

2009

Private Conservation Easements: A Record of Achievements and the Challenges Ahead

Gerald Korngold
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs

 Part of the [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

Korngold, Gerald, "Private Conservation Easements: A Record of Achievements and the Challenges Ahead" (2009). *Other Publications*. 426.

https://digitalcommons.nyls.edu/fac_other_pubs/426

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

Private Conservation Easements:



© Windham Land Trust

Part of the stream to Lake Suzanne in the Windham Land Trust property.

Gerald Korngold

Over the past 25 years, there has been a dramatic increase in the acquisition of conservation easements by nonprofit organizations. Privately held conservation easements, i.e., those held by nonprofits rather than governmental entities, have thus emerged as an important and growing tool for the preservation of natural and scenic features of the United States landscape.

Conservation easements bring many benefits, as nonprofits use market forces rather than government coercion to achieve environmental goals. Conservation easement acquisitions by nonprofits also bring efficiencies, are cost-effective, and repre-

sent the free choice of the landowners. This legal tool has yielded increased, and arguably more effective, conservation efforts in recent decades, and the laws that permit and regulate conservation easements should continue to protect and validate such interests.

At the same time, though, private conservation easements raise some public policy concerns related to the tax subsidies; the absence of public process in their creation; long-term stewardship; and flexibility to adapt conserved land to emerging needs of the community. This article examines the recent achievements and benefits of conservation easements, and suggests some reforms that might make them an even stronger vehicle for land conservation in the public interest.

A RECORD OF ACHIEVEMENTS AND THE CHALLENGES AHEAD

Defining Conservation Easements

A conservation easement is a restriction on land that prevents the owner of the burdened property from altering the natural, ecological, open, or scenic attributes of the property. (In some states or localities, this tool is termed a “conservation restriction,” “conservation right,” or “conservation servitude.”) Conservation easements that protect scenic views and natural features—the most common type of easement—do not necessarily give the public access to the property. Rather, the public receives benefits through the support of wildlife habitat or visual access from outside the property.

Conservation easements typically last in perpetuity, often reflecting the desire of donors to preserve the land forever. The Internal Revenue Code encourages this practice by permitting income tax deductions for donations only if the conservation easement is perpetual in nature. The perpetuity aspect is both the great strength and potential weakness of a conservation easement. The unlimited duration ensures that the property’s natural feature will be preserved for future generations. Governmental regulations cannot ensure perpetuity, since they can be amended by local officials or politicians who are subject to various pressures over time.

On the other hand, perpetuity may present a problem since it freezes the land’s use. The environmental importance of a piece of land may decrease or disappear due to subsequent changes in the ecology and climate. Moreover, the local community may have a great need to use a parcel under conservation easement for affordable housing, a hospital or school, or even economic development. The perpetual restriction of a conservation easement may prevent changes in land use necessary to meet the then current social, environmental, and economic needs of future generations.

William H. Whyte (1959) popularized, if not invented, the term “conservation easement” when he advocated their use, despite various legal impediments. Most important, the common law only permitted restrictions to exist between neighboring parcels and did not allow an organization to hold a restriction over land if it did not own nearby prop-

erty (i.e., the prohibition of “in gross” restrictions). To permit nonprofits to hold conservation easements in gross, statutory validation was necessary. Thus, over the past 30 years, all states have passed laws allowing private conservation easements.

U.S. and International Experiences

There is limited data on the number and acreage of private conservation easements, as there is no universal reporting requirement in the United States. However, the fragmentary data that can be teased out show significant numbers and tremendous percentage of growth. In 2005, the Land Trust Alliance reported that local and state land trusts held easements on more than 6.2 million acres, showing a 148 percent increase from the 2000 figure of 2.5 million (table 1). The Nature Conservancy Web site indicates that it currently holds 3.2 million acres under conservation easements. These two figures exceed 9 million acres, and do not include the many conservation easements held by other nonprofits. This acreage is roughly equivalent to the combined land area of Rhode Island, Delaware, Connecticut, and Hawaii.

TABLE 1
Conservation Easement Acreage Held by Land Trusts in Sample States, 2005

State	Total Conservation Easement Acreage	Total Land Acreage Within State	Percentage of State Land Under Conservation Easement
Maine	1,492,279	22,646,400	6.58
Vermont	399,861	6,152,960	6.49
Maryland	191,330	7,940,480	2.40
New Hampshire	133,836	5,984,000	2.23
Virginia	365,335	27,375,360	1.33
Colorado	849,825	66,620,160	1.27
Massachusetts	61,569	6,755,200	0.91
New York	191,095	34,915,840	0.54
Arizona	35,645	72,958,720	0.04
Iowa	6,000	36,014,080	0.01

Source: Land Trust Alliance (2005, chart 5); U.S. Census Bureau (2006, table E-1, using a factor of 640 acres per square mile to convert area figures).



© Windham Land Trust

Old woods trail in the Windham Land Trust property.

Conservation easements are no longer an exclusively American phenomenon, as a number of other countries have begun using them. Most of these countries follow the “common law” system of jurisprudence, so it was possible for them to expand the law of easements and restrictions by statute to accommodate conservation easements by permitting “in gross” ownership, similar to what occurs in the United States.

Common law countries now permitting conservation easements to some extent include various Canadian provinces (e.g., Ontario, British Columbia, New Brunswick, Alberta), various Australian states (e.g., New South Wales, Victoria, Queensland, Western Australia), New Zealand, Ghana, Kenya, Uganda, and Tanzania. Extending the conservation easement vehicle to countries following “civil law” systems is harder to accomplish, as even the concept of “in gross” ownership is foreign and specifically barred by governing codes. Still, some conservation easement-type legislation has been passed with local modifications in Mexico and Costa Rica, and legislation is proposed in Chile.

A Recent Legal Decision

A case decided by the Supreme Judicial Court of Maine in March 2009, *Windham Land Trust v. Jeffords* (967 A.2d 690), demonstrates how judicial validation of conservation easements may well lead to their increased use. In that case, prior owners of a 100 acre parcel donated a conservation easement on 85 acres to the Windham Land Trust

(the Trust). No restriction was placed on the remaining 15 acres, on which there were farm buildings and a residence. The conservation easement stated that its purpose was to preserve the property and limited the owners’ use to “residential recreational purposes.”

The defendants, the current owners of the 100 acres, agreed to be bound by the easement when they purchased the property. They later sought to bring paying guests on to the restricted land for wagon rides, horse-drawn sleigh rides, hiking, snowshoeing, and Nordic skiing on the logging roads; and for fishing and ice skating on the pond. They claimed such commercial activity was necessary to generate income for maintenance of the roads and pond.

After attempting unsuccessfully to get the defendants to mediate the issue, the Trust brought an action against the them, claiming that their use of the property for commercial purposes violated the conservation easement. The State Attorney General, pursuant to statutory power, intervened in the lawsuit to seek enforcement. The Supreme Judicial Court had to determine whether the restriction to “residential recreational purposes” included the uses proposed by the defendants.

The court could have interpreted the language in a manner that favored either the Trust or the defendants. It chose the former, finding that “residential recreational purposes” referred to recreational activities associated with the residents living on the 15 unrestricted acres, and did not encompass the income-producing uses by outsiders. In doing so, the court chose to reject the defendant’s view that “residential” merely referred to uses generally ancillary to residential uses, not to this 15 acre parcel. The court also rejected the defendants’ evidence that the deed occasionally referred to “recreational use” without the residential modifier.

Such is the business of judging, where courts choose between competing views. But what is noteworthy is that in supporting the Trust’s position, the court did not follow traditional constructional maxims in reaching a result that was favorable to the protection of the easement.

Longstanding legal precedent holds that when interpreting land restrictions, doubts should be resolved in favor of permitting freer use of the land rather than greater limitations on the owner’s use. The court could have relied on this concept to find that the ambiguity in the conservation ease-

ment permitted the proposed commercial uses. But the court instead protected the conservation easement to the fullest. Moreover, the court chose to rely on the “plain meaning” of the deed to reach its finding, eschewing evidence that other courts might have used—i.e., the definition of “residential” as used elsewhere in the law and evidence surrounding the transaction.

The significance of the *Windham Land Trust* decision lies in its strong support for conservation easements and the willingness of at least this court to enforce these interests to the fullest. To the extent that this case is a harbinger of future decisions, it is an important milestone in the recognition and validation of conservation easements.

Benefits and Costs

The Acquisition Stage

Many of the benefits of conservation easements are apparent in the acquisition stage. Easements serve the growing value of land preservation in the United States, where property is now prized for its natural and historical features and no longer solely for its development potential. Moreover, private conservation easements are nongovernmental programs, so direct acquisition costs are not borne by cash-strapped local, state, or federal governments.

The purchase of conservation easements allows for efficient land conservation arrangements, as organizations can achieve preservation goals without having to acquire a fee interest. Not surprisingly, the growth of easement acquisition has been accelerating as compared to outright acquisition of the full fee interest in conservation land. Finally, easements are consensual transactions and avoid bitter, divisive battles of coercive conservation methods such as governmental regulation.

Still, there are various concerns about the creation of conservation easements. There is a significant federal tax subsidy, since section 170(h) of the Internal Revenue Code gives an income tax deduction to the donor of a perpetual conservation easement. In the 2003 tax year, the deductions for conservation and historic easements totaled \$1.49 billion. Moreover, the average amount of a conservation easement donation was three times higher than the average amount of the next highest type of donation, supporting the inference that conservation easements provide tax benefits primarily to higher income individuals (table 2). Additionally, local and state property tax revenues are reduced

by the placement of an easement on a property. This forces the municipality either to cut services or to increase the tax burden on other citizens to maintain revenue levels.

It is also fair to ask whether all conservation easements advance conservation goals, and whether all are consistent with a public land use process. Nonprofits may accept a donation of any conservation easement, often initiated by a taxpayer seeking a deduction, even though the easement does not serve a real preservation goal. National organizations have recommended “best practices” for acquisition, and while these are helpful they are not binding. Additionally, nonprofits do not necessarily acquire conservation easements pursuant to a public land use plan. So, conservation easements may not be part of a coordinated, community-wide preservation program.

Moreover, nonprofits are not subject to the democratic, political process, and may not be responsive to the local citizenry. This could lead to conflicts, especially between distant nonprofits owning conservation easements and the local community. Even William H. Whyte (1959, 37) warned of the “muted class and economic conflicts” inherent in conservation easements.

Given the benefits of conservation easements, there are some possible adjustments to the acquisition phase that could make them even stronger vehicles for conservation in the public interest.

- Reform the Internal Revenue Code subsidy to permit a deduction for an open space or habitat

TABLE 2
Types of Individual Noncash Charitable Contributions, 2003

Type of Contribution	Average Amount Per Donation
Easements	\$619,727
Real estate	\$201,112
Other investments	\$158,903
Mutual funds	\$43,889
Corporate stock	\$34,279
Art and collectibles	\$6,282
Clothing	\$878
Household items	\$808
Average amount, all donations (including those not shown)	\$2,585

Note: Not all types of noncash charitable contributions are shown.

Source: Wilson and Strudler (2006, figure A).

easement only if there is prior local, state, or federal governmental certification that the easement provides a significant public conservation benefit. This would help to ensure that public funds spent via deductions are used only for important, comprehensive, environmental goals. Donors would have an incentive to engage with the public land use process, bringing the advantage of planning, coordination, and leverage.

This recommendation would make donations of open space and habitat easements consistent with the requirements for deductions of historic easements, which need governmental approval of the site for deductibility (*Internal Revenue Code* § 170(h)(4)(A)(iv)). Transaction costs may increase, but states such as Massachusetts that already require governmental approval for private conservation restrictions still have managed to create a high number of such interests.

- Parties could still freely donate conservation easements that do not qualify under the revised guidelines, but the public would no longer subsidize these gifts. Owners would still be able to do what they want with their property.
- Because of a dearth of data on conservation easements, states should require counties to maintain separate records listing conservation easements, along with their other land records.

The Operational Stage

Effective stewardship of conservation easements requires periodic inspections and monitoring of the burdened property, discussions with the landowner over present and potential violations, and enforcement actions. Meaningful stewardship is essential to ensure the continued value of the easement to the public and to oversee the tax subsidy.

There are certain benefits to nonprofit ownership during the operational stage. The nonprofit, not government, bears the cost of stewardship, and an adequately resourced, committed nonprofit can do an especially fine job in this endeavor. Nonprofits are less subject to political interest group pressures and can raise (or initially require from donors) necessary monitoring funds.

There are some concerns, though. Inadequately funded and weakly governed nonprofits often lack the fiscal and organizational capital to sufficiently monitor the easements. Although many organizations perform well, there are reports of failures

by nonprofits to monitor, enforce, or even know about the easements they own. Various steps can be taken to increase the operational effectiveness of privately held conservation easements.

- Increased educational programs and compilations of best practices, such as those offered by the Land Trust Alliance, may provide guidance to nonprofits seeking to enhance their stewardship. It remains to be seen, however, whether low-functioning organizations will bother to take advantage of these offerings.
- The attorneys general in the states can increase their activity in bringing actions to enforce conservation easements when the nonprofits owning them fail to do so. The attorney general has the power to do so pursuant to the authority to represent the public's interest in matters of charitable trusts, gifts, and organizations. The problem is limited resources, especially at a time when we see state attorneys general laying off employees. One possibility is to require a one-time fee when conservation easements are recorded, to be devoted exclusively to attorney general enforcement.

The Perpetuity Issue

Conservation easements are fixed, perpetual property rights that bring important protection to threatened environmental areas. But over time there will inevitably be advances and emerging challenges in economic and social circumstances, technology, the political fabric, and the environment. In the face of inexorable change, the lack of flexibility in perpetual easements may create a problem for future generations. This is not likely to occur often. One would expect the vast majority of conservation easements to be enforced as written. But in some rare instances, a new development may call for the modification or even termination of a conservation easement in order to serve the public interest.

Flexibility can be increased to provide for these rare situations by various means.

- While nonprofits boards have the power to amend conservation easements, trustees/directors often hesitate to modify easements out of a concern that they are breaching a fiduciary duty. Nonprofit law needs to be clarified to provide that the duty of care, loyalty, and obedience to the overall mission is not violated by compromises on one specific easement.

- Judges can be more aggressive in applying traditional legal doctrines that could bring needed flexibility in those rare situations where the public interest requires changes.
- Finally, government can employ the doctrine of eminent domain to “take” conservation easements that prevent development in the public interest. The nonprofit holder can use the compensation it receives to preserve other land.

One case decided in 2008 reached mixed results on the flexibility issue. In *Bjork v. Draper*, the Appellate Court of Illinois dealt with a conservation easement that had been granted to the Lake Forest Open Lands Association (886 N.E.2d 563). The easement granted to the Association by a former owner was intended to retain the property in perpetuity as scenic and open space, and prohibited the placement or construction of any structures of any kind. Subsequent owners (the Drapers) sought to add a brick driveway turnaround to the lot and to replace some plantings.

The Association, after discussions with the Drapers, approved of this change and executed an amendment to the conservation easement. The Association consented since the Drapers agreed to provide substitute land under the conservation easement for the turnaround area, so that the conservation purpose could continue to be achieved. Under the Illinois conservation easement statute, any owner of property within 500 feet of the property under a restriction can sue to enforce it. (Ill. Stat., ch. 765, sec. 120.4). The Bjorks, owners of a neighboring lot, sued to challenge the validity of the amendment.

The correct decision would have been for the court to uphold the amendments since they reflected the agreement of the true parties in interest—the nonprofit owning the easement and the burdened landowner. It is necessary to provide for flexibility in conservation easements to accommodate legitimate owner requests, especially when the preservation goals will not be compromised. *Bjork* seemed to be such a case. If there is no ability to reach modification agreements, owners will hesitate to enter into conservation easements, and the overall preservation effort will be frustrated.

However, the *Bjork* court was only partially right. The court appropriately held that there was a power to amend despite the easement being granted in “perpetuity.” But, the court erred when

it held that since the original language of the easement barred any structure, an amendment could not alter that original provision and permit the turnaround. This makes no sense: since when can the parties not amend “any and every” term in an agreement?

The real culprit here is the Illinois statute that allows neighbors a right of enforcement. This statute was probably enacted for a good reason—to ensure that someone can enforce a conservation easement if the nonprofit fails to do so. But, as illustrated by *Bjork*, the right of neighbor enforcement frustrates the compromise and flexibility necessary to accommodate evolving circumstances and injects numerous, meddlesome free riders into the equation.

Conclusion

Private conservation easements have become a major factor in preservation efforts. There are many benefits to these effective, nongovernmental tools for safeguarding the environment. Conservation easements have permitted the leverage of private initiative, resources, and commitment to ensure that open space and wildlife habitats are preserved for future generations. They have made a positive impact on the landscape of today and tomorrow. With some modifications in their form and use, conservation easements can become an even more powerful vehicle to ensure natural preservation while serving the public interest. **L**

▶ ABOUT THE AUTHOR

GERALD KORNGOLD is professor of law at New York Law School and a visiting fellow in the Department of Valuation and Taxation of the Lincoln Institute of Land Policy in 2009–2010. He researches property rights, conservation easements, and global land issues. Contact: Gerald.Korngold@nyls.edu

▶ REFERENCES

- Land Trust Alliance. 2005. National land trust census report. www.lta.org/census
- U.S. Census Bureau. 2006. State and metropolitan data book. Table E-1, State ranking—area and population. www.census.gov/compendia/smadb/
- Whyte, William H., Jr. 1959. *Securing open space for urban America: Conservation easements. Technical Bulletin*. Washington, DC: Urban Land Institute.
- Wilson, Janette, and Michael and Strudler. 2006. Individual noncash charitable contributions, 2003. *Internal Revenue Service, SOI Bulletin* (Spring). www.irs.gov/pub/irs-soi/03incart.pdf