. Army Corps of Engineers ("USACE") have jurisdiction over waters of the United States pursuant to the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*

Aside from compliance with all applicable laws, a challenge in drafting conservation easements is accounting for the long-term (often intended to be perpetual) nature of the agreements. Beyond the current parties, the drafter must consider the potential for transfer to future entities (by any and all parties) and changed circumstances of the landscape. For example, consider a conservation easement created decades ago to preserve hundreds of acres of farmland. Today, transportation planners have identified that a part of the property may be in the intended right-of-way for the preferred route for a new highway. Short of condemning the property and the conservation easement, can the conservation easement be amended to accommodate the changed land use? Assuming that the conservation easement currently prohibits highways (or transportation infrastructure more generally), it may be *amendable* to facilitate the use, provided the drafters included language allowing for such changes. The California easement contains the following, relatively straightforward, amendment provision:

[172] This easement was found in the U.S. Army Corps of Engineers Regulatory In lieu fee and Bank Information Tracking System (RIBITS) database, which provides extensive information on both project development resources and project tracking in each of the 38 USACE districts throughout the country. http://www.lrc.usace.army.mil/Missions/Regulatory/RIBITS.aspx (Accessed May 27, 2012).

> 13. Amendment.
>
> This conservation easement may be amended only by mutual written agreement of Grantor and Grantee and written approval of the Signatory Agencies, which approval shall not be unreasonably withheld or deleted. Any such amendment shall be consistent with the purposes of this Conservation Easement and California law governing conservation easements, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of the county in which the Bank Property is located, and Grantee shall promptly provide a conformed copy of the recorded amendment to the Grantor and the Signatory Agencies.

Conservation easements are commonly drafted to allow for amendments, subject to various conditions and requirements. Amendments are typically tied to unanimous, discretionary consent amongst the holder, grantor, and applicable third parties.

In other cases, conservation easements are drafted to limit the discretion over whether or not consent may be given. Commonly, conservation easements include a provision acknowledging that mere economic hardship, for example, unforeseen economic opportunities, may not be the basis for amendment. Also, a conservation easement created for federal income tax purposes may contain a provision prohibiting any amendment frustrating the qualifying conservation purpose. Such a limitation may forestall changes to the easement to accommodate the highway example above if one of the conservation purposes is viewshed preservation and, for example, the planned highway would be visible from a nearby protected park. To help resolve these conflicts, when an amendment is sought, the drafter may state specific conditions within the easement document that would violate the conservation purpose, thus prohibiting amendment. However, given the variety of conceivable grounds for amendment, it is hard to address every situation that arises. As a result, whether authority exists to amend the conservation easement often comes down to party agreement.

Another aspect of administration concerns termination. As has been discussed, conservation easements may be terminated in a number of ways, including eminent domain and purchase in lieu of condemnation.[173] The conservation easement can be structured to clarify the rights and obligations of the parties should the need for termination arise. For example, with respect to the just compensation proceeds, the conservation easement can specify the manner in which these funds will be apportioned amongst the parties in the event the property and easement are subsequently condemned. In fact, for conservation easements used for federal tax purposes, the holder must have the right to receive proceeds in proportion to its interest.[174] The following provisions from the Maryland easement provide an example of both condemnation (paragraph B) and valuation language (paragraph C):

> B. Condemnation. This Conservation Easement may be terminated through condemnation proceedings if condemnation of a part or all of the Property by a public authority renders it impossible or impractical to fulfill the Conservation Purpose. Grantees may, at their option, join in the negotiations or proceedings at any time to object to the taking and to recover the full value of the interests in the property subject to the taking and all incidental or direct damages resulting from the taking. All expenses reasonably incurred by the parties to this Conservation Easement in connection with such taking shall be paid out of the recovered proceeds.
>
> C. Proceeds. The granting of this Conservation Easement gives rise to a property right, immediately vested in Grantees, with a fair market value at least equal to the ratio of the value of this Conservation Easement on the effective date of this grant to the value of the Property without deduction for the value of the Conservation Easement on the effective date of this grant.
>
> If this Conservation Easement is terminated in whole or in part, whether by judicial extinguishment or condemnation, Grantees shall be entitled to a percentage of the gross sale proceeds or condemnation award equal to the greater of: (i) the percentage required pursuant to Treasury Regulation § 1.170A-14(g)(6); or (ii) the proportion that the value of this Conservation Easement at the time of extinguishment or condemnation bears to the then value of the Property Easement at the time of extinguishment or condemnation bears to the then value of the Property as a whole. Such proceeds received by Grantees shall be used by Grantees in a manner consistent with the Conservation Purpose of the original contribution. This paragraph is subject to any applicable Maryland or Federal statues, including but not limited to Section 12-104(g) of Real Property Article, Ann. Code of Maryland.

This example allows for the easement to be terminated by condemnation and specifies how the property will be valued and how the proceeds will be allocated. Including such language in the agreement is helpful to avoid conflict in the event the easement is terminated.

E. Signatures of Necessary Parties

As discussed in the Forms of Conveyance subsection, a number of entities may be made party to a conservation easement. As such, depending on the requirements of state law, some or all of these entities will be required to memorialize by signature their acceptance of the conservation easement's terms. It is helpful to keep this requirement in mind as a separate element during the drafting process to ensure that all necessary and

[173] *E.g.* S.C. CODE ANN. § 27-8-80 ("A person or entity empowered to condemn may condemn a conservation easement for other public purposes pursuant to applicable provisions of the 1976 Code or federal law.").

[174] Treas. Reg. § 1.170A-14(g)(6)(ii); 26 C.F.R. § 1.170A-14(g)(6)(ii).

preferred parties are included in the drafting process and the ultimate agreement. As noted previously, the conservation easement process is a real property transaction governed by state laws. The form of signature and necessary notary blocks should follow the form of the jurisdiction where the property is located. The conservation easement should then be recorded in the normal manner for land transactions in the jurisdiction.

F. Exhibits

As noted, some components of the agreement cannot be fully described within the conservation easement document itself and will be incorporated by reference as exhibits. Such exhibits may include legal descriptions of the property, descriptions of the property for the purposes of illustrating the terms of the conservation easement, baseline documentation for monitoring and enforcement, and mortgage subordination.

A legal description identifies with certainty the boundaries of the subject area as determined by a land survey and may take the form of a metes and bounds description or reference a drawing with land coordinates labeled. In many instances a recent survey of the property may be available and sufficient for the transaction. More often, the property's existing surveys are old or outdated and the parties should consider commissioning a new survey to ensure accuracy. All surveys should clearly indicate any existing easements and rights-of-way on the property, including if any are granted to the holder in virtue of the conservation easement. Clear property descriptions are a good way to avoid future conflicts.

In addition to formal surveys, conservation easements frequently include one or more sketch maps to help illustrate the restrictions and rights created by the conservation easement. Sketch maps often indicate notable features on the property, such as wetlands or endangered species habitat, while showing the location of existing structures and activities permitted as reserved rights. Also, where the conservation easement establishes different restrictions for different parts of the property (see Section V.C, Land Use Provisions: Restrictions, Reserved Rights, and Holder's Affirmative Rights), the sketch map can be used to show where these different regions are located. If the legal description is included as a survey rather than a recitation of metes and bounds, these items may be included on the survey. Providing for clear and accurate sketch maps helps all parties and successors in interest have a clear understanding of the conservation easement's effect on the property and avoid conflicting interpretations after execution.

As previously discussed, conservation easement holders must monitor and enforce the easement terms. Baseline documentation tailored to each property provides the framework for these activities. Baseline documentation is required by federal tax regulations,[175] and even easements not used for tax purposes frequently incorporate this requirement. These reports describe, in both quantitative and qualitative terms, the condition of the property when the conservation easement was created.

Holders rely on the baseline documentation to illustrate the various obligations and restrictions created by the conservation easement. These detailed provisions not only help guide the day-to-day activities of property owners, but also the long-term monitoring and enforcement actions of holders. As for monitoring, the baseline documentation provides direction as to what conditions of the property need to be periodically observed and documented. Easement violations will be shown by comparing the observed condition of or activities on the property to the provisions of the easement.

For an idea of what is included in a baseline document, the Land Trust Alliance's Baseline Policy Template, designed to meet federal tax regulations, includes the following elements:

1. Cover Page;
2. Table of contents.
3. Acknowledgement/Certification.
4. Background information.
5. Physical and ecological features.
6. Documentation necessary to address conservation purposes test and public benefit.
7. Photographs.
8. Legal information.
9. References.
10. Optional information.[176]

To fulfill its intended purpose, the baseline documentation should be specific and measurable. The unique facts and circumstances of each property and the terms of the transaction will guide these descriptions. The scope of the baseline documentation should reflect the conservation easement's stated purpose. For example, with conservation easements predicated on habitat and wildlife preservation, baseline documentation would describe key habitat areas and nesting sites. Finally, as to who prepares the baseline documentation, federal tax regulations place the responsibility on the property owner, but frequently, given the need to work with this document over the long term, holders and other conservation professionals provide assistance and may, in fact, lead the effort. In such situations it is important that the landowner understand the purpose and contents of the document.

The last type of exhibit to be discussed is documentation of mortgages or other lien subordination materials.

[175] Treas. Reg. § 1.170A-14(g)(5)(i); 26 C.F.R. § 1.170A-14(g)(5)(i). As part of a 2006 state-wide review of conservation easements in Colorado, the IRS requested copies of the baseline documentation from 250 conservation easements. JANE ELLEN HAMILTON, CONSERVATION EASEMENT DRAFTING AND DOCUMENTATION 214 (Land Trust Alliance 2008), hereinafter cited as "HAMILTON."
http://www.eli.org/pdfs/landtrusthandbook/6.pdf.

[176] HAMILTON, *supra* note 175, 243–47.

As discussed previously, conservation easements, in order to be valid, ordinarily must be consented to by all those with interests in the property. Beyond this however, the law may also require certain adjustments in the relative positioning of the various parties. For example, conservation easements created for federal income tax purposes require mortgage subordination,[177] which means the conservation easement itself may be relevant in the event of foreclosure. Also, subordination may be structured—in compliance with IRS regulations—so as to allow for limited, additional mortgages on the property if the holder subordinates its rights.[178] These types of arrangements may be necessary for working farms, subject to conservation easements, that depend on financing.

VI. MAINTAINING AND ENFORCING A CONSERVATION EASEMENT

The previous section dealt with some of the ways that conservation easements provide for obligations and rights regarding monitoring and enforcement. This section offers additional background and details on these issues, specifically how holders and third parties carry out these tasks.

A. Maintenance and Enforcement Responsibility

An understanding of the long-term maintenance and enforcement provisions arising from conservation easements will enable transportation agencies to make informed decisions regarding who is best suited for these tasks, which may affect the way the transaction is structured. For example, compensatory mitigation properties may have irregular boundaries and specific ecological needs that require expertise beyond the scope of the transportation agency personnel involved. In these cases, the agency may contract the task of monitoring and enforcing easement lands and boundaries to a third-party professional. For the purposes of this discussion, it is assumed that a transportation agency is most likely to be the proponent of the conservation easement (either the grantee or holder) and not the landowner (grantor).

As described previously, the conservation easement itself should document the basis for granting maintenance and enforcement authority to the holder or a selected third party.[179] The authority to enforce conservation easements, however, varies from jurisdiction to jurisdiction and may depend on a number of factors, including conservation easement enabling legislation, other state statutes, and case law.[180] For example, in some states, the conservation easement enabling legislation gives the attorney general standing to enforce conservation easements.[181] Also, neighbors or the general public may[182] or may not[183] have standing to enforce the easement. The legal basis for enforcement authority arises from the purpose of the easement. If an easement has a broad public purpose, then it is likely that a more general enforcement authority will exist. For the purposes of this section, the term "holder" will be used to encompass any entity with maintenance and enforcement rights and duties, whether specified in the conservation easement or otherwise authorized.[184]

B. Considerations for Maintenance and Enforcement

Having discussed who has the authority and obligation to maintain and enforce the conservation easement, the discussion turns to why these activities are necessary. The reasons are both legal, as discussed above, and practical in nature. The rules governing federal income and estate tax deductions require conservation easements to include both monitoring and enforcement provisions. Since a number of conservation easements are created for tax purposes and many holders require compliance with federal tax regulations even if they are not being used for tax purposes, more often than not conservation easements will include these provisions.

Aside from the federal tax regulations, states may have specific requirements regarding monitoring and enforcement. Maine requires monitoring and reporting to occur no less frequently than every 3 years.[185] Some states prohibit third-party enforcement of easements unless the third party is a party to the conservation easement. For example, Wyoming's legislation does not include a "person authorized by other law" to be a third-party enforcer, as do several other states whose legislation is based on the UCEA.[186] As a result, the enforce-

[177] Treas. Reg. § 1.170A-14(g)(6); 26 C.F.R. § 1.170A-14(g)(6).

[178] BYERS & PONTE, *supra* note 4, at 457.

[179] RENEE J. BOUPHON, CONSERVATION EASEMENT STEWARDSHIP 243 (Land Trust Alliance 2008), hereinafter cited as "BOUPHON." http://learningcenter.lta.org/attachedfiles/0/71/7143/CESteward_Small.pdf.

[180] Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 758 (2005).

[181] *E.g.* CONN. GEN. STAT. § 47-42c. ("The Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.").

[182] *E.g.* 765 Ill. COMP. STAT. § 120-4(c) (granting standing to "the owner of any real property abutting or within 500 feet of the real property subject to the conservation right.").

[183] *E.g.* Burgess v. Breakell, No. 95-0068033, 1995 Conn. Super. LEXIS 2290, at *1 (Conn. Super. Ct.. Aug. 7, 1995) (finding neighbor did not have standing since she was not a party to the conservation easement).

[184] This use of "holder" is broader than what has been considered in the digest to this point. For simplicity's sake, the holder has been generally discussed as the party to whom the legal ownership of the deed of conservation easement has been transferred.

[185] ME. REV. STAT. ANN. tit. 33, § 477(5).

[186] *See* WYO. STAT. ANN. § 34-1-203(a). Several states authorize a "person authorized by other law" to enforce conservation easements, which has been interpreted to include

ment duties of a conservation easement in Wyoming should be fully thought through at the drafting stage so that if a non-holder agency is to have such authority, that agency will be made an explicit party to the agreement. Understanding how the relevant state handles the monitoring and enforcement issue may influence how a conservation easement is negotiated and ultimately drafted.

Beyond the general requirements made applicable either through federal tax regulations or state enabling legislation, the particular holder may have legal requirements based on its incorporation status. For example, for private land trusts organized as IRC Section 501(c)(3) tax-exempt charitable organizations,[187] failure to monitor and enforce their conservation easement holdings may result in a loss of this designation. IRS Form 990, "Return of Organization Exempt from Income Tax," requires the reporting of the number and acreage of conservation easements monitored by physical inspection. Coupled with the need for land trusts to remain a qualified organization for tax purposes, these organizations should be expected to take their monitoring and enforcement duties seriously. Finally, a private land trust's bylaws or other guiding documents may require certain monitoring and enforcement actions.

Where government entities are holders of conservation easements, the agency's enabling legislation and regulations may govern how it manages its conservation easements. For example, in South Carolina the SCDNR is permitted to own interests in real property but only "for the purpose of providing game reserves, fish ponds, game farms, fish hatcheries, public hunting and fishing grounds and for other purposes necessary and proper for the protection, managing or propagating of fish and game and furnishing the people of the State with hunting areas and fishing facilities."[188]

Thus, it would be appropriate for the SCDNR to hold easements only when the land will be accessible for public fish and game purposes but public access may threaten the conservation value of the property. It is more difficult to control the behavior of the public at large than the behavior of the limited number of people allowed on private property. Careful consideration must be given to whether or not an agency with a statutory purpose of allowing public access is the appropriate entity to monitor and enforce a particular conservation easement.

Aside from legal requirements to monitor and enforce, holders will often monitor and enforce their conservation easements for institutional reasons. Land trusts tend to be committed to their conservation goals, and they are often managed and staffed by motivated, dedicated individuals. Demonstrating vigilance in monitoring and enforcement is important in terms of institutional standing and continued fundraising capacity. As shown in the Bear Yuba Land Trust example, the dedication of an entity to its obligations may be critical to the success of the conservation project. Transportation agencies need to be well aware of the partnerships that are created in the conservation easement relationship and not be surprised by the strident advocacy of the organization entrusted with enforcing the agreement.

Case Study: Bear Yuba Land Trust—A Commitment to Conservation Easement Defense

The Bear Yuba Land Trust (formerly the Nevada County Land Trust) has demonstrated considerable vigilance defending its conservation easements. When a neighbor sought to judicially establish a right-of-way claim across one of the Trust's conservation easements, the Trust mounted a full-fledged legal defense. The trial, which included over 455 exhibits and 23 witnesses, lasted 8 days over an 8-month period and involved multiple site visits to the disputed property. The Trust conducted a special appeal campaign that helped fund a portion of these legal fees, which ended up totaling more than $300,000.

Ultimately, the Trust prevailed by showing that the neighbor's right-of-way claims lacked sufficient evidence. Darla Guenzler, executive director of the California Council of Land Trusts, notes that "[l]ocal communities, the public, and landowners have made enormous investments in conserving land for the many public benefits it provides, and it is essential to defend challenges to these natural treasures."[189]

C. Stewardship

Having discussed the legal requirements and institutional motivations of monitoring and enforcement, key aspects of the process are presented below. These activities are generally categorized as stewardship of the conserved property. The Lowcountry Open Land Trust provides a good example of stewardship.

the Attorney General and the general public. *See, e.g.*, FLA. STAT. § 704.6(9)(d).

[187] Jane Prohaska, *Nonprofit Law and Recordkeeping for Land Trusts* 1, LAND TRUST ALLIANCE 130 (2008). ("Without status as a tax-exempt public charity under federal tax law, many land trusts would simply be unable to operate."), http://learningcenter.lta.org/attached-files/0/95/9565/DL_Recordkeeping_Vol_1_05062010_lores.pdf.

[188] S.C. CODE ANN. § 50-3-10.

[189] *$300,000 Spent to Defend Easement in California*, http://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-news/300-000-spent-to-defend-easement-in-california.

Case Study: The Lowcountry Open Land Trust—Monitoring and Enforcement Plans and Processes

The Lowcountry Open Land Trust, based in Charleston, South Carolina, offers a good example of a land trust committed to monitoring and enforcing its conservation easements.[190] Over the years, the Trust has protected over 83,000 acres in perpetuity. As part of its Stewardship Program, the Trust engages in the following activities:

- Monitoring of protected properties.
- Documenting changes to properties periodically using photographs and geographic information systems.
- Tracking changes in ownership.
- Providing easement education to new landowners.
- Reviewing and granting approval requests for permitted activities.
- Maintaining property records.
- Serving as a resource for landowners regarding property management issues.
- Correcting violations through voluntary compliance or, if necessary, legal proceedings.

To support these activities, the Trust has established the Stewardship Fund, funded primarily by membership dues and donations. Having celebrated its 25th anniversary in 2010, the Low Country Open Land Trust has the experience, resources, and desire to monitor and enforce its conservation easement portfolio for years to come.

While an entity may have an established monitoring program such as the one presented above, each transaction and property remains unique, and the plan should be adapted for the property. The specific needs of a particular property should be set out in the baseline document. In sum, the three major components of a monitoring plan are frequency, methodology, and documentation.

Monitoring Frequency

Monitoring frequency is determined on a case-by-case basis according to legal and project-specific requirements as mentioned previously. Often conservation easements provide for at least annual or biannual site visits,[191] but certain conservation easements may need to be monitored more frequently. For example, for conservation easements providing reserved rights for new construction, monitoring may need to take place regularly during the development and construction processes, to ensure that sensitive ecological features such as wetlands are protected and that activities reserved to the landowner are not in excess of the rights delineated in the easement.[192] Also, some conservation easements require more frequent monitoring during certain seasons, for example, to monitor wildlife nesting activities. Whatever the case may be, monitoring frequency often is an important issue for holders and grantors, who must allow holders access to carry out their responsibilities.

Again, it cannot be reiterated enough that these relationships begin at the conception of the conservation easement.[193] Early in the process, it is important to understand the monitoring frequency needs, identify capable holders,[194] and work with the grantor to make sure that all parties are in agreement regarding what will be done.

Monitoring Methodology

As with monitoring frequency, the appropriate monitoring methodology depends on the circumstances of each property and may vary from a site walk for a small park to aerial viewing for thousands of acres of rugged terrain. Aside from the size of the property, the complexity of the conservation protections may require experts to perform the monitoring. An example of this would be a compensatory mitigation site that involved extensive ecosystem restoration. In the Bear Creek example presented in Section IV, after the wetland restoration work was completed, specific hydrology and vegetation parameters had to be measured and documented for 5 years. During this monitoring period, the landowner and mitigation banker, Restoration Systems, provided the monitoring. Once this specific, intense performance monitoring is completed, the routine main-

[190] http://www.lolt.org.

[191] In addition to monitoring conservation easements to ensure compliance, these site visits also provide the opportunity for the holder to become acquainted with new owners of the property. As previously discussed, many conservation easements are perpetual in nature and almost all "run with the land" so as to bind successors in interest. Therefore, it is important for holders to maintain good relations with the original grantor as well as establish new ones with new owners. BOUPHON, *supra* note 179, at 213.

[192] BYERS & PONTE, *supra* note 4, at 145. Conservation easements are often drafted to require giving the holder notice prior to commencing any construction. As a result, these requests should be recorded and identified for special monitoring needs, as necessary.

[193] In addition to formal site visits, some land trusts engage in what can be described as "drive-by" monitoring. According to David Shields, Associate Director of the Land Stewardship Program with the Brandywine Conservancy, operating in southeastern Pennsylvania and northern Delaware, "we have to be sensitive to the landowners…[m]ore frequent monitoring could be interpreted by the landowner as a lack of trust, but a 'windshield view' can be informative without being intrusive." BOUPHON, *supra* note 179, at 227.

[194] Monitoring conservation easements requires monitors, of course. Land trusts typically rely on a combination of on-staff professionals and volunteers from the community. However, outside consultants may be brought in as well. The Agricultural Stewardship Association in upstate New York saw its volunteer training program expand as the land trust's conservation portfolio grew in size. BOUPHON, *supra* note 179, at 217, 253.

tenance and enforcement duties will become the responsibility of the North Carolina Coastal Land Trust as the long-term holder. Transportation agencies similarly may want to contract out monitoring services when very specific ecological parameters need to be assessed and reported to ensure specific outcomes, such as the production of compensatory mitigation.

Monitoring Documentation

Finally, since the purpose of monitoring ultimately is to ensure compliance, documentation and recordkeeping are essential elements of any monitoring program and should be described in detail within the baseline report. Monitoring criteria and reporting formats may be based on standard practices of the holder or specific regulatory guidelines as in the case of compensatory mitigation. The protocol will determine the best means of data collection and reporting. Photographs may be the most useful means of documenting boundaries and any encroachment violations, whereas the collection of specific rainfall data may require onsite, mechanized equipment. Periodic reporting allows for inspection of the site and an analysis of changes in the site conditions over time. If or when a violation of the easement terms is found, the reporting documents will become the basis of any subsequent enforcement action.

D. Enforcement Programs

Conservation easement holders may also have formal enforcement programs that direct how violations are addressed from identification through resolution. As with other aspects of conservation easements, thinking through the eventuality of enforcement before such action is needed will increase the likelihood of a smooth resolution to any such actions if it occurs. Enforcement can be time consuming, complicated, and costly; but as with monitoring, holders should take their enforcement responsibilities seriously and have the capacity to devote resources accordingly. In what follows, some key aspects of both the violation verification and resolution processes are discussed.

Holders may learn about a potential violation though a variety of means, but no matter how it is discovered, thorough documentation and review should be completed. As mentioned above, the monitoring reports completed prior to discovery of the violation will provide key evidence of the intended easement condition. Entities familiar with the enforcement process go to considerable lengths to adequately verify and document the violation, for example by identifying the photographer, the location, and the date. While it may seem burdensome to take such measures each time there is an issue, the documentation will become significant should resolution fail and litigation result.

Aside from the collection and documentation of data, the property's baseline report and the conservation easement agreement should be reviewed. Because the person involved in the current situation may not have been involved in the initial acquisition, an internal review of the case file is essential before deciding what the next steps should be. The reviewer should have a clear understanding of the scope of the property owner's reserved rights and what actions or conditions may constitute a violation.[195] What is perceived to be a violation to one individual (based on expectations of what conservation means) may not be prohibited by the terms of the easement itself. To help determine legal violations, the review should include input of attorneys as well as the organization's staff and policymakers. Such a measured review may prevent the expenditure of limited resources on misguided enforcement actions and preserve the important relationship with the property owner.

If the holder determines that a violation has occurred, the conservation easement may contain specific terms regarding the enforcement process and should be the basis of the action where such terms exist. For illustration, a typical enforcement process is described here. When the violation is discovered and assessed, the property owner should be notified of the violation in writing. This writing should include details on the alleged violation and inform the landowner what remedial steps must be taken and within what timeframe. The letter may also invite the property owner to meet with the holder to resolve conflicts and work towards a settlement of the issue. Often the property owner may have been unaware of the condition causing the violation and quickly amenable to resolving the issue. In other instances, the owner may seek to settle the issue by negotiating a change in the conservation easement that allows the present condition in exchange for allowing additional protections on the property or additional clarity in the conservation easement.[196]

When resolution cannot be readily negotiated, the terms of the conservation easement may direct or allow the initiation of a judicial action. In other cases, some form of alternative dispute resolution, such as mediation or arbitration, may be a required prerequisite to litigation. Mediation may be a preferable approach as it often is less costly and less adversarial than litigation. If mediation is not successful, then litigation may ultimately be necessary to resolve the dispute.

As previously mentioned, litigating conservation easement violations can be time consuming, complicated, and costly; however, litigation of conservation easements does occur and the parties should be prepared for the possibility of this outcome. Perhaps not surprisingly, the focal point of these cases will often be the conservation easement agreement itself. Again, time spent in careful drafting with all parties involved may prevent or lessen the likelihood of an adversarial proceeding.

Courts have taken a number of different approaches to resolving these issues, and some examples are presented here. Depending on the position of the parties, one approach may be preferable to another. Note, however, that these cases do not represent majority or mi-

[195] BOUPHON, *supra* note 179, at 161–62.

[196] BYERS & PONTE, *supra* note 4, at 164.

nority approaches, since these decisions are based predominantly on case-specific facts and governing law.

One approach taken by courts has been to "attempt[] to discern the parties' intent at the time the parties entered into the agreement."[197] For example, in a case in Massachusetts, a court held that a swimming pool did not qualify as a permitted "structure" under the conservation easement, even though the town's zoning code treated swimming pools as a type of structure.[198] The appeals court upheld the lower court's decision, which had been based on the zoning code's definition, but focused on "[t]he grantor's stated purpose…to restrict the use of (the property) and retain it predominantly in its natural, scenic and open condition."[199]

Another approach—the plain meaning approach—focuses less on the parties' intent and more on a strict analysis of the conservation easement's language. For example, in a case involving scenic conservation easements held by the U.S. Forest Service, the court held that ranching structures such as barns and corrals were authorized even though the conservation easement permitted only "one residence and one tenant dwelling."[200] This result was reached because the conservation easement, in addition to the limitations on residences and dwellings, referenced a federal regulation, which expressly authorized dude ranching uses and structures.[201] As a result, based on "the plain meaning of the language used in the easement," the court held that ranching structures in addition to residences and dwellings are authorized.[202] In reaching this decision, the appeals court noted with approval the following language from the district court's decision:

> It would have been easy for the Government's drafter to place language in the deed prohibiting all dude ranching buildings otherwise permitted by the regulation….But the Government did not do so. Because of this drafting failure, the Government is now essentially asking this Court to re-write the deed….But the Court does not have the power to re-write the deed.[203]

These examples demonstrate some of the ways courts handle ambiguities in enforcement actions. As demonstrated by the two cases presented, it can be hard to predict how courts will analyze these issues. Therefore, as previously mentioned, conservation easements should be drafted to meet the needs of all parties and to avoid foreseeable conflicts to the extent possible *based on the laws of the state in which they are operating*. For example, if in the *Goldmuntz* case, given the character of the protected property and its current use, a swimming pool was a foreseeable addition, the conservation easement could have specifically addressed whether or not swimming pools were allowable. A second lesson from the *Goldmuntz* case is the importance of a clear and detailed purpose statement within the agreement. In that case, the purpose statement provided the backstop for the court's analysis.

The *Racine* case illustrates the need for conservation easements to be internally consistent. This means avoiding unintentional ambiguities within the four corners of the easement itself. Inconsistencies provide an opening for parties to assert their own interpretation and challenge the restrictions or reserved rights. In *Racine*, the court rejected the government's argument that the scenic conservation easement prohibited ranching structures due to inconsistent provisions, namely the reference to (and apparent incorporation of) the federal regulation that expanded the class of authorized uses. Had the government sought to prohibit ranching structures, the reference to the federal language could have been qualified as to permit certain uses, but not to expand upon the ultimate number of structures permitted.

The above cases are illustrative examples of both the process of litigating conservation easements and the importance of planning and drafting the initial agreements. It should be noted that in most cases of litigation, the parties involved, especially with regard to the property owner, are not the original parties to the agreement.[204]

VII. AMENDING AND TERMINATING A CONSERVATION EASEMENT

As stated in the introduction to this digest, transportation agencies are likely to encounter conservation easements in one of two ways—either out of a need to establish an easement or a need to enter upon a property where one has been established. In the latter instance, an understanding of how the easement may be amended or terminated will be useful. This holds true whether a conservation easement used for wetlands mitigation needs to be modified to accommodate changed conditions or property subject to conservation easement needs to be acquired for transportation infrastructure expansion. This section examines some of the major legal and practical issues surrounding amendment and some other means by which conservation easements may be terminated other than eminent domain.

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[197] Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373, 382 (analyzing 19 published opinions involving conservation easement enforcement), hereinafter cited as "Thompson & Jay."

[198] *See* Goldmuntz v. Chilmark, 38 Mass. App. Ct. 696, 651, N.E.2d 864 (1995).

[199] *Id*. at 865.

[200] *See* Racine v. United States, 858 F.2d 506, 508 (9th Cir. 1988).

[201] *Id*. at 508–509 (*citing* 36 C.F.R. 292.16(g)(1), which permits ranching structures not impairing "scenic, natural, historic, pastoral, and fish and wildlife values").

[202] *Id*. at 509.

[203] *Id*.

[204] Thompson & Jay, *supra* note 197.

A. Amendment by Agreement

Under the UCEA, "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[205] This language is significant because under the common law, since "[c]onservation easements do not fit easily into any previously existing category of property interests," courts tended to employ various, and at times conflicting, legal principles to address amendments.[206] Today, however, "given the existence of statutory provisions for conservation easements in virtually all 50 states, conservation easements are creatures of statute and their attributes, limitations, and applications are all governed by the statutes that authorize them."[207] As a result, both statutes and the common law of property[208] provide the basis for discussing the amendment of conservation easements.

The UCEA provides generally that conservation easements may be amended "in accordance with the principles of law and equity."[209] As a result, under the common law, like other nonpossessory interests in real property, easements may be amended by agreement, subject to the governing procedures and express limitations contained in the conservation easement itself.[210] As a practical matter, it is again the conservation agreement itself that should provide the greatest clarity as to how it may be amended.[211] Conservation easements frequently allow for limited amendments in order for the transaction to retain its original purpose and to comply with federal tax regulations (for donated easements) or other legal requirements (i.e., wetlands mitigation and scenic preservation), or due to the insistence of one or more of the parties.[212] Indeed, it may be this type of flexibility that solidifies agreement between the parties. In any event, in accordance with the principles of law and equity, situations may arise where amending the conservation easement is necessary and appropriate. Both the prohibitions against amendment and situations where amendments are made are discussed below.

It is unlikely that parties will be successful in amending the duration or type of holder of a conservation easement that was put in place for the purposes of obtaining a tax benefit. The federal tax law states that the conservation easement will be "in perpetuity."[213] As a result, even if state property law allows for term conservation easements, federal tax laws may prevent a donated conservation easement from being amended to a shorter duration. If the subject conservation easement was amended such that its conservation purpose no longer existed or the term was expressly shortened by the amendment, then the original donor may be in violation of the subject tax regulations.

Tax regulations also state that the holder of the conservation easement will be a qualified organization and any future transfer will be to another qualified organization that agrees, in writing, to carry out the easement's conservation purposes.[214] Since qualified organizations must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions,"[215] this requirement often results in yet another limitation on amendment in that the conservation easement will be drafted to prevent amendments that would authorize uses incompatible with conservation values. Finally, since private entities authorized to hold conservation easements for tax purposes must qualify as IRC Section 501(c)(3) organizations, the law governing public charities provides additional limitations on the ability to freely amend conservation easements.[216] Any changes to the conservation easement not in accordance with these laws may invalidate the agreement and jeopardize the legal status of the holder organizations. It is not uncommon for land trusts, as a matter of institutional policy, to accept only those conservation easements that meet the substantive requirements of federal tax law, even when they are not being donated.

As discussed previously, conservation easements that are the result of a compensatory mitigation project or other regulatory program usually have a number of state and federal agencies with oversight authority. As

[205] UCEA § 2(a).

[206] Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1190 (1989) (noting the common law differences regarding amendment of restrictive covenants and equitable servitudes). "The statutory conservation easement prevalent today arguably is an entirely new type of property interest that does not fit into the traditional categories of easement, real covenant, and equitable servitude." *Id*. at 1194.

[207] Lindstrom, *supra* note 152, at 25, 35.

[208] Not all states' conservation easement enabling legislation is based on the UCEA and in some states the term "easement" is not used when referring to what in essence is a conservation easement under the UCEA. Nevertheless, "while there has been, and will continue to be, much academic analysis of the nature and origin of conservation easements under the common law, for all practical intents and purpose today, they can be considered 'easements.'" Lindstrom, *supra* note 152, at 25, 38.

[209] UCEA § 3(b).

[210] ELY & BRUCE, *supra* note 124, at 10:41 (listing a variety of ways in which easements may be amended or terminated under the common law).

[211] A discussion of drafting amendment provisions is included in Section VI.D.

[212] *See* Lindstrom, *supra* note 152, at 25, 45.

[213] Treas. Reg. § 1.170A-14(g)(6)(2); 26 C.F.R. § 1.170A-14(g)(6)(2) .

[214] Treas. Reg. § 1.170A-14(c)(1)(2); 26 C.F.R. § 1.170A-14(c)(1)(2).

[215] Treas. Reg. § 1.170A-14(c)(1); 26 C.F.R. § 1.170A-14(c)(1).

[216] *See* Lindstrom, *supra* note 152, at 46–49 (discussing Form 990's monitoring and reporting requirements governing § 501(c)(3) organizations that hold conservation easements and other requirements necessary to maintain § 501(c)(3) status and the ability to continue holding conservation easements).

a practical matter, any amendment to these easements will require significant notice and negotiation. It is unlikely that any amendment seeking to decrease the term of the easement or the amount of area protected will be acceptable.

In some situations, the grantor may insist on strict amendment limitations even when not required to do so by law. This may occur, for example, when the property holds special familial or environmental significance to the grantor and these features were significant motivating factors for creating the conservation easement.

Transportation agencies should be aware of the impetus for a conservation easement before attempting to amend the easement for a particular purpose. The effects of an amendment on the landowner and the holder should be carefully considered and accommodated when possible.

B. Implications of Charitable Trust Law

Because of the expressed public value of the types of resources protected by conservation easements and the intended public benefit, a number of legal authorities view conservation easements as charitable trusts,[217] and should a court accept this view,[218] it holds significant ramifications regarding whether and how amendments may occur. Specifically, "the entity holding a conservation easement, in its capacity as trustee, can be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding."[219] In such a proceeding, a court may allow amendment of the conservation easement if:

1, Property is given in trust for a particular charitable purpose;
2. It is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and
3. The settlor manifested a more general intention to devote the property to [a] charitable purpose.[220]

It is likely that *cy pres* ordinarily would only be required for outright termination or substantial amendments that are contrary to the purposes of the conservation easements.[221] For minor and administrative amendments, the amendment provision contained in the conservation easement typically applies.[222]

While *cy pres* proceedings are common when a private party seeks to terminate or significantly modify a conservation easement (often as an alternative to the use of eminent domain), charitable trust principles also may be relevant. Consider a situation where property burdened by a conservation easement has been targeted for acquisition to accommodate a new highway. Even if the conservation easement was donated for tax purposes and included the previously discussed amendment limitations, charitable trust principles may nevertheless provide a means of amending or terminating the conservation easement as a result of changed conditions. Take for example, the conservation easement drafted to protect an endangered species, which now has been delisted and enjoys relative abundance. Charitable trust principles would allow a party with standing, which could be the original grantor of the easement, holder, or even the state attorney general,[223] to petition the court to amend or terminate the conservation easement. However, charitable trust principles may prevent a material amendment desired by the transportation agency if a court decides that the *cy pres* conditions have not been met, even if the parties to the conservation agreement consent to the change.

C. Termination by Means Other than Eminent Domain

In addition to eminent domain, statutes and common law allow for the termination of conservation easements in a number of different ways, such as through merger,

[217] UNIFORM TRUST CODE § 4 ("Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust."); RESTATEMENT (THIRD) OF PROPERTY § 7.11 (2000) (recommending that a form of *cy pres* be applied to conservation easements); UCEA § 3, comment (2007):

> …because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and state law of adopting states as it relates to the enforcement of charitable trust should apply to conservation easements.

C.f. Lindstrom, *supra* note 152, at 25, 56-69 (presenting arguments against the view that conservation easements should be treated as charitable trusts).

[218] There are only a few reported appellate decisions dealing with the application of charitable trust principles to conservation easements. For example, In Hicks v. Dowd, 2007 WY 74, 157 P.3d 914 (2007), the court recognized this principle, holding that the attorney general—not a member of the general public—had standing to challenge amendments to a conservation easement. Several lower court decisions have taken a similar approach as well. *See, e.g,. In re Preservation Alliance for Greater Philadelphia,* O.C. No. 759 (Ct. Com. Pl. of Philadelphia County, Pa., June 28, 1999) (applying *cy pres* to allow changes to a conservation easement on a historic building's facade).

[219] Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, 23 PROBATE & PROPERTY 52–53 (July/August 2009), hereinafter cited as "McLaughlin & Machlis." "The doctrine of *cy pres* is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor when that intent cannot be effectuated to the letter of the donor's directions or specifications." 88 AM. JUR. PROOF OF FACTS 3D 469 § 2 (2007).

[220] 88 AM. JUR. PROOF OF FACTS 3D 469 § 2 (2007).

[221] McLaughlin & Machlis, *supra* note 219, at 54–55.

[222] *Id*.

[223] *See, e.g*., Hicks v. Dowd, 2007 WY 74, 157 P.3d 914 (2007) (*citing* WYO. STAT. ANN. § 4-10-110 authorizing the Attorney General to "exercise the rights of a qualified beneficiary with respect to a charitable trust").

judicial sale, and marketable title legislation. Knowledge of each of these mechanisms will be helpful to transportation agencies in the processes of either seeking to perpetuate or terminate conservation easements. These topics should be evaluated, based on local state laws, during the drafting of conservation easements by transportation agencies and also in the consideration of long-term monitoring and reporting.

Under the common law, conservation easements may cease to exist via the doctrine of merger. Generally, merger occurs when the owner of the servient estate (the property burdened by the easement) acquires the dominant estate (the rights granted by the easement) or vice versa.[224] However, at least one state's enabling legislation (Maine's) expressly provides that the doctrine of merger does not apply to conservation easements.[225] Also, should a court be convinced to view a conservation easement as creating a charitable trust, the merger doctrine may be inapplicable since the public stands as a beneficiary thus, preventing complete unity of title.[226] Despite these apparent limitations on the merger doctrine as it relates to conservation easements specifically,[227] transportation agencies need to be cognizant of the doctrine of merger, especially when public transportation dollars are being used to acquire conservation easements.

In the conservation easement context, the doctrine of merger may become relevant if, for example, a transportation agency holds a conservation easement over wetlands and subsequently obtains the underlying fee title by eminent domain or some other means. At that point, the transportation agency may wish to continue the use of land for conservation purposes or it may not. The question of whether a merger automatically extinguished the conservation easement and the protections afforded therein is significant. Similarly, a landowner may be given the opportunity to acquire the easement over his or her property. In such a case, the private land trust may avoid the potential merger argument at the outset by including a co-holder, such as a government agency, who also would have to be convinced to release the easement before it could be sold. By doing so, the holder—or holders—could avoid the doctrine of merger, if recognized in their state, from voiding the easement without their consent.

Also, while some states terminate conservation easements upon foreclosure actions,[228] others provide exceptions to that rule. For example, in Colorado, conservation easements are not terminated as a result of property tax lien foreclosures.[229] However, the effects of these exceptions as applied to conservation easements are limited. The general rule is that a judicial sale gives clear title to subsequent purchasers free and clear of past liens. For this reason, the requirement for the fee owners to pay property taxes and all other liens takes on utmost importance. To deal with this, as part of the ongoing monitoring process, conservation easement holders should periodically review the property's tax records and be on guard for subsequent liens and judicial sales.

The possibility of termination by judicial sale impacts the way conservation easements are structured. For example, under federal tax law, property owners must ensure that any outstanding mortgage interests are subordinated to the conservation easement.[230] Subordination means that in the event of foreclosure, the bank's mortgage takes a back seat to the holder's interest in the property (the conservation easement), thereby allowing the conservation easement to persist despite the property owner's default. Banks are understandably reluctant to agree to subordination, so this represents a major point of caution in regards to acquiring conservation easements on leveraged property. The title search conducted during the acquisition of the conservation easement should notify the grantee if any mortgages, liens, or delinquent taxes exist on the property. In the case of uncertainty or as a matter of course, the grantee or holder may require a title insurance policy for the property. This helps cut down on the monitoring and enforcement efforts needed to secure the conservation easement, as well as help protect the public's investment.

Finally, in addition to merger and judicial sale, state marketable title acts can have the potential to undermine conservation easements in the long term. The purpose of these acts is to extinguish all private restrictions on property after a certain period of time unless subsequent notice filings or other indices of ownership take place to preserve the interest.[231] Marketable title acts work differently from state to state; however, generally the laws establish a period of years after which all liens and encumbrances on real property are void in the absence of affirmative conduct by the lienholder. These laws ensure the efficient administration of local property records and the reduction of costs attendant to property transactions. For conservation easements, marketable title acts demand a farsighted, organized approach to monitoring and management by holders.

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[224] *See* ELY & BRUCE, *supra* note 124, at § 2.27.

[225] ME. REV. STAT. ANN. tit. 33, § 479(10).

[226] *See* Lindstrom, *supra* note 152, at 25, 42.

[227] *See generally* Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, DUKE J. OF L. AND CONTEMP. PROBS. 74 (2011).

[228] *See* ELY & BRUCE, *supra* note 124, at § 10:41. *C.f.* ME. REV. STAT. ANN. tit. 33, § 479(9) (conservation easements survive municipal tax liens and foreclosures).

[229] COLO. REV. STAT. § 39-11-136(3).

[230] Treas. Reg. § 1.170A-14(g)(2); 26 C.F.R. § 1.170A-14(g)(2).

[231] *See generally* Bill Silberstein & Bridget McNeil, *Protecting Conservation Easements from Marketable Title Act Extinguishment*, LAND TRUST ALLIANCE EXCHANGE (Winter 2002), http://learningcenter.lta.org/attached-files/0/20/2040/exchange_21_01_08.pdf.

Though some states provide exceptions for conservation easements,[232] this is not the standard practice.

As a result, to ensure continued regulatory compliance and protect the public's investment over the long term, transportation agencies should evaluate the applicability of state marketable title acts and design mechanisms for addressing these issues. For example, when the transportation agency holds the conservation easement, internal processes should be developed to periodically update title. Where others hold conservation easements that were secured in part with transportation agency funds, the conservation easement should be structured to require periodic updating as it relates to marketable title act requirements.

[232] CAL. CIV. CODE § 880.240(d).

APPENDIX A: IDENTIFYING THE TAX ISSUES RELATED TO CONSERVATION EASEMENTS

Landowners place conservation easements on their property for a number of reasons including the desire to preserve family property in its current condition for future generations. Also, the considerable tax benefits that may result from the donation of a conservation easement provide an incentive for their use. This section discusses how conservation easements may, in some instances, be used to achieve tax savings, namely, through income and estate tax deductions and property tax savings. The discussion of income and estate taxes focuses on federal tax law, but many state tax laws include benefits for conservation easement donations. Examples will be presented as appropriate.

Note:

The intent of this section is to identify and summarize the major tax implications of conservation easements as they existed at the time of writing—not to provide tax or legal advice. Therefore, readers are advised to consult legal and tax professionals in their states for questions involving particular situations and controversies and to confirm the current status of tax legislation.

A. INCOME TAX

The federal income tax deduction for donated conservation easements offers an exception to the general rule that donations of partial interest in property are not eligible for charitable deductions.[233] Section 170(h) of the Internal Revenue Code provides an exception for qualifying conservation easement donations. To qualify, the property owner must carefully follow detailed federal procedural and substantive requirements. A donor needs to realize that satisfying state property requirements is only a necessary—not a complete—condition for obtaining federal tax benefits. Not only must a donor follow the rules generally applicable to charitable contributions, but also those specifically governing conservation easements, principally Section 170(h) and its accompanying regulations at 26 C.F.R. § 1.170A-14.[234]

To qualify for the deduction, the conservation easement must be a qualified conservation contribution, meaning it must satisfy the following four elements of federal tax law:

1. The contribution is of a "qualified real property interest."
2. The contribution is made to a "qualified organization."
3. The contribution is exclusively for "conservation purposes."
4. The conservation purposes are protected in perpetuity.[235]

[233] *See* I.R.C. § 170(f)(3).

[234] *But see* Trout Ranch v. Commissioner, 2012 U. App. LEXIS 17198 Tax CAS P 50524 (Aug. 16, 2012) (private partnership purchased land to develop home sites. It preserved 85 percent by conservation easement and claimed a 26 U.S.C. § 1.170 charitable deduction in the amount of $2.2 million. IRS, stating that charitable easement did not reduce property value, appraised charitable deduction at zero. Tax Court eventually allowed a $560,000 charitable deduction.).

[235] *See* I.R.C. § 170(h); Treas. Reg. § 1.170A-14(a); 26 C.F.R. § 1.170A-14(a).

A qualified real property interest is defined to include a "perpetual conservation restriction," [236] which in turn is defined as "a restriction granted in perpetuity on the use which may be made of real property—including an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude)."[237] As a result, "compliance with all of the *state* statutory requirements for creating an easement is essential if the easement is to qualify under federal tax law as a 'perpetual conservation restriction.'"[238]

A qualified conservation contribution must be donated to a qualified organization, which must meet each of the following conditions to constitute an eligible donee:

1. The organization must be either a local, state, or federal government agency, or a public charity qualified under IRC Section 501(c)(3);

2. The organization must have a commitment to protect the conservation purposes of the donation; and

3. The organization must have the resources to enforce the restrictions imposed by the easement.[239]

Private land trusts commonly assume the role of qualified organization, but as the above definition makes clear, public agencies—presumably including transportation agencies—may be eligible as well. However, one commentator has noted that merely being a public agency is insufficient to satisfy the "commitment to protect the conservation purposes," given the potential for changed circumstances and conflicting values and objectives.[240] The regulations also require that the conservation easement itself include a provision limiting any future transfer or termination of the easement as follows:

1. The easement must prohibit the holder of the easement from transferring it to any organization that not an "eligible donee" as described above.

2. The easement must require that any transferee organization agree in writing to carry out the conservation purposes of the easement.

3. The easement must require that, if a later unexpected change in the conditions surrounding the easement property makes impossible or impractical the continued use of the property for conservation purposes, any proceeds received by the easement holder resulting from the later sale or exchange of the easement property must be used in a manner that is consistent with the conservation purposes of the easement.[241]

The third requirement is that the conservation easement be used exclusively for at least one of the following four conservation purposes:

1. The preservation of land areas for outdoor recreation by, or the education of, the general public.

2. The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.

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[236] I.R.C. § 170(h)(2)(c)

[237] Treas. Reg. § 1.170A-14(b)(2); 26 C.F.R. § 1.170A-14(b)(2).

[238] Lindstrom, *supra* note 152, at 441, 449.

[239] *Id*. at 450 (*citing* Treas. Reg., 26 C.F.R. § 1.170A-14(c)(1)); 26 C.F.R.).

[240] *Id*. at 451.

[241] *Id*. at 452 (*citing* Treas. Reg. 26 C.F.R. § 1.170A-14(c)(2)).

3. The preservation of open space (including farmland and forest land) where such preservation is (a) for the scenic enjoyment of the general public, or (b) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit.

4. The preservation of a historically important land area or a certified historic structure.[242]

It is important to keep in mind that the conservation easement must be exclusively for conservation purposes, which amounts to a general prohibition on inconsistent uses that "would permit destruction of other significant conservation interests" aside from the stated purpose of the conservation easement.[243] Finally, it bears noting that in recent years the IRS has applied increased scrutiny to claimed qualified conservation contributions, and has challenged several based on failure to satisfy the exclusively for conservation purposes test.[244] Furthermore, the IRS may attach a penalty when the value of a qualified conservation contribution is overstated, [245] unless good faith is demonstrated.[246]

The last requirement for qualified conservation contributions is that the conservation purposes be protected in perpetuity. The law in many states allows conservation easements to be established for a term of years. Such easements, though valid as a matter of state law, would be ineligible for an income tax deduction. The regulations recognize the potential for termination down the road as a matter of law (such as in consideration of marketability of title), but this appears not to bear on the perpetuity factor.[247] Moreover, the potential for the parties to a conservation easement to consent to amendment or termination does not violate the perpetuity requirement.[248]

A recent case, *Kaufman v. Shulman*,[249] addressed the issue of perpetuity with regard to the priority rights of those with interest in the property to proceeds from extinguishment or through condemnation actions or from insurance. In *Kaufman*, which dealt with post-extinguishment proceeds from the conservation easement on a historic property in Boston, the mortgage lien holder subrogated its rights to proceeds to the conservation easement holder *except* in certain circumstances, which included condemnation. The tax court concluded that this provision, with its exceptions, failed to meet the requirement of perpetuity because the holder did not have an *absolute, guaranteed* priority right to proceeds.[250] [251] The First Circuit reversed this decision on appeal, concluding that if the subrogation provision were to be construed to defeat the tax treatment of the conservation easement, then it "would appear to doom practically all donations of easements, which is surely contrary to the purpose of Congress."

In addition to the discussion above, the tax deduction will not be allowed where surface mining rights are reserved to the landowner, although some other forms of mining are permissible.[252] Finally, the conservation

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[242] I.R.C. § 170(h)(4).

[243] Treas. Reg. § 1.170A-14(e)(2); 26 C.F.R. § 1.170A-14(e)(2). However, activities that do not impair significant conservation interests (including existing uses) or those that are necessary to protect the stated conservation purposes of the easement are not inconsistent uses. Treas. Reg., § 1.170A-14(e)(3); 26 C.F.R. § 1.170A-14(e)(3).

[244] *See, e.g,.* Glass v. Commissioner of Internal Revenue, 471 F.3d 698 (6th Cir. 2006) (challenging sufficiency of habitat preservation).

[245] *See* Whitehouse Hotel, Ltd. P-ship v. Commissioner, 139 T.C. No. 13, 2012 U.S. Tax Ct. LEXIS 40 (filed Oct. 23, 2012); Kiva Dunes Conservation v. Commr, T.C. Memo 2009-145, 2009 Tax Ct. Memo LEXIS 144 (2009).

[246] Edgar Corp. v. Commissioner, Docket Nos. 23676-08, 23688-08, 23689-08, U.S. Tax Ct. Memo 2012-35, 103 T.C.M. 1185 (filed Feb. 6, 2012).

[247] Treas. Reg., § 1.170A-14(g)(3); 26 C.F.R. § 1.170A-14(g)(3).

[248] Lindstrom, *supra* note 152, at 441, 476.

[249] Kaufman v. Shulman, 687 F.3d 21 (1st Cir. 2012).

[250] Kaufman v. Commissioner, 136 T.C. No. 13 (2011).

[251] Treas. Reg. § 1.170A-14(g)(2); 26 C.F.R. § 1.170A-14(g)(2).

[252] Treas. Reg.§ 1.170A-14(g)(4)(i); 26 C.F.R. § 1.170A-14(g)(4)(i).

easement must include a written "natural resource inventory" if the donor reserves any development or use rights, allow the holder to enter the property to monitor and enforce (based, in part, on the inventory), and require the donor to notify the holder prior to exercising any rights reserved in the easement that may impair conservation values.[253]

Having summarized the eligibility requirements for the federal income tax deduction, the mechanics of the deduction will now be discussed. As a starting point, the total value of the conservation easement may be deducted.[254] However, the law governing charitable deductions (including conservation easements) limits the deduction that can be taken each year.

For the grantor to claim the deduction, the conservation easement must be valued. Federal law places the responsibility to perform an appraisal on the donor, while regulating how it must take place. The value of a conservation easement donation, like all other charitable contributions exceeding $5,000, must be backed by a "qualified appraisal"[255] conducted by a "qualified appraiser."[256] In the wake of reported widespread abuses of the conservation easement tax deduction,[257] the regulations governing appraisals were stiffened as part of the 2006 Pension Protection Act.[258] However, implementing regulations have yet to be finalized as of this writing.[259] Finally, Form 8283, "Noncash Charitable Contributions," which must be filed along with all claims for a conservation easement donation, requires, among other things, additional substantiation of the appraisal and heightened reporting thresholds for donations greater than $500,000.

As for the appraisal itself, valuation of conservation easements for tax purposes based generally on the before and after approach, which subtracts the post-easement value of the property from the pre-easement value.[260] The law requires that the following factors be taken into consideration when proceeding with this approach: 1) current use of the property; 2) an assessment of the development potential of the property; and 3) any effect on property values brought about by existing zoning or conservation restrictions.[261] Various approaches to the before and after methodology exist. For example, the "development methodology" assumes the before value to represent the highest development potential under current law.[262] However, all of these valuation approaches involve some degree of subjectivity and assumptions, especially those relying heavily on questionable, long-term development projections.[263]

Finally, before turning to a discussion of the federal estate tax benefits associated with conservation easements, it is important to recognize that some states provide income tax benefits of their own. For example, South Carolina offers a tax credit towards state income tax, in addition to the federal income tax deduction, equal to 25 percent of the value of a conservation easement donation that meets the federal requirements.[264] As with the federal tax rules, South Carolina limits the tax benefits that can be taken each year

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[253] Treas. Reg. § 1.170A-14(g)(5); 26 C.F.R. § 1.170A-14(g)(5).

[254] Treas. Reg. § 1.170A-14(h)(3)(ii); 26 C.F.R § 1.170A-14(h)(3)(ii).

[255] Treas. Reg. § 1.170A-13(c)(3); 26 C.F.R. § 1.170A-13(c)(3).

[256] Treas. Reg. § 1.170A-13(c)(5); 26 C.F.R. § 1.170A-13(c)(5).

[257] Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601176.html (Accessed Jan. 1, 2013).

[258] I.R.C. § 170(f)(11)(E).

[259] In the meantime, IRS Notice 2006-96 provides interim guidance on the new definitions of "qualified appraisal" and "qualified appraiser."

[260] Treas. Reg. § 1.170A-14(h)(3); 26 C.F.R. § 1.170A-14(h)(3).

[261] Treas. Reg. § 1.170A-14(h)(3)(ii); 26 C.F.R. § 1.170A-14(h)(3)(ii).

[262] Lindstrom, *supra* note 152, at 441, 500.

[263] *See, e.g,.* Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47 (2011).

[264] S.C. CODE ANN. § 12-6-3515.

and provides for limited carry-forward provisions.[265] Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Iowa, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, and Virginia have provided state tax credits of their own, which are similar to South Carolina's approach in various respects, such as the reference to federal regulations for eligibility determination.[266]

B. ESTATE TAX

The federal estate tax provisions, though currently in flux, have provided two separate estate tax benefits for conservation easements. The first recognized the value reduction of the taxable estate due to development restrictions imposed by the conservation easement. The second involved an exclusion for qualifying conservation easements.

As a general rule, contractual restrictions on the use of real property cannot be taken into account in determining an estate's value, however, an exception has been made for conservation easements.[267] Conservation easements created during the decedent's life that satisfy the requirements of IRC Section 170(h) were eligible for the exemption.[268] Also eligible were conservation easements created by will that satisfied Section 170(h), but the conservation purposes test need not be met.[269] More generally, for conservation easements not meeting the requirements of Section 170(h), the law still allowed a reduction in the value of the estate as long as the following requirements were met:

1. The restrictions are the result of a "bona fide business arrangement."

2. The restrictions are not a device to transfer property to family members for less than adequate consideration.

3. The terms of the restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.[270]

For the last category of conservation easements, it is important to recognize that the conservation easement need not be donated; instead, the conservation easement may be sold or given in exchange for development approval and the property owner would still be entitled to the reduction in estate value based solely on the reduced value of the property.

In addition to the reduction in estate value, IRC Section 2031(c) provided an additional exclusion for a "qualified conservation easement" created during the decedent's life, pursuant to the will, or in some cases by the executor or the heirs. To meet the requirements of a "qualified conservation easement," the requirements of IRC Section 170(h) including the conservation purposes test must be satisfied. Note, however, that "qualified conservation contribution" (for income tax deduction purposes) and "qualified conservation easement" are not the same, as the latter imposes additional requirements.[271] One of the requirements was that the decedent must have owned the property for at least 3 years prior to his or her death.[272] In addition, the exclusion was available only to the family of the original donor, but could be taken by his or her spouse and

[265] *Id*.

[266] For up-to-date summaries of each of these programs, visit the Land Trust Alliance's "State and Local Tax Incentives" Web site at http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives.

[267] Treas. Reg. § 25.2703-1; 26 C.F.R. § 25.2703-1.

[268] Treas. Reg. § 25.2703-1(b)(4); 26 C.F.R.§ 25.2703-1(b)(4).

[269] I.R.C. § 2055(f)

[270] Lindstrom, *supra* note 152, at 527 (*citing* Treas. Reg., § 25.2703-1(b)(1) and (2); 26 C.F.R. § 25.2703-1(b)(1) and (2)).

[271] *Id*. at 530.

[272] I.R.C. § 2031(c)(8)(A)(ii).

subsequent generations.[273] Also, the exclusion could not be given for conservation easements whose sole conservation purpose was historic preservation.[274] Finally, conservation easements that allow anything more than *de minimus* commercial recreational uses were disqualified for the purposes of the IRC Section 2031(c) exclusion.[275] Other case-specific requirements needed to be satisfied for the purposes of the estate tax exclusion and should be evaluated on a case-by-case basis, by state. Those estates qualifying for the IRC Section 2031(c) exclusion received a 40 percent reduction of the conservation easement-restricted land value, up to a maximum of $500,000.[276]

Aside from the estate tax benefits described above, conservation easements of course have the capacity to control the use of land into the future. Taken together, conservation easements make for a powerful and appealing estate planning option for many landowners, especially those that are land rich and cash poor.

C. PROPERTY TAX

Conservation easements may lower the market value of the property it burdens, because of development and use restrictions limiting its full economic potential. As a result, one might expect that in addition to federal and state tax benefits for income and estate taxes, reductions in property tax (based on diminished appraised values) should follow as well. However, whether or not property tax savings result varies from state to state and sometimes between local governments within the same state. As a result, the best advice for determining the property tax benefits associated with conservation easements calls for a case-by-case approach.

Some state statutes expressly require property tax adjustments based on the presence of conservation easements. For example, Colorado requires that "[r]eal property subject to one or more conservation easements in gross shall be assessed, however, with due regard to the restricted uses to which the property may be devoted."[277] Similarly, in Georgia, the recordation of a conservation easement "shall be notice to the board of tax assessors…and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county."[278] However, Georgia goes a step further than Colorado by expressly authorizing property owners to appeal the easement-adjusted valuation.[279] In states like Colorado and Georgia the property tax issue is straightforward. Unfortunately, states with such clarity in regards to the property tax issue are the exception rather than the rule.

In some states, the conservation easement enabling legislation is silent or ambiguous on the issue of property tax valuation, and this leads to uncertainty from jurisdiction to jurisdiction within those states. To take just two examples, neither Arizona's[280] nor Michigan's[281] enabling statutes address property taxes. Elsewhere, property tax reductions based on conservation easements are authorized, but not required, which can lead to intrastate variations.[282] For this category of states, appraised values may reflect the existence of conservation easements, but this comes not as the result of express statutory mandate, but rather due perhaps

[273] I.R.C. § 2031(c)(8)(C).

[274] I.R.C. § 2031(c)(8)(B).

[275] I.R.C. § 2031(c)(8)(B).

[276] To qualify for the full 40 percent reduction, the conservation easement must have reduced the value of the property by at least 30 percent. I.R.C. § 2031(c).

[277] COLO. REV. STAT. § 38-30.5-109.

[278] GA. CODE ANN. § 44-10-8.

[279] *Id*.

[280] *See* ARIZ. REV. STAT. ANN. §§ 33-271 *et seq*.

[281] *See* MICH. COMP. LAWS §§ 324.2140 *et seq*.

[282] MASS GEN. LAWS ch. 59, § 11.

to the assessor's office's liberal implementation of the general requirement that property taxes reflect actual market value. Additionally, property tax appeals by a landowner, which are generally permitted in most states, may be another means of obtaining property tax reductions in states without an express requirement. However, as previously stated, in states where the law is unclear, care must be taken to ascertain local practices and applicable laws.

While the laws in the majority of states fall into the categories previously discussed, the laws in Idaho, Oregon, and Florida are worth mentioning separately since they take quite different approaches. Idaho's enabling legislation expressly provides that conservation easements must be ignored for property tax purposes.[283] Oregon allows a property owner, prior to creating the conservation easement, to receive a formal report from the county assessor's office as to the effect on valuation.[284] In 2008, voters in Florida approved a constitutional amendment that authorized the legislature to completely exempt "[l]and that is dedicated in perpetuity for conservation purposes and that is used exclusively for conservation purposes," subject to other eligibility requirements on size of property and authorized uses.[285]

[283] IDAHO CODE ANN. § 55-2109. ("The market value shall be computed as if the conservation easement did not exist.")

[284] OR. REV. STAT. § 271.715.

[285] FLA. STAT. § 196.26. For more information on the constitutional amendment, *see The Florida Senate Interim Report* 2010-117, http://archive.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-117ep.pdf.

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