

Not a Public Trust

The Land Trust-Held Conservation Easement in Pennsylvania



No legal precedent exists in Pennsylvania for finding that a conservation easement acquired by a private land trust is a public trust.

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Introduction

Land trusts work to conserve natural resources; in doing so they provide a public benefit. They act in the public's interest; they create lasting conservation legacies. Because of this, people come to trust these conservation organizations as community leaders and responsible stewards of the land. Land trust staff and volunteers naturally want to maintain and deepen that trust.

Advocates for increased government oversight of conservation easements often assert that conservation easements acquired by land trusts are "trusts." Sometimes they mean charitable trusts; sometimes—public trusts. (Sometimes it's not clear what is meant.) Such assertions, combined with (1) staff and volunteers' desire to maintain trust and (2) a failure to distinguish between lay usage and legal constructs around the word *trust*, makes the proposition *that a land trust-held easement is a public trust* an amorphous, positive-sounding, innocuous statement—for the uninformed.

This guide seeks to bring clarity to the matter. It finds that no legal precedent exists in Pennsylvania for finding that a conservation easement acquired by a private

land trust is a public trust.¹ Should such a claim be asserted by a government, this would constitute a taking for which compensation would be due to the land trust.

The guide [*Not a Charitable Trust: The Conservation Easement in Pennsylvania*](#)² investigates the false notion that *all* conservation easements are charitable trusts.

In contrast, the guide [*The Nature of the Conservation Easement and the Document Granting It*](#)³ describes what a conservation easement actually is and how it operates under the law. In exploring holder covenants and the roles of beneficiaries and the attorney general, it identifies the powerful mechanisms available under the law for promoting trust and ensuring the responsible management of conservation easements in the public interest.

The Public Interest

The Pennsylvania General Assembly, in enacting the Conservation and Preservation Easements Act (the "CPEA")⁴, established the public's interest in preserving the viability of conservation easements as an instrument for the protection of natural and scenic re-

¹ The applicability of the public trust doctrine, or its codification in the Donated or Dedicated Property Act, to *government-held* conservation easements is beyond the scope of this guide.

² Pennsylvania Land Trust Association (2014). <http://conservationtools.org/guides/show/137>.

³ Pennsylvania Land Trust Association (2014). <http://conservationtools.org/guides/show/138>.

⁴ The Pennsylvania Conservation and Preservation Easements Act, the act of June 22, 2001 (P.L. 390, No. 29) (32 P.S. §§5051-5059) was enacted in its final form as House Bill 975, PN 2294. <http://conservationtools.org/guides/show/89>.

sources.⁵ The people of Pennsylvania established in the state constitution the imperative for the state to conserve public natural resources, which buttresses the public interest in conservation easements to the extent they protect public resources (e.g., water, air, wildlife).⁶

The public *interest* in the viability of conservation easements and the conservation achieved by them extends to *all* easements whether held by land trusts or government. It forms the basis for intervention by the Attorney General when holder covenants are not enforced due to the absence or dereliction of duty on the part of holder.

However, *public interest and public trust are entirely different concepts*. The recognition of a public interest in the viability of conservation easements does not imply that they have become public trust property.

Legal Framework

The public trust doctrine applies only to publicly held assets⁷ not privately held assets such as a conservation easement held by a private land trust⁸.

⁵ §2 of the CPEA: “The General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of this Commonwealth.”

⁶ Article I §27 of the Pennsylvania Constitution reads in part: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

⁷ The public trust doctrine has also been applied to preserve the public benefits of *publicly owned* land in Pennsylvania; for example, to prevent the state or a political subdivision from selling for development parkland on which the community has come to rely.

⁸ This guide does not address the applicability of either the public trust doctrine or the DDPA (defined below) to conservation easements held by government.

Common law public trust doctrine

The concept of public trust was developed by the courts to provide to the state, as trustee for the public, ownership or easement rights over private property to allow public access to public areas—such as navigable waters and beachfront—where no alternative publicly owned access is available and the commercial, navigational or other public policy interest is paramount.⁹

Pennsylvania codification

In Pennsylvania, the public trust doctrine has been codified in the Donated and Dedicated Property Act,¹⁰ (the “DDPA”). The DDPA applies to all real estate interests donated or dedicated to political subdivisions for public use and has been held by the Pennsylvania Supreme Court¹¹ to supersede the common law public trust doctrine. Although not defined in the DDPA, a “political subdivision” commonly refers to a city, county, township or other municipality having legislative powers.¹²

Court findings

When a court holds that a legally valid public trust has been imposed on private property, the government action is not a taking for which compensation must be paid the former owner under the guarantee of private property rights set forth in the fifth amendment of the federal Constitution.¹³

⁹ Jay, Jessica, *Third Party Enforcement of Conservation Easements*, 29 Vermont L.Rev. 757, 779.

¹⁰ Act of December 15, 1959 P.L.1772, 53 P.S. §§3381-3386.

¹¹ *In re Erie Golf Course*, 605 Pa. 484, 992 A.2d 75 (2010).

¹² For example, the Pennsylvania Historical and Museum states that: “Pennsylvania’s primary political subdivisions consist of counties and municipalities. Types of incorporated municipalities are townships, cities and boroughs...” http://www.heretohelp.pa.gov/portal/server.pt/community/land_records/3184/county_and_municipal_records/439671.

¹³ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

No Precedent for Application to Private Charitable Assets

Preserve public benefit

One alleged justification for application of the public trust doctrine to conservation easements is to safeguard the benefits accorded to the public by conservation easements. Research for this guide has not disclosed any Pennsylvania case in which the charitable assets of an organization, no matter how beneficial to the public, were claimed by the Commonwealth of Pennsylvania as public trust assets. Such an action, if upheld, would expose the assets of all public charities to the potential for an uncompensated taking on the grounds that such assets provided a public benefit.

Avoid mismanagement

Another alleged justification is to avoid the possibility of mismanagement of conservation easements. Research for this guide has not disclosed any case in which the government was permitted to take over the private assets of charities, without compensation, on the grounds that the directors of these charities may, in the future, mismanage the assets. Imposition of a public trust is a drastic step reserved for instances when compelling public necessity, not satisfied by other means, necessitates the action.

Operation of Public Trust Doctrine

Advocates of the notion that the public trust doctrine will enable government to exercise oversight over management decisions by charitable organizations have not articulated the costs and risks arising from the imposition of public trust on conservation easements.

Government responsibility for easement management and administration

Imposition of a public trust is an all-or-nothing proposition. If the government asserts control over property as trustee for the benefit of the public, then (if such assertion is upheld by the court), the government cannot pick and choose the rights that it wants to exercise.

It is the owner of the trust asset (in the case of an easement, the holder of the easement) and bears total responsibility to own, operate and manage it for the benefit of the public. There is no legal precedent in Pennsylvania for the picture painted by advocates of the public trust that imposition of a public trust will afford the state the benefit of control over easement decisions without the corollary burden: assumption of total responsibility for providing and paying for all management, administration and enforcement of easements in perpetuity.

Takings

Restrictions on government transfer of public trust assets

If the government does not want to bear responsibility for entrusted easements in perpetuity, the government may seek to transfer the easements back to private land trusts subject to government controls (for example, controls on amendment). This may not be feasible, even with a willing transferee. A taking of property from one private owner for the purpose of transfer to another private owner is illegal under Pennsylvania law, whether or not compensation is paid.¹⁴

Compensable taking if public trust claim rejected

The state, or political subdivision, asserting that conservation easements are public trust property risks liability for a compensable taking if the courts decline to find a legally valid public trust in the claimed assets.¹⁵ If the courts reject the claim, the usurpation of holder's rights to own and manage its charitable assets

¹⁴ Pennsylvania's Urban Redevelopment Law (the Act of May 24, 1945, Public Law 991, codified at 35 P.S. §1701 et seq.) and Pennsylvania's Eminent Domain Code (26 Pa. Cons. Stat.) were amended in 2006 in response to the Supreme Court decision in *Kelo vs. City of New London*, 125 S. Ct. 2655 (2005) which upheld such takings in the context of urban renewal projects.

¹⁵ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) held that imposition of a legally valid public trust is not a taking for which compensation must be paid by the state.

under otherwise applicable law is a compensable taking.

Compelling Private Charity to Act as Public Trustee

To avoid the wholesale transfer of conservation easements to state or local government under the public trust doctrine, proponents of the public trust notion sometimes add a twist wholly unsupported by existing law: they assert that application of the public trust doctrine to conservation easements not only subjects private charitable assets to a public trust but *compels the private charity to assume a quasi-governmental capacity as trustee for the benefit of the public*.¹⁶ No evidence has been found that any private charity governed by Pennsylvania law has ever been compelled to act as an agent or instrumentality of the state as trustee of a public trust imposed on its assets.¹⁷

Resources at ConservationTools.org

To find experts on the topics covered by this guide, see the right hand column of the on-line edition at <http://conservationtools.org/guides/show/136>. The on-line edition also contains the most up-to-date listing of related library items and guides.

Library Categories

[Conservation Easements](#)

Related Guides

[The Nature of the Conservation Easement and the Document Granting It](#)

[Not a Charitable Trust: The Conservation Easement in Pennsylvania](#)

[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#)

¹⁶ Research for this guide has disclosed only one case (arising in New Jersey) in which not only was private property (beachfront) held to be subject to a public trust but the private owner was held to act as trustee for the benefit of the public. The owner was a community association that owned and controlled all of the streets and common areas in the oceanfront community and was described as a quasi-public entity functioning much like a municipality. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306 (1984).

¹⁷ Conscripting of a private charity to act as an instrumentality of the state, involuntarily and apparently for no compensation, may be expected to raise a number of statutory and constitutional issues.

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Submit Comments

Share your thoughts regarding this guide with the Pennsylvania Land Trust Association: Do any subjects need clarification or expansion? Do you have other concerns or suggestions? Please call 717-230-8560 or email aloza@conserveland.org. Thank you.

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